

**Official Time as a Form of Union Security in
Federal Sector Labor-Management Relations**

By

Kenneth Bullock

**B.A., May 1986, Pennsylvania State University
J.D., LL.M., May 1995, Duke University**

**A Thesis submitted to
The Faculty of
The George Washington University
Law School
in partial satisfaction of the requirements
for the degree of Master of Laws**

August 31, 2006

**Thesis directed by
Charles B. Craver
Freda H. Alverson Professor of Law**

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Report Documentation Page				Form Approved OMB No. 0704-0188	
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE 31 AUG 2006		2. REPORT TYPE N/A		3. DATES COVERED -	
4. TITLE AND SUBTITLE Official Time as a Form of Union Security in Federal Sector Labor-Management Relations				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S)				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) The George Washington University				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) AFIT/CIA				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION/AVAILABILITY STATEMENT Approved for public release, distribution unlimited					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT UU	18. NUMBER OF PAGES 105	19a. NAME OF RESPONSIBLE PERSON
a. REPORT unclassified	b. ABSTRACT unclassified	c. THIS PAGE unclassified			

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I. Introduction

Can a nationwide labor-management relations system based on the principle of exclusive representation operate effectively, even if the law deprives the unions of the ability to obtain adequate financial support? That question has been the subject of an unannounced experiment in the Federal Government since the 1960s, and so far the answer is not a resounding “yes.”

The majority of federal workers are represented by unions that have the right and the duty to represent all employees, regardless of union membership. Since the unions are required to offer their basic services to all, incentives for employees to join and pay union dues are much weaker than they are in many private-sector and state government bargaining units. To make matters even more difficult, most federal-sector employees do not have bargaining representatives that are permitted to directly bargain with management over wages and economic benefits,¹ and thus the unions lack one of the primary recruiting tools enjoyed by non-federal unions. As a result,

¹ Several federal agencies, including the U.S. Postal Service and the Tennessee Valley Authority, operate under labor-management systems that allow bargaining for wages and benefits. RICHARD C. KEARNEY, LABOR RELATIONS IN THE PUBLIC SECTOR 174 (2001). Even in the majority of federal agencies that are covered by the Federal Sector Labor-Management Relations Statute (5 U.S.C. § 7101-7135 (2000)), unions participate in the setting of wages for over 200,000 trade and blue-collar employees through their membership in national and regional wage committees and local wage survey committees. KEARNEY at 172-73.

rates of union membership in the federal sector are low,² even though coverage of federal workers by union contracts is exceptionally high.³

How do federal-sector unions effectively represent all employees without a traditional system of “union security;” i.e., the means to compel financial support from the employees served? A system has gradually evolved in which “official time” (that is, paid federal time spent by union officials performing representational activities) has become a substitute for union dues. While the costs of official time are relatively minor in relation to the overall federal personnel budget, it has been the subject of controversy, especially when employees revealed questionable practices in the Social Security Administration during the 1990s.

This article will show that between 1962 and 1978, the Executive Branch and Congress allowed the official-time system to evolve haphazardly, disregarding sound advice and options on union security provided by government studies. There are substantial indications that official time is not an adequate substitute for more direct methods of union security, and moreover it causes problems and imposes costs that would not exist if other forms of union security were available to unions. While there is not yet sufficient information on the subject to choose a single alternative, Congress should authorize agencies to conduct test programs, so that arrangements that have proven themselves in the private and non-Federal public sectors can be evaluated in the Federal level. In the absence of Congressional action, union leaders

² In 2001, the three largest labor organizations specializing in federal employee representation had membership rates that varied between 11 and 53 percent of the eligible employees, and the largest of the three unions (the American Federation of Government Employees) had a membership rate of only 34 percent. Marick F. Masters, *Federal-Sector Unions: Current Status and Future Directions*, 25 J. LAB. RES. 55, 66 (2004).

³ In 2001 61 percent of federal non-Postal employees were represented by unions, and 97 percent of those employees were covered by a collective bargaining contract. *Id.* at 62.

and managers should be vigilant in controlling the use of official time, while taking advantage of its limited value to promote smooth labor-management relations.

II. Exclusive Representation and Union Security in American Labor Relations

a. Exclusive Representation

The principle of exclusive representation is one of the most distinctive features of the American collective bargaining system. Under the American rule, after a majority of workers in a bargaining unit choose a union as exclusive bargaining representative, that union has a duty to represent all employees in the bargaining unit, regardless of union membership.⁴ Scholars have explained that this system evolved because of the peculiar history of organized labor in this country. Since governments and courts were initially hostile to organized labor, American unions were unable to pursue the “top-down,” government-sanctioned form of collective bargaining that prevails in many European nations. Instead, they focused on exerting economic pressure on individual employers and industries, a method that gave rise to the exclusive contract as the primary goal of bargaining.⁵

Exclusive representation requires employees who desire collective bargaining to choose one union for the life of an agreement, minimizing inter-union conflict. When employers are forced by the law or economic circumstances to deal with unions, there are advantages to dealing with a single union. Having a single, unified

⁴ 29 U.S.C. § 159(a) (2000) (exclusive representation under the National Labor Relations Act); 5 U.S.C. § 7114 (2000) (exclusive representation under the Federal Sector Labor-Management Relations Statute).

⁵ Richard R. Carlson, *The Origin and Future of Exclusive Representation in American Labor Law*, 30 DUQ. L. REV. 779, 783-840 (1992); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1426-27 (1971).

bargaining partner can promote orderly bargaining, and exclusive unions tend to promote labor peace, since they suppress the disruption and unrest that can result from competition among unions.⁶ In the absence of the exclusive representation principle, employees are free to refrain from union membership, if they are also willing to forego the benefits of collective bargaining. However, in the absence of an exclusive representation rule, employers could be forced to bargain with multiple employee groups, ensuring considerable confusion and additional expense in labor-management relations.

There are two obvious weaknesses to a labor-management system that relies on exclusive representation. First, in the absence of a majority vote in favor of a particular union, even a large minority of workers who desire representation will be frustrated, unless the law or economic forces oblige the employer to bargain or consult with a minority union. Second, exclusive representation creates the potential for the “free rider,” an employee who enjoys the benefits negotiated and protected by the exclusive bargaining representative without providing financial support. In response to this problem, unions and employers have developed several types of arrangements collectively dubbed “union security.”

b. Types of Union Security Arrangements

1. The Closed Shop

The closed shop allows the employer to hire only employees who are members of the union before hiring, and membership in the union remains a condition

⁶ KEARNEY, *supra* note 1, at 73; Carlson at 788. On the other hand, before the principle of exclusive representation was established, private employers often exploited divisions among unions to obtain more favorable results at the bargaining table. Carlson at 789, 813.

of employment after hiring. The closed shop was permitted under the original version of the National Labor Relations Act (NLRA),⁷ but since each employee's job was to subject to the vagaries of internal union discipline, even if the employee diligently paid dues, abuses occurred. Negative publicity about abuses of the closed shop led to its prohibition in the Taft-Hartley Amendments to the National Labor Relations Act in 1947.⁸ The closed shop can no longer be legally enforced in any workplace in the United States.

2. The Union Shop

Under the union shop, employees must become and remain full members of the union within a defined time period after hiring, usually 30 days. The union shop is only slightly less coercive than the closed shop from the employee's viewpoint, but it represents a significant shift from the employer's viewpoint, since the union no longer has complete control over the pool of potential employees.

The NLRA does not prohibit the negotiation of the union shop, but the employer's ability to enforce union shop agreements is limited by NLRA § 8(a)(3) and the U.S. Supreme Court's decision in *NLRB v. General Motors Corp.*, where the Court held that the NLRA did not authorize any union-shop membership requirement beyond the payment of fees and dues.⁹ Since it is a violation of the NLRA for an employer to enforce a union shop clause against an employee who has faithfully tendered dues and fees to the union, employees are protected from losing their jobs as

⁷ National Labor Relations (Wagner) Act, 49 Stat. 449 (1935)(codified as amended at 29 U.S.C. §§ 151-166 (2000)).

⁸ Pub. L. No. 80-101, § 8(a)(3), 61 Stat. 136, 140 (1947), codified as amended at 29 U.S.C. § 158(a)(3) (2000).

⁹ 373 U.S. 734, 743-44 (1963).

a result of any union discipline not related to dues payment. The courts have also held that objecting employees are entitled to a rebate of the portion of union dues and fees used for political or public affairs purposes.¹⁰

Even though the union shop has not been fully enforceable under Federal law since 1947, it was the most common form of union security in private-sector collective bargaining agreements as recently as 1995,¹¹ and it even exists in a few public-sector agreements.¹²

3. The Agency Shop and Fair Share

Even as they banned the closed shop, the drafters of the Taft-Hartley Amendments were sufficiently concerned about the “free rider” problem that they carefully crafted the Act to allow milder forms of union security, including the agency shop.¹³ The agency shop is similar to the union shop, but it lacks one of its more objectionable features. The employee is not required to become a member of the union or to express ideological support for unionism, but he is required to pay the union an amount equivalent to union dues and fees, to cover the cost of representative activities. The agency shop is found in a significant number of private-sector agreements¹⁴ and is permitted for at least a portion of the public workforce in nineteen states and the District of Columbia.¹⁵ Supreme Court decisions¹⁶ have

¹⁰ *Infra* section II.d.

¹¹ A 1995 Bureau of National Affairs study (the most recent available) found that 64% of private-sector agreements provided for the union shop. BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 97 (14th ed. 1995).

¹² A 2001 survey reported that agreements in five states purported to place public employees under the union shop. KEARNEY, *supra* note 1, at 72.

¹³ WILLIAM W. OSBORNE, JR., LABOR LAW AND REGULATION 426 (2003).

¹⁴ The 1995 BNA study found agency shop provisions in ten percent of the agreements reviewed. BUREAU OF NATIONAL AFFAIRS at 97.

¹⁵ KEARNEY, *supra* note 1, at 72-73.

restricted the ability of unions to fully enforce agency shop provisions against employees who object to providing financial support for union activities. As a result, objecting employees are entitled to a rebate of those portions of dues expended on political activity.

The “fair share” arrangement is a variation on the agency shop that features a pre-determined fee structure, omitting the portion of dues that would be used for political activities. The arrangement relieves employees of the responsibility to demand fee rebates.¹⁷ Eleven states recognize the “fair share” for public employees.¹⁸

The Taft-Hartley Amendments originally required a majority of employees in the bargaining unit to authorize the negotiation of the agency shop in a referendum.¹⁹ The requirement proved to be unnecessary, however, since the agency shop was authorized in about 97 percent of elections held under the clause. Therefore, Congress repealed the requirement in 1951, replacing it with a provision for a deauthorization election.²⁰ The deauthorization election is not frequently used. In Fiscal Year 2005, the National Labor Relations Board conducted only 59 union-security-deauthorization elections, and employees voted for deauthorization of union security provisions in only 16 of the elections.²¹

¹⁶ Discussed in section II d *infra*.

¹⁷ *E.g.*, Howard C. Hay, “Union Security and Freedom of Association” in LABOR RELATIONS LAW IN THE PUBLIC SECTOR 146-155 (Andria S. Knapp, ed. 1977).

¹⁸ KEARNEY, *supra* note 1, at 73.

¹⁹ Pub. L. No. 80-101, § 9(e)(1), 61 Stat. 136, 144 (1947).

²⁰ Pub. L. 82-189, § 1(b)(c), 65 Stat. 601 (1951), codified at 29 U.S.C. § 159(e)(1) (2000).

²¹ 70TH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 17 (2006). To put those numbers in perspective, the Board processed over 29,000 total cases that year. *Id* at 1.

4. Fee for Service

Occasionally unions have attempted to circumvent state and Federal prohibitions on coerced dues payments by attempting to charge employees for particular services. Unions frequently seek to obtain nonmember reimbursement for expensive services, such as arbitration. Fee-for-service arrangements are less coercive than those discussed above, because payment of the fee is not a condition of employment, but merely a condition of access to the union's services. Unfortunately for the unions, the NLRB and the Federal Labor Relations Authority have consistently held that requiring nonmembers to pay fees or expenses for access to the contractual grievance/arbitration process violates the exclusive representative's duty of fair representation.²²

5. Maintenance of Membership

Under a maintenance-of-membership clause, employees are not required to join the union, but they are required to maintain their membership once they have elected to join, usually for a fixed period or for the life of the existing contract. Maintenance of membership prevents employees from opportunistically joining and then resigning from the union based on the individual's short-term needs. Maintenance of membership is very common in the public sector,²³ but it is rare in the

²² *E.g.*, IAM Local 697 and Carroll, 223 N.L.R.B. 832, 834 (1976); see the discussion in Section V.d *infra*. There is a limited exception under the NLRA for employees who have obtained an exemption to mandatory support of unions on religious grounds. Unions can charge fees for grievance and arbitration services rendered to such employees. 29 U.S.C. § 169 (2000).

²³ KEARNEY, *supra* note 1, at 73.

private sector (due to the prevalence of the union shop and the agency shop),²⁴ and it is prohibited in the Federal Government.²⁵

6. Dues Withholding (“Checkoff”)

Automatic dues checkoff is a limited but important form of union security in which the employer agrees to automatically deduct dues from consenting employees’ paychecks each pay period and forward the funds to the union. Many union contracts require the union to pay a small administrative fee to the employer for each dues deduction, but some unions have negotiated dues checkoff provisions that cost them nothing. Under the NLRA, contracts may allow employees to rescind their authorizations only at specified intervals of no more than a year, or the life of the current contract.²⁶ When such provisions are used, the dues checkoff becomes a virtual substitute for a maintenance of membership agreement. Automatic dues checkoff is a great boon to union officials, since it relieves them of the time-consuming duty of collecting dues while ensuring a steady stream of funds. Dues checkoff appears in the overwhelming majority of private and public labor contracts,²⁷ and Federal-sector agencies are required by statute to provide it (free of administrative charges) to any exclusive bargaining representative.²⁸

7. Leave for Representational Activities

Time off for representational activities is not usually discussed as a form of union security, but it serves many of the same purposes, since it provides an

²⁴ BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 97-98.

²⁵ 5 U.S.C. § 7102 (2000).

²⁶ 29 U.S.C. § 186(c)(4) (2000).

²⁷ BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 99; KEARNEY, *supra* note 1, at 73.

²⁸ 5 U.S.C. § 7115 (2000).

important form of support and stability for the exclusive bargaining representative. As this article will show, low rates of union membership have made official time the most important form of union security in the Federal sector.

About half of all private-sector contracts provide limited paid time for union officials to represent employees in grievances.²⁹ The vast majority of private-sector contracts allow long-term unpaid leave for employees who become full-time union officials, and most of these provisions allow employees to accrue seniority and eligibility for other benefits while on union leave.³⁰ About half of all private-sector agreements allow for short-term, unpaid union leave for attendance at union conferences and training activities,³¹ and a small percentage guarantee paid time for union negotiators.³² There have been no comparable studies of contracts in the public (non-Federal) sector, but it is believed that official time provisions are common in state and local government collective bargaining agreements,³³ especially for grievance processing.³⁴

A key difference between official/company time and other union security arrangements is that it is provided by the employer and not by the bargaining unit employees. Presumably, many employers are willing to provide at least a limited amount of union leave because it promotes the smooth operation of the collective bargaining process. For instance, it gives union leaders an incentive to conduct bargaining or grievance activities during normal work hours, which is usually more

²⁹ BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 36.

³⁰ *Id.* at 73.

³¹ *Id.*

³² *Id.* at 56.

³³ See KEARNEY, *supra* note 1, at 294.

³⁴ *Id.* at 305.

convenient for management officials. Because there is no “coercion” involved, company/official time it has not aroused nearly the level of controversy that accompanies other union security provisions.

c. The Controversy over Union Security

Even after the closed shop and the strictest forms of the union shop were prohibited nationwide in 1947, bitter controversy over mandatory support for unions continued. A key factor in the continuing controversy was the fact that labor and management leaders frequently disregarded the law and negotiated contract provisions that had the practical effect of perpetuating union shop or agency shop arrangements.³⁵ Since few employees had the sophistication or the resources to challenge the contracts, the prohibited practices continued. The unions’ willingness to violate Taft-Hartley proved to be shortsighted, as the continued abuses inspired the rise of the “Right to Work” (RTW) movement during the 1940s. The first RTW laws had been passed in 1944, and by 1947, eleven states had adopted RTW laws.³⁶ In the same year, the Taft-Hartley Act passed, including an explicit provision allowing states to prohibit mandatory financial support to unions.³⁷

During the 1950s the RTW movement gained momentum and evolved into a national organization, the National Right to Work Committee (NRWTC), which drew its support from workers and small business owners.³⁸ By the late 1960s, laws that prohibited compulsory support of unions had been enacted or adopted by judicial

³⁵ GEORGE C. LEEF, *FREE CHOICE FOR WORKERS: A HISTORY OF THE RIGHT TO WORK MOVEMENT* 36 (2005).

³⁶ *Id.* at 29.

³⁷ 29 U.S.C. § 164 (b) (2000).

³⁸ *Id.* at 43-46.

interpretation in twenty-two states.³⁹ The NRWTC continues to campaign for Federal and state laws restraining all forms of compulsory unionism.⁴⁰

There is no question that RTW laws prevent the negotiation of strong union-security clauses in the states where they are effective, and such laws can even be effective beyond state borders, influencing contracts negotiated in multi-state bargaining units that include RTW and non-RTW states.⁴¹ Researchers have spent considerable effort attempting to determine the ultimate effect of “right to work” laws on union membership rates. Since the laws exist only in states with weak traditions of union membership, it is difficult to distinguish between the effects of the RTW laws and the effects of the underlying cultural factors that gave rise to them. A 1998 study of the available literature concluded that a consensus of the most reliable studies showed that RTW laws are strongly correlated with low success of union organizing efforts and increased “free riding.”⁴²

As Section III of this article will show, overuse of the politically-charged term “right to work” has distorted the public debate over union security in the Federal sector. While the RTW supporters are certainly justified in pursuing effective measures to enforce Taft-Hartley’s prohibitions on the closed shop and the union shop, the RTW movement has also pursued the prohibition of the fair share and even the milder forms of union security. Reckless use of the slogan has misled many

³⁹ KEARNEY, *supra* note 1, at 73-74 (listing 21 of the states but omitting Florida, which judicially adopted a prohibition on compulsory union support in 1977 (Fla Educ. Ass’n v. Pub. Empl. Relations Comm’n, 346 So. 2d 551 (Fla. Ct. App. 1st Dist. 1977))).

⁴⁰ A summary of the NRWTC’s legislative activities can be found at their website, <http://www.right-to-work.org/legislation/> (accessed June 15, 2006).

⁴¹ BUREAU OF NATIONAL AFFAIRS, *supra* note 11, at 98-99.

⁴² William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463 (1998).

ordinary Americans and political leaders into believing that any form of union security is the functional equivalent of the union shop.

d. Constitutional Aspects of Union Security in the Public Sector

Before 1977 there was considerable uncertainty over the constitutional validity of union shop and agency shop provisions in the public sector. In a previous constitutional challenge to union shop arrangements negotiated under the Railway Labor Act (RLA), the Supreme Court had avoided the constitutional issue by holding that the RLA itself prohibited the use of coerced dues for political activities over the objections of dissenting employees.⁴³

In *Abood v. Detroit Board of Education*,⁴⁴ the Court squarely faced the constitutional issue in the context of an agency-shop clause for a bargaining unit of public school teachers. The Court decided this public employee case in substantially the same manner it had decided the railway workers case, holding that the requirement for public employees to pay agency fees did not unconstitutionally infringe on the employees' rights, if the fees were used only to support the purposes of collective bargaining.⁴⁵ However, the Court held that enforcement of the agency-fee provision would infringe on dissenting employees' freedom of speech and association rights if the fees were used to support political or ideological causes "not germane to its duties as collective-bargaining representative."⁴⁶ Significantly, the

⁴³ *IAM v. Street*, 367 U.S. 740 (1961); *see also* *Ry. Employees Dep't, IAM, v. Hanson*, 351 U.S. 225 (1956).

⁴⁴ 431 U.S. 209 (1977).

⁴⁵ *Id.* at 235-36.

⁴⁶ *Id.* at 235.

Court found no constitutional difference between public and private workers for purposes of union security agreements.⁴⁷

In subsequent decisions, the Supreme Court has drawn specific distinctions between expenditures for prohibited political purposes and expenditures for authorized representational activities. In a 1984 case decided under the RLA, the Court held that national conventions, social activities, and publications were all sufficiently related to collective bargaining to justify charging their expenses to objecting employees, while organizing expenses were not.⁴⁸ Two years later, in a public employee case, the court held that the Constitution requires unions to establish safeguards to prevent dissenting employees' contributions from being temporarily used for prohibited purposes, to provide dissenters with adequate information about the basis for the calculation of their proportionate share, and to establish a prompt procedure for ruling on objections.⁴⁹ In 1991 the Court held that the use of mandatory fees collected from public employees for national program expenses, convention expenses, and even strike preparation funds was permissible, even though a strike would have been illegal under state law.⁵⁰

III. Federal Sector Collective Bargaining, Official Time, and Union Security Before 1978

a. Employee Organization and Collective Bargaining before 1962

Many discussions of Federal-sector collective bargaining begin with the publication of President Kennedy's seminal executive order in 1962, but organized

⁴⁷ *Id.* at 232 ("The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.")

⁴⁸ *Ellis v. Bhd. of Ry., Airline and Steamship Clerks*, 466 U.S. 435, 450-51 (1984).

⁴⁹ *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 304-09 (1986).

⁵⁰ *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 527-32 (1991).

labor activity in the Federal sector occurred as early as the 1830s. During that decade, organizations of employees at various Navy yards used a combination of strikes and legislative petitions to obtain guarantees of a ten-hour workday without reduction in pay.⁵¹ When the Federal Government purchased the Government Printing Office from a private concern in 1861, its unionized employees became Federal employees.⁵² Collective bargaining (including bargaining over wages) continued, and Congress eventually recognized the relationship in the Kiess Act of 1924.⁵³

Large-scale legislative activities by Federal employee organizations continued to meet with great success, but the Executive Branch proved to have a limited tolerance for the Federal unions' legislative activities. Between 1865 and 1880, concerted pressure by organized employee groups led to Congressional recognition of "prevailing rate" wages for blue-collar workers⁵⁴ and the eight-hour work day.⁵⁵ By the time President Theodore Roosevelt took office, postal workers had attained such a degree of influence over postal wage legislation that he issued an executive "gag order" in 1902, prohibiting all Federal employees from contacting Congress to influence any legislation.⁵⁶ The postal workers' organizations had previously avoided formal affiliation with the more militant national organizations, but the Roosevelt gag order, combined with harsh anti-union tactics employed by postmasters, led to a change of strategy.

⁵¹ STERLING D. SPERO, *GOVERNMENT AS EMPLOYER* 79-84 (reprint 1972).

⁵² *Id.* at 379-82.

⁵³ *Id.* at 383; Pub. L. No. 68-276, 43 Stat. 658 (1924).

⁵⁴ SPERO, *supra* note 51, at 84.

⁵⁵ *Id.* at 88-91.

⁵⁶ *Id.* at 122.

Local postal workers' organizations cooperated with the American Federation of Labor (AFL) to secure passage of the first major piece of legislation on the subject of Federal-sector employee organization, the Lloyd-LaFollette Act of 1912.⁵⁷ The Act reversed the gag order and went even further, guaranteeing Federal employees the right to participate in employee organizations without reprisal. Although the Act was a significant victory for organized labor, it did not require Federal agencies even to consult with employee organizations, and for decades there was no significant follow-up action. Congress declined to make the 1935 National Labor Relations Act (NLRA)⁵⁸ and its amendments applicable to the Federal sector. In the 1947 Taft-Hartley amendments to the NLRA, Congress emphasized its coolness to Federal-sector unionism by explicitly barring Federal-sector employees from participating in strikes.⁵⁹

Despite the restrictive legal environment, employee organization continued in many Federal agencies. Buoyed by the success of the collaborative effort to win passage of Lloyd-LaFollette, the AFL was able to obtain affiliations with most of the major postal workers' organizations within a few years.⁶⁰ Meanwhile, an unsuccessful attempt to lengthen working hours for white-collar employees in Washington spurred the AFL's successful organization of Federal white-collar, professional, and craft workers into the National Federation of Federal Employees

⁵⁷ Pub. L. No. 62-336, 37 Stat. 555. By its terms, Lloyd-LaFollette originally applied only to postal employees, but in practice it came to be applied to all Federal workers.

⁵⁸ National Labor Relations Act, *supra* note 7.

⁵⁹ Taft-Hartley Act, § 305, Pub. L. No. 80-101, § 305, 61 Stat. 136, 160. As originally enacted, the strike prohibition provided only for the termination of an offending employee, but a 1955 amendment made each Federal employee strike a felony offense. Pub. L. No. 84-330, 69 Stat. 624.

⁶⁰ SPERO, *supra* note 51, at 147.

(NFFE) in 1917.⁶¹ The NFFE left the AFL in 1931, and the AFL created the American Federation of Government Employees (AFGE) to replace it in 1933.⁶² In 1938 an organization of Treasury employees began operations, and this organization eventually became the National Treasury Employees Union (NTEU), which is currently one of the largest federal non-Postal unions, along with AFGE and NFFE.⁶³

Even in the absence of an affirmative Federal policy, a few Federal agencies developed various forms of consultation or collective bargaining on their own initiative. The TVA, established under a special statutory authority that granted it considerable flexibility in employee management, became the first large Federal agency to engage in modern collective bargaining, concluding its first written agreement in 1940.⁶⁴ Eventually the TVA negotiated agreements with bargaining units representing virtually its entire blue-collar workforce and many white-collar employees as well, and in the process it became the first large agency to embrace the principle of exclusive representation.⁶⁵ The scope of bargaining was surprisingly broad, including wages, job classification, and training, and there was no provision for the TVA leadership to override negotiated agreements or arbitrator decisions.⁶⁶

Following the TVA's example, several divisions of the Department of the Interior embarked on formal collective bargaining during the 1940s. The Secretary of the Interior approved the Bonneville Power Administration's first formal agreement

⁶¹ *Id.* at 178.

⁶² *Id.* at 190-91.

⁶³ National Treasury Employees' Union website, www.nteu.org (accessed June 25, 2006).

⁶⁴ MURRAY B. NESBITT, LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE 297 (1976).

⁶⁵ WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 100-101 (1961).

⁶⁶ *Id.* at 103-04.

in 1945.⁶⁷ Collective bargaining became so commonplace that the Interior Department issued a *Manual on Labor Relations* that included specific guidance on certification of bargaining representatives and the negotiation of agreements.⁶⁸ While the Interior Department's practices emulated those in the private sector to a great extent, there were still considerable differences, in addition to the absence of a strike weapon for employees. The Secretary of the Interior kept veto power by reserving the right to override any negotiated contract provisions and to reject any grievance awards.⁶⁹

The efforts of the TVA and the Interior Department took place in the absence of any detailed government-wide guidance. The Civil Service Commission did issue a Guide in 1951 urging agencies to meet with employee representatives to discuss matters of interest to employees and to carefully consider any proposals submitted.⁷⁰ During the Eisenhower Administration, proposed executive orders were drafted that would have required all agencies to recognize and "consult" employee organizations,⁷¹ but President Eisenhower declined to act, even on these relatively weak proposals.

By 1961, it was estimated that approximately one-third of the Federal workforce belonged to employee organizations, but the membership was

⁶⁷ President's Task Force on Employee-Management Relations in the Federal Service, Staff Report I (Staff Papers on Employee-Management Relations) 43 (Oct. 1962), available at National Archives College Park (MD) Center, Record Group 174, Box 41.

⁶⁸ HART, *supra* note 65, at 87-89 (1961).

⁶⁹ *Id* at 90-91.

⁷⁰ Federal Personnel Council, U.S. Civil Service Commission, Suggested Guide for Effective Relationships with Organized Employee Groups in the Federal Service, Aug. 28, 1952 revision, in President's Task Force on Employee-Management Relations in the Federal Service, Staff Report II, Appendix B, available at National Archives College Park (MD) Center, Record Group 174, Box 41.

⁷¹ Civil Service Commission, Proposed Executive Orders on Employee-Management Relations (1954 and 1957), in Employee-Management Relations in the Federal Service Background Papers, available at National Archives College Park (MD) Center, Record Group 174, Box 42.

disproportionately located in the Post Office Department. Union membership among non-Postal employees was estimated at only 16 percent.⁷² The two unions with the largest Federal-sector membership were both postal employee organizations.⁷³ AFGE and NFFE represented employees across a broad spectrum of Federal agencies, but they could not boast anything close to the membership of the two largest postal unions.⁷⁴

b. Pre-1962 Developments in Union Security and Official Time

The Federal Government's first reported encounter with a union security arrangement occurred when it acquired the Government Printing Office (GPO) in 1861. The GPO's predecessor (a private printing company) had operated as a closed shop, and the GPO continued to do so, without reported incident, for decades. In 1903 the GPO terminated a bookbinder because he had been expelled from the union, and the employee appealed to the Civil Service Commission. The Commission reversed the termination and was upheld by President Theodore Roosevelt, who wrote that "no rules or resolutions of [a] union can be permitted to override the laws of the United States"⁷⁵ The GPO's union shop thus came to an abrupt end, but the GPO continued to engage in collective bargaining.⁷⁶

Despite its pioneering attitude toward bargaining, the TVA rejected all proposals to negotiate union shop or agency shop arrangements, since it believed such negotiations would be unlawful, even under the TVA's broad grant of statutory

⁷² President's Task Force on Employee-Management Relations in the Federal Service, Staff Report II (Employee-Management Relations Practices in the Federal Service) 9 (October 1961), available at National Archives College Park (MD) Center, Record Group 174, Box 41.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ SPERO, *supra* note 51, at 380-81

⁷⁶ *Supra* notes 52 and 53 and accompanying text.

authority.⁷⁷ However, the TVA adopted an official policy of encouraging union membership as part of its union contracts, which required supervisors to consider membership as a positive factor in employee evaluations,⁷⁸ transfers, promotion, and retention.⁷⁹ Both the Authority and its unions considered the union preference provisions as a form of union security.⁸⁰ The TVA was one of the first Federal agencies to set up a system of voluntary dues checkoffs.⁸¹ The Interior Department also rejected the union shop and the agency shop as “contrary to the principles of the Federal Government,”⁸² but it allowed the Bonneville Power Administration to introduce voluntary dues checkoffs in 1953.⁸³

Official time was documented as an issue in the Federal sector as early as 1919, when Franklin Roosevelt (then Assistant Secretary of the Navy) directed that the Boston Navy Yard not discriminate against members of shop committees whose grievance representation activities had reduced their productivity.⁸⁴ This order suggests that the use of official time for grievance representation was an accepted practice as early as the World War I era, at least in one large department, despite the absence of any written guidance authorizing it.

The Civil Service Commission’s 1952 Guide recommended allowing employees to consult with management representatives while on official time, but it discouraged the use of official time for organizing, soliciting dues, or distributing

⁷⁷ HART, *supra* note 65, at 102-03.

⁷⁸ *Id.* at 99.

⁷⁹ *Bowman v. Tenn. Valley Auth.*, 744 F.2d 1207, 1210 (6th Cir. 1984).

⁸⁰ *Id.*

⁸¹ HART, *supra* note 65, at 106.

⁸² Staff Report I, *supra* note 67, at 44.

⁸³ *Id.* at 57.

⁸⁴ SPERO, *supra* note 51, at 100.

literature.⁸⁵ The version of the Federal Personnel Manual in effect in 1961 stated that employees “should be assured” of reasonable official time for preparing grievances, but it made no other mention of official time, even for employees representing grievants.⁸⁶

Surveys conducted in 1961 by the President’s Task Force revealed that the limited use of official time had become common in many agencies. Some unions used official time to a much greater degree than others, so it appears that the practice varied considerably, even within agencies. Most of the postal employee unions used little or no official time,⁸⁷ but the NFFE, which represented employees in every large agency, reported that it used official time for investigation of grievances and for membership meetings.⁸⁸ A few unions even reported using official time for dues collection and solicitation of new members.⁸⁹ 28 agencies reported that they allowed representation of employees in grievances and appeals on official time, and no agency with significant union membership reported denying official time for grievance processing.⁹⁰ Only a few agencies reported allowing official time for collection of union dues, organizing, or internal union meetings.⁹¹

⁸⁵ Suggested Guide, *supra* note 70, paragraph 5b.

⁸⁶ Federal Personnel Manual, Chapter E2, in Background Papers, *supra* note 71.

⁸⁷ President’s Task Force on Employee-Management Relations in the Federal Service, Staff Report VI (Labor-Management Relations in the Federal Service as Reported by Organizations of Federal Employees) 26 (1961), available at National Archives College Park (MD) Center, Record Group 174, Box 41.

⁸⁸ *Id.* at 25.

⁸⁹ *Id.*

⁹⁰ Staff Report II, *supra* note 72, at 19.

⁹¹ *Id.*

c. President Kennedy's Task Force and Executive Order 10,988

After World War II, employee organizations, led by the postal unions, began to press Congress to pass government-wide legislation mandating union recognition. The first union recognition bill was introduced in 1949, and successor bills were introduced in each Congress through the 1950s. A Civil Service Commission analyst later noted that the bills became “steadily more complex and more emphatic in pressing the union viewpoint.”⁹² Despite the substantial lobbying power of the Postal unions, the opposition of the Truman and Eisenhower administrations ensured that none of the bills reached a floor vote in either house of Congress.⁹³ Eventually, the Postal unions gained a valuable ally in Senator John F. Kennedy. Although the Democratic Party platform in 1960 did not mention the recognition of Federal-sector unions,⁹⁴ Kennedy predicted, in an October 1960 letter to a Postal union official, that a Democratic presidential administration, in concert with a Democratic Congress, could “deal effectively” with legislation on union recognition.⁹⁵

After the Democrats' success in the 1960 election, organized labor pounced on what it believed to be a golden opportunity. The AFL-CIO drafted an ambitious new bill that would have obliged Federal agencies to bargain with representatives of national unions over a wide array of policies, including “promotions, demotions, rates of pay and reductions in force.”⁹⁶ Interestingly, the bill would *not* have established the principle of exclusive representation, instead requiring agencies to negotiate with

⁹² Civil Service Commission Operations Letter 700-7, May 26, 1961, in Background Papers, *supra* note 71.

⁹³ *Id.*; WILLEM B. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES CIVIL SERVICE 45 (1966).

⁹⁴ Staff Report I, *supra* note 67, at 27.

⁹⁵ VOSLOO, *supra* note 93, at 58-59.

⁹⁶ H.R. 12, 87th Cong. (1961), *quoted in* VOSLOO, *supra* note 93, at 49.

organizations, even those representing only a handful of employees.⁹⁷ In the early days of the 87th Congress, 25 other bills were introduced on the same subject.⁹⁸

However, President Kennedy's assurance that he would "deal effectively" with the issue of union recognition did not turn out as the unions had hoped. Rather than supporting any of the proposed legislation, in June 1961 the President announced the formation of the Task Force on Employee-Management Relations in the Federal Service.⁹⁹ He named Labor Secretary Arthur Goldberg, a well-known academic expert on labor-management relations and a former AFL-CIO attorney and negotiator, to head the Task Force. In the appointing memorandum, Kennedy referred to the requirement for "prompt attention by the Executive Branch" to the issue of Federal sector labor-management relations, signaling his intention to issue an executive order.¹⁰⁰ The appointment of the Task Force immediately dampened Congressional enthusiasm for legislation on the subject,¹⁰¹ and even organized labor soon resigned itself to the prospect of an executive order. The AFL-CIO submitted its own draft of an executive order in August.¹⁰²

The Task Force recommended bringing the Federal sector several steps closer to private-sector practice in labor relations, but it never seriously considered opening the door to the union shop or the agency shop. Indeed, the idea must have been

⁹⁷ *Id.* at 51.

⁹⁸ *Id.* at 59; Staff Report I, *supra* note 67, at 25.

⁹⁹ President's Memorandum Appointing Task Force on Employee-Management Relations in the Federal Service (June 22, 1964), *reprinted in* COMM. ON POST OFFICE AND CIVIL SERVICE, HOUSE OF REPRESENTATIVES, 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, at 1184 (1978)(hereinafter LEGISLATIVE HISTORY).

¹⁰⁰ *Id.*

¹⁰¹ VOSLOO, *supra* note 93, at 59.

¹⁰² AFL-CIO Draft Executive Order, August 1961, in President's Task Force on Employee-Management Relations in the Federal Service, Staff Report III (Summary of Testimony: Task Force Hearings) Appendix (Oct. 1961), available at National Archives College Park (MD) Center, Record Group 174, Box 41.

considered a clear political taboo, since it was not included in any of the 26 proposed bills, and none of the union representatives who testified at the Task Force’s hearings proposed it.¹⁰³ Instead, the unions focused their energy on requests for voluntary dues checkoffs.¹⁰⁴ In its Report, the Task Force expressed its “emphatic opinion” that the closed shop and the union shop were inappropriate to the Federal service,¹⁰⁵ but it did not mention the agency shop or attempt to evaluate whether it might be appropriate in the Federal sector. The omission was particularly odd in light of the Task Force’s reliance on the following quote from a 1955 American Bar Association report: “A government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar favorable basis”¹⁰⁶

Of course, Federal law had required private employers to negotiate union shop or agency shop proposals since 1935. The Report’s conclusion on union security might have been more persuasive if the Task Force had at least considered the agency shop or if it had explained why union security was less appropriate for Federal employees than for private-sector employees.

In contrast to its quick dismissal of the union shop, the Task Force carefully considered the desirability of voluntary dues checkoffs. Relying on a legal analysis prepared by the Department of the Interior in 1951, supported by three subsequent decisions of the Comptroller General, the Task Force concluded that any diversion of

¹⁰³ Staff Report I, *supra* note 67, at 25-26.

¹⁰⁴ Staff Report III, *supra* note 102, at 7, 38, 54; AFL-CIO Draft Executive Order, *supra* note 102, at § 9.

¹⁰⁵ President’s Task Force On Employee-Management Relations In The Public Service, A Policy For Employee-Management Cooperation In The Federal Sector (1961)(hereinafter Task Force Report), *reprinted in* LEGISLATIVE HISTORY, *supra* note 99, at 1177, 1208 (1978).

¹⁰⁶ *Id.* at 1189.

Federal employees' pay required Congressional authority.¹⁰⁷ Therefore, the Task Force recommended that Congressional authority be sought to implement dues checkoffs throughout the government.¹⁰⁸

Before making recommendations on the use of official time, the Task Force first asked the Department of Labor's attorneys for an opinion on the legal authority for the practice. The Department of Labor Solicitor's memo noted that union activities were arguably not official business, and therefore might not be a proper use of Federal resources. However, the memo advised that agency heads had broad authority to grant "official leave" for activities deemed to be in the government interest, pursuant to department heads' statutory power to define the manner of employment within their agencies.¹⁰⁹ The Solicitor reasoned that the collection of union dues, solicitation of union membership, attending union meetings, and organizing could be considered "in the government interest," since such activities might promote good employee-management relations.¹¹⁰ However, the memo also advised that the statutory authority did not authorize "substantial periods" of Government time for union activities.¹¹¹

Ultimately, the Task Force recommended that the use of official time be authorized, but on a limited basis. Noting that the agencies "varied" in their policies on allowing dues solicitation and organizing, the Task Force, without further

¹⁰⁷ With the exceptions of the TVA, the Bonneville Power Administration, and the Inland Waterways Corporation, which operated under permissive personnel-management statutes. Staff Report I, *supra* note 67, at 49-61.

¹⁰⁸ Task Force Report, *supra* note 105, at 1204.

¹⁰⁹ Staff Report I, *supra* note 67, at 65-67. The relevant statute at the time was 5 U.S.C. § 22, now codified at 5 U.S.C. § 301 (2000), which authorizes each department head to issue regulations "for the government of his department, the conduct of its employees, [and] the distribution and performance of its business"

¹¹⁰ Staff Report I, *supra* note 67, at 65-67.

¹¹¹ *Id.*

explanation, recommended that official time not be permitted for internal union business.¹¹² On the question of official time for negotiations and grievance proceedings, the Task Force noted

“[T]here is virtual unanimous agreement that consultation between employee organizations and management should be conducted on official time. The Task Force is of the opinion that this practice should continue, inasmuch as management officials will always be in a position to control the amount of time involved. ... If [the amount of official time] becomes burdensome, it would be appropriate for management to require that employee representatives negotiate on their own time.”¹¹³

The Task Force’s recommendations appear to have been based on the cautious wording of the Department of Labor Solicitor’s opinion, combined with the Task Force’s assessment that wide-ranging use of official time was not prevalent in most Federal agencies.

Before President Kennedy took action on the Report, the National President of AFGE responded to the Report’s recommendations in a letter to Secretary Goldberg.¹¹⁴ The letter stated, possibly for the first time, AFGE’s belief that there should be an explicit linkage between the lack of private-sector-style union security arrangements and the generous authorization of official time. If Federal-sector unions were not to be granted precisely the same rights as their private-sector counterparts, the argument went, then the agencies must “lean over backwards” to promote effective labor relations, and this included permission to conduct internal union business on “company time.”¹¹⁵ Secretary Goldberg’s response to AFGE on this

¹¹² Task Force Report, *supra* note 105, at 1204.

¹¹³ *Id.* at 1203.

¹¹⁴ Letter from James A. Campbell to Arthur J. Goldberg, Dec. 28, 1961, available at National Archives College Park (MD) Center, Record Group 174, Box 41.

¹¹⁵ *Id.*

particular point is unknown,¹¹⁶ but AFGE's view found no support in the Task Force Report or in the ensuing Executive Order.

President Kennedy quickly implemented the Task Force recommendations in January 1962. Executive Order 10,988¹¹⁷ required agencies to recognize all lawful Federal employee organizations, and it set up three tiers of recognition: informal, formal, and exclusive. Organizations able to recruit and maintain at least ten percent of the bargaining unit population as members (and chosen as exclusive representative by a majority of the bargaining unit) could qualify for exclusive recognition.¹¹⁸ Exclusive representatives were entitled to negotiate formal collective bargaining agreements and to represent bargaining unit members in all traditional labor-management relationships, such as grievance proceedings.¹¹⁹ If no organization could obtain majority support as exclusive representative, but one or more could show membership by at least ten percent of the bargaining-unit members, then such organizations could receive formal recognition, which included the right to meet and confer over "personnel policies and practices" and "matters affecting working conditions."¹²⁰ Any other lawful employee organizations were entitled to informal recognition, even if another organization attained exclusive recognition. However, informal recognition did not require agencies to consult, but only to allow presentation of views "on matters of concern to its members."¹²¹

¹¹⁶ *Id.* A notation on the letter states that he responded at a lunch meeting.

¹¹⁷ 27 Fed. Reg. 551 (Jan. 17, 1962).

¹¹⁸ *Id.* § 6a.

¹¹⁹ *Id.* § 6b.

¹²⁰ *Id.* § 5.

¹²¹ *Id.* § 4.

A brief paragraph on official time prohibited the solicitation of memberships, dues, and internal organization business except on non-duty time.¹²² It allowed official time for “officially requested and approved consultations and meetings,” but only when “practicable.”¹²³ Agencies were permitted unilaterally to deny official time, even for contract negotiations and grievance proceedings involving exclusively recognized organizations.¹²⁴

d. Developments in Official Time and Union Security: 1962 to 1978

Although union leaders were not fully satisfied with the E.O. 10,988, they immediately began taking advantage of it. As unions made progress in attaining exclusive recognition and in negotiating written agreements during the 1960s, they soon began to test the limits of Section 9 of the Executive Order. Because official time involved the use of government resources, the Comptroller General assumed a crucial role as legal arbiter of questionable provisions. In 1966 the Comptroller General approved a contract provision allowing the use of official time “to attend union conducted training sessions designed to inform employees on ... provisions of Executive Order 10,988 which are of mutual concern to the agency and the employee organization.”¹²⁵ However, the decision added two major restrictions. First, no official time could be granted to train employees on recruiting, internal business, or, oddly enough, “the art of collective bargaining negotiations.” The Comptroller General reasoned that the listed training subjects would not be “in the interest of the

¹²² *Id.* § 9.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Comptroller General Clarifies Use of Administrative Leave to Attend Union Training Sessions, GOV'T EMPL. REL. REP. (BNA), July 12, 1966, at A-3.

Government.” Second, and with no rationale, the decision restricted grants of official time to periods of eight hours.

Meanwhile, unions achieved a victory on the subject of dues checkoffs. In 1963, the Comptroller General determined that an act of Congress just a few weeks prior to the issuance of the 1961 Task Force Report¹²⁶ provided a legal basis for voluntary dues withholding.¹²⁷ Therefore, in October 1963, the Civil Service Commission issued regulations authorizing agencies to negotiate checkoff provisions with exclusively recognized organizations while requiring the collection of an administrative fee of two cents per deduction.¹²⁸ Employees could withdraw their authorizations for dues deduction at six-month intervals.¹²⁹ By 1968, over 23 million dollars was being deducted annually.¹³⁰

Between 1962 and 1969, union representation in the Federal sector blossomed from 29 exclusive units representing about 19,000 employees (all in Interior and the TVA) to over 2,300 exclusive units in 35 agencies representing over 1.4 million employees (over half of the Federal workforce subject to E.O. 10,988).¹³¹ By the late 1960s, over three-quarters of the collective bargaining agreements covering Federal employees provided for official time for grievance processing, arbitration, or both.¹³² The bulk of those agreements provided official time for union representatives only,

¹²⁶ 5 U.S.C. § 3075 (now codified at 5 U.S.C. § 5525 (2000)).

¹²⁷ B-40342, B-132133, 42 Comp. Gen. 342 (1963).

¹²⁸ NESBITT, *supra* note 64, at 211.

¹²⁹ *Id.*

¹³⁰ *Id.* at 213.

¹³¹ Study Committee Report and Recommendations (August 1969), in U.S. FEDERAL LABOR RELATIONS COUNCIL, LABOR-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE 63 (1975).

¹³² BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, NEGOTIATION IMPASSE, GRIEVANCE, AND ARBITRATION IN FEDERAL AGREEMENTS 29 (1970).

not for grievants or witnesses.¹³³ Many of the agreements also included prohibitions against “excessive use” of official time.¹³⁴ The tone and content of the most typical contract terms suggests that the use of official time was limited and carefully controlled by management during the 1960s.

1. Johnson’s Review Committee and the Right-to-Work Movement

In 1967 President Johnson appointed a Review Committee to assess developments under E.O. 10,988 and to make recommendations for reforms. The comments of some of the union leaders and agency representatives before the Review Committee shed light on the limited application of official time under E.O. 10,988.

The TVA reported that official time requests were “carefully scrutinized” because “[s]ubsidization by management of union activities undermines genuine independence,” and also related that it did not allow official time for union representatives in bargaining negotiations.¹³⁵ AFGE complained that agencies were overly restrictive in granting requests to place full-time union officials on leave without pay and argued that agencies should be required to grant leave without pay to any full-time union officers and employees.¹³⁶ The National Association of

¹³³ *Id.* at 30.

¹³⁴ *Id.*

¹³⁵ President’s Review Committee on Federal Employee-Management Relations, Summary Of Testimony And Written Submissions 29 (October 1967) (available at U.S. Dept. of Labor, Wirtz Labor Library, Washington D.C.)

¹³⁶ Federal employees on approved leave without pay (LWOP) maintain their eligibility for certain benefits and can accrue credit for retirement. For a summary of current LWOP provisions, see the Office of Personnel Management website, http://www.opm.gov/oca/leave/html/lwop_eff.htm (accessed May 29, 2006). The use of LWOP for collective bargaining activities was not specifically addressed in any of the executive orders or in the current Statute.

Government Employees (NAGE) went even further, suggesting that officials of large bargaining units be granted full, paid official time for union duties.¹³⁷

During the Review Committee's oral testimony, the debate over union security, suppressed by the 1961 Task Force, burst into the open. Representatives of the AFL-CIO and the American Federation of State, County, and Municipal Employees (AFSCME) urged authorization of the union shop or the agency shop.¹³⁸ A group of university professors and other labor-relations experts agreed, offering the following argument:

It is hard to understand why [the 1961 Task Force] included the union shop in the same category [as the closed shop]. . . . All the union shop implies is an additional work requirement over and above the national security question, citizenship, adequate attendance on the job, appropriate promptness, etc. The union shop is a logical extension of the concept of exclusive recognition If all employees receive the benefits obtained by the union then it is logical for all employees to be required to join the organization.¹³⁹

Of the agency representatives who testified before the Review Committee, only the Department of Commerce opposed the agency shop, on the vague grounds that "the Federal establishment is [not] ready for anything like that."¹⁴⁰ The NRWTC offered a more extensive argument, accusing the AFL-CIO of exploiting the exclusive recognition provision of E.O. 10,988 to obtain union security provisions through

¹³⁷ Summary of Testimony, *supra* note 135, at 74-75.

¹³⁸ President's Review Committee on Federal Employee-Management Relations, Summary Of Testimony And Written Submissions 2, 84 (October 1967) (available at U.S. Dept. of Labor, Wirtz Labor Library, Washington D.C.)

¹³⁹ Charles J. Slanicka et al., Proposals for Amending Executive Order 10988, p. 11, *in* U.S. President's Review Committee On Employee-Management Relations In The Federal Service, 1967-68, Statements And Other Material Presented To The Committee Vol. 7 (available at U.S. Dept. of Labor, Wirtz Labor Library, Washington D.C.)

¹⁴⁰ Summary of Testimony, *supra* note 135, at 65.

legislation or a new executive order.¹⁴¹ In the NRWTC's view, "a decision by this body to allow so-called 'union security' clauses would amount to the Federal Government coercing its more than 3,000,000 employees to either 'pay up or get out.'"¹⁴²

The Review Committee completed a draft report that recommended abolishing informal recognition and tightening the standards for formal recognition.¹⁴³ The draft report endorsed dues checkoffs as an effective union security measure, and it made no recommendations on the union shop or the agency shop.¹⁴⁴ However, it did recommend enhancing the effectiveness of dues checkoffs by making them revocable at twelve-month intervals rather than the then-prevailing six-month intervals.¹⁴⁵ It did not recommend changes to the official time rules. The Review Committee's work ceased at this point, and it never issued a final report, reportedly because of an objection to the draft report from the Department of Defense.¹⁴⁶

However, a comment by the Civil Service Committee Chairman at a press briefing in April 1968 set off a Congressional furor on union security. The Chairman reportedly stated that the Review Committee was considering a recommendation on "union security as it relates to something more than dues check-off."¹⁴⁷ Several members of Congress immediately expressed concerns. Labor Secretary Willard

¹⁴¹ Statement of S.D. Cadwallader, President of the National Right to Work Committee, Oct. 27, 1967, in U.S. PRESIDENT'S REVIEW COMMITTEE, *id.*

¹⁴² *Id.*

¹⁴³ Draft Report of the President's Review Committee on Employee-Management Relations in the Federal Service 22-24 (April 1968), reprinted in 56th ANNUAL REPORT OF THE SECRETARY OF LABOR 33, at 48-53 (1968).

¹⁴⁴ *Id.* at 61-62.

¹⁴⁵ *Id.*

¹⁴⁶ The Defense Department objected to the Review Committee's draft recommendation to set up a Federal Labor Relations Panel to handle negotiation impasses. NESBITT, *supra* note 64, at 130-31.

¹⁴⁷ *E.O. Review Committee Attempting to Submit Recommendations to President by April 30*, GOV'T EMPL. REL. REP. (BNA) No. 241 (Apr. 22, 1968), at A-8.

Wirtz emphatically denied that the Review Committee would recommend introduction of the union shop or the agency shop,¹⁴⁸ but some members of Congress believed that preventive action was necessary to relieve the White House from the “relentless pressure” exerted by union leaders.¹⁴⁹ Legislation was introduced in both houses prohibiting any sort of compulsory union dues, and in hearings held by the Senate Civil Service Committee in June 1968, several Congressmen and Senators offered various arguments against union security measures. One Congressman asserted that “[c]ompulsory membership would put employees in service to the union leaders, rather than the other way around” and made the interesting argument that compulsory payment of dues or fees to unions would amount to a taxpayer subsidy of unions.¹⁵⁰ Members also expressed concerns about Federal employees being forced into union disciplinary systems¹⁵¹ and the use of dues money for political activities.¹⁵² None of the members present at the hearing spoke in favor of union security.

The proposed legislation against “compulsory union membership” did not come to fruition, but the hearings demonstrated the strong political opposition to any form of the union shop in the Federal sector, as well as Congress’s poor understanding of the workings of union security provisions in the private sector.

In 1970, during the debates over the Postal Reorganization Act, Congress provided another demonstration of its hostility to union security in the Federal sector.

The Nixon Administration’s original bill proposed to remove employees of the new

¹⁴⁸ Letter from Willard Wirtz to Senator Wallace Bennett, July 1, 1968, *quoted in Employee-Management Relations in the Federal Service: Hearings on S. 341 before the Senate Comm. on Post Office and Civil Service*, 90th Cong. at 117 (1968).

¹⁴⁹ *Id.* at 26 (statement of Rep. Benjamin Blackburn).

¹⁵⁰ *Id.* at 27.

¹⁵¹ *Id.* at 29.

¹⁵² *Id.* at 27 (statement of Rep. Benjamin Blackburn) and 32 (statement of Sen. Jack Miller).

U.S. Postal Service from the Federal labor relations system and place them under the NLRA.¹⁵³ However, the bill ran into staunch opposition in the House when some members realized that § 8(a)(3) of the NLRA (authorizing negotiation of the agency shop) would govern Postal employees. To obtain House support for the bill, a strong “right-to-work” provision was added.¹⁵⁴ Union leaders, recognizing that the Post Office Department had high rates of union membership even without the agency shop, accepted defeat on the union security issue in order to get expanded bargaining rights for Postal Service employees under the NLRA.¹⁵⁵

2. E.O. 11,491 and Developments in the 1970s

President Johnson left office without amending E.O. 10,988, leaving the task to the Nixon Administration. In 1969 President Nixon appointed a Study Committee, which relied heavily on the data and recommendations gathered by President Johnson’s Review Committee.¹⁵⁶

Two of the Study Committee’s most significant recommendations were to abolish informal and formal recognition, leaving exclusive recognition as the sole possibility at the unit level.¹⁵⁷ Regarding informal recognition, the Study Committee noted agency complaints that it “encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management.”¹⁵⁸

Although most union leaders had urged the retention of informal recognition, the

¹⁵³ NESBITT, *supra* note 64, at 144.

¹⁵⁴ “Each employee of the Postal Service shall have the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right.” Pub. L. No. 91-375, § 1209, 84 Stat. 719, 737 (1970) (codified at 39 U.S.C. § 1209 (2000)).

¹⁵⁵ NESBITT, *supra* note 64, at 144-45.

¹⁵⁶ Study Committee Report and Recommendations *supra* note 131, at 63 (1975).

¹⁵⁷ *Id.* at 65-66.

¹⁵⁸ *Id.* at 65

Study Committee supported the recommendations of most agencies, which cited the same concerns that had been voiced on informal recognition.¹⁵⁹

Although the records of the Review Committee contained no testimony criticizing the existing official time regime, the Study Committee recommended a significant reduction in the use of official time:

This permissiveness [in E.O. 10,988] has led to a wide divergence of practice among the agencies in granting official time for employees serving as union negotiators. Some agencies grant official time; others prohibit it or limit the amount of time that is to be used. This has resulted in inconsistent treatment of employees similarly situated. In addition, the grant of official time has led in some instances to the protraction of negotiations over a period of many months. We believe that an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged. We recommend that the new order provide that employees serving as labor organization representatives not be carried in a duty status when engaged in the negotiation of an agreement with agency management.¹⁶⁰

The Study Committee also noted that voluntary dues checkoffs had “worked well as a union security measure,” and that the system be continued “in order to foster stability in labor-management relations.”¹⁶¹ The Study Committee’s Report made no mention of the Review Committee’s recommendation that the revocation period for dues checkoffs be lengthened to twelve months.

The resulting Executive Order introduced several major changes to the Federal program, including the creation of a Federal Labor Relations Council (FLRC) to administer the program¹⁶² and a Federal Service Impasses Panel with the authority

¹⁵⁹ *Id.* at 65-66.

¹⁶⁰ *Id.* at 72.

¹⁶¹ *Id.* at 75.

¹⁶² Exec. Order No. 11,491, § 4, 34 Fed. Reg. 17,605 (Oct. 29, 1969).

to direct arbitration of negotiation impasses,¹⁶³ the abolition of informal recognition,¹⁶⁴ the phase-out of formal recognition,¹⁶⁵ and the elimination of the requirement for ten-percent membership as a prerequisite for exclusive recognition.¹⁶⁶ The Order also implemented the Study Committee’s recommendation to prohibit official time for union negotiators.¹⁶⁷

Not surprisingly, the prohibition on official time for negotiations, without any countervailing union security provisions, had mixed consequences. In 1971 the FLRC reported that the prohibition had resulted in “difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union’s inability to provide representation.”¹⁶⁸ On the positive side, the Council noted that the prohibition had promoted “better advance planning” and “more efficient use of meeting time.”¹⁶⁹ After balancing the costs and benefits, the Council recommended that the President authorize sufficient amounts of official time to avoid “undue hardship or delay in negotiations” and to promote “economical and business-like bargaining practices.”¹⁷⁰

In August 1971 the President implemented the recommendations.¹⁷¹ As amended, E.O. 11,491 permitted the parties to bargain for official time for union negotiators, but each negotiator was limited to either 40 hours or one-half the total time spent in negotiations, and the number of union negotiators receiving official time

¹⁶³ *Id.* § 17.

¹⁶⁴ *Id.* § 7f.

¹⁶⁵ *Id.* § 8.

¹⁶⁶ *Id.* § 10.

¹⁶⁷ *Id.* § 20.

¹⁶⁸ Federal Labor Relations Council, Report and Recommendations on the Amendment of Executive Order 11,491 (June 1971), in *LABOR-MANAGEMENT RELATIONS*, *supra* note 131, 53, at 58.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Exec. Order No. 11,616, ¶ 11, 36 Fed. Reg. 17,319 (Aug. 26, 1971).

would be limited to the number of management representatives.¹⁷² Official time for contract administration functions, such as grievance processing, was left for agencies to negotiate, and the prohibition on official time for internal union business remained unchanged from the 1962 Order. The official time provisions of E.O. 11,491 remained in this form until the Order was superseded by the Civil Service Reform Act in 1978.

As the Federal Government's peculiar form of collective bargaining established itself, the "free rider" problem began to emerge. In 1974 the president of a large AFGE local complained to a Senate committee that it was required to represent over 13,000 Air Force bargaining unit employees, even though it had only 3,100 dues-paying members.¹⁷³ The local estimated that its officials and stewards spent over seventy percent of their representational time on matters involving non-members, and they received no paid official time under their agreement.¹⁷⁴ In 1976 an AFGE official claimed that the union, which represented 650,000 Federal workers, had fewer than 300,000 dues-paying members.¹⁷⁵

Without robust dues remittances, the unions turned to the resource that was available to them: official time. During the early 1970s, the amount of effort expended in negotiating official-time provisions in contracts increased dramatically. A 1973 Civil Service Commission study showed that official time was among the

¹⁷² *Id.*

¹⁷³ *Labor-Management Relations in the Federal Service: Hearing on S. 351 Before the Senate Comm. on Post Office and Civil Service*, 93rd Cong. 203 (1973) (written submission of J.M. Hopperstad).

¹⁷⁴ *Id.* at 204.

¹⁷⁵ *Official Time Dispute Never Would Have Arisen with Union Security, Mulholland Tells SFLRP*, GOV'T EMPL. REL. REP., Dec. 27, 1976, at A-10.

most time-consuming issues in contract negotiations.¹⁷⁶ Between 1970 and 1973, the Federal Service Impasses Panel reported that the frequency of official time as an issue in impasse cases grew from 1 in 27 cases in 1970 to 10 in 68 cases in 1973.¹⁷⁷

By 1975 the typical federal sector contract provided “reasonable” official time for union stewards and officers,¹⁷⁸ but contract provisions for block grants of official time for union officers (usually expressed as a certain number of hours per week) appeared in a few contracts, and allowances of 100 percent official time for union officers had even begun to appear.¹⁷⁹ Block grants for stewards were also becoming more common, but the amounts of time granted were generally modest.¹⁸⁰ Government officials began to acknowledge publicly that official time was being used as an alternative to the private sector’s union security arrangements.¹⁸¹ Although the use of official time expanded, in most cases it was kept within carefully-defined limits. A 1974 Civil Service Commission survey of collective bargaining agreements showed that nearly a third of all Federal employees were covered by contracts granting official time allowances for union stewards.¹⁸² While

¹⁷⁶ CSC/OMB Survey of the Collective-Bargaining Process Under E.O. 11491, March 1974, 92, at 93, 109.

¹⁷⁷ Written statement of Howard W. Solomon, Federal Service Impasses Panel, in *Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service*, 93rd Cong. 84, at 85 (1974).

¹⁷⁸ UNITED STATES CIVIL SERVICE COMMISSION, UNION REPRESENTATION PROVISIONS IN FEDERAL LABOR AGREEMENTS 23 (1976).

¹⁷⁹ *Id.* at 29, 39.

¹⁸⁰ *Id.* at 38-39 (showing that the most common block-grant provisions for stewards provided only two hours per pay period).

¹⁸¹ *Federal Labor Relations Program: Briefing before the House Subcomm. on Civil Service of the Comm. on Post Office and Civil Service*, 95th Cong. 12 (1977) (Statement of Anthony F. Ingrassia, Director, U.S. Civil Service Commission).

¹⁸² Civil Service Commission, Special Labor Agreement Information Retrieval System Survey (Apr. 1974) in *Federal Service Labor-Management Legislation: Hearings on H.R. 13, H.R. 9784, H.R. 10700 and Related Bills before the Subcomm. on Manpower and Civil Service, House Comm. on Post Office and Civil Service*, 93rd Cong. 122 (1974).

the vast majority of bargaining units had obtained official time for contract negotiations, in the large majority of cases, less than 200 hours of aggregate official time was used.¹⁸³

In a countervailing trend, union officials in some of the larger bargaining units were gradually transforming into full-time (or nearly full-time) union officials while on Federal pay, and the Office of the Comptroller General attempted unsuccessfully to intervene. In 1976 it decided that permitting an employee to be away from his official position for an “extended period” was an impermissible use of government resources, because it interfered excessively with governmental functions.¹⁸⁴ Concluding that the authority granted by 5 U.S.C. § 301 and the Civil Service Commission’s regulations was not “sufficiently broad” to permit an employee to be diverted from her primary duties for an extended period, the Comptroller General arbitrarily set an upper limit of 160 hours per employee per year.¹⁸⁵ Objections from the FLRC and the national unions persuaded the Comptroller General to postpone implementation of the decision,¹⁸⁶ and eventually it dropped the specific limitation and deferred to the Civil Service Commission’s new regulations, which imposed no new numerical limitations on the use of official time.¹⁸⁷

In a 1975 review of the Federal sector labor-management program, the FLRC noted that the represented proportion of the non-Postal Federal workforce had

¹⁸³ Civil Service Commission, An Assessment of the Labor-Management Relations Climate at Federal Field Activities, in *Labor-Management Legislation*, *supra* note 182, at 103.

¹⁸⁴ B-156287 (Feb. 23, 1976), *reprinted in* GOV’T EMPLOYEE REL. REP. (BNA) No. 646, Mar. 1, 1976, at G-1. The decision concerned a union proposal that a teacher in an overseas Department of Defense school be allowed to spend fifty percent of his duty time in contract negotiations on paid status, and the other fifty percent in unpaid leave status.

¹⁸⁵ *Id.*

¹⁸⁶ B-156287 (unpublished), 1976 U.S. Comp. Gen. LEXIS 2802 (Mar. 22, 1976).

¹⁸⁷ B-156287 (Sep. 15, 1976), *reprinted in* GOV’T EMPLOYEE REL. REP. (BNA) No. 675, Sep. 20, 1976, at A-7.

expanded to fifty-six percent by mid-1974.¹⁸⁸ Although there had been many disputes between union leaders and agency representatives over official time under E.O. 11,491, and several agencies and union representatives had recommended modifications to the official time rules, the Council decided that none of the suggested changes were backed by substantial evidence and that E.O. 11,491 promoted “businesslike conduct of labor relations while minimizing financial hardships on individual employees”¹⁸⁹ Therefore, the Council recommended no change to the policies on official time.¹⁹⁰

Repeated efforts to impose reforms through legislation during the early 1970s also proved unsuccessful. A group of bills did receive hearings in the House in 1974, but the bills received criticism from both agency and union representatives. One of the bills would have authorized the agency shop *and* mandated full official time for any labor-management proceedings, without limit.¹⁹¹ The Civil Service Commission criticized the proposal, stating that “Collective bargaining would be subsidized to the advantage of labor organizations by making official time an automatic right.”¹⁹² The Department of Transportation also objected to expanded use of taxpayer-funded official time, arguing that “employees who desire union representation should be prepared to support these efforts.”¹⁹³ Another bill, which would have eliminated the duty of exclusive representation, was criticized by the National Treasury Employees Union, on the grounds that it would lead to “great instability” as employees joined

¹⁸⁸ Report and Recommendations of the Federal Labor Relations Council on the Amendment of E.O. 11,491 as Amended (Jan. 1975), in *LABOR-MANAGEMENT RELATIONS*, *supra* note 131, 25, 28.

¹⁸⁹ *Id.* at 52.

¹⁹⁰ *Id.*

¹⁹¹ *Federal Service Labor-Management Legislation*, *supra* note 182, at 553.

¹⁹² *Id.* (comments of the U.S. Civil Service Commission).

¹⁹³ *Id.* at 574 (written comments of the General Counsel, Department of Transportation).

and resigned from unions whenever convenient.¹⁹⁴ None of the bills succeeded, partly because of lack of support from the Ford Administration, and partly because of a lack of consensus among the large Federal employee unions on the specifics of the legislation.¹⁹⁵

By the mid-1970s, the shortcomings of the Federal Government's experiment with union security had become evident. The Civil Service Commission concluded that the official-time system had reached a good balance and needed no further reforms, but unions chafed at their lack of financial resources. Foreclosed from charging employees for services rendered to them, some unions had already begun to test the boundaries of the Order by seeking to have designated union officials placed on increasingly larger block grants of official time. The system was ripe for further reform, and there was no shortage of thoughtful proposals.

IV. Enactment of the Federal Service Labor-Management Relations Statute

At the outset of his administration in 1977, President Jimmy Carter was eager to capitalize on public discontent with a Federal civil service system that was perceived as inefficient at best and corrupt at worst.¹⁹⁶ Therefore, he sought to enact the most thorough overhaul of the Federal personnel system since the Pendleton Act. Soon after he took office, he appointed the Federal Personnel Management Project (FPMP), a task force of approximately 100 Federal managers, to conduct a complete

¹⁹⁴ *Id.* at 327 (statement of Vincent L. Connery, National President, NTEU).

¹⁹⁵ *Federal Employee Bargaining*, GOV'T EMPL. REL. REP. (BNA), Jan. 17, 1977, at 5.

¹⁹⁶ Christine Godsil Cooper and Sharon Bauer, *Federal Sector Labor Relations Reform*, 56 CHI.-KENT L. REV. 509, 521 (1980).

review of Federal personnel policies.¹⁹⁷ Several of the FPMP's study teams examined the union security issue and recommended consideration of the agency shop in the Federal sector.

The most thoughtful and detailed examination of the subject appeared in an Option Paper prepared by unnamed FPMP personnel.¹⁹⁸ The paper noted that the governments of eight states and the District of Columbia had authorized negotiation of the agency shop for at least a portion of their employees. It also cited the recent Supreme Court's recent holding in *Abood* that the agency shop, as practiced under the NLRA, did not violate the First Amendment rights of public employees.¹⁹⁹ After noting the large numbers of Federal-sector agreements that provided for official time and government space for unions, the authors summarized strong arguments in favor of reform:

All benefits, and others, which accrue to the financial security of the union, are paid for by the agency (and ultimately, the taxpayers). Authorization of agency shop or related arrangements which would make the union more self-sufficient could provide an argument for shifting some or most of these financial burdens from the taxpayers to the employees whose interests the union is representing in these activities.²⁰⁰

The authors also summarized one argument in favor of the *status quo* on official time, although the argument was not particularly persuasive: "Conversely, it has been argued that the current provision of such economic benefits to unions and their

¹⁹⁷ Haynes Johnson, *Civil Service Will Get a Top-to-Bottom Study*, WASH. POST, May 28, 1977, at A2.

¹⁹⁸ Federal Personnel Management Project, Option Paper No 4: Federal Government Labor-Management Relations (Sep. 20, 1977), in STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 96TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978 1351 (Comm. Print 1979) [hereinafter LEGISLATIVE HISTORY].

¹⁹⁹ *Id.* at 1389; *supra* Section II.d.

²⁰⁰ Option Paper No. 4, *supra* note 198, at 1390-91.

employee representatives offsets any demonstrated need for agency shop or related forms of union security.”²⁰¹

The Option Paper discussed the District of Columbia’s unusual variation on the agency shop, in which employees could escape the obligation to pay agency fees by waiving their right to union representation in grievances and appeals.²⁰² The Paper considered several other interesting versions of the agency shop, including a requirement to condition the agency shop on a separate vote of bargaining unit members and a requirement that the agency shop be granted only if unions agreed to consolidate bargaining-unit recognitions at the national or regional level.²⁰³ The authors seemed inclined to recommend a modified agency-shop arrangement, perhaps along the lines of the District of Columbia’s model, but in the end they merely presented it as one option for consideration.²⁰⁴ Two other study groups made clear recommendations that some sort of agency fee should be made negotiable.²⁰⁵

As the FPMP conducted its studies, Congress worked on several proposals for a labor-management relations statute. In early 1977, three pro-union bills were introduced in the House, each backed by a different labor organization, and each containing an agency shop provision.²⁰⁶ The bills backed by AFGE and the NTEU contained mandatory agency shop provisions for exclusive bargaining

²⁰¹ *Id.* at 1391.

²⁰² *Id.* at 1388. The current version of this code provision is at D.C. CODE § 1-617.11(a) (2006). The same code section also allows negotiation of the agency shop, and the opt-out provision would only apply in bargaining units where the agency shop has not been negotiated.

²⁰³ *Id.* at 1390.

²⁰⁴ *Id.* at 1391.

²⁰⁵ Task Force 6 Report, Labor-Management Relations (undated), in LEGISLATIVE HISTORY, *supra* note 198, at 1441; Final Staff Report, President’s Reorganization Project (Dec. 20, 1977), in LEGISLATIVE HISTORY at 1462.

²⁰⁶ H.R. 13, 95th Cong., § 7114(c) (1977), reprinted in LEGISLATIVE HISTORY, *supra* note 198, at 149-50; H.R. 1589, 95th Cong., § 5(c) (1977), reprinted in LEGISLATIVE HISTORY at 197; H.R. 9094, 95th Cong., § 7116(c) (1977), reprinted in LEGISLATIVE HISTORY at 276.

representatives. The NFFE's less-ambitious bill would have allowed elections to authorize "fair representation fees" while allowing unions to charge non-members for arbitrations and other special representational services.²⁰⁷ Congressional committee staffers and union planners theorized that a mandatory union shop provision was a good opening position for negotiations, which might result in a milder form of union security.²⁰⁸ Staffers specifically mentioned Hawaii's agency shop law and the TVA's system of providing incentives in the personnel system for union membership.

Continued lack of consensus within the labor movement prevented any of the bills from moving forward in 1977.²⁰⁹ Eventually the three groups compromised on one bill, H.R. 9094,²¹⁰ which made unlimited official time mandatory in all collective bargaining negotiations and grievance proceedings and explicitly allowed unions and management to negotiate unlimited amounts of official time for any purpose relating to labor-management relations.²¹¹ Although its prospects appeared bleak when introduced,²¹² H.R. 9094 eventually became the basis of the Federal Sector Labor-Management Relations Statute (hereinafter FSLMRS or Statute).

Despite the recommendations of its own Personnel Project, the Carter Administration had little interest in statutory reform of Federal sector labor-management relations.²¹³ In March 1978 the Administration introduced a civil

²⁰⁷ *NFFE Bargaining Bill Proposal Presented to House Subcommittee*, GOV'T EMPL. REL. REP. (BNA), May 16, 1977, at 6.

²⁰⁸ *Administration Not Yet Ready with Bargaining Bill Stand*, GOV'T EMPL. REL. REP. (BNA), July 4, 1977, at 8.

²⁰⁹ *Analysis: Military Union Furor, Stalled Legislation Marked 1977*, GOV'T EMPL. REL. REP. (BNA), Jan. 9, 1978, at 7.

²¹⁰ *Id.*

²¹¹ LEGISLATIVE HISTORY, *supra* note 198, at 295.

²¹² *Analysis*, *supra* note 209.

²¹³ President Carter's Civil Service Commission chairman explained that the President's lack of interest stemmed from a desire to keep control of the program through the Executive Order, rather

service reform bill that lacked any provisions on labor-management relations.²¹⁴ The bill did include proposals to streamline the disciplinary and appeals processes for Federal employees, and those elements of the bill aroused the ire of many Federal-sector unions. While several of the Federal employee unions declared their outright opposition to President Carter's reform bill, the AFGE leadership stated publicly that it would support the bill, *if* a labor-management relations statute were added.²¹⁵ AFGE's gambit paid off in late April, when the President agreed to add a labor-management relations title to the bill.²¹⁶

The agency shop was a contentious issue throughout the legislative process. The Democratic members of the House Post Office and Civil Service Committee played the key role in crafting the final legislation, and they used H.R. 9094, rather than the Administration's less ambitious bill, as the basis for their committee markup.²¹⁷ At the outset, the Administration expressed its firm opposition to any form of the union shop,²¹⁸ and even the most pro-union Democrats in the House recognized the political difficulty of passing an agency shop provision.²¹⁹ Still, Committee Democrats proposed a compromise agency shop provision that would

than surrendering it to Congress. *No Labor Relations Package in Proposed Legislation Yet*, GOV'T EMPL. REL. REP. (BNA), Feb. 13, 1978, at 8. In a public question-and-answer session on the civil service reform legislation in August 1978, President Carter made one of his few public comments on the labor-management relations portion of the bill: "My preference is to limit the collective-bargaining process in this legislation to what is included in the Executive Order today." PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER, 1978 at 1368 (1979).

²¹⁴ LEGISLATIVE HISTORY, *supra* note 198, at xii.

²¹⁵ Causey, *Unions May Get New Clout*, WASH. POST, Apr. 13, 1978, at C2.

²¹⁶ Kathy Sawyer, *New Rules Drafted for U.S. Workers*, WASH. POST, Apr. 26, 1978, at A1.

²¹⁷ LEGISLATIVE HISTORY, *supra* note 198, at xv-xvii. The Administration's initial proposal for a Labor-Management Relations Statute was the verbatim text of E.O. 11,491. S. 2640, 95th Cong. (1978), *reprinted id.* at 484.

²¹⁸ Mike Causey, *White House Getting Its Way*, WASH. POST, May 8, 1978, at C2.

²¹⁹ One representative went so far as to criticize the FPMP's support for the agency shop as a "smoke screen" for the Administration's hostility toward unions, since "everyone knows that it is a virtual certainty that Congress would refuse to approve [agency shop legislation]." LEGISLATIVE HISTORY, *supra* note 198, at 834 (comments of Rep. William F. Walsh).

have required an election in each bargaining unit (separate from the election to certify a union as exclusive bargaining agent) to authorize the agency shop.²²⁰

The House bill's agency shop provision was deleted during the House Committee markup, probably because of the Administration's opposition.²²¹ Later, in the House-Senate Conference Committee, the House conferees persuaded the Senate to delete a provision from the Senate bill that "no employee shall be required by an agreement to become or to remain a member of a labor organization, or to pay money to an organization."²²² Union leaders had long decried similar provisions in the Executive Orders as thinly-veiled expressions of hostility toward unions. Although the explicit prohibition on the agency shop was deleted, Section 7102 of the Statute protected the right of employees to refrain from joining or assisting any labor organization.²²³ And if any further doubt remained, the Conference Committee's Report made the intent of Congress clear:

The conferees wish to emphasize, however, that nothing in the conference report authorizes, or is intended to authorize, the negotiations of an agency shop or union shop provision.²²⁴

In its markup of the bill, the House Committee rejected an Administration proposal to delete the expanded official time provisions.²²⁵ Instead, it adopted a compromise bill that conceded only a minor amendment to the official time provisions of H.R. 9094 by making official time for grievance processing negotiable,

²²⁰ Kathy Sawyer, *Hill Panel Democrats Work to Alter Civil Service Bill*, WASH. POST, June 10, 1978, at C4.

²²¹ LEGISLATIVE HISTORY, *supra* note 198, at xv-xvii.

²²² H.R. REP. NO. 95-1717, S. REP. NO. 95-1272 [hereinafter CONFERENCE REPORT], at 159 (1978), *reprinted in* LEGISLATIVE HISTORY, *supra* note 198, at 827.

²²³ 5 U.S.C. § 7102 (2000).

²²⁴ CONFERENCE REPORT, *supra* note 222, at 159, *reprinted in* LEGISLATIVE HISTORY, *supra* note 198, at 827.

²²⁵ 124 CONG. REC. 25, 601 (Aug. 10, 1978)(statement of Rep. Clay).

rather than mandatory.²²⁶ A Republican member of the Committee decried the bill's official time provisions as "outright taxpayer support for labor unions representing Federal employees,"²²⁷ but his objection is the only explicit criticism of the expanded official-time provisions that appears in the legislative history.

The bill reported out of the House Committee contained § 7132 on official time, which was enacted verbatim as § 7131 of the Statute:

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 nonduty 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

²²⁶ *Id* at xv-xvii, 844. For practical purposes, union supporters gave up very little in this compromise, since the overwhelming majority of collective bargaining agreements already provided for official time for grievance processing.

²²⁷ *Id* at 735 (additional views of Rep. Taylor).

agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.²²⁸

Since the official time provisions were only a small portion of one title of a massive civil service reform bill, it is unlikely that many legislators understood the scope of the changes, especially in the official time provisions. The careless (or perhaps disingenuous) statement of one of the legislation's supporters on the House floor did not help to promote understanding:

What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. ... So we are now going to put into the United States Code instead of the Federal Register this basic plan of President Kennedy's that has worked so well in the last 15 years.

The Federal employee unions do not get much out of this amendment process that is not already in the Executive order.²²⁹

The final floor debate on the House bill provided a vivid illustration of how poorly most members of Congress understood the official time changes. One of the last issues debated before the bill's final floor vote was the relatively minor matter of requiring agencies to provide dues checkoffs at no cost to unions, rather than making negotiable a two-cent administrative fees for each deduction.²³⁰ Although the cost of this concession to the Government was negligible compared to the costs of expanded official time, Congressmen vigorously criticized the latter while ignoring the former. One representative complained, "for the first time we are going to allow the Treasury to pay for union activity. ... We are giving more than equity--we are allowing

²²⁸ H.R. 11,280, 95th Cong., § 7132 (1978).

²²⁹ 124 CONG. REC. 29,182 (Sep. 13, 1978) (statement of Rep. Udall).

²³⁰ The provision was enacted as § 7115 of the statute.

Federal employee unions to dip into the Federal treasury to provide for the dues checkoff.”²³¹

No changes were made to the official time provisions of the House bill on the floor, and the bill passed in September 1978.²³² Meanwhile, the Senate passed a bill that closely tracked E.O. 11,491 and included its official time provisions nearly verbatim.²³³ The Report of the Senate Committee on Governmental Affairs reflected its view that the *status quo* was sufficient to promote effective labor relations:

“Nothing in the [official time] provision prohibits an agency and labor organization from negotiating provisions which provide for official time for labor organization representatives to engage in contract administration and other representational activities (including negotiations which arise out of circumstances during the term of the basic agreement) which are of mutual interest to both the agency and the labor organization and which relate to the labor-management relationship”²³⁴

Nonetheless, for reasons that were not recorded, the House bill’s official time rules prevailed in the Conference Committee²³⁵ and were enacted as § 7131 of the Civil Service Reform Act in October 1978.²³⁶

The FSLMRS²³⁷ significantly strengthened the position of Federal sector unions. It replaced the Federal Labor Relations Council, which had been composed of Federal agency heads, with an independent Federal Labor Relations Authority (FLRA),²³⁸ and it empowered the FLRA to decide disputes over bargaining unit

²³¹ 124 CONG. REC. 29,201 (Sep. 13, 1978)(statement of Rep. Rousselot).

²³² LEGISLATIVE HISTORY, *supra* note 198, at xx-xxv.

²³³ *Id.* at 600.

²³⁴ S. Rep. No. 95-969, *reprinted in* LEGISLATIVE HISTORY, *supra* note 198, at 772-73.

²³⁵ The Conference Report contained no details on how the differences over official time were settled. LEGISLATIVE HISTORY, *supra* note 198, at 793-828.

²³⁶ Pub. L. No. 95-454, 92 Stat. 1111 (1978).

²³⁷ 5 U.S.C. §§ 7101-7135 (2000).

²³⁸ *Id.* § 7105.

determinations and elections,²³⁹ the duty to bargain in good faith,²⁴⁰ and to conduct hearings on complaints of unfair labor practices.²⁴¹ The FSLMRS also required agencies to negotiate grievance procedures allowing unions to invoke arbitration directly, without any requirement to obtain approval from a Federal official.²⁴² All members of the Federal Service Impasses Panel were placed on five-year terms of office to increase their independence.²⁴³

The FSLMRS enhanced union opportunities for the use of official time while increasing management's obligations to provide it. The prohibition on official time for internal union business remained,²⁴⁴ but the legislative history accompanying it would guarantee that the prohibition would be narrowly construed. The limits on official time for union negotiators were removed, and official time became mandatory for preliminary and post-impasse stages of bargaining and for bargaining of agreements other than full-fledged collective bargaining agreements.²⁴⁵

In perhaps the most significant change, the FSLMRS added a broad authorization that had not appeared in any of the executive orders. § 7131(d) granted agencies and unions broad authority to negotiate unlimited amounts of official time for bargaining unit employees for any matters "reasonable, necessary, and in the public interest." Section 7131(d) did not limit the ambit of negotiated official time to labor-management relations activities. While official time for contract administration

²³⁹ *Id.* § 7111.

²⁴⁰ *Id.* § 7117(c).

²⁴¹ *Id.* § 7118. Under E.O. 11,491, an Assistant Secretary of Labor had performed each of these functions. E.O. 11,491, § 6, 34 Fed. Reg. 17,605 (1969), amended by E.O. 11,616, ¶ 4, 36 Fed. Reg. 17,319 (1971).

²⁴² 5 U.S.C. § 7121(b) (2000).

²⁴³ *Id.* § 7119(c)(3). Under E.O. 11,491, § 5, all members of the Panel had served at the pleasure of the President.

²⁴⁴ 5 U.S.C. § 7131(b) (2000).

²⁴⁵ *Id.* § 7131 (a). See Interpretation and Guidance, 2 F.L.R.A. 265 (1979).

had not been forbidden under the executive orders, the lack of specific authorization (other than the limited, general authorization of 5 U.S.C. § 301),²⁴⁶ combined with the Comptroller General's oversight, had served as a restraint on the practice, and agencies had never been held to a duty to bargain such proposals. Section 7131(d) opened the door for a wide variety of new (or newly-expanded) uses of official time for union representatives. By creating an explicit, statutory basis for official time, the statute also ended the Comptroller General's role as interpreter of the official time rules.

And thus, with minimal public debate, Federal employee unions and their Congressional supporters had achieved one of the goals the AFGE President had expressed in 1961: the authority to obtain copious amounts of paid official time to compensate for the prohibition of the agency shop. The steadfast opponents of “compulsory unionism” in the Carter Administration and Congress had held the line against the dreaded agency shop, but in the process they had unwittingly set the stage for enhanced, government-funded union security. It is interesting to speculate on how the debate would have unfolded if the Carter Administration had seriously considered the recommendations of its Personnel Project and decided to allow one of the many creative proposals for the agency shop to emerge from the House Committee. Instead, the unions were left to fight for official time as a primary means of support, with negative consequences for the evolution of labor-management relations.

²⁴⁶ *Supra* note 109 and accompanying text.

V. Developments in Union Security Since 1978

a. Expansion of Official Time

1. Official Time vs. Management Rights

The FSLMRS set up a tension between § 7131 and the management-rights provisions of § 7106.²⁴⁷ The stakes grew during the 1980s as unions tried to take advantage of § 7131(d) to bargain for 100 percent official time for union officials in large bargaining units. By early 1984, the vast majority of agreements provided merely for “reasonable” official time.²⁴⁸ Agreements for 100 percent official time were rare, and agreements for 50 percent official time were not much more common.²⁴⁹ Still, union leaders worked hard to expand the number of officials on 100 percent official time.

In determining the negotiability of an AFGE proposal for 60 full-time union representatives²⁵⁰ in a consolidated bargaining unit containing over 72,000

²⁴⁷ 5 U.S.C. § 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws--

...

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

²⁴⁸ U.S. OFFICE OF PERSONNEL MANAGEMENT, A SURVEY OF UNION REPRESENTATION PROVISIONS IN FEDERAL LABOR AGREEMENTS 2 (1984)

²⁴⁹ *Id.* at 32 (only 4 of 2,439 agreements allowed 100% official time for union officers).

²⁵⁰ Before the FLRA issued its decision, impasse proceedings had been resolved through arbitration, and the arbitrator had awarded AFGE 12 full-time positions. *Id.* at 216 n.1.

employees, the FLRA determined that the agency did not have a duty to bargain over the proposal, based on its factual finding:

The employees in the units of exclusive recognition involved herein are skilled technicians in areas of sheet metal work, electronics, electrical engineering, data processing, and procurement functions. It is often the case that the employees work in crews in which the various tasks and skills are interrelated and interdependent so that the progress of the work depends on each function in the work process being fulfilled.²⁵¹

FLRA resolved the tension between § 7106 and § 7131 in favor of management by adopting a test that asked whether a union bargaining proposal would have a “direct effect” on a management right enumerated in § 7106.²⁵² If the agency could demonstrate that a proposal for 100 percent official time would, under the circumstances, require the agency to shift personnel from other work projects or organizations to cover the union official’s regular duties,²⁵³ then the FLRA concluded that the proposal had a direct effect on management’s right to determine the “numbers, types, and grades of employees” under § 7106(b), and therefore the proposal was negotiable only at the agency’s election.²⁵⁴

On review, the U.S. Court of Appeals disagreed, reasoning that the FLRA’s analysis would render § 7131(d) virtually irrelevant:

[I]f [the FLRA’s] test were consistently applied to the negotiability of new proposals for official time, its effect would be to make such proposals negotiable at the agency’s election whenever an agency is efficiently run. Any provision for additional official time in an efficiently run organization will require the agency to reassign work to other employees and, if present employees are already busy throughout

²⁵¹ *Id.* at 220.

²⁵² AFGE Council of Locals No. 214 and Dept. of the Air Force, Air Force Logistics Command, 19 F.L.R.A. 215 (1985).

²⁵³ *Id.* at 220-22.

²⁵⁴ *Id.* at 222.

the day, to hire additional employees to perform these reassigned duties.²⁵⁵

The Court's conclusion is certainly debatable, since the FLRA's decision was based on specific factual findings that would be difficult for agencies to justify in most circumstances, especially if the union does not propose any officials on 100% official time. Lacking any useful legislative history on the disputed issue, and perhaps realizing the weakness of its reasoning, the Court ventured to speculate on Congress's intent:

In specifically providing for official time, Congress must have envisioned either some reallocation of positions or some additional hiring and hence some limitation in management's right to determine the number of employees assigned to a work project or organizational subdivision. Otherwise, the official time provision of section 7131(d) would be a dead letter.²⁵⁶

While the decision in *AFGE Council of Locals No. 214* did not force any agency to accept proposals for 100 percent official time, imposing a duty to bargain over such proposals was significant, especially since that duty had never existed under the executive orders. This decision paved the way for a significant expansion of the number of full-official-time employees, a trend that would later generate controversy.²⁵⁷

2. "Labor-Management Activity" under § 7131(d)

Section 7131(d), with its seemingly open-ended authorization to negotiate grants of official time, was one of the most significant innovations of the Statute.

²⁵⁵ *AFGE Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1529 (D.C. Cir. 1986).

²⁵⁶ *Id.*

²⁵⁷ *Infra* Section V.c.5.

However, the House Committee Report did signal a significant limitation management's duty to bargain its provisions:

Section 7132(d) [enacted as § 7131(d)] makes all other matters concerning official time for unit employees *engaged in labor-management relations activity* subject to negotiation between the agency and the exclusively recognized labor organization involved.²⁵⁸

The FLRA has consistently held that § 7131(d) imposes on agencies the duty to bargain over any proposal for official time to be used for labor-management relations activities,²⁵⁹ but it has also been consistent in upholding management's right to refuse to bargain proposals that fall outside those bounds. Therefore, it has held that agencies have no duty to bargain proposals for official time to attend employee funerals,²⁶⁰ to appear at any Federal agency for interviews or testing,²⁶¹ to visit members of Congress for "any" job-related reason,²⁶² and for teachers to conduct curriculum development and participate in accreditation evaluations.²⁶³

In some early decisions, the FLRA also overturned arbitrators' awards that interpreted contract provisions as granting official time for purposes not related to labor-management relations.²⁶⁴ Essentially the FLRA held such provisions were a prohibited subject of bargaining. In 1991 the FLRA overruled its earlier decisions

²⁵⁸ H.R. REP. NO. 95-1403, at 59 (1978)(emphasis added)

²⁵⁹ *E.g.*, Dep't of Justice, INS, and AFGE Nat'l Border Patrol Council, 37 F.L.R.A. 362, 370-71 (1990)(rejecting Agency argument that time for preparing unfair labor practice charges was outside the scope of § 7131(d).

²⁶⁰ AFGE Local 2761 and Dep't of the Army, Army Publications Distribution Center, 32 F.L.R.A. 1006, 1012 (1988). The provision had been negotiated at the local level but disapproved by the Department of the Army prior to implementation of the agreement under 5 U.S.C. § 7114(c).

²⁶¹ AFGE Local 2094 and Veterans Admin. Med. Ctr., 19 F.L.R.A. 1027, 1029 (1985).

²⁶² *Id.*

²⁶³ Panama Canal Fed'n of Teachers, Local 29, and Dep't of Def. Dependents Sch., Panama Region, 19 F.L.R.A. 814 (1985).

²⁶⁴ Dep't of Health and Human Services, Social Security Admin., and AFGE, 27 F.L.R.A. 391, 392-93 (1987)(union official had used duty time to represent former employee in unemployment compensation hearing); Nat'l Archives and Records Admin. and AFGE Local 2928, 24 F.L.R.A. 245 (1986) (union official had used duty time to assist an employee who had been arrested by the local police).

and held that § 7131 did not prohibit parties from negotiating official time for purposes not directly related to labor-management relations:

Consistent with an agency's broad discretion to grant paid time in a variety of circumstances, parties may agree in their collective bargaining agreements to provide official time for other matters. In such circumstances, an arbitrator's interpretation of a collective bargaining agreement provision dealing with official time will not be found deficient under the Statute unless the award is contrary to law, rule, or regulation or other grounds stated in section 7122 of the Statute.²⁶⁵

The Authority did not cite any source of positive authority for its holding in *Council of Field Labor Locals*, but it could have cited 5 U.S.C. § 301, which authorizes agency heads to prescribe rules for internal agency operations.²⁶⁶

Council of Field Labor Locals does not oblige agencies to bargain official time proposals that fall outside the ambit of the FSLMRS. In fact, the Authority has continued to issue decisions holding that such proposals are permissive subjects of bargaining.²⁶⁷ However, the *Council of Field Labor Locals* decision can result in a substantial increase in agencies' official-time liabilities, if agency negotiators are not careful in drafting agreements, or if supervisors carelessly allow past practices to broaden the scope of unions' official time entitlements.²⁶⁸

²⁶⁵ AFGE Nat'l Council of Field Labor Locals and Dep't of Labor, Mine Safety and Health Admin., 39 F.L.R.A. 546, 553 (1991). 5 U.S.C. § 7122(b) permits exceptions from arbitration awards "on other grounds similar to those applied by Federal courts in private sector labor-management relations."

²⁶⁶ See *supra* note 109 and accompanying text.

²⁶⁷ Nat'l Assn. of Gov't Employees Local R1-109 and Dep't of Veterans Affairs Med. Ctr., 49 F.L.R.A. 852 (1994) (holding non-negotiable a union proposal for official time for union representatives to attend unemployment compensation hearings).

²⁶⁸ E.g., Dep't of Veterans Affairs Med. Ctr. and AFGE Local 2250, 53 F.L.R.A. 1228 (1998) (agency committed an unfair labor practice when it refused to comply with its past practice of granting official time to the Union's representatives to attend Equal Employment Opportunity hearings).

3. Interpreting the “Internal Union Business” Prohibition

The prohibition on conducting internal union business during duty time has been a constant feature of Federal labor relations since President Kennedy’s Executive Order. In fashioning the official time provisions of the FSLMRS, the House Committee grudgingly retained the prohibition, but the bill’s proponents ensured that there was abundant legislative history to support a very narrow construction of the “internal business” prohibition. The House Committee Report stated “Section 7132(b) provides that matters *solely relating to* the internal business of a labor organization must be performed when the subject employee is in a nonduty status.”²⁶⁹

During the debate on the House floor, two of the Committee members worked to eliminate any possible ambiguity about the “internal business” provision:

Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization. The section also lists three such activities *reflecting our intention that “internal business” be strictly construed to apply only to those activities regarding the structure and institution of the labor organization*. Activities that involve labor-management contacts are not included in this section. Nor is preparation for such activities, such as grievances, bargaining, unfair labor practice proceedings, included within this section. Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities.²⁷⁰

In its first decisions interpreting § 7131(b), the FLRA used this legislative history faithfully, creating opportunities for unions to negotiate uses of official time that agencies would not have been obligated to allow under the executive orders. In a

²⁶⁹ H.R. REP. NO. 95-1403, at 58-59 (1978)(emphasis added).

²⁷⁰ 124 CONG. REC. 29,188 (Sept. 13, 1978) (statement of Rep. Clay)(emphasis added). Rep. Ford made a similar statement during the same debate. 124 CONG. REC. 29,200 (Sept. 13, 1978).

1979 case,²⁷¹ the agency disputed its duty to bargain a union proposal for official time to complete required reports under § 7120 of the FSLMRS. After a careful examination of the legislative history quoted above, the FLRA concluded that the appropriate test for interpreting § 7131(b) was whether the proposed use of official time was “solely related to the structure and institution of [the] labor organization.”²⁷² It concluded that the preparation of required reports for Federal agencies did not constitute “internal union business” under that test.²⁷³

Using similar reasoning, the FLRA later held that recordkeeping required by the Internal Revenue Service was not excluded by § 7131(b), and therefore the agency had a duty to bargain over a proposal to use official time for such purposes.²⁷⁴ The FLRA used the same reasoning in rejecting an agency’s argument that preparation for contract negotiations constituted “internal union business” under § 7131(b).²⁷⁵ The FLRA has also held that attendance at internal union meetings is not necessarily excluded under § 7131(b), if the union can show that it used the meeting time for purposes such as discussing grievances and conducting training, and not for internal union governance.²⁷⁶

4. Lobbying Activities

Whenever the agency shop is discussed as an option for the Federal service, the specter of mandatory union fees being used for lobbying or other political

²⁷¹ AFGE Local 2823 and Veterans Admin. Reg’l Office, 2 F.L.R.A. 4 (1979).

²⁷² *Id.* at 8.

²⁷³ *Id.* at 9.

²⁷⁴ NTEU and U.S. Dep’t of the Treasury, Internal Revenue Serv., 38 F.L.R.A. 1366 (1991).

²⁷⁵ AFGE Local No. 1692 and Headquarters 323d Flying Training Wing, 3 F.L.R.A. 305 (1980).

²⁷⁶ Dep’t of Health and Human Servs., Social Security Admin., and AFGE, 27 F.L.R.A. 391, 395-96 (1987).

activities is usually raised as an argument against the idea.²⁷⁷ Therefore, it is interesting that the FLRA has interpreted the FSLMRS to *require* agencies to negotiate official time for union representatives to conduct certain lobbying activities. The Authority first confronted the issue in 1993, when it decided a negotiability dispute over the following proposal:

Union officials shall be permitted a reasonable amount of Official time to represent Federal Employees by visiting, phoning and writing to elected representatives in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by NFFE.²⁷⁸

The Authority based its decision largely on § 7102 of the FSLMRS, which lists Federal employees' collective bargaining rights, including the right of their representatives "to present 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"²⁷⁹ Since lobbying Congress was clearly a representational activity contemplated under the Statute, the FLRA held that the agency had a duty to bargain a union proposal for its representatives to use official time to communicate with Congress on matters that "pertain to unit employees' conditions of employment."²⁸⁰

Several years later, another FLRA decision demonstrated the hazards of imprecise drafting when negotiating agreements. Interpreting a contract provision that provided union officials "reasonable time during working hours without loss of leave or pay to represent employees in accordance with this agreement," an arbitrator

²⁷⁷ *E.g.*, *supra* note 152 and accompanying text.

²⁷⁸ NFFE Local 122 and Dep't of Veterans Affairs Reg'l Office, 47 F.L.R.A. 1118, 1121-22 (1993)

²⁷⁹ 5 U.S.C. § 7102(1) (2000); *NFFE Local 122*, 47 F.L.R.A. at 1124.

²⁸⁰ *NFFE Local 122*, 47 F.L.R.A. at 1125-26.

ruled that the agency was obligated to provide union officials time for lobbying activities.²⁸¹ In denying the agency's exceptions to the arbitration award, the FLRA held that his award was based on a "plausible" interpretation of the broadly-worded contract language.²⁸² In an effort to persuade the Authority to overrule the *NFFE Local 122* decision, the agency also argued that the award violated the Hatch Act,²⁸³ which prohibited partisan political activities on government time, and 18 U.S.C. § 1913, a criminal statute that generally prohibits the use of appropriated-fund resources for lobbying Congress, unless expressly authorized. The Authority rejected both arguments. It found that the lobbying activity in question was non-partisan and therefore did not violate the Hatch Act,²⁸⁴ and it held that the FSLMRS constituted an express authorization for the type of lobbying conducted by the union officials, thus exempting it from the prohibition of 18 U.S.C. § 1913.²⁸⁵

In 1996 Congress complicated matters when it began adding the following section (or language very similar to it) to the annual appropriations acts of the Department of Defense: "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."²⁸⁶ Since a large proportion of Federal employees covered by the FSLMRS are paid through Department of Defense appropriations acts, this new fiscal restraint was a significant development.

²⁸¹ Dep't of the Army, Corps of Engineers and NFFE Local 259, 52 F.L.R.A. 920, 922 (1997).

²⁸² *Id.* at 924.

²⁸³ 5 U.S.C. §§ 7321-26 (1994).

²⁸⁴ *NFFE Local 259*, 52 F.L.R.A. at 927.

²⁸⁵ *Id.* at 933.

²⁸⁶ Department of Defense Appropriation Act, Pub. L. No. 104-61, § 8015, 109 Stat. 636, 654 (1996).

Relying on the new appropriations act section, a state National Guard bureau challenged its duty to bargain a contract proposal similar to the one held negotiable in *NFFE Local 122*. The proposal in question would have granted union officials reasonable official time to contact Congress “in support of or opposition to pending desired legislation which would impact the working conditions of employees”²⁸⁷ The FLRA held that the proposal was not negotiable, because § 8015 of the Appropriations Act (and the similar sections included in subsequent Defense Appropriations Acts) was specific, unambiguous, and contained no exceptions.²⁸⁸ It clearly prohibited the use of Defense appropriated funds to attempt to influence Congress on “pending” legislation.²⁸⁹ In a subsequent case, the Authority upheld the negotiability of a more carefully worded union proposal, which called for official time only to contact Congress on “desired” legislation.²⁹⁰

The lesson for negotiators is to be precise in contract language, to authorize exactly what is desired, and to avoid violating applicable laws. The *NFFE Local 122* decision demonstrates that vague drafting of contract provisions can result in giving unions much more official time than is intended. On the other hand, the *Granite State Chapter* decision shows how precise drafting of proposals by union negotiators can make the difference between negotiability and non-negotiability.

²⁸⁷ Ofc. of the Adjutant General, N.H. Nat’l Guard and Granite State Chapter, Ass’n of Civilian Technicians, 54 F.L.R.A. 301, 302 (1998).

²⁸⁸ *Id.* at 310-11.

²⁸⁹ *Id.*

²⁹⁰ Ass’n of Civilian Technicians, Razorback Chapter 117 and Nat’l Guard Bureau, Ark. Nat’l Guard, 56 F.L.R.A. 427 (2000).

b. Trends in Impasse Resolution for Official Time Proposals

Since the strike and the lockout are not available as impasse-resolution tools in the Federal sector, Congress set up an impasse-resolution system involving the Federal Mediation and Conciliation Service (FMCS) and the Federal Service Impasses Panel (FSIP).²⁹¹ If mediation and negotiation fail to resolve bargaining disputes, FSIP has the authority to directly resolve them or to appoint arbitrators to conduct binding arbitration.²⁹² Although FSIP resolutions are not necessarily representative of the terms of all bargaining agreements, an examination of published FSIP decisions is instructive, since any clear trends presumably would influence union and management negotiators.

Unions, of course, generally strive to increase the amount of official time available to them and (especially in large bargaining units) to get more officials on 100 percent official time, and sometimes they succeed. For example, the arbitrator's award that preceded the FLRA decision in *AFGE Council of Locals No. 214* provided the union with twelve 100-percent positions throughout Air Logistics Command over the agency's opposition.²⁹³ Only three years after the Air Force's defeat in *AFGE Council of Locals No. 214*, the Air Force agreed to increase the number of union officials on 100 percent official time to 27.²⁹⁴

But management is not necessarily doomed to a spiral of constantly-increasing official time, if agency officials are resolute in requiring unions to justify their

²⁹¹ 5 U.S.C. § 7119 (2000).

²⁹² 5 C.F.R. § 2471.11 (2006).

²⁹³ *AFGE Council of Locals No. 214*, supra note 252, at 216 n.1.

²⁹⁴ *AFGE, AF Logistics Command Agree on New Contract Six Months Early*, 27 GOV'T EMPL. REL. REP. (BNA) 500 (1989).

demands for increases. In a 1990 impasse case arising from the Department of Veterans Affairs, a union representing 300 employees sought to replace a “reasonable time” clause with a defined-time clause specifying 100 percent official time for the union president and 20 percent each for the vice president and secretary.²⁹⁵ The union claimed that the increases for the union officers were necessary, because stewards were “difficult to recruit and retain.”²⁹⁶ The agency argued that there was no evidence of a workload increase to justify the union proposal and pointed out that the union was not making good use of its steward system or the full-time agents available through its national union.²⁹⁷ In adopting the agency’s proposal, the FSIP urged the union to make greater efforts to cultivate stewards and to make use of its ability to distribute work.²⁹⁸ However, it did not consider management’s argument that 100 percent official time would be a hardship, merely because the current union president was in a critical duty position.²⁹⁹ In a similar decision, FSIP rejected a union’s proposal to shift from a “reasonable time” provision to 100 percent official time for the president of a 1,300-member bargaining unit.³⁰⁰ The union’s proposal had been motivated to a large extent by its envy for the block-time arrangements negotiated by two other bargaining units on the installation, but the Panel found the union’s justification insufficient.³⁰¹

²⁹⁵ Dep’t of Veterans Affairs Med. Ctr. Newington, Conn., and Local R1-109, Nat’l Assn. of Gov’t Employees, 90 FSIP 56 (Aug. 22, 1990).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* The union president was the only dental technician responsible for making prosthetic devices at the facility.

³⁰⁰ Dep’t of the Army, U.S. Army Communications-Electronics Command and Local 476, NFFE, 99 FSIP 79 (Aug. 3, 1999).

³⁰¹ *Id.*

Even if the agency allows the union to grow accustomed to an excessive amount of official time, it is not impossible to make corrections. In a 1985 decision, the FSIP adopted a management proposal to reverse a past practice in which the agency had allowed two union officials to be on 100 percent official time under a “reasonable time” agreement.³⁰² In support of its proposal, the agency argued that representational duties for the 700-member bargaining unit involved few grievances and third-party hearings, but official time resulted in direct costs of over \$92,000 during a three-year period, in addition to indirect costs of overtime and reduced efficiency resulting from the absence of the two union officials.³⁰³ In its decision, the FSIP deferred to the agency’s record-keeping, characterizing the union’s use of official time as “excessive.”³⁰⁴ In similar decision in a 1992 case, FSIP adopted management’s proposal to reduce a union president’s official time cap from 100 percent to 80 percent, after concluding that the union had not presented sufficient justification to keep the president on full official time.³⁰⁵ In a more recent decision, the Panel adopted a compromise that reduced a union president from 100 percent official time to 60 percent in a geographically dispersed bargaining unit of 600 employees.³⁰⁶

Recently the Panel has been willing to take agencies’ operational needs into account in evaluating proposals for 100 percent official time. In a 2003 decision, the

³⁰² Army Corps of Engineers, Kansas City Dist. and Local 29, NFFE, 85 FSIP 88 (Nov. 8, 1985).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Dep’t of the Army, Presidio of Monterey, Calif., and Local 1457, AFGE, 91 FSIP 85 (Dec. 30, 1991).

³⁰⁶ Dep’t of the Army, Army Corps of Engineers, Pittsburgh Engineer District, and Local 2187, AFGE, 01 FSIP 1 (Feb. 21, 2001).

Panel denied the union's request for full official time for its union president, instead choosing a compromise solution:

In our view, the Employer has a legitimate interest in ensuring that its professional employees, many of whom hold understaffed positions, are available to perform patient care duties for at least a portion of their work time. Thus, limiting the local Union president to 60-percent official time, and others to no more than 40 percent, *would ensure that Union representatives continue to serve as health care providers, the positions for which they were hired, at least on a part-time basis.*³⁰⁷

Another recent FSIP case pitted the Centers for Medicare and Medicaid Services against AFGE in an impasse over their national Master Labor Agreement.³⁰⁸ AFGE, which represented 3,800 employees,³⁰⁹ sought to increase the overall "bank" of official time hours from 12,000 per year to 18,000 and to keep seven union officials on 100 percent official time.³¹⁰ The agency, wishing to place tighter controls on the use of official time and to ensure that all of its employees spent a significant amount of time performing agency work, proposed reducing the bank of hours to 9,000 and limiting official time for individual union officials to no more than 50 percent of their duty time.³¹¹ The FSIP decided to adopt the agency's proposal nearly verbatim, mainly because the union's time records showed that it had used only 8,000 hours of official time (aside from contract negotiations) in 2002.³¹² One labor-

³⁰⁷ Dep't of Veterans Affairs, VA Med. Ctr. Indianapolis, Ind., and Local 609, AFGE, 03 FSIP 29 (June 5, 2003)(emphasis added).

³⁰⁸ Dep't of Health and Human Services, Centers for Medicare and Medicaid Services, and Local 1923, AFGE, 02 FSIP 167 (May 10, 2004).

³⁰⁹ *Id.*.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

relations expert offered a pithy analysis of the outcome: “Life is tough for the stupid and careless. Go in [to FSIP] with a good case, or don’t go in at all.”³¹³

A few weeks later, the FSIP adopted an agency’s proposal in preference to a union proposal that would have increased the union vice-president from 50 to 100 percent official time.³¹⁴ The union, which had recently become the exclusive bargaining agent, argued that organizational tasks required two full-time officials.³¹⁵ The agency countered that the union could adequately discharge its representational duties with a vice president on 50 percent official time, if its leaders were willing to delegate some responsibility to other union officials.³¹⁶ Noting the relatively small size of the bargaining unit (6,000 nurses)³¹⁷ and the fact that the union’s proposal appeared to be based mainly on its internal organizational needs, FSIP adopted the agency’s proposal. FSIP also noted its deference to the agency’s operational needs:

Authorizing another full-time Union representational position for a registered nurse at a time when the VA is experiencing difficulties in retaining nurses and striving to provide the best possible medical care for our nation's military veterans is unwarranted. In contrast, the Employer's proposal to authorize 50-percent official time for the Union's national vice-president is a more balanced approach because it permits the incumbent of that position to divide time between attending to Union representational matters and providing nursing services to veterans.³¹⁸

FSIP decisions in recent years have not always been pro-management, however. In a 2001 decision, the Panel adopted a union proposal that more than doubled the union’s official time ceiling, after the union demonstrated that the

³¹³ *FSIP Decision Could Have Major Implications for Future Negotiations*, FED. HUMAN RES. WEEK, May 25, 2004, at 97.

³¹⁴ Dep’t of Veterans Affairs and United Am. Nurses, 04 FSIP 45 (July 1, 2004).

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

previous ceiling was inadequate and that it was undertaking significant new responsibilities, including representation of employees in EEO proceedings.³¹⁹

FSIP favors the side that is well prepared and able to justify its proposals with specific facts. Recently this trend has often favored management, possibly because management officials have superior resources, or possibly because management tends to exercise better judgment in formulating its bargaining proposals. Whatever the reason, it is clear that FSIP is not eager to enhance unions' official time authorizations without sound, documented reasons. Another favorable development for management is the Panel's recent willingness to consider the agency's mission requirements, and not just the resource needs of the union, in deciding proposals for 100 percent official time. The Panel's decisions demonstrate that, even under the relatively permissive atmosphere created by § 7131 and the *AFGE Council of Locals No. 214* decision, well-prepared and resolute agency negotiators can achieve meaningful limitations on contractual grants of official time.

c. Problems in Administering Official Time

1. Evaluating Union Officials

Evaluations and other career actions for employees who are on full or nearly full official time pose interesting problems for supervisors. The Office of Personnel Management's regulations on evaluating Federal employees require that employee performance actually be observed for some minimum period before an evaluation can be issued, although it does not specify what the minimum period should be.³²⁰ The

³¹⁹ U.S. Army Corps of Eng'rs and United Power Trades Org., 01 FSIP 48 (May 24, 2001).

³²⁰ 5 C.F.R. § 430.207(a) (2006).

regulations prohibit basing performance evaluations on assumptions or anything other than actual observations of employee performance.³²¹ Before promulgating the regulations, OPM specifically rejected a proposal to mandate presumptive performance ratings for full-time union officials:

When an employee is serving as the representative of a labor organization, he or she is performing duties for that labor organization. To intermingle performance of the representational duties into the appraisal program would be inappropriate because appraisal of the employee's performance must be based solely upon the employee's performance of agency duties. For employees who spend 100 percent of their time as labor representatives, and for employees who spend a significant amount of time as determined by the agency, this means that they cannot, and should not, be given performance appraisal ratings of record.³²²

Since it would obviously infringe on employee rights for supervisors to evaluate employees on their performance as union officials, many full-time union officials may go years without performance evaluations, risking the loss of Federal career opportunities as a result. One union president attempted to circumvent this problem by proposing a contract provision that would have required the agency to temporarily amend his performance plan to reflect his status as unit president.³²³ The proposal also would have allowed the union president's evaluation to be completed by "a neutral source selected from either the Federal Labor Relations Authority, a FMCS Mediator, or an Arbitrator."³²⁴ The FLRA held the proposal was non-negotiable because it conflicted with a statutory requirement that employee appraisals

³²¹ 5 C.F.R. § 430.208(a)(2) (2006).

³²² Performance Management, Final Rule, 60 Fed. Reg. 43,936, at 43,937 (Aug. 23, 1995).

³²³ NAGE, Fed. Union of Scientists and Eng'rs Local R1-144 and Dep't of the Navy Naval Underwater Sys. Ctr., 42 F.L.R.A. 1285, 1286 (1991).

³²⁴ *Id.*

be based on “job performance,”³²⁵ which the Authority construed to include only “an employee’s performance of agency-assigned duties and responsibilities.”³²⁶

Another union made a more successful proposal. Employees working full-time or nearly full-time on union duties would receive evaluations based on a minimum of only 120 hours of agency work annually.³²⁷ The FLRA held that bargaining of the proposal was mandatory for the agency, since there was no statute or government-wide regulation prescribing a minimum appraisal period,³²⁸ and the agency could not demonstrate a compelling need for a period longer than 120 hours.³²⁹

The Authority’s case law provides considerable guidance for agencies and unions on this difficult subject, but it cannot resolve the basic problem created by the Statute’s limited system of union security. Due to their limited financial resources, Federal-sector unions are forced to rely on the sacrifices of volunteers who choose union service over their Federal career path, sometimes for years at a time. The heavy reliance on volunteer efforts undoubtedly restricts union effectiveness and conflicts directly with agency operations, with negative consequences for the overall success of the labor-management program.

2. Promotion of Employees Who Use Official Time

The FSLMRS makes it an unfair labor practice for management “to interfere with, restrain, or coerce” any employee in the exercise of employee rights defined in

³²⁵ 5 U.S.C. § 4302 (2006).

³²⁶ *Fed. Union of Scientists and Eng’rs*, 42 F.L.R.A. at 1292.

³²⁷ *NTEU and Dep’t of Treasury, IRS*, 55 F.L.R.A. 1005 (1999).

³²⁸ *Id.* at 1007-08.

³²⁹ *Id.* at 1008-09.

the Statute.³³⁰ It has consistently upheld complaints against agencies that make adverse promotion or transfer decisions based on speculation about the effects of an employee's union activities.

Even if an employee currently spends over 70 percent of his duty time on union activities, it is an unfair labor practice to deny that employee a requested transfer to a more desirable position based solely on the past union activities.³³¹ Nor can an agency ask questions about an applicant's union responsibilities during a job interview, raising the inference that the applicant was required to moderate his demands for official time in advance as a condition of selection.³³² Under the same reasoning, the agency cannot consider an employee's past use of official time as a factor in a promotion decision, unless it can show that the employee's absence will interfere with the employee's performance of duties of the new position.³³³ However, if the agency can establish that the employee's performance of union duties in the current job position is preventing the accomplishment of mission-critical business, then the agency may be justified in transferring that employee to a less critical duty position, with no loss of pay.³³⁴

As a practical matter, it is difficult to see how employees who consistently spend a large proportion of their duty time on representational activities can remain competitive for promotion, even in an environment free of anti-union discrimination. Since employees can be evaluated based only on the duty activities assigned by the

³³⁰ 5 U.S.C. § 7116(a)(1) (2000).

³³¹ U.S. Army, Corpus Christi Army Depot, and Jesse O. Hall, 4 F.L.R.A. 588 (1980); *accord* AFGE Local 3446 and Dep't of Health and Human Services, Social Security Admin., 43 F.L.R.A. 467 (1991).

³³² Veterans Admin. Med. Ctr. and Reg'l Office and AFGE Local 1509, 23 F.L.R.A. 122 (1986).

³³³ AFGE Local 3446 and Dep't of Health and Human Svs., SSA, 43 F.L.R.A. 467 (1991).

³³⁴ Dep't of the Navy, Norfolk Naval Shipyard, and Tidewater Va. Fed. Employees Metal Trades Council, 15 F.L.R.A. 867 (1984) (the agency had failed to establish that the employee's union responsibilities interfered with his duties to a degree that justified his reassignment).

agency, it seems nearly impossible, in any honest evaluation system, for busy union representatives to keep up with their peers. Thus, the reliance on block grants may have two negative tendencies: (1) punishing any career-minded employees who volunteer to represent their co-workers, and (2) attracting union representatives who tend to be less competitive or less ambitious in their primary agency duties. Neither tendency contributes to an effective system of labor-management relations.

3. Control, Monitoring and Prevention of Abuse

Although the Statute requires employers to respect employees' rights to official time, it also prohibits the use of official time for internal union business and requires that official time be "reasonable, necessary, and in the public interest."³³⁵ The conflicting requirements of the Statute pose challenges for first-line supervisors, who rarely have any expertise in labor-management relations. The FLRA has allowed agencies to enforce reasonable restrictions on official time (through disciplinary action, if necessary), to ask general questions about the use of official time, and to hold employees to reasonable job performance standards. However, the FLRA has not fully established the extent to which supervisors can investigate suspected abuse of official time.

An early decision by an FLRA Administrative Law Judge (ALJ) provided a good illustration of the difficulties involved.³³⁶ A second-level supervisor directed that all first-level supervisors determine the general nature of the representational

³³⁵ 5 U.S.C. § 7131(d) (2000).

³³⁶ Defense Gen. Supply Ctr. and AFGE Local 2047, 15 F.L.R.A. 932 (1984)(ALJ Decision).

activities to be performed before releasing any union officers on official time.³³⁷ The policy was driven by legitimate concerns about abuse of official time and the necessity to keep proper accounting data on official time.³³⁸ When a steward's first-level supervisor failed to adequately implement the directive, the second-level supervisor had a personal discussion with her to discuss the importance of management's inquiries into her use of official time.³³⁹ In deciding the union's unfair labor practices complaint, the ALJ concluded that management's actions were a proper way to balance its obligations with employee rights:

The contention that the rule was designed to restrict or prevent representational activity . . . flies in the face of contract provisions which clearly recognize management's right to such information as is necessary to determine whether official time requested or used is reasonable, and even whether release itself is warranted after weighing the work needs of the moment against the representational need.³⁴⁰

The FLRA has held that the agency does not commit an unfair labor practice when it enforces contract provisions requiring supervisor approval before union officials leave the premises on official time.³⁴¹ In a 1986 case, the agency had disciplined a union president after it learned that he left the installation without permission. Even though the union president was using the official time to cooperate with an FLRA investigation into an unfair labor practice complaint, the Authority upheld the ALJ's conclusion that the union's rights to pursue complaints did not take priority over "the mission of an agency and its responsibility to monitor the activities

³³⁷ Supervisors were directed to determine "whether the steward would be engaged in negotiations, representing a 'client' or involved as a witness in some proceeding." *Id.* at 936.

³³⁸ *Id.*

³³⁹ *Id.* at 940-41.

³⁴⁰ *Id.* at 941.

³⁴¹ Marine Corps Logistics Base Barstow, Calif., and AFGE Local 1482, 23 F.L.R.A. 594 (1986).

of its work force.”³⁴² The ALJ also noted that the agency had a right and a responsibility to know the whereabouts of its employees while on duty time.³⁴³

When a union steward fails to follow the contractual procedures for release on official time, and that failure disrupts the workplace, management can take appropriate steps to bring the steward into compliance.³⁴⁴ When a large volume of phone calls from employees directly to a union steward’s office, in violation of the contract, disrupted the work of the secretaries in the steward’s office, management instructed the secretaries to ask all callers the general nature of their business and, when appropriate, to remind them of the contractual procedures for contacting the steward through their own supervisors.³⁴⁵ The FLRA upheld an administrative law judge’s determination that the agency’s actions were “a reasonable method of policing the contract”³⁴⁶ The same decision also upheld the agency’s action in limiting the steward’s representational meetings on official time to one per day, after the employee had demonstrated a pattern of prioritizing her union business over her agency duties.³⁴⁷

Agencies can hold employees to reasonable standards of job performance. When the record shows that the agency has attempted to reconcile an employee’s use of official time with his essential duties, but the employee’s duty performance is still unacceptable, it is not an unfair labor practice to reprimand the employee or to note

³⁴² *Id.* at 603.

³⁴³ *Id.* at 604.

³⁴⁴ Dep’t of the Air Force, Air Logistics Command, and AFGE Local 1138, 14 F.L.R.A. 311 (1984).

³⁴⁵ *Id.* at 321-25.

³⁴⁶ *Id.* at 329.

³⁴⁷ *Id.* at 330.

performance problems in a formal evaluation, even if time spent on representational duties is a factor in the lagging job performance.³⁴⁸

The Authority has held that an agency does not have a duty to bargain a proposal that would substantially deprive management of discretion to deny requests for Leave Without Pay (LWOP) to perform representational activities.³⁴⁹ The proposal would have required management to grant such requests unless work demands left “no reasonable alternatives” to denial.³⁵⁰ The Authority called the proposal a “substantive restriction” on the agency’s right to assign work.³⁵¹ Oddly, the Authority did not factor employees’ § 7102 rights into the decision, as it would in an official time case. For that reason, the precedential value of the decision is questionable, but since it has not been overruled, it is a valuable piece of precedent for management in negotiating official time provisions. It would be interesting to see how the FLRA would apply this decision when considering an agency’s bargaining proposal to exercise veto power, based on mission requirements, over the union’s selection of which employees to place on 100% official time.

An unresolved question is the degree to which supervisors can inquire into the specific uses of official time, if abuse is suspected. The FLRA has held that, in general, management officials unlawfully interfere with representational activities if they require union representatives to disclose specific statements that represented employees have made to them.³⁵² However, management officials can lawfully

³⁴⁸ Dep’t of the Air Force, Scott AFB, Ill., and Nat’l Ass’n of Gov’t Employees Local R7-23, 14 F.L.R.A. 289, 299-300 (1984).

³⁴⁹ NTEU and Dep’t of Treasury, Customs Service, 46 F.L.R.A. 696 (1992).

³⁵⁰ *Id.* at 722-23.

³⁵¹ *Id.* at 726.

³⁵² 5 U.S.C. § 7116(a)(1); *E.g.*, Dep’t. of Treasury, Customs Service and NTEU, 38 F.L.R.A. 1300 (1991).

investigate instances of misconduct that occur in the course of representational activities, so long as investigative questions are carefully tailored to avoid the substance of any protected communications.³⁵³

What if union officials fail to cooperate, or if management suspects that they are giving dishonest answers? In one decision, the FLRA stated that a supervisor did not interfere with protected activities by merely entering a union office to check on the whereabouts of an employee who was representing a co-worker in a grievance, but he did commit a violation when he returned to the union office a second time and engaged in heated argument with the union representative, in front of the represented employee.³⁵⁴

The FLRA has given management substantial leeway to make necessary inquiries into specific uses of official time. Still, in practice, management will usually depend on the honesty of employees. Management officials often avoid inquiries into suspected abuse of official time, since such inquiries have a natural tendency to provoke unwanted labor-management conflict. The dynamics of the official time system, which pit management's responsibility to effectively use resources against employee rights to confidential representation, leave considerable room for abuse and unnecessary conflict. The potential for abuse grows even greater when employees are placed on 100 percent official time and spend much of their time in union offices, out of sight of their nominal supervisors.

³⁵³ Fed. Bureau of Prisons and AFGE Local 709, 53 F.L.R.A. 1500, 1511 (1998).

³⁵⁴ *E.g.*, Social Security Admin. and AFGE Local 1923, 7 F.L.R.A. 823, 830-31 (1982).

4. Erosion of Critical Skills

A 1991 negotiability decision by the FLRA illustrates one of the problems that results from placing employees on extended periods of official time. The union proposed a 120-day retraining period, free of formal evaluations, for any union officials who returned to full agency duties after being on more than 60 percent official time for at least two years.³⁵⁵ The union argued that the transition period was necessary to enable former union officials to catch up on changes in technology and patent procedures.³⁵⁶ The FLRA held that the agency was not required to bargain over the proposal because, by prohibiting it from formally evaluating employees, it excessively interfered with management's right to assign work under § 7106(a)(2)(B) of the Statute.³⁵⁷ The fact that the union felt the need to make the proposal demonstrates that the assumption of full-time or nearly full-time union duties can significantly reduce the effectiveness of employees in their primary government duties.

5. The Social Security Administration Controversy

A political battle over the use of official time in the Social Security Administration (SSA) during the 1990s offered the best case study to date of the advantages and drawbacks of the Federal Government's system of union security. Investigations by the SSA, the General Accounting Office (GAO), and House committees revealed poor managerial control over the use of official time and frustration among SSA managers at their inability to assign work to union officials.

³⁵⁵ Patent Ofc. Prof'l Ass'n and U.S. Dep't of Commerce Patent and Trademark Ofc., 41 F.L.R.A. 795, 808 (1991).

³⁵⁶ *Id.* at 810.

³⁵⁷ *Id.* at 811-16.

The SSA controversy also illustrated the difficulty of reconciling the unions' need to maintain a degree of confidentiality in their operations with management's need to prevent abuse of official time.

During the 1980s, the SSA and AFGE became entangled in a bitter dispute over the use of official time under a "reasonable time" provision in their contract. The parties submitted numerous disagreements over the use of official time to a single arbitrator, who eventually overstepped his authority and issued a questionable order directing SSA to grant all official time requests and to file grievances with him over requests it found inappropriate.³⁵⁸ During a Congressional investigation in 1987, SSA's Labor Relations Director stated that SSA had lost control over the use of official time due to the arbitrator's decisions, and as a result the number of employees on 100 percent official time had increased from 8 to 56 since 1982. He estimated that the costs of SSA support for union activities would increase from \$4.4 million to \$5.8 million between 1986 and 1987.³⁵⁹

The dispute was eventually resolved after the parties reached a new collective bargaining agreement in 1988. The agreement replaced the previous official time provision with a nationwide bank of official time for the life of the agreement.³⁶⁰

Although the new contract resolved a long and costly dispute, later events proved that

³⁵⁸ *Grievance over Use of Photocopier not Settled by Official Time Awards*, 26 GOV'T. EMPL. REL. REP. (BNA) 1644 (1988).

³⁵⁹ *Federal Sector Labor-Management Dispute Resolutions: Hearing before Subcomm. on Employment and Housing, House Comm. on Government Operations*, 101st Cong. 159-60 (1987) (statement of Peter D. Spencer).

³⁶⁰ *AFGE Members Reject SSA Contract*, 27 GOV'T EMPL. REL. REP. (BNA) 41 (1989). Although the AFGE membership voted against the contract, FSIP later ordered the contract implemented anyway. *Panel Orders SSA Contract Implemented Despite Rejection by Union Membership*, 28 GOV'T EMPL. REL. REP. 6 (1990).

SSA was unable or unwilling to use its provisions to rein in the use of official time by AFGE officials.

During the mid-1990s, a combination of factors caused the House of Representatives to take a critical interest in the use of official time. The pro-union stance of the Clinton Administration, combined with its promotion of labor-management partnership councils in Federal agencies,³⁶¹ led to increases in the use of official time. The Hatch Act Amendments of 1993³⁶² loosened restrictions on the political activities of Federal civilian employees, and for the first time in decades Federal employees began to appear at partisan (often Democratic) political events, causing suspicion and resentment among Republicans.³⁶³ Finally, the Republican takeover of the House of Representatives in 1994 put the leadership of House committees into the hands of representatives who did not support union causes.

In 1995 House leaders asked the General Accounting Office to investigate reports that the use of official time had dramatically increased in the SSA. The GAO concluded that the use of official time in the SSA had increased substantially between 1990 and 1995³⁶⁴ and that the estimated cost of expenditures for union activities at SSA roughly doubled between 1993 and 1996 to over \$12 million annually.³⁶⁵ The personnel costs of official time constituted the vast majority of that expense.³⁶⁶ SSA also reported that the number of employees spending 75 percent or more of their duty

³⁶¹ E.O. 12,871, 58 Fed. Reg. 52,201 (1993).

³⁶² Pub. L. No. 103-94, 107 Stat. 1001 (1993).

³⁶³ Mike Causey, *Union Grievances*, WASH. POST, Sep. 10, 1996, at B2.

³⁶⁴ General Accounting Office, *Union Activity at the Social Security Administration*, Rept. No. B-266105 at 9-13 (Oct. 2, 1996).

³⁶⁵ *Id.* at 17.

³⁶⁶ *Id.* at 18.

time on representational activities grew from 80 to 145 between 1993 and 1995.³⁶⁷ In contrast, less than \$5 million in union dues was collected from SSA employees in 1995, demonstrating the degree to which the SSA's unions depended on official time as a means of support.³⁶⁸

The report noted some benefits that union leaders and SSA officials had claimed as results of the increased labor-management cooperation in the SSA, including decreases in grievance arbitrations and unfair labor practices cases.³⁶⁹ However, the GAO interviewed many SSA managers, and most complained that uncontrolled employee absences on representational activities interfered with their ability to provide customer service and accomplish other agency tasks.³⁷⁰

For comparison, GAO also reported statistics provided by the Postal Service and the Internal Revenue Service (IRS), two other agencies that had been tracking the use of official time. SSA used much more official time, proportional to its number of bargaining unit employees, than either of the other two agencies.³⁷¹ The Postal Service, which had a much higher rate of union membership (83 percent, versus 46 percent in the SSA), supported only 2.32 hours of official time per employee in 1995, compared to 7.76 hours per employee in the SSA.³⁷² With a high rate of membership, the Postal Service unions were able to pay the salaries of 460 full-time representatives and to reimburse members for time spent on contract negotiations.³⁷³ The IRS, which had a union membership rate similar to that of the SSA, was able to keep its official-

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 19.

³⁶⁹ *Id.* at 14-15.

³⁷⁰ *Id.* at 19.

³⁷¹ *Id.* at 20.

³⁷² *Id.*

³⁷³ *Id.* at 29.

time usage to 5.43 hours per bargaining unit member, a much lower level than the SSA.³⁷⁴

The House Subcommittee on the Civil Service held hearings on the GAO's findings in September 1996 at which the Subcommittee Chairman criticized the sharp rise in official time at SSA and a similar increase in the Customs Service.³⁷⁵ Perhaps revealing his primary motivation for calling the hearing, the Chairman suggested that the unions should spend their money on representational activities, rather than "spending millions of their members' hard-earned money on political campaigns."³⁷⁶ Union leaders pointed to the reduction in complaints documented in the GAO report, claiming that the reduction resulted from increased use of official time in partnership meetings.³⁷⁷ The hearings resulted in no proposed legislation, but the House Subcommittee on Social Security, which had also received the GAO report, requested that the SSA Inspector General (IG) conduct a follow-up evaluation.

The resulting IG audit, completed in July 1998, concluded that SSA had inadequate controls in place to track official time and to prevent abuses.³⁷⁸ Even the most conscientious supervisors had difficulty in properly controlling official time, because the SSA's roster of union officials was years out of date, supervisors were not aware of the amount of "bank" time available to union representatives, and the

³⁷⁴ *Id.* at 20.

³⁷⁵ Rep. Mica cited an increase in official time costs in the Customs Service from \$470,000 to \$1 million annually, but he did not cite the source of his information. *Taxpayer Subsidy of Federal Unions: Hearing before the Subcomm. on the Civil Service of the House Comm. on Gov't Reform and Oversight*, 104th Cong. 1 (1996).

³⁷⁶ *Id.* at 2.

³⁷⁷ *Id.* at 107 (statement of Robert M. Tobias, National President, National Treasury Employees Union).

³⁷⁸ SSA Office of the Inspector General, Audit Report: Use of Official Time for Union Activities at the SSA, in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the, House Comm. on Ways and Means*, 105th Cong., 95, at 100 (1998).

forms used to request official time often did not elicit sufficient information to support a determination of whether the time was permitted under the contract.³⁷⁹ The majority of supervisors found the system for supervising the use of official time ineffective, and many complained that they did not have sufficient authority to monitor official time.³⁸⁰ Moreover, many supervisors allowed union representatives to use official time without approval, in violation of the contract.³⁸¹ Higher-level SSA management failed to act on the majority of supervisor reports of suspected abuse of official time.³⁸²

Union intransigence was another theme of the IG report. In many cases the unions did not fulfill their contractual responsibilities to cooperate with investigations of official time abuse.³⁸³ AFGE also failed to cooperate completely with the IG audit itself. AFGE leaders initially instructed their representatives not to respond to the IG's information requests, and AFGE never fully cooperated with the IG investigation.³⁸⁴ An AFGE official explained to Congress that some of the questions the IG asked union officials were "inappropriate, confusing, and simply unnecessary."³⁸⁵ One of the questions that AFGE found objectionable was a request for union representatives to provide a breakdown of their official-time activities among three broad categories: consulting with management, grievances, and union

³⁷⁹ *Id.* at 111-113.

³⁸⁰ SSA Office of the Inspector General, Evaluation Report: Council 220 Union Representative and Manager Observations on the Use and Management of Official Time at SSA, in *Labor-Management Relations at the Social Security Administration: Hearing before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105th Cong. 34, at 53 (1998).

³⁸¹ *Id.* at 114.

³⁸² *Id.* at 117.

³⁸³ *Id.*

³⁸⁴ *Id.* at 108.

³⁸⁵ *Labor-Management Relations*, *supra* note 380, at 290 (statement of Witold Skwierczynski).

administrative matters.³⁸⁶ In explaining AFGE's legal basis for objecting to the IG questions, the testifying AFGE official demonstrated a poor understanding of the applicable FLRA case law³⁸⁷ and showed little interest in curbing the use of official time by his union officials.

A separate IG report concluded that it was impossible to quantify the value of the SSA's labor-management partnership program, because there was no adequate system to identify successful initiatives and cost savings associated with the program.³⁸⁸ The report also questioned the validity of the claims that partnership activities had caused reductions in arbitration hearings and unfair labor practices cases in SSA,³⁸⁹ casting doubt on the previous claims that union involvement in partnership activities yielded benefits that exceeded the costs in official time.

At the ensuing House Subcommittee hearing, representatives learned that the SSA had allowed union leaders a surprising amount of latitude in selecting employees who would serve on 100 percent official time.³⁹⁰ According to one supervisor:

One of our union officials . . . worked for several years as a Claims Representative and eventually began spending approximately 50% of his time on official time. He was later named an Administrative Officer by the Regional Vice President and notified local management that he would be using 100% official time for an indefinite period. He was later elected to the Regional Vice President position and continued to use 100% official time. He recently lost the election for Regional

³⁸⁶ SSA Office of the Inspector General, *supra* note 380, at 45, 61.

³⁸⁷ *Labor-Management Relations*, *supra* note 380, at 294. Mr. Skwierczynski cited two FLRA decisions that concerned agency attempts to elicit the details of protected discussions between employees and union stewards. The IG had not asked any such questions.

³⁸⁸ SSA Office of the Inspector General, Audit Report: Partnership Activities at the Social Security Administration (July 1998), in *Labor-Management Relations in the Social Security Administration*, *supra* note 378, at 155, 160.

³⁸⁹ *Id.* at 172.

³⁹⁰ The records of the hearing do not make it clear whether the latitude was explicitly granted in the SSA-AFGE contracts or had evolved as a practice.

Vice President, but was immediately appointed by the Local President a Chief Steward and given 100% official time.³⁹¹

An SSA manager reported frequent misreporting of the purposes of official time by union officials to circumvent time caps, and two supervisors complained of morale problems caused by misuse of official time by full-time union officials.³⁹² An SSA human resources official confirmed that the SSA-AFGE contract gave union officials the primary authority to determine what official time was “reasonable.”³⁹³

Just prior to the 1998 hearings, Representative Mica (who had convened the 1996 hearings) drafted an omnibus civil service reform bill that would have included a provision drastically reducing the use of official time, limiting it to grievance processing and attending management-initiated meetings.³⁹⁴ The proposal was similar to a stand-alone bill that had been introduced the previous year and had stalled in Committee.³⁹⁵ Leaders of Federal employee unions blasted the proposal,³⁹⁶ and a general lack of enthusiasm in Congress for controversial reform initiatives persuaded Representative Mica to abandon it.³⁹⁷ No legislation resulted from the 1998 SSA hearings.

Unfortunately, there was no public follow-up on the findings made by the GAO and the SSA Inspector General. Although the reports raised serious questions about the propriety of the use of official time in the SSA, the defiant comments made

³⁹¹ *Id.* at 244 (written, post-hearing submissions of Edwin Hardesty).

³⁹² *Id.* at 218-22 (statements of Jim Schampers and Edwin Hardesty).

³⁹³ *Id.* at 270 (statement of Paul D. Barnes).

³⁹⁴ Louis C. LaBrecque, *Union Leaders Call on House Panel to Drop Official Time Provisions from Bill*, 36 GOV'T EMPL. REL. REP. (BNA) 727 (June 29, 1998).

³⁹⁵ H.R. 986, 105th Cong. (1997).

³⁹⁶ LaBrecque, *supra* note 394.

³⁹⁷ Louis C. LaBrecque, *Committee OKs TSP, Child Care Changes as GOP Gives up on Massive Reform Bill*, 36 GOV'T EMPL. REL. REP. (BNA) 835 (Jul. 27, 1998); Ben White, *Civil Service Changes Stall in House*, WASH. POST, Jul. 20, 1998, at A15.

by AFGE’s representative and the lack of concern demonstrated by the SSA human resources official did not bode well for meaningful reform. The most recent Office of Personnel Management study shows that SSA’s unions use official time at about the same rate that they did in the mid-1990s.³⁹⁸

d. The Unions’ Dilemma: the Duty of Fair Representation

As noted above, the FSLMRS imposes a duty upon an exclusive bargaining representative to “[represent] the interests of all employees in the unit it represents . . . without regard to labor organization membership.”³⁹⁹ In the absence of any authority to compel dues payments, and with a scope of bargaining much narrower than in the private sector (or in the Postal Service), the three largest non-Postal Federal unions do not enjoy high membership rates. The largest (AFGE) claims just over a third of its bargaining units as members, the next largest (NTEU) claims just over half, and the third-largest (NFFE) claims about a tenth.⁴⁰⁰ Official time makes it easier for unions to supply volunteers for representational activities, but effective representation also requires funds to pay full-time professional staff and attorneys. In this respect, the Federal-sector unions lag far behind their counterparts.

Throughout the history of the Statute, the desire for stable finances has driven unions to try to offer a higher level of representational services for members, but often they have been rebuffed. In a pivotal, early decision, the FLRA held that it was an unfair labor practice for a union to offer attorney representation only to union

³⁹⁸ *Infra* note 431 and accompanying text.

³⁹⁹ 5 U.S.C. § 7114(a)(1) (2000).

⁴⁰⁰ Masters, *supra* note 2, at 66; AFGE membership claim updated by consulting www.afge.org (June 19, 2006).

members in disciplinary actions.⁴⁰¹ The FLRA and the courts later softened the effects of the doctrine. In a pair of cases in the late 1980s, two Federal appellate courts held that unions could discriminate against non-members in offering representation for statutory appeals processes (in these cases, appeals of disciplinary actions to the Merit Systems Protection Board).⁴⁰² Both courts reasoned that the duty of fair representation extended only to those responsibilities exclusively conferred on the unions by statute or contract. Later the FLRA reached a similar conclusion in a case alleging discrimination in providing representation to employees responding to disciplinary proposals. The FLRA reasoned that the agency's regulation allowed employees to choose any representative for disciplinary actions, and since the right to representation was not connected to the collective bargaining agreement, the union did not have a duty to represent the employee.⁴⁰³

By contrast, representation in the contractual grievance/arbitration process falls squarely within the duty of fair representation. Arbitrations can cost several thousand dollars per hearing,⁴⁰⁴ and contracts frequently obligate unions to pay half of all arbitration expenses, regardless of the outcome. The FLRA has held that the union violates its duty of fair representation when it demands "user fees" from

⁴⁰¹ NTEU and Customs Serv., 10 F.L.R.A. 519 (1982), *aff'd sub nom.* NTEU v. FLRA, 721 F.2d 1402 (D.C. Cir. 1983).

⁴⁰² AFGE Local 916 v. FLRA, 812 F.2d 1326 (10th Cir. 1987); NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986).

⁴⁰³ AFGE Local 1857 and Holdahl, 46 F.L.R.A. 904 (1992).

⁴⁰⁴ The Federal Mediation and Conciliation Service (FMCS), which provides arbitrator rosters for most Federal-sector arbitration, calculated that the average arbitration cost in FY 2005 was over \$3,700. FMCS, Arbitration Statistics, Fiscal Year 2005 (Oct. 3, 2005), at www.fmcs.gov (accessed June 20, 2006).

nonmember employees⁴⁰⁵ or requires nonmembers to contribute to an arbitration fund.⁴⁰⁶ As a result, arbitrations for all employees are financed entirely by members. Due to the resulting financial limitations, union locals tend to be very selective about making demands for arbitration. Decision making on such matters can be quite subjective, so it is not surprising that the FLRA has had occasion to decide allegations of discrimination against non-members in grievance representation. Many of the reported cases result from blatant union misbehavior, such as explicitly suggesting that the availability or quality of grievance representation might depend on union membership.⁴⁰⁷ In cases that are not as clear-cut, the FLRA applies a two-part test: first the employee must establish that discrimination was a “motivating factor” for the union’s decision, and then the burden shifts to the union to prove that there was a reasonable justification and that it would have made the same decision absent the discrimination.⁴⁰⁸

An interesting, unexplored question about the Federal grievance/arbitration system concerns the extent of hidden discrimination against non-members in union decisions to demand arbitration. Unions certainly have powerful motives to avoid financing arbitration hearings for non-members, and a tight-lipped union leadership could leave the spurned non-members with no evidence to support a complaint of an unfair labor practice. Since non-members are less likely to be knowledgeable about FLRA complaint procedures than members, it is likely that very few nonmembers

⁴⁰⁵ NTEU and Dep’t of the Treasury, IRS, 38 F.L.R.A. 615, 624 (1990)(“ A union’s obligations under section 7114(a)(1) require that, with respect to matters falling within the scope of that section, a union’s activities be undertaken without regard to membership status.”)

⁴⁰⁶ NTEU and Dep’t of the Treasury, Customs Svs., 46 F.L.R.A. 696, 703-04 (1992).

⁴⁰⁷ *E.g.*, SEIU Local 556 and Paige, 17 F.L.R.A. 862 (1985); AFGE Local 1778 and Dep’t of the Air Force, 438th Air Base Group, 10 F.L.R.A. 346 (1982).

⁴⁰⁸ AFGE Local 1345 and Vasquez, 53 F.L.R.A. 1789 (1998).

would even explore the possibility of a complaint against the union. Finally, the FLRA's remedies for proven acts of discrimination are not particularly daunting to violators. Typical remedies include cease-and-desist orders and orders to reimburse nonmembers for fees obtained under coercion.⁴⁰⁹ Under the Statute, unions have much to gain and little to lose if they adopt unspoken policies favoring members over nonmembers.

e. Union Security in the Federal Sector Today

Despite the SSA controversy of the 1990s, there has been little movement to reform Federal law and policy on union security. In 2002 two bills were introduced to amend § 7131. A House bill would have imposed a statutory reporting requirement,⁴¹⁰ and a Senate bill would have narrowed the categories of authorized official time,⁴¹¹ but both bills died in committee.

Nor has there been significant movement toward broader revisions to the FSLMRS, despite repeated criticisms from inside and outside the Federal Government . In 1988, soon after Congressional hearings examined the need for overall reform of the Statute, the newly-elected AFGE National President publicly decried the union's poor financial condition and called on Congress to allow unions to "move in the direction of the agency shop."⁴¹² Later the AFL-CIO unsuccessfully

⁴⁰⁹ *E.g.*, SEIU Local 556, 17 F.L.R.A. at 864-66; AFGE Local 1778, 10 F.L.R.A. at 351-52.

⁴¹⁰ H.R. 4907, 107th Cong. (2002).

⁴¹¹ S. 2383, 107th Cong. (2002).

⁴¹² Frank Swoboda, *Managing a 'Microcosm of America'; New President Sturdivant Calls Finances 'No. 1 Enemy' of AFGE*, WASH. POST, Sept. 7, 1988, at A17.

lobbied the Clinton Administration for an executive order allowing unions to charge fees to non-members.⁴¹³

Perhaps the most credible call for reform of Federal-sector union security practices came in a 1991 GAO report based on survey responses from Federal administrators, union leaders, and third-party experts.⁴¹⁴ GAO found a consensus among all three groups that the FSLMRS had bred an overly adversarial and litigious climate.⁴¹⁵ Several management officials blamed the litigiousness partly on the Federal union security system, claiming that the lack of an agency shop or fair share arrangement forced unions to cater to a minority of malcontents instead of representing all employees.⁴¹⁶ Management officials also criticized the official time system as a source of conflict between unions and management and claimed that it prevented unions from hiring professional representatives who would be more effective negotiators.⁴¹⁷ A clear majority of the agency headquarters officials joined the union leaders and third-party officials in supporting the authorization of the agency shop in the Federal sector.⁴¹⁸ The GAO urged Congress to convene a panel of experts to recommend a complete overhaul of the Statute,⁴¹⁹ but no action was taken.

⁴¹³ Laura Koss-Feder, *Dues Blues: Nonpaying Workers Irk Federal Unions*, N.Y. TIMES, Nov. 24, 1996, at Section 3, Page 11.

⁴¹⁴ General Accounting Office, *Federal Labor Relations: A Program in Need of Reform*, Report No. B-244904 (July 1991).

⁴¹⁵ *Id.* at 18-22. The report cited examples of FLRA negotiability cases that arose over such trivial issues as the cancellation of a picnic (U.S. Army Adjutant General Pubs. Ctr. and AFGE Local 2761, 35 F.L.R.A. 631 (1990)) and an agency's failure to renew a water cooler contract. (U.S. Dept. of Labor, Employment Standards Administration, and AFGE, 37 F.L.R.A. 25 (1990)).

⁴¹⁶ Federal Labor Relations, *supra* note 414, at 33.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 77.

Meanwhile the TVA was forced to retreat from its innovative and long-standing union security mechanism⁴²⁰ after a Court of Appeals decision in 1984.⁴²¹ The Sixth Circuit held that granting preference to union members in involuntary reassignment actions violated the union's duty of fair representation.⁴²² In response to the decision, the TVA modified the union-preference provisions in its contracts by removing the provisions giving union members preference in promotion and transfer decisions.⁴²³ However, TVA did not renounce the policy of considering union membership generally as a positive factor "within the limits permitted by applicable laws and Federal regulations."⁴²⁴

Recently OPM began imposing an annual requirement for all agencies covered by the FSLMRS to track and report the use of official time.⁴²⁵ The most recent survey, covering fiscal year 2004, showed that unions use an average of 3.7 hours of official time per bargaining unit employee annually.⁴²⁶ OPM did not attempt to estimate the cost of official time in the FY 2004 report, but in the previous year's report, the estimated cost was over \$128 million.⁴²⁷ Assuming that agencies are

⁴²⁰ *Infra* notes 77 through 80 and accompanying text.

⁴²¹ *Bowman v. Tenn. Valley Auth.*, 744 F.2d 1207 (6th Cir. 1984), *cert. denied sub nom. Ofc. and Prof'l Employees Union v. Bowman*, 470 U.S. 1084 (1985).

⁴²² *Id.* at 1214. The Court reached this conclusion even though the TVA is not covered by any of the labor-management relations statutes, and therefore its unions are not bound by the explicit statutory duties that flow from exclusive representation. The Court inferred the duty of fair representation from the TVA's enabling statute and the fact that exclusive representation had become the practice. *Id.* at 1212.

⁴²³ General Accounting Office, *Labor-Management Relations: Tennessee Valley Authority Situation Needs to Improve*, Report No. B-237506, at 40 (September 26, 1991).

⁴²⁴ *Id.*

⁴²⁵ OPM Memorandum for Heads of Departments and Agencies, June 17, 2002, available at www.opm.gov/lmr (accessed June 18, 2006). The requirement excludes the Postal Service and other agencies not covered by the Statute.

⁴²⁶ U.S. Office of Personnel Management, *Official Time Usage in the Federal Government: Summary Report, FY 2004 Survey Responses 2, 6* (Feb. 2006)(unpublished, copy on file with author).

⁴²⁷ U.S. Office of Personnel Management, *Official Time Usage in the Federal Government Fiscal Year 2003* (undated), at www.opm.gov/lmr (accessed June 18, 2006).

reporting official time with reasonable accuracy, this does not represent an enormous cost, relative to the overall cost of civilian employee programs. By way of comparison, the Office of Management and Budget reported that the total cost of civilian pay and benefits for executive branch agencies (excluding the Postal Service) in 2005 was nearly \$170 billion.⁴²⁸ Therefore, even if agencies are under-reporting their official time figures by as much as one-third, the total cost of official time represents a mere one tenth of one percent of the total civilian personnel budget.

The rate of official time usage varies widely among agencies, but OPM's studies so far have not explored the reasons for the variations. The Department of Defense, which has the largest number of bargaining unit employees by far, reported only 1.6 hours of official time used per employee.⁴²⁹ Veterans Affairs, with the next largest bargaining unit population, reported 3.0 hours per employee.⁴³⁰ Several agencies with large numbers of bargaining unit employees reported much higher rates of official time usage per employee: 7.7 hours in Treasury, 7.5 hours in the SSA, and 11.2 hours in the Department of Transportation.⁴³¹ The statistics raise significant questions about the possibility of abuse or inefficiency in the use of official time in the latter agencies. Conversely, the agencies with higher rates of official time usage may have found productive uses of official time that should be shared with the rest of the government.

In the FY 2004 report, OPM for the first time described the uses of official time in three broad categories. The lion's share of official time was categorized as

⁴²⁸ U.S. OFFICE OF MANAGEMENT AND BUDGET, ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2007 356 (2006).

⁴²⁹ Official Time Usage FY 2004, *supra* note 426, at 5.

⁴³⁰ *Id.* at 6.

⁴³¹ *Id.* at 5-6.

“General Labor-Management Relations,” a category that would include contract administration and training.⁴³² The next largest category was “Dispute Resolution,”⁴³³ a category that presumably includes grievance processing, arbitration, and representation of appellants in statutory appeals processes (where such representation is allowed by contract). Contract negotiation (for basic agreements and mid-term renegotiations) accounted for a mere 13 percent of overall usage of official time.⁴³⁴

VI. CONCLUSIONS AND RECOMMENDATIONS

a. Lessons for Management and Unions

In an ideal labor relations system, management and unions would strive in unison to negotiate and implement official time provisions that provide unions the official time that they need (but no more) while including effective safeguards against abuse. Unfortunately, as the SSA investigations demonstrated, that ideal is not always achieved. That is unfortunate, because the FLRA and FSIP have provided unions and management nearly all of the tools necessary to arrange for needed official time while keeping its use within reasonable bounds. To create an effective official time program, management and unions should:

1. Come to the bargaining table prepared. FSIP’s decisions demonstrate that good, categorized records of previous official time use are critical. If a party expects new developments (such as bargaining unit expansion or assumption of new representational duties) to affect the need for official time, then it should integrate the

⁴³² *Id.* at 3-4.

⁴³³ *Id.*

⁴³⁴ *Id.*

new developments into its proposals, basing the specifics of the proposals on empirical evidence of official time use, whenever possible.

2. Be specific in contractual provisions. As the FLRA decisions demonstrate, arbitrators are likely to interpret vague contract provisions literally, giving them much broader scope than the agency may have intended, and the FLRA upholds arbitrators' reasonable interpretations of vague contract terms.

3. Agree that careful management of official time is in the interest of employees and management, and therefore detailed procedures for monitoring of official time should be included in contracts. During the three-year course of the Congressional inquiries concerning the SSA, AFGE adopted a defensive and confrontational approach toward inquiries into its official time practices, even though the IG investigations raised significant questions about the behavior of their local officials. Negative public or Congressional scrutiny of union members' use of official time does not serve the interests of employees or agencies. Contrary to AFGE's arguments during the 1998 hearings, only the content of communications between employees and union representatives is protected by the Statute. The FLRA has made it clear that supervisors may make general inquiries into the nature of official time used by any individual union representative, including those who are using large block grants of official time. Unions should accept this reality and work in partnership with management to eliminate abuses. If unions are unwilling to do so, agencies should still propose appropriate contract provisions and be prepared to argue them at impasse proceedings, if necessary.

4. Whenever practical, work to minimize the number of employees on 100 percent official time and to limit the duration of any individual's tenure in such positions. Given their limited financial resources, unions representing large bargaining units may find no effective alternative to placing some employees on 100 percent official time. Still, negotiators must consider the adverse effects of the practice on individual careers and on agency operations, as well as the increased potential for abuse when individuals approach 100 percent official time. The use of "100 percenters" promotes the development of significant experience in those individuals, but it also encourages an unhealthy centralization of union functions in a few members, especially when the bargaining unit is not particularly large. Unions need some individuals to have deep expertise, but they also need broad involvement, and over-reliance on a few members who use large block grants of time discourages the development of the union steward system. Unless it is absolutely necessary, grants of block time should not exceed 50 percent, so that all employees can remain engaged in their primary duty responsibilities and unions will have an incentive to spread responsibilities. If union leaders do not agree, FSIP has demonstrated that it is willing to favor well-justified agency proposals along these lines.

b. Unanswered Questions

Why do some agencies use far more official time per employee than others? OPM's recent statistical reports raise obvious questions. The differences should be studied to determine whether official time is being overused in some agencies. On the other hand, it is possible that some agencies have devised productive uses of

official time that account for the increased numbers. Either way, close study of the issue could yield valuable lessons that can be shared across the Federal Government.

Is there a relationship between the ease of obtaining official time under collective bargaining contracts and the number of frivolous complaints filed by unions? This issue would not be difficult for government investigators to study, since all of the necessary data resides in the files of government agencies. Agency headquarters and OPM retain copies of collective bargaining agreements, and the FLRA presumably retains information on the number of unfair labor practice charges filed by unions that do not result in settlements or complaints issued by FLRA field offices. OPM and FLRA should investigate the relationship between the liberal availability of official time and the number of unsuccessful unfair labor practices charges filed by unions.

Did the Statute's expansion of official time for contract negotiations in 1978 lead to increased union intransigence or excessive demands in bargaining? A study of this question could prove difficult, since it would be necessary to separate the effects of § 7131 from the effects of other aspects of the Statute, but it would shed much-needed light on the effects of § 7131 on the efficiency of collective bargaining.

How do some federal-sector unions achieve much higher membership rates than others, and is there a significant difference in the overall effectiveness of unions in bargaining units that have higher union membership rates (i.e., unions that rely less on official time as a means of support)? The available data shows that the National Treasury Employees Union (NTEU) has unusually high rates of union membership among non-Postal agencies, while units represented by the NFFE have exceptionally

low membership rates. What is the NTEU doing to achieve its relative success, and does higher membership contribute to a better labor relations program?

Do unions practice silent discrimination against nonmembers in decisions to demand arbitration of grievances? Thanks to the dues checkoff procedure, agencies have all the information they need to analyze this problem. By comparing lists of dues-paying members to arbitration records, agencies can easily determine whether a pattern of discrimination against non-members is occurring agency-wide or at particular activities. A Federal study of the issue would shed valuable light on the effectiveness of the Federal-sector grievance/arbitration system and its system of union security.

c. The Need for Reform; Options to Evaluate

Many critics of the use of official time have focused on the use of taxpayer resources by unions. This criticism is unpersuasive, since OPM's figures show that the overall cost of official time is tiny in comparison to the total personnel budgets of Federal agencies. Moreover, many activities that occur on official time (such as participation of ordinary employees in employee-management councils and grievance proceedings) would occur in any well-run organization, even in the absence of unions. Certainly there should be concern about the potential for abuse and waste of taxpayer resources, but a cursory glance at the news headlines will reveal abuse and waste of government resources in many contexts, often far in excess of the total annual cost of official time in the Federal Government.

But that is not the end of the discussion, because the available evidence suggests that the Federal Government's union security arrangements are a major factor in some of the Federal labor system's most costly shortcomings, including:

- A lack of union funds to pay for professional employees, which forces unions to rely on volunteers and may leads to ineffective representation in many bargaining units;
- Limited union ability to pay for arbitration, which restricts the overall use of arbitrators to the detriment of employee rights and tempts unions to discriminate against non-members;
- The tendency of management's necessary oversight of the use of official time to undermine union independence in the use of its resources;
- A lack of involvement by most bargaining unit employees in union affairs, accompanied in some bargaining units by an over-centralization of union functions in a few officials using block grants of official time;
- Unnecessary conflict between unions and management over the allocation and use of official time; and
- Negative effects on organizational effectiveness and worker morale due to the excessive use of 100% official time by unions in some agencies.

Given the great variation in size, mission, and culture of Federal agencies, it is likely that there is no "one size fits all" approach for union security in the Federal sector. Therefore, Congress should authorize OPM to implement different types of test programs in selected agencies. At a minimum, the following options should be tested:

1. Authority to Negotiate a “Fair Share” Agreement

Fair share arrangements have proven to be workable in many state and local governments and have withstood constitutional scrutiny. There is no persuasive argument that the Federal sector is so dramatically different that the fair share agreement should not at least be tested there. To assuage critics of compulsory union support, the Federal-sector “fair share” could include a mandatory authorization election prior to the negotiation of the fair share (as was required in the original version of the Taft-Hartley Amendments) *and* a procedure for a deauthorization election, similar to one in the current NLRA. Such safeguards in a test program should be sufficient to satisfy all but the most zealous opponents of organized labor. In fact, such a system might provide some gratification to anti-union activists. Given the low rates of union membership in many federal agencies, it is likely that many union locals would fail to gain majority support for the fair share in an authorization election, possibly resulting in the dissolution of some union locals.⁴³⁵ Such a development might be healthy for the union movement, since it would enable unions to concentrate their resources on bargaining units where they enjoy substantial support.

History shows that Congressional approval of the fair share would not be easy to obtain, even on an experimental basis. However, the historical evidence also suggests that previous proponents of the agency shop have overreached by proposing a mandate for the union or agency shop, rather than merely an authorization to bargain over the subject, and have damaged their cause as a result. A more modest

⁴³⁵ In fact, one of the management officials interviewed as part of the 1991 GAO study raised this very possibility. Federal Sector Labor Relations, *supra* note 414, at 34.

reform proposal, such as an experiment with the fair share, might stand a chance of success, if its supporters take the time to explain the differences between the fair share and the union shop, as well as the relevant Supreme Court case law, which for decades has upheld the fair share for public employees against constitutional challenges.

2. Modification of the Duty of Fair Representation.

On grounds of basic logic and fairness, it is impossible to justify a duty of fair representation that requires union members to shoulder the significant out-of-pocket costs of grievance arbitration and similar services that unions are required to provide to nonmembers. If a fair share arrangement is not adopted in federal agencies, unions should at the very least be able to require reimbursement of discrete costs resulting from personal services rendered to nonmembers, just as the NLRA allows unions to charge service fees to religious objectors. To prevent opportunism by employees, unions should be able to require a minimum period of paid union membership before providing personal services to an employee without charge.

Modifying the duty of fair representation would enable unions to provide better service to their paying members, thus making membership more attractive and enhancing the overall health of unions. But unlike the agency shop or the fair share, a modified duty of representation would not involve any coerced dues or fees.

Members would be required to pay unions only when availing themselves of expensive union services, and then only on a cost-reimbursement basis. This alternative would not be a radical departure from the current Federal system, and it would still allow nonmembers to “free ride” on many union efforts, such as the

general benefits of collective bargaining contracts. But the payoff could be enormous. Relief from the responsibility to finance arbitrations for nonmembers, combined with the possibilities for providing new enticements for membership, could make a tremendous difference to the effectiveness of union locals.

An objection to this arrangement is that it would diminish the rights of nonmembers by discouraging them from exercising their arbitration rights. This objection is not persuasive. First, it is based on the questionable assumption that nonmembers have realistic access to grievance arbitration under the current system. Second, any tendency toward exclusion from the arbitration system would be entirely at the individual employee's option. Finally, since nonmembers need not be deprived of access to the negotiated grievance system short of arbitration, they will still have a basic level of procedural protection, courtesy of the union.

3. An Examination of the TVA's Pre-1984 Preference Policy

Between 1950 and 1984, the TVA entered into contractual provisions granting union members preferential treatment in a wide variety of personnel actions. For example, TVA's pre-1984 contract with the Tennessee Valley Trades and Labor Council included the following provision:

Membership in unions party to this agreement is advantageous to employees and to management, and employees are accordingly encouraged to become and remain members of the appropriate unions. Such membership is a positive factor in appraising relative merit and efficiency. Accordingly, within the limits permitted by applicable laws and Federal regulations, qualified union members are selected and retained in preference to qualified nonunion applicants or employees.⁴³⁶

⁴³⁶ McDavid v. TVA, 555 F. Supp. 72, 73 (E.D. Tenn. 1982).

TVA openly touted the policy as a form of union security, reasoning that employee relations would be improved if employees were encouraged to participate in their unions.⁴³⁷ As mentioned above, TVA was forced to restrict its implementation of the policy in 1984 after the Sixth Circuit concluded that the contract provisions violated the unions' duty of fair representation. Unfortunately, no published studies have ever examined the effectiveness of the old TVA system as a union security mechanism. The preference system provided powerful incentives for union membership with no outright coercion or reliance on public resources. While many employees under union shop and agency shop contracts face near-certain termination from employment for failure to pay union dues, TVA employees faced only a higher risk of involuntary reassignment, non-selection for promotion, or layoff during times of retrenchment. Therefore, the system deserves closer scrutiny, but certain modifications might be in order.

Constitutional challenges to the policy based on the First Amendment freedom of association are unlikely to succeed. In the lone reported case where a court has decided an employee's or applicant's direct constitutional challenge to the TVA policy, a federal district court upheld it.⁴³⁸ The plaintiff, an unsuccessful applicant for employment, claimed that the TVA's preference policy violated his First and Fifth Amendment rights, but he raised no religious or political objections to the use of his dues. Absent a claim of "forced ideological or political conformity," the court upheld

⁴³⁷ *Bowman v. TVA*, 744 F.2d 1207, 1210 (6th Cir. 1984).

⁴³⁸ *McDavid*, 555 F.Supp. at 75.

the policy based on a “rational basis” review, since classifications based on union membership are not constitutionally suspect.⁴³⁹

However, there is a serious constitutional issue inherent in the TVA approach: the lack of a provision for religious or political objections. TVA’s policy granted a preference only for membership in a union, and not merely for providing equivalent financial support (i.e., payment of agency fees). The system created dilemmas for religious and political objectors similar to those created by the pure union shop agreement. The problem could easily be remedied by conforming the system more closely to the NLRA’s agency shop model, in which dues are reduced by the proportional amount the unions spend on non-representational activities, and religious objectors have the option of contributing an equivalent amount to a charity. This modification would weaken the effectiveness of the system to an unpredictable degree, since financial support for the union does not bring the same advantages as proactive membership. Still, the modification would almost certainly be worthwhile to avoid burdening important individual rights.

An obvious practical drawback of TVA’s policy is that it may result in the promotion of less-capable employees over more-capable coworkers, based on willingness to join the union and pay dues. In this respect, the TVA model requires, to a greater extent than the other union security measures, modification of the merit principles that have governed public employment since the late Nineteenth Century. Civil service merit systems generally require that personnel decisions be based entirely on merit and fitness for the job, precluding the consideration of private

⁴³⁹ *Id.* at 74 (citing *City of Charlotte v. Local 660, Int’l Ass’n of Firefighters*, 426 U.S. 283 (1986)).

organization membership as a criterion.⁴⁴⁰ While individual merit is certainly very important, it is not unreasonable to consider an employee's willingness to participate in an effective labor-management relations system as an aspect of merit. In a workplace based on the principle of exclusive representation, employees who do not support or participate in their labor organizations have a negative effect on the agency's mission, regardless of their other individual strengths.

On close scrutiny, the disadvantages of the TVA model might be found to outweigh the advantages, but the fact that TVA management enthusiastically embraced the system for decades suggests that it may have some value. Therefore, the TVA's pre-1984 practices should be studied, and strong consideration should be given to testing a modified version of the TVA system in another agency.

4. Restrictions on Official Time

The political and policy trade-off for testing or permanently adopting any new system of union security should be the curtailment of unions' use of official time. The system imposes non-trivial costs on Federal agencies, and unions should not be permitted to use it to the extent that prevails today, if they are also given access to more effective union security measures. The simplest and most time-tested approach would be to restore the authorization for official time to its status under E.O. 11,491, if new union security provisions are adopted in any agency. Specifically, official time for participation in grievance proceedings, meetings with management officials, and collective bargaining talks should be allowed, as these uses of official time are relatively limited and easy for management to monitor. The provision of 100 percent

⁴⁴⁰ For a detailed discussion of merit systems and collective bargaining in public employment, see KEARNEY, *supra* note 1, at 178-192.

official time to employees on bargaining teams should also be reconsidered, based on the results of a thorough study into the matter. However, official time for lobbying, pre-bargaining preparation and similar activities should be curtailed, as it is difficult or impossible for management to monitor, and an effective union security system enables unions to compensate their officials for such activities from their own funds.

A rollback of the official time authorization to pre-1978 levels will reduce or eliminate many of the problems that have resulted from implementation of § 7131, including the proliferation of employees on 100 percent official time, the difficulty of policing its use, frequent negotiability disputes and impasses, and the natural human tendency to be less careful when expending someone else's resources. The resulting benefits should be carefully weighed when evaluating any of the test programs described above. The likely result would be a healthier and more valuable system of labor-management relations.