

**71 FLRA No. 102**NATIONAL RIGHT TO WORK LEGAL DEFENSE  
FOUNDATION, INC.

0-PS-41

DECISION ON  
REQUEST FOR GENERAL STATEMENT  
OF POLICY OR GUIDANCE

January 24, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester concurring)

**I. Statement of the Case**

The National Right to Work Legal Defense Foundation (the Foundation) requests, pursuant to § 2427.2 of the Authority's Regulations,<sup>1</sup> a general statement of policy or guidance on the interpretation of § 7131(b) of the Federal Service Labor-Management Relations Statute (the Statute).<sup>2</sup>

Section 7131(b) states that “[a]ny 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 non-duty status.”<sup>3</sup> In *AFGE, AFL-CIO, Local 2823 (Local 2823)*, the Authority interpreted § 7131(b) of the Statute as prohibiting official time for any activity that is “solely related to the institutional structure of a labor organization.”<sup>4</sup>

In its request, the Foundation asks the Authority to issue a general statement of policy or guidance overturning *Local 2823* and finding that § 7131(b) “prohibits [the] use of official time not only for activities that solely relate to the institutional structure of a labor organization, but for any activities that relate to the internal business of a labor organization, even if the activity also relates to other union business.”<sup>5</sup> The Foundation asserts that the Authority's interpretation of § 7131(b) in *Local 2823* “defies the [S]tatute's plain

language,”<sup>6</sup> which bars official time for activities “relating to the internal business” of a union.<sup>7</sup>

**II. Decision**

In deciding whether to issue a general statement of policy or guidance, the Authority considers the standards in § 2427.5 of the Authority's Regulations.<sup>8</sup> We find the Foundation's request to be dependent upon the circumstances of the case at issue, so much so, that this issue of law and policy can be developed more fully in the context of an actual dispute.<sup>9</sup> As the Authority has stated, internal union-business activities “must be considered based on the particular facts and circumstances of each case.”<sup>10</sup> Thus, the question is more appropriately addressed in a case or controversy – such as an arbitration, unfair-labor-practice, or negotiability dispute<sup>11</sup> – or, alternatively, through the rule-making process. Therefore, we deny the Foundation's request for a general statement of policy or guidance.<sup>12</sup>

We note that Executive Order 13,837 has returned official time to the federal labor community's

<sup>3</sup> *Id.*<sup>4</sup> 2 FLRA 3, 9 (1979) (emphasis added); *see also NTEU*, 45 FLRA 339, 361-62 (1992) (finding provision negotiable because it did “not solely relate to the structure and institution of the [u]nion”); *NTEU*, 38 FLRA 1366, 1368 (1991) (finding proposal negotiable because it did “not solely relate to the structure and institution of the [u]nion”); *AFGE, AFL-CIO, Local 1692*, 3 FLRA 304, 308 (1980) (“The disputed proposal in the instant case clearly does not relate solely to the structure and institution of the labor organization.”).<sup>5</sup> Request at 1.<sup>6</sup> *Id.*<sup>7</sup> 5 U.S.C. § 7131(b) (emphasis added).<sup>8</sup> 5 C.F.R. § 2427.5.<sup>9</sup> *Id.* § 2427.5(a).<sup>10</sup> *Dep't of HHS, SSA*, 46 FLRA 1118, 1123 (1993); *see also USDA, Farm Serv. Agency, St. Louis, Mo.*, 66 FLRA 450, 451 (2012) (*USDA*).<sup>11</sup> *See USDA*, 66 FLRA at 450-51 (arbitration); *AFGE, Local 987*, 37 FLRA 119 (1990) (unfair-labor-practice); *IAMAW, Lodge 2424*, 5 FLRA 438 (1981) (negotiability).<sup>12</sup> *See Order Denying Request for Gen. Ruling*, 51 FLRA 409, 412 (1995) (“[I]ssues of law and policy generally may be developed more fully in the context of the facts and circumstances presented by parties within the context of a dispute between them.”).<sup>1</sup> 5 C.F.R. § 2427.2.<sup>2</sup> 5 U.S.C. § 7131(b).

attention.<sup>13</sup> Among other things, that Order: emphasizes that agencies should “give special attention to ensuring” that official time is not used for “internal union business in violation of [§] 7131(b);”<sup>14</sup> directs employees to obtain “advance written authorization from their agency” before using official time;<sup>15</sup> and states that the total amount of official time bargained under § 7131(d) of the Statute should ordinarily not exceed one hour per bargaining-unit employee each fiscal year.<sup>16</sup> The effect and application of the Executive Order is most appropriately addressed through a case or controversy – not a general statement of policy or guidance.<sup>17</sup>

**Member DuBester, concurring:**

I agree that the request does not satisfy the standards governing the issuance of general statements of policy or guidance. Because the questions posed by the request can more appropriately be addressed in the context of facts and circumstances presented by parties in an actual dispute, I concur in the Decision to deny the request.

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<sup>13</sup> Member Abbott clarifies that he supports the Policy Statement’s reference to Executive Order 13,837 (E.O.) as addressing, at least in part, the question posed by the Foundation. He also agrees that questions of this nature most naturally will be addressed as specific circumstances arise. However, Member Abbott notes that the E.O. excludes the adverb “solely” when describing the limitation on activities that must be excluded from official time. This exclusion is hardly accidental. Thus, existing Authority precedent cited by the Foundation runs counter to the plain language of the E.O. and, as noted before, is “supported by nothing more than the Authority’s own repetition of it.” *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 (2018) (Member DuBester dissenting). The axiomatic fact that disputes concerning this E.O. will be resolved by the Authority does not mean that we should not bring clarity where we can today.

<sup>14</sup> *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335, 25,338 (May 25, 2018).

<sup>15</sup> *Id.* at 25,337.

<sup>16</sup> *Id.* at 25,336.

<sup>17</sup> See *AFGE, AFL-CIO v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019) (stating that “the [u]nions must pursue their claims [that Executive Orders 13,836, 13,837, and 13,839 are inconsistent with the Statute] through the scheme established by the Statute, which provides for administrative review by the FLRA followed by judicial review in the courts of appeals.”).