

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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August 31, 2018

The Honorable Jeff T. H. Pon
Director
Office of Personnel Management
1900 E Street N.W.
Washington, D.C. 20415

The Honorable Mick Mulvaney
Director
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

Dear Director Pon and Director Mulvaney:

Forty years ago, Congress passed landmark civil service reforms to strengthen and protect a merit-based, non-partisan, and effective federal workplace. That law authorized collective bargaining and union representation to defend employees from arbitrary and abusive personnel decisions and resolve workplace disputes fairly in the public interest.¹

However, on May 25, 2018, President Donald Trump signed three Executive Orders that imposed sweeping and destructive limits on the rights of federal employees, the ability of whistleblowers to report abuses, the scope of collective bargaining, and merit system principles of personnel management.² On July 5, 2018, the Office of Personnel Management (OPM) issued three guidance memos implementing the President's Executive Orders.³

¹ Pub. Law No. 95-454 (Oct. 13, 1978).

² Exec. Order No. 13836, 83 Fed. Reg. 25329 (June 1, 2018); Exec. Order No. 13837, 83 Fed. Reg. 25335 (June 1, 2018); Exec. Order No. 13839, 83 Fed. Reg. 25343 (June 1, 2018).

³ Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, *Guidance for Implementation of Executive Order 13836—Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining* (July 5, 2018); Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, *Guidance for Implementation of Executive Order 13837—Ensuring Transparency, Accountability, Efficiency in Taxpayer-Funded Union Time Use* (July 5, 2018); Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, *Guidance for Implementation of Executive Order 13839—Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles* (July 5, 2018).

Last week, on August 25, 2018, a federal judge ruled that key provisions of these Executive Orders are “an improper exercise of his statutory authority” and conflict directly with the laws Congress passed decades earlier. The Court found that “many of the challenged provisions of the Orders at issue here effectively reduce the scope of the right to bargain collectively as Congress has crafted it, or impair the ability of agency officials to bargain in good faith as Congress has directed, and therefore cannot be sustained.”⁴

The Court ruled that key parts of the Executive Orders are illegal, including Sections 5(a), 5(e) and 6 of Executive Order 13,836; Sections 3(a), 4(a) and 4(b) of Executive Order 13,837 and Sections 3, 4(a) and 4(c) of Executive Order 13,839. Those provisions included:

- arbitrary limits on the allowable time, procedures, and topics for collective bargaining, which the judge determined “put an entire hand on the scale with respect to certain negotiable provisions of a collective bargaining agreement before negotiations even begin (never mind the thumb)”;
- counterproductive restrictions on whistleblowers utilizing union representation when they face retaliation for reporting waste, fraud, and abuse;
- severe limitations on the ability of federal employees to engage in collective bargaining by slashing the amount, use, and purpose of Official Time; and
- the expulsion of unions from office space in federal buildings and the denial of the right of employees to challenge firings in grievance procedures.⁵

In ruling against substantial portions of the Executive Orders, the Court expressly enjoined the “President’s subordinates from implementing or giving effect” to the invalidated provisions of the Executive Orders.⁶

On August 29, 2018, OPM issued a brief, one-page memo notifying the heads of federal agencies that it was rescinding the portions of its previous guidance memos relating to the invalidated sections of the Executive Orders.⁷ However, some agencies were already actively implementing the policies the Court struck down, and OPM’s tersely worded revision does not address what agencies should do about illegal actions that agencies have already taken to implement the invalidated sections of the Executive Orders.

⁴ *American Federation of Government Employees v. Trump*, No. 1:18-CV-1261, slip op. (D.D.C. Aug. 25, 2018).

⁵ *Id.*

⁶ *Id.*

⁷ Memorandum from Dr. Jeff T.H. Pon, Director, Office of Personnel Management, to Heads of Executive Departments and Agencies, *Updated Guidance Relating to Enjoinment of Certain Provisions of Executive Orders 13836, 13847 and 13839* (Aug. 29, 2018).

For example, on March 12, 2018, the Department of Education unilaterally imposed a labor contract that severely restricted the amount of official time union leaders may spend on labor relations, required union officials to turn in agency equipment including laptops and cellphones, and evicted union officials from agency office space.⁸

In addition, on July 9, 2018, the Social Security Administration's Office of Labor-Management and Employee Relations issued "Technical Guidance for Union Officials" which implemented the now-invalidated provisions arbitrarily restricting official time and denying unions use of office space and telephone lines and restricting use of computers.⁹

Request for Briefing

As the Ranking Member of the Committee on Oversight and Government Reform, which has oversight and legislative jurisdiction over your agencies and federal labor relations policy, I request a briefing by September 14, 2018, on your plans to bring agencies into compliance with the judge's decision and remedy past violations. This briefing should include:

- (1) actions being taken by OPM and OMB to restore the *status quo ante* at agencies where the invalidated provisions of the Executive Orders were imposed before the judge's decision;
- (2) a timeline of actions planned by OPM or OMB to bring federal agencies into compliance with the judge's decision; and
- (3) next steps that are being contemplated by the Trump Administration.

Thank you for your prompt attention to this request.

Sincerely,


Elijah E. Cummings
Ranking Member

cc: The Honorable Trey Gowdy, Chairman

⁸ Memorandum from Samantha Cutler, Department of Education, to Claudette Young, American Federation of Government Employees, *Implementation of New Collective Bargaining Agreement* (Mar. 9, 2018). See also Arts. 4-5 of "Collective Bargaining Agreement" (Mar. 12, 2018) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/notice%20to%20supervisors%202.pdf>).

⁹ Office of Human Resources/Office of Labor-Management and Employee Relations, Social Security Administration, *Technical Guidance for Union Officials, Implementation of the Executive Orders, Actions Effective July 9, 2018* (July 6, 2018) (online at <https://democrats-oversight.house.gov/sites/democrats.oversight.house.gov/files/documents/Union%20Guidance%20on%20EOs%20Effective%20070918.pdf>).