



Union Time on the People's Dime

A Closer Look at Official Time

Testimony before Subcommittee on Government Operations
Committee on Oversight and Government Reform
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Chairman Meadows, Ranking Member Connolly, and members of the Subcommittee:

Thank you for holding this hearing and providing me the opportunity to discuss the issue of official time in the federal workforce. My name is William "Trey" Kovacs III, and I am a labor policy analyst at the Competitive Enterprise Institute (CEI). CEI is a nonprofit, nonpartisan public policy organization that focuses on regulatory issues from a free market and limited government perspective.

Summary

Union official time constitutes a direct government subsidy to federal employee unions. It uses tax dollars to support the private interests of federal employee unions, which are private entities. The Civil Service Reform Act of 1978 (CSRA) requires federal agencies to allow their employees to perform union business, such as collective bargaining negotiations, during work hours instead of the public service they were hired to do. According to the latest data collected by the Office of Personnel Management (OPM), in Fiscal Year 2014 official time cost \$162,522,763.18 and federal employees spent 3,468,170 hours conducting union activities.¹

¹ Office of Personnel Management, "Labor-Management Relations in the Executive Branch," October 2014, <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relationsin-the-executive-branch-2014.pdf>.

A longstanding problem associated with official time is a lack of transparency concerning the costs, activities performed, and amount of time used. Since 1979, federal oversight agencies have concluded that recordkeeping practices related to official time need improvement.² Poor recordkeeping and unreported official time use is common across federal agencies, as multiple Government Accountability Office (GAO) and Inspector General reports have shown.³

Problems with official time have been recognized by administrations from both political parties. During the Clinton administration, the OPM explained:

When union officials are on official time, they are not available to perform the duties associated with their regular positions. This can hamper the agency in accomplishing its mission, as certain assignments must either be delayed, covered by other employees, or accomplished through the use of overtime. The use of significant amounts of official time ... may adversely affect an employee's ability to keep his or her technical skills current.⁴

The effects of official time appear to directly conflict with the "findings and purpose" of the Civil Service Reform Act, which formalized collective bargaining and official time in the federal government. In the CSRA's explanation of the rationale for the legislation, Congress found that:

[E]xperience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them ... safeguards the public interest, ... contributes to the effective conduct of public business, ... and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment.⁵

However, as the Clinton administration found when it looked at the issue, official time harms the "effective conduct of public business," as it diverts federal employees away from their assignments and agency's mission to perform the private business of the union instead. Furthermore, some federal employees on *100 percent* official time never perform any public service. It makes no sense to assume that a collective bargaining system that permits federal

² General Accounting Office, "Inadequate Recordkeeping on Official Time Used for Representational Functions," September 17, 1979, <https://www.gao.gov/products/FPCD-79-77>.

³ The following is a sample of government reports on the need for improved recordkeeping of official time. National Labor Relations Board Office of Inspector General, "Official Time for Union Activities," Report No. OIGAMR-62-10-01, December 2009, https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1700/oig-amr-62-10-01_0.pdf, Government Accountability Office, "Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time," GAO-15-9, October 2014, <https://www.gao.gov/products/GAO-15-9>.

⁴ Office of Personnel Management, "Report to Congress on Official Time and Services by Unions Representing Federal Employees Fiscal Year 1998," 1998, <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=1998>.

⁵ 5 U.S.C. § 7101

employees—who were hired to do other jobs—to perform union business 100 percent of the time “safeguards the public interest” or “contributes to the effective conduct of public business.”

Official time also clashes with the finding that collective bargaining facilitates amicable settlements of disputes between employees and their employers. In fact, the opposite appears to be the case. Official time leads to the filing of frivolous grievances by federal employee unions.⁶ This is a predictable outcome, because federal employee unions are granted near-unlimited official time to prepare and file grievances and defend employees during appeals procedures.⁷

Proponents argue the subsidy is necessary because federal employee unions are required by law to represent non-members who do not pay union dues or fees. This problem can be easily solved by lifting the legal requirement for federal employee unions to represent non-members. Congress should consider implementing what is known as Workers Choice—a members-only union policy that relieves unions of the obligation to represent non-members, and thus eliminates the purported need for official time.

Background

The Civil Service Reform Act of 1978 grants unions use of official time for collective bargaining, impasse proceedings, and cases before the Federal Labor Relations Authority (FLRA), the agency that resolves labor dispute in federal workforce. Outside of this, official time may only be granted “in any amount the agency employer and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.” One statutory restriction on official time is that it cannot be granted for internal union business, such as conducting union elections or collecting union dues.

A non-statutory limit on official time found in many collective bargaining agreements is a requirement that a supervisor must authorize official time prior to use. This restriction is not an effective safeguard, as government reports have shown. The Office of Personnel Management sporadically collects official time data from federal agencies and publishes its findings in a report. OPM reports official time in four broad categories:

1. General Labor Management—Meetings between labor and management officials to discuss general conditions of employment, labor-management committee meetings,

⁶ Testimony of James Sherk Before the Committee on Oversight and Government Reform United States House of Representatives, “Official Time: Good Value for the Taxpayer?” June 1, 2011, <https://www.heritage.org/testimony/official-time-good-value-the-taxpayer>.

⁷ The following is an example of a frivolous grievance, which likely would not have been filed if official time was prohibited. According to the Federal Labor Relations Authority, on one occasion when union officials of an American Federation of Government Employees Border Patrol local were granted official time, “the taxpayers paid for the parties to bicker over whether the agency or the union should pay the cost of leftover food from a union-sponsored event that had lower-than-expected attendance purportedly because the agency would not permit the union to use its public address system.” AFGE, Local 2913, 67 FLRA 107 (2013), <https://www.flra.gov/decisions/v67/67-26.html>.

labor relations training for union representatives, and union participation in formal meetings and investigative interviews.

2. Dispute Resolution—Time used to process grievances up to and including arbitrations and to process appeals of bargaining unit employees to the various administrative agencies.
3. Term Bargaining—Time used by union representatives to prepare for and negotiate a basic collective bargaining agreement or its successor.
4. Mid Term Bargaining—Time used by union representatives to bargain over issues raised during the life of a term agreement.

Legislative Reforms to Official Time

Congress should enact legislation to eliminate the practice of official time. Labor unions exist to promote the interests of the workers they represent, not the public. As such, all activity conducted by labor unions should be financed by union dues.

At a minimum, Congress should take steps to improve tracking and recordkeeping of official time. Under the current accounting regime, the cost of official time is severely underestimated. Further, the true cost of the union subsidy is difficult to determine because of poor tracking and recording of when employees use official time. For instance, official time is frequently taken without supervisor authorization, which is commonly required by collective bargaining agreements. Moreover, what activities federal employees engage in while on official time are often unknown to their agency employers.

The following legislative reforms could eliminate official time or improve transparency regarding the accounting of its use.

Workers Choice/Members-only Unions

The Department of Education recently curtailed official time use in its most recent collective bargaining agreement with the American Federation of Government Employees (AFGE).⁸ In response, AFGE Council 252 President Claudette Young attempted to justify a need for official time, complaining that the new contract was crafted to make it “intentionally difficult for union officials to represent employees, which is required by law, regardless of whether the employee is a dues-paying member.”⁹

The law referenced in the AFGE official’s statement grants labor unions the status to act as an “exclusive representative.” In the federal workforce, non-members cannot be forced to pay fees to a union as a condition of employment to cover the cost of representation. Labor unions argue that official time is a necessary subsidy for them to meet the legal obligation of

⁸ Collective Bargaining Agreement U.S. Department of Education and National Council of Department of Education Locals American Federation of Government Employees, AFL-CIO, Council 252, March 12, 2018, <https://www.afge.org/globalassets/documents/generalreports/2018/collective-bargaining-agreement-02-08-2018.pdf>.

⁹ Erich Wagner, “Union Leaders Demand Education Department Return to Negotiating Table,” Government Executive, March 28, 2018, <https://www.govexec.com/pay-benefits/2018/03/union-leaders-demand-education-department-return-negotiating-table/147047/?oref=channeltopstory>.

representing non-members. Section 7114 of the CSRA requires an exclusive representative to negotiate on behalf of all workers in a bargaining unit, both union members and non-members.¹⁰ Exclusive representative status confers a responsibility on federal employee unions to treat union members and non-members equally and fairly. A union may not discriminate against employees who are not members.

A better legislative solution is available to address these union concerns than a massive taxpayer funded subsidy, with very few safeguards in place to ensure official time is used prudently. The alternative is simply to remove the requirement that federal employee unions represent non-members.

Membership in and representation by a union should be voluntary. Non-members should not be forced to work under a union-negotiated agreement they do not want and unions should not be forced to represent employees who do not pay dues. A policy of Workers Choice, or members-only unions, addresses union concerns, eliminates the need for official time, and protects workers' freedom of association.

Under such a policy, a union would only represent, negotiate on behalf of, and collect dues from its members. Non-members would no longer be forced to accept representation by a union they prefer not to join or fund.

Federal “Gift Clause”

Official time is also granted to public-sector unions by state and local governments. Unlike at the federal level, where there are little to no legal restrictions or prohibitions on official time, 47 state constitutions contain provisions that potentially ban the union subsidy (but are rarely enforced).¹¹

These constitutional provisions, known as “Gift Clauses,” prohibit the use of public expenditures to aid private entities. For example, Wyoming’s Constitution states:

Neither the state nor any county, city, township, town, school district, or any other political subdivision, shall loan or give its credit or make donations to or in aid of any individual, association or corporation ... nor subscribe to or become the owner of the capital stock of any association or corporation.¹²

Congress could eliminate official time—and other federal expenditures to private entities—by enacting a federal statutory restriction on the use of taxpayer funds similar to those found in state Gift Clauses.

¹⁰ 5 U.S.C. 7114(a)(1)

¹¹ For a list of state Gift Clauses, see Jon Riches, “Public Money for Private Gain: Legal Strategies to End Taxpayer-Funded Union Activism and Pension Spiking,” Goldwater Institute, June 10, 2014, https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/1/28/Release%20Time.pdf.

¹² Wyoming Constitution, Article 16, Section 6.

Gift Clauses arose in reaction to scandals involving the corrupt transfer of taxpayers' money to private enterprises. They were enacted to ensure the public's money was spent prudently and strictly supported public purposes. For example, in the 1830s, Illinois defaulted on interest payments after the state "invested" money to finance 1,341 miles of railroad (only 26 miles were built.) Indiana, which spent \$10 million on "investments" in canals, turnpikes, and railroads, was forced into default in 1840.¹³

State courts, in general, use the following analysis to determine whether a public expenditure to a private entity violates the Gift Clause. For example, in Arizona, public aid to private entities must 1) promote a public purpose and 2) the public entity must receive proportionate, quantifiable, and direct benefit for the aid given.¹⁴ Official time does not fulfill either requirement.

When determining whether a public expenditure serves a public purpose, it is necessary to establish what benefit it obliges the recipient of taxpayer funds to provide for the public. In the case of official time, at both the federal and state level, unions are not typically required to provide any service to the public. Unions operate to serve the interest of their members, and official time gives employees time to perform activity that promotes the goals of the union.

The public is best served when government employees perform the jobs they were hired to do. It is difficult to determine whether official time serves a public purpose because of a widespread lack of accountability on its use. This poor recordkeeping means many agencies cannot accurately determine how much time employees spend on official time and what activities they perform.

Part two of the gift clause analysis examines what the private entity is contractually *required* to do for the public in return for the subsidy, and whether the public receives adequate benefit for the public outlay. At the federal level, the sole statutorily required use of official time is to represent employees in collective bargaining and grievance procedures. Neither of these activities place any obligation on labor unions to provide any benefit to the public. Other official time activities like lobbying obviously do not serve a public purpose and serve only the narrow interests of the union.

There is no quantifiable consideration to the public from labor unions as recipients of official time. As noted, official time, at minimum, costs the public \$162 million in FY2014, the latest year for which data are available. The public does not receive any services from the labor union in exchange for the subsidy of official time.

¹³ Clifford F. Thies, "Development of the American Railroad Network During the Early 19th Century: Private versus Public Enterprise," Independent Institute, October 2001, http://www.independent.org/pdf/working_papers/42_development.pdf.

¹⁴ Rebecca Burnham, "Arizona Supreme Court Clarifies 'Gift Clause' Limits on Public Payments to Private Parties," Greenburg Traurig Litigation Alert, February 8, 2010, <https://www.lexology.com/library/detail.aspx?g=3b8fe445-68f7-4c22-90e6-21c85a2641ff>.

Improve Official Time Recordkeeping and Transparency

The enactment of H.R. 1293, sponsored by Rep. Dennis Ross (R-Fla.), would improve transparency regarding federal official time.¹⁵ As noted, flaws in official time recordkeeping have long been recognized by administrations of both parties. The same problems persist today.

The Office of Personnel Management's report on the costs and amount of official time used is currently the best source for such information. However, OPM publishes the report infrequently. The latest edition covers FY2014.

Moreover, the OPM report has many deficiencies. A 2014 Government Accountability Office (GAO) report criticized OPM's accounting methods related to official time and determined its cost estimates to be inaccurate.¹⁶ As I noted in previous testimony on the subject:

Using a more sound methodology that uses the actual salary of employees using official time, GAO found at four of the six agencies it examined, official time costs are about 15 percent higher than the OPM cost estimates.¹⁷

OPM estimates of the costs of official time have other shortcomings. OPM only reports the payroll costs of official time. A provision found in many collective bargaining agreements requires taxpayer funds to cover the cost of office space, telephones, and travel for government employees using official time. These costs are not trivial. The Social Security Administration (SSA) produces an annual report on its union official time costs; it provides a more accurate portrayal of the non-payroll costs associated with official time. In FY 2015, travel and per diem, office space, telephones, supplies, interest, and arbitration expenses associated with official time cost \$2.2 million, which is 15 percent of the total official time cost at the SSA.¹⁸

A 2017 GAO report on official time use at the Department of Veterans Affairs (VA) found lack of proper tracking and recording that are representative of problems at many other federal agencies:

- VA employees do not know how to record official time in the agency's time and attendance system.

¹⁵ H.R. 1293, 115th Cong. 2017).

¹⁶ Government Accountability Office, "Actions Needed to Improve Tracking and Reporting of the Use and Cost of Official Time," GAO-15-9, October 2014, <http://oversight.house.gov/wp-content/uploads/2014/11/GAO-report.pdf>.

¹⁷ Testimony of Trey Kovacs Before the Subcommittee on Economic Opportunity and Subcommittee on Government Operations, "The Use of Official Time for Union Activities at the Department of Veterans Affairs," February 16, 2017, <https://oversight.house.gov/wp-content/uploads/2017/02/kovacs.pdf>.

¹⁸ Social Security Administration, "Social Security Administration Report Concerning Expenditures for Union Activities," January 21, 2016, <https://www.ssa.gov/legislation/Official%20Time%20for%20Union%20Activities--FY2015.pdf>.

- The VA uses two time and attendance systems, one of which lacks specific codes for official time.
- The VA does not collect reliable data on official time. Instead, it uses “records, estimates, or other methods” to calculate official time.
- Based on the unreliable data on official time, the GAO could not determine the amount of official time used or what activities were performed.¹⁹

H.R. 1293 addresses many of these inadequacies. Specifically, it requires OPM will to furnish a report on the costs of official time throughout the federal government on an annual basis. The report must:

- Include all information presented in the current OPM report.
- Detail the specific types of activity for which official time was granted.
- Detail official time’s impact on agency operations.
- List the total number of employees who were granted official time.
- Determine the amount of office space granted to unions to conduct official time activities.

Conclusion

Official time is an unnecessary subsidy to federal employee unions that only serves the interests of unions and their members, not the public. Taxpayers do not receive a direct benefit or any discernable consideration in return for the cost of official time.

Congress should eliminate the federal union subsidy known as official time. In addition, unions should be relieved of their legal obligation to represent non-members who do not pay dues, thus eliminates the union argument for why official time is necessary.

Short of that, Congress should require the Office of Personnel Management to issue a detailed annual reporting of official time and agencies to improve their tracking of union activity. Taxpayers have a right to know how many of their tax dollars are used to finance official time and what union activities federal employees undertake instead of the job they were hired to do.

¹⁹ Government Accountability Office, “VA Could Better Track the Amount of Official Time Used by Employees,” GAO-17-105, January 2017, <https://www.gao.gov/assets/690/682250.pdf>.