1983

Rights to Official Time for Unions Representing Federal Employees

Carlton J. Snow

Elliott M. Abramson

Follow this and additional works at: http://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.case.edu/caselrev/vol34/iss1/4

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons.
It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
The concept of official time, which permits federal employee negotiators to bargain collectively and simultaneously receive pay, is an integral part of labor relations in the federal sector. It helps to bridge the economic gap between federal agencies and unions, thus facilitating more constructive bargaining. This Article surveys the historical underpinnings of official time, tracing its development from 1962 to the present. Reimbursement of travel and per diem expenses, an important subset of official time, is also considered. Special emphasis is placed on the Supreme Court's recent ruling on the issue, and the controversy following it. The author critically evaluates the official time question and presents recommendations for enhancing the contribution of official time to federal sector labor relations.

INTRODUCTION

DURING THE LAST five years, the concept of official time has become a potent force in the federal sector, prompting important changes in labor-management relations. For federal organizations, official time is paid time off from regular work duties to participate in collective bargaining as well as other representational activities associated with the labor relations process. Although ostensibly simple, this idea has a complex history and has provided the impetus for a shift in the balance of power between labor and management.

Until 1978, federal employee representatives had to take annual leave time or leave without pay to participate in negotiations, unless their labor contract granted them official time. Management negotiators, on the other hand, not only received official time but also received pay.

* Professor of Law, Willamette University. A.B., Taylor University (1960); M. Div., Fuller Theological Seminary (1965); M.A., University of Wisconsin (1966); J.D., University of Wisconsin (1969).

** Professor of Law, DePaul University. A.B., Columbia University (1960); J.D. Harvard University (1963).

time for all negotiation activities but also received reimbursement for their travel and per diem expenses. This imbalance enabled management to capitalize on the union's weak financial position to encourage concessions. With passage of the Civil Service Reform Act of 1978 the disparity apparently was eliminated.

Under Title VII of the Act, a federal employee representative obtained the right to 100% of official time for most collective bargaining activities. Moreover, for the first time, collective bargaining received congressional recognition as making an important contribution to the public interest. In 1979, the Federal Labor Relations Authority (FLRA), the body empowered to administer the Act, issued an *Interpretation and Guidance* allowing 100% of official time for almost all contract negotiation activities. The *Interpretation* also required federal agencies to reimburse union representatives for their per diem and travel expenses, thus eliminating the financial advantage traditionally held by management negotiators. With relative equalization of bargaining power, the dynamics of labor relations in the federal sector was altered significantly.

Perhaps one of the most notable controversies wrought by changes in the official time concept was the travel and per diem question. Until the most recent Supreme Court Term, the sharp division among the circuit courts of appeals addressing the issue exacerbated the uncertainty surrounding the problem. However, in *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, the Supreme Court resolved the circuit split, holding unanimously that the FLRA improperly required federal agencies to reimburse union negotiators for their travel and per diem expenses.

Official time, and more specifically the issue of travel and per diem expense reimbursement, are inextricably bound up in the matrix of executive orders, legislation, administrative directives, and court decisions which has guided federal sector labor relations for the past two decades. In its initial foray into the official time area the Supreme Court recognized as much, relying on a

---

3. See infra notes 94-104 and accompanying text.
5. See infra notes 120-35 and accompanying text.
6. See infra notes 143-207 and accompanying text.
8. Id. at 441.
variety of these factors to decide *Bureau of Alcohol*.9

This Article examines the concept of official time from its inception in a 1962 Executive Order and traces its development to 1978.10 Next is an analysis of the changes engendered by the Civil Service Reform Act of 1978 and a discussion of the FLRA's *Interpretation and Guidance* construing section 7131 of the Act.11 A review of the Interpretation's mixed reception in the federal circuit courts of appeals and its rejection by the Supreme Court follows.12 The Article also considers recent reaction to the Court's decision in *Bureau of Alcohol*.13 Finally, the Article discusses the broader concept of official time, as interpreted by the FLRA, and ponders the potential contributions of official time to federal labor relations.14

I. ORIGINS OF THE OFFICIAL TIME CONCEPT

A. Prelude: The Executive Order Era

In January 1962, President Kennedy issued Executive Order 10,988, which brought sweeping changes to labor-management relations in the federal sector.15 Primarily a conceptual outline of basic rights, the Kennedy Order gave federal employees the right to form employee labor organizations and bargain collectively with their employers.16 Under this Executive Order, the granting of official time to employee representatives was solely within an agency's discretion.17

Interpreting Order 10,988, the Comptroller General issued a

9. See infra notes 211–22 and accompanying text.
10. See infra notes 15–91 and accompanying text.
11. See infra notes 94–128 and accompanying text.
12. See infra notes 143–222 and accompanying text.
13. See infra notes 250–74 and accompanying text.
17. Section 9 of Executive Order 10,988 provided:

Solicitation of memberships, dues, or other internal employee organization business shall be conducted during the non-duty hours of the employees concerned. Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.

decision in July 1966, authorizing "administrative leave"\textsuperscript{18} for employee representatives.\textsuperscript{19} The decision stated that administrative leave could be granted to an employee representative "to attend union conducted training sessions designed to inform employees on the scope and basic provisions of Executive Order 10,988 which are of mutual concern to the agency and the employee organization."\textsuperscript{20} Agencies could grant administrative leave when the training program dealt with matters such as "statutory or regulatory provisions relating to pay, working conditions, work schedules, employee grievance procedure, performance ratings, adverse action appeals, as well as agency policy and negotiated agreements pertaining thereto."\textsuperscript{21} The Comptroller General, however, announced two restrictions on granting leave for training sessions: (1) the primary purpose of the session must not be to train or inform the employee "concerning solicitation of memberships and dues, other internal organization business, or representation of the employee organization in the art of collective bargaining negotiations," since such matters are not in the interest of the government; and (2) the agency may grant administrative leave only for such short periods of time—ordinarily not to exceed eight hours—as are reasonable under the circumstances.\textsuperscript{22}

On October 29, 1969, President Nixon signed Executive Order 11,491, effective January 1, 1970, superseding Kennedy Order 10,988.\textsuperscript{23} As originally promulgated by President Nixon, section 20 of Executive Order 11,491 explicitly prohibited granting official time for collective bargaining and internal union activities.\textsuperscript{24} One year later President Nixon signed Executive Order 11,616, amend-

\begin{itemize}
  \item \textsuperscript{18} The term "administrative leave" is used interchangeably with "official time" in the federal labor relations context.
  \item \textsuperscript{19} See Comptroller General Clarifies Use of Administrative Leave to Attend Union Training Sessions, [July-Dec.] GOV'T EMPL. REL. REP. (BNA) No. 151, at A-3 (July 12, 1966).
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id. at A-4.
  \item \textsuperscript{24} Section 20 of Executive Order 11,491 as originally enacted provided: "Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management." Exec. Order No. 11,491, § 20, 3 C.F.R. 861, 873 (1966–70 Compilation), reprinted in 1969 U.S. CODE CONG. & AD. NEWS 2948, 2957.
\end{itemize}
The new Order allowed an agency and a union to agree to a reasonable amount of official time for union representatives in contract negotiations. Specifically, the modification permitted the parties to authorize as much as forty hours of official time or one-half of the time spent in negotiations during working hours.26

Because of its restrictive orientation, section 20 was used initially to limit the amount of official time that could be authorized. For example, in *Department of the Navy* and *Department of the Army*, the Federal Labor Relations Council (FLRC)27 set aside the Assistant Secretary's findings that the agencies had committed an unfair labor practice by refusing to grant official time to union witnesses at unit determination hearings.28 The FLRC noted that the protected right of employees to engage in or refrain from union activity "can hardly be deemed to import a duty of assistance to employees by management."29 Even though management representatives who appeared on behalf of the agency did so in their official capacity on official time, the FLRC concluded that "it does not follow . . . that the refusal to grant the same right to union witnesses constitutes improper 'discriminatory' treatment."30

---

26. Executive Order 11,616 amended § 20 to provide:
   Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

27. Section 4 of Executive Order 11,491 established the Federal Labor Relations Council (FLRC) to administer the Order, hear unfair labor practice complaints, and decide questions of negotiability. The Council was composed of the Chairman of the Civil Service Commission, the Director of the Office of Management and Budget, and the Secretary of Labor.

29. *Department of the Navy*, 1 F.L.R.C. No. 72A-20 at 493 (emphasis in original).
30. Id.
The FLRC found that while the purpose of Executive Order 11,491 was to provide employees an opportunity to participate in the formulation and implementation of policies affecting employment, the Order did "not reflect a policy of 'encouraging such relationships.'" The FLRC did find, however, that if the Assistant Secretary determined that there was a need for union witnesses to testify at hearings, he could promulgate an official time requirement by regulation. In other words, the parties could not authorize the official time by agreement. However, once the unit determination hearing was set, the Assistant Secretary could require the attendance of union witnesses. He then could order the agency to pay the witnesses as if they were on duty.

Through the negotiation process, the parties gradually opened the door to broader interpretation of the section 20 official time provision. The FLRC did not interfere with collective bargaining agreements permitting official time for contract administration activities, such as participation in grievance discussions, third party proceedings, and discussions with management relevant to the administration of the agreement. Relying on the statutory construction aid of expressio unius est exclusio alterius, the FLRC, in a policy statement regarding official time, found that section 20 prohibited only the use of official time for internal union business. Thus, official time appropriately could be used for any other activities associated with labor-management relations and of "mutual interest to both the agency and the labor organization." Grievance discussions were specifically found to benefit both the agency and the labor organization because they helped maintain a constructive and cooperative relationship between the parties, thereby

31. Id.
32. Id. at 494–95; see also Social Sec. Admin., Bureau of Hearings & Appeals v. American Fed'n of Gov't Employees, Local 3615, 8 A/S.L.M.R. Dec. & Rep. 472, A/S.L.M.R. No. 1028 (1978). In Social Security Administration, the ALJ granted official time to a union representative for the representative's two-day appearance at an unfair labor practice proceeding. The Assistant Secretary noted that absent an exception filed by the agency, the ALJ's ruling would not be overturned. However, the Assistant Secretary added that under § 206.7(g) of his regulations, only necessary witnesses must be granted official time for participation in unfair labor practice hearings. 8 A/S.L.M.R. No. 1028 at 472 n.2.
33. Department of the Navy, 1 F.L.R.C. No. 72A-20 at 495.
34. Expressio unius est exclusio alterius is a maxim of statutory interpretation meaning that "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 521 (5th ed. 1979).
36. Id. at 874.
promoting the purposes of Executive Order 11,491. The parties, therefore, could agree to authorize official time for union representatives engaged in grievance discussions within the time limits of section 20.

In early 1976, the United States Dependents Schools, the European Area, and the Overseas Federation of Teachers negotiated an official time provision. The parties agreed that the union representative, a mathematics teacher, would be excused and placed on administrative leave for half of each day during the school year, and would be granted leave without pay for the other half of each day so that he could devote full time to labor-management activities. According to the provision, the teacher was to serve as the union representative for the entire three-year term of the agreement. He would receive half of his government salary for the period but would not be required to teach a single class during that time. The Army challenged the contract provision, contending that it violated the official time provisions of section 20.

The Overseas Federation of Teachers explained that the union representative needed the agreed upon amount of time for handling grievances, appeals, and complaints, attending meetings with management officials, and preparing union responses to agency directives. There were three military departments involved in the agreement and almost 1,000 bargaining unit members scattered over an area two and one-half times the size of the United States. Moreover, the unit members were subject to three to six levels of administrative control. Therefore, the union representative, while still technically a mathematics teacher, needed to spend all of his working hours on union management business in order to accomplish his task.

The Comptroller General asked the FLRC for its recommendations before rendering a decision. Consistent with its procedural rules, the FLRC solicited the Department of Defense's view. The

37. Id.
40. Id.
41. Id. at G-2.
42. Id.
Department of Defense found nothing illegal in the agreement since the contract authorized payment for only half of the actual time spent on negotiations. Furthermore, the Department of Defense found that the reasonableness of the provision was a matter for the parties to determine at the bargaining table. The FLRC determined that none of the activities listed by the Federation involved internal union activities. To the contrary, the FLRC found that all of the activities the union representative intended to pursue benefited both the agency and the labor organization, thus effectuating the purposes of Executive Order 11,491. For these reasons, both the Department of Defense and the FLRC recommended approval of the provision, asserting that it was for the parties to decide whether one person would devote all of his working time to representation matters or whether several employees would share the work.

Despite the recommendations, the Comptroller General ruled that an agreement permitting an employee to be away from his official governmental position for an extended period of time substantially interfered with agency functions and the performance of the representative's official duties. The Comptroller General concluded that no employee would be allowed to spend more than 160 hours per year engaged in representational activities; however, he did not explain how he arrived at a maximum of 160 hours. Recognizing that his decision would affect all existing labor agreements, the Comptroller General allowed a ninety-day transition period so that agencies and unions could make arrangements to comply with the decision.

This decision sparked so much controversy that one month later the Comptroller General announced that he had decided to suspend enforcement of the decision with regard to existing collec-

43. *Id.* at G-1.
44. *Id.* at G-2.
45. *Id.* at G-3. The Comptroller General stated:

[We are of the opinion that departments and agencies may only permit their employees to devote such time to the performance of representational duties as will not substantially interfere with the performance of the duties of their official positions. While it is impracticable to establish rigid guidelines governing the maximum amount of time that any individual employee may devote to representational duties, we believe that no employee should be allowed to spend more than 160 hours per year engaged in such activities.]

*Id.*
46. *Id.*
47. *Id.*
tive bargaining agreements until October 1, 1976.\textsuperscript{48} He advised, however, that a final decision would be applicable to any new contracts negotiated before October.\textsuperscript{49}

By September 15, 1976, the Comptroller General had retreated even further from his decision. He abandoned his proposed maximum of 160 hours of official time per year for union representatives.\textsuperscript{50} Using guidelines proposed by the Civil Service Commission, the Comptroller General declared that “[t]he amount of official time is to be determined by balancing the impact on employee performance and efficiency, effective conduct of the Government’s business, and rights of employees to be represented.”\textsuperscript{51}

Unfortunately, the decision failed to define what was meant by “employee performance and efficiency,” “effective conduct of the Government’s business,” or “rights of employees to be represented.” Further, the decision did not indicate how the agencies were to quantify these three factors to determine a reasonable amount of official time. However, the Comptroller General did suggest that the Civil Service Commission’s guidelines, scheduled to be published before October 1, 1976, be consulted.\textsuperscript{52} The Comptroller General allowed the agreement between the United States Dependents Schools, the European Area, and the Federation to be implemented “consistent with this decision and the Commission’s guidelines.”\textsuperscript{53} Apparently, an employee representative could spend all of his duty time on representation matters as long as the parties agreed that it was reasonable to do so.

B. \textit{Federal Personnel Manual Letter 711–120}

On October 14, 1976, the Civil Service Commission issued its guidelines for use of official time in Federal Personnel Manual Letter 711–120.\textsuperscript{54} Considered a landmark interpretation of sec-


\textsuperscript{49} \textit{Id.}


\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id. at A-8.}

\textsuperscript{53} \textit{Id.}

tion 20 of Executive Order 11,491, the Letter attempted to define "representational functions," established a list of criteria for agency managers to consider when authorizing a reasonable amount of official time, and mandated that agencies institute and maintain recordkeeping systems for official time used for representational functions.\textsuperscript{55} Although it was intended to clarify matters, the Letter served only to complicate the issues further due to its bureaucratic language. Fortunately, only the recordkeeping requirement remains in effect today.\textsuperscript{56}

The Commission's Letter first attempted to define with specificity the term "representational functions." According to the Commission, the term meant "those activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or the terms of a collective bargaining agreement."\textsuperscript{57} The Letter went on to state that the term included "activities undertaken by specific, individual designation [such as grievance administration] as well as those activities authorized by a general collective designation."\textsuperscript{58} Despite the attempt at specificity, the definition was laden with ambiguity. For instance, it was unclear whether mid-term negotiations, necessitated by changed circumstances, were included in the definition.

The Letter further stated that, when authorizing official time, agency heads or their designees should be satisfied that the use of official time was reasonable and mutually beneficial to the agency and its employees. The Letter then set forth the criteria to use when making determinations. First, usage of official time was to be consistent with applicable statutes, regulations, and executive orders. Second, the official time authorization had to comply with the time restrictions of section 20. Third, the agency was required to balance the effective conduct of the government's business against the employees' rights of representation.\textsuperscript{59} Furthermore, the agency was to consider a number of additional factors: (1) the agency's purpose and manner of functioning, (2) the dispersion and accessibility of the employees, (3) the number of employees represented, (4) the supervisory structure, (5) past experience concerning efficient use of official time, and (6) the impact of em-

\textsuperscript{55} Letter 711-120, supra note 54, at A-6, 7.
\textsuperscript{56} See infra note 320 and accompanying text.
\textsuperscript{57} Letter 711-120, supra note 54, at A-6.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
ployee involvement in the decisionmaking process on employee performance and efficiency as well as on the efficient administration of government. Although the Letter did not establish a fixed number of hours for official time, agencies had to ensure that amounts approved for employee representatives did not exceed what was necessary to perform representational functions. The Letter added, however, that under "no circumstances should the amount approved result in serious interference with the assigned responsibilities of the agency or activity or be unjustifiable in light of the benefits, including sound employee-management relations, to be derived." The Commission failed to define "serious interference" or "unjustifiable," which led to difficulties in enforcement.

The Commission then reviewed past agency experience with official time for representational functions as reflected in agency records, negotiated agreements, and grievance and arbitration decisions. It noted that the majority of contracts already in force authorized official time in terms of "reasonableness" rather than specific amounts of time. A statistical study showed that most federal employees engaged in representational activities spent twenty-five percent or less of their official time in such activities, while only a few spent more than fifty percent. Agency experience also revealed that in determining what was a reasonable amount of time, arbitrators tended to look at a number of factors, including: (1) the kind and extent of matter requiring representation, (2) past practice, (3) the degree of efficiency demonstrated in the use of official time, and (4) the cost-benefit ratio of providing alternative means of problem resolution.

Finally, the Letter required that agencies develop recordkeeping methods to account for all use of official time. Agencies were to use this information in evaluating the impact of authorized official time on agency operations and effective employee representa-

60. Id. at A-6, 7.
61. Id. at A-7.
62. Id.
63. Id.
64. Id. The statistics were quoted from a 1976 survey of Union Representational Provisions in Federal Labor Agreements. The survey was conducted by the Civil Service Commission's Office of Labor-Management Relations. USCSC/OLMR-76/11 (May 1976). It is important to note that the Commission seemed to offer this information for comparative purposes only and not to define a standard of "reasonableness."
Again, the Commission left specific terms such as "impact on agency operations" and "effective employee representation" undefined and, thus, incapable of evaluation by any quantifiable means.

II. OFFICIAL TIME PROBLEMS UNDER SECTION 20 OF EXECUTIVE ORDER 11,491: QUESTIONS OF CONTRACT INTERPRETATION

Under Executive Order 11,491, as amended, the use of official time for employee representational activities was a negotiable bargaining subject that could become a contractual right if agreed to by the parties, even though it was not a guaranteed right under the Order.\(^\text{67}\) Although the Civil Service Reform Act of 1978 subsequently established a statutory right to official time for representational activities,\(^\text{68}\) parties may still determine their official time policy by agreement. Although the following decisions arose under section 20 of Order 11,491, they illustrate contract interpretation problems which could affect parties which have chosen to alter the statutory right to official time.

In *Social Security Administration*, the American Federation of Government Employees, Local 1760, filed an unfair labor practice charge alleging that the agency had violated Executive Order 11,491 by refusing to grant official time to two union officers who had attended a meeting called by a representative of the Assistant Secretary.\(^\text{69}\) The purpose of the meeting was to discuss a representation petition filed by the agency in a separate proceeding.\(^\text{70}\) The Assistant Secretary held that the agency had no contractual obligation to grant official time to union officials who were not employees of the agency\(^\text{71}\) and, therefore, dismissed the complaint.\(^\text{72}\)

Many contractual provisions governing use of official time allowed union representatives a "reasonable" amount of time to

\(^{66}\) *Id.*


\(^{68}\) 5 U.S.C. § 7131(a) (1982); *see infra* note 95 and accompanying text.


\(^{70}\) *Id.* at 508.

\(^{71}\) *Id.* at 509. The union officials were employed by the Bureau of Retirement and Survivors Insurance, a component of the Social Security Administration. *Id.* at 510 n.7.

\(^{72}\) *Id.* at 510.
perform their representational duties.\textsuperscript{73} When ambiguity in the term "reasonable" led to an abuse of the privilege or to interference with work production, employers generally were upheld in their efforts to restrict the use of official time.\textsuperscript{74} In a case decided by the Federal Service Impasses Panel, for example, the employer and the union were told to adopt language in their next collective bargaining agreement limiting the use of official time by the union president to fifty percent of his monthly work schedule.\textsuperscript{75} Rejecting the assertion that such a restriction would infringe on the union's right to assign representatives to particular grievances, the Panel held that the fifty percent limit did not constitute improper interference with internal union affairs.\textsuperscript{76}

In a similar case, an employer temporarily assigned a union steward to a lower grade position because of the disproportionate time he spent on union activities.\textsuperscript{77} Testimony at the unfair labor practice hearing indicated that the steward was in a particularly demanding position, such that his frequent absence adversely affected the employer's efficiency.\textsuperscript{78} Moreover, the steward was qualified for the new position and did not suffer a pay reduction as a consequence of the transfer.\textsuperscript{79} Under these circumstances, the Assistant Secretary found that the employer's action did not constitute an unfair labor practice.\textsuperscript{80}

An employer, however, does not have free reign to impose restrictions on the use of official time while still negotiating with the union over the official time policy. In \textit{Warner Robins Air Logistics Center}, the Assistant Secretary held that an employer could not implement its last offer of a ten percent maximum on the use of official time if the parties had agreed to submit the issue to mediation.\textsuperscript{81} Unlike the private sector, parties in the public sector can-

\textsuperscript{73} See supra text accompanying notes 63–65.
\textsuperscript{74} See infra notes 75–80 and accompanying text.
\textsuperscript{76} Id.
\textsuperscript{79} Id. at 712.
\textsuperscript{80} Id. at 709. For a discussion of the dual role of the union representative in the context of a discriminatory discharge case and the peculiar problems associated with the use of official time, see Snow & Abramson, \textit{The Dual Role of the Union Steward: A Problem in Labor-Management Relations}, 33 SYRACUSE L. REV. 795, 816 (1982).
not resort to self-help after impasse if they have an agreement to mediate. Thus, even where an employer legitimately wants to curb abuse of the official time policy, it must abide by the rules of contract negotiation.

Likewise, an employer may not arbitrarily impose a maximum limit on the use of official time without first warning individual representatives that they have been taking an excessive amount of official time. The imposition of a limit on the excessive use of official time without prior warning is considered to be an unfair labor practice.

In two separate cases, the Assistant Secretary held that employers may demand that an employee representative strictly adhere to established procedures for use of official time. Such procedures may require that a representative obtain advance permission before taking official time. An employer may also require an employee representative to notify management personnel whenever leaving for union activities. In another case, the Assistant Secretary found that the unilateral imposition of rigid restrictions on the use of official time did not constitute a patent breach of the negotiated agreement. He implied that management’s interpretation was arguably within the terms of the negotiated agreement, thus the “interpretation would merely be a matter of contract interpretation, to be resolved through the parties’ grievance and arbitration machinery.”

Because the use of official time under Executive Order 11,491 was a matter of contractual agreement, many cases involving contract interpretation were resolved in the arbitration forum. Most
of these cases involved the employer imposing a limit on the use of official time. In one such case, an employer issued a memorandum restricting the use of official time to twenty-five percent of total worktime.89 Prior practice between the parties had allowed the union president as much time as needed, even up to 100% of worktime. The arbitrator found that management's denial of official time in excess of the twenty-five percent limit constituted a violation of the collective bargaining agreement as well as an alteration of past practice.90 He therefore ruled that the employer could not unilaterally impose a twenty-five percent limit on the use of official time.91

The foregoing cases represent typical contract interpretation problems arising under section 20 of Executive Order 11,491. With passage of the Civil Service Reform Act of 1978, however, the use of official time for representational activities became a statutory right. The statutory embodiment brought with it new controversies, many of which still persist. They could not be resolved merely by resorting to established rules of contract interpretation. Therefore, the law of federal labor relations under the Civil Service Reform Act has developed through the guidance of the Federal Labor Relations Authority (FLRA)92 and the federal circuit courts of appeals. Perhaps one of the most troublesome controversies arising from the Act was the travel and per diem expense question. The official time provisions did not address union reimbursement for such costs, generating the type of confusion that often accompanies legislative silence. A partial answer

89. Tooele Army Depot v. International Ass'n of Machinists and Aerospace Workers, Lodge No. 2261 (unpublished 1978) (St. Clair, Arb.).
90. Id. at 16.
91. Id. at 18; see also Bremerton Metal Trades Council v. Naval Undersea Warfare Eng'g Station (unpublished 1980) (Rudolph, Arb.) ("reasonable time" provision restricted to 10 hours per week constituted breach of collective bargaining agreement); Naval Ordnance Station v. International Ass'n of Machinists & Aerospace Workers, Lodge No. 830 (unpublished 1979) (Render, Arb.) (management's imposition of limitation of 20% per week upon union president's use of official time violated collective bargaining agreement).
But cf. Department of the Navy, Naval Weapons Station, Concord, Cal., 8 A/S.L.M.R. Dec. & Rep. 996, A/S.L.M.R. No. 1115 (1978) (management's assessment that annual leave time should not exceed 25% of duty time found to be reasonable interpretation of contract provision; Assistant Secretary emphasized that decision based on contract interpretation rather than breach with past practice).
92. In enacting the Civil Service Reform Act, Congress established the Federal Labor Relations Authority (FLRA) to assume the duties of the FLRC. Unlike its predecessor, the FLRA was deliberately set up as an autonomous body. No more than two of the Authority's three members may be affiliated with the same political party, and none may hold another position in the federal government except as otherwise provided by law. See 5 U.S.C. § 7104 (1982).
to this difficult question recently came from the United States Supreme Court in Bureau of Alcohol, Tobacco & Firearms v. FLRA.93 To understand the complexity of the travel and per diem expense issue as well as other questions that now cloud the concept of official time, it will be helpful to examine the Civil Service Reform Act and its interpretation by the FLRA before focusing on the sharp split among the circuit courts of appeals, the arguments the Supreme Court analyzed in Bureau of Alcohol, and subsequent reaction to the Court's decision.

III. THE SCOPE OF OFFICIAL TIME UNDER THE CIVIL SERVICE REFORM ACT OF 1978: THE TRAVEL AND PER DIEM EXPENSE CONTROVERSY

A. Roots of the Controversy

1. Section 7131

On October 13, 1978, President Carter signed the Civil Service Reform Act of 1978 into law.94 Title VII of the Act establishes the basic framework for labor-management relations in the federal sector, supplanting the battery of executive orders, Comptroller General opinions, and contractual interpretations which formerly controlled this area. One of the Act's most significant innovations is its concept of official time. Under section 7131, employee representatives are guaranteed 100% official or "duty" time whenever they are needed for collective bargaining negotiations.95 While section 7131 answers the fundamental question of whether union representatives are entitled to official time, it simultaneously raises many new questions.

As an initial matter, the strict prohibition against official time except by contractual agreement contained in the original version

95. Section 7131(a) provides:
   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. 5 U.S.C. § 7131(a) (1982).
of Executive Order 11,491 contrasts sharply with the allowance of 100% of official time in section 7131(a). The only restriction is that the number of union negotiators receiving official time cannot exceed the number of management negotiators. Section 7131(b) continues the prohibition against using official time for internal union business, while subsection (c) authorizes the FLRA to determine whether employees participating in FLRA proceedings should receive official time. The final subsection provides that parties may bargain for a "reasonable" amount of official time to cover those representational activities not addressed in the preceding subsections.

Not long after the statute's enactment, questions arose concerning the intended scope of section 7131(a). Specifically, the newly created FLRA had to determine whether section 7131(a) covered mid-term contract negotiations and whether it also allowed reimbursement to union representatives for their travel and per diem expenses. Pursuant to its authority under section 7105(a)(1) of the Act, the FLRA solicited public comment from interested persons. On December 19, 1979, the FLRA issued its

---

96. See supra note 24 and accompanying text.
97. See supra note 95.
98. Section 7131(b) provides: "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." 5 U.S.C. § 7131(b) (1982).
99. Section 7131(c) provides:

   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.

100. Section 7131(d) provides:

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

101. See supra note 92. Many observers see the FLRA as a great improvement over its management-oriented predecessor. See, e.g., Frazier, supra note 94, at 133-34.
102. Section 7105(a)(1) provides: "The Authority shall provide leadership in establishing policies and guidance relating to, matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter." 5 U.S.C. § 7105(a)(1) (1982). The FLRA also has authority to promulgate rules and regulations as necessary to carry out the provisions of the Act. 5 U.S.C. § 7134 (1982). In analyzing this dichotomy, the Ninth Circuit determined that the Interpretation and Guidance was issued as an interpretative policy guideline under § 7105 rather than under the rulemaking authority.
Interpretation and Guidance, addressing these two basic questions concerning section 7131(a) and also determining the effect of the savings clause of section 7135(a)(1) on existing collective bargaining agreements.

2. The FLRA's Interpretation and Guidance

Relying on legislative history and the implicit congressional intent underlying Title VII of the Act, the FLRA concluded: (1) that section 7131(a) encompasses all negotiations between an exclusive representative and an agency, regardless of whether the negotiations occur during the term of the contract; (2) that employee representatives on official time are entitled to payment from their agencies for travel and per diem expenses; and (3) that provisions in existing collective bargaining agreements which are more restrictive than the official time policy of section 7131 may be renewed if both parties agree, or may be superseded by section 7135(a)(1) if either party objects to continuation of the contractual provision.

In concluding that section 7131(a) applied to mid-term negotiations, the FLRA looked first at explicit language in the statute which provides that an employee representative must be given of...
ficial time when representing a union in negotiating a "collective bargaining agreement." 108

Relying on statutory definitions, 109 the FLRA concluded that "collective bargaining agreement" means any agreement entered into as a result of the parties' good faith bargaining about employment conditions. 110 Thus, it determined that Congress must have intended the official time provision to apply to all contract negotiations, even those occurring in mid-contract. 111

To buttress its conclusion, the FLRA found support in the legislative history of section 7131(a). The Authority noted that Congress rejected language proposed in the Senate's version of the section 112 that would have continued the restrictive official time policy of section 20 of Executive Order 11,491. 113 Moreover, Congress rejected a Senate Committee suggestion that official time be limited to negotiation of a basic collective bargaining agreement, prohibiting official time for "negotiations which arise out of circumstances during the term of the basic agreement." 114 To the contrary, Congress adopted language identical to that in the House version of section 7131(a) which did not indicate an intent to limit the use of official time to the negotiation of basic collective bargaining agreements. 115 By rejecting the Senate Committee Report and proposed language in the Senate Bill, the FLRA reasoned that Congress must have intended to remove previous restrictions on the use of official time. 116

108. 2 F.L.R.A. No. 31 at 265-68.
109. Section 7103(a)(8) defines "collective bargaining agreement" as follows: "[C]ollective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter." 5 U.S.C. § 7103(a)(8) (1982).
Section 7103(a)(12) defines "collective bargaining" as follows: "[C]ollective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession.

110. 2 F.L.R.A. No. 31 at 267.
111. Id.
113. 2 F.L.R.A. No. 31 at 267. Section 7232 of Senate Bill 2640 was identical to the language of § 20 of Executive Order 11,491 as amended. See supra note 26.
115. 2 F.L.R.A. No. 31 at 267; see H. R. 11280, 95th Cong., 2d Sess. § 7132(a) (1978).
116. 2 F.L.R.A. No. 31 at 267-68.
Using a broad public policy analysis, the FLRA concluded by noting Congress' recognition in section 7131(a) that "labor organizations and collective bargaining in the civil service are in the public interest."\(^\text{117}\) Therefore, the Authority found that a liberal interpretation of section 7131(a), allowing official time for midterm negotiations, was necessary to achieve the legislatively declared goal of effective union representation.\(^\text{118}\) As the FLRA interpreted it, effective union representation could be realized only by equalizing the position of union negotiators with that traditionally held by government negotiators.\(^\text{119}\) This equalization argument became the cornerstone of the FLRA's analytical framework justifying its decision to allow employee representatives to recoup travel and per diem expenses.

The most controversial aspect of the Interpretation, the travel and per diem expense ruling, found support in three separate arguments. Initially, the FLRA considered the statutory language and legislative history. Conceding that neither expressly allowed payment of travel and per diem expenses,\(^\text{120}\) the FLRA noted that Congress, nevertheless, believed that "collective bargaining 'contributes to the effective conduct of public business' and that 'collective bargaining in the civil service [is] in the public interest.'"\(^\text{121}\) Hence, the FLRA concluded that union representatives engaged in negotiating a collective bargaining agreement were "clearly engaged in 'official business' for the Government" and, therefore, were entitled to per diem and travel expenses under 5 U.S.C. § 5702(a).\(^\text{122}\)

\(^{117}\) Id.
\(^{118}\) Id.
\(^{119}\) Id. The FLRA further noted that under § 7114(b) of the Act, parties had an obligation "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations. Id. at 268; see 5 U.S.C. § 7114(b)(3) (1982). To fulfill this obligation, parties would have to be given official time for all negotiations relating to employment conditions, not just negotiations for a basic agreement. 2 F.L.R.A. No. 31 at 268.

\(^{120}\) 2 F.L.R.A. No. 31 at 269. While conceding the lack of direct support in the legislative history, the FLRA argued in a footnote that under Executive Order 11,491 it was clear that travel expenditures were not authorized for union representatives engaged in negotiation activities. By expressly rejecting the Senate Bill which would have retained the language of § 20 as well as its recognized interpretation, Congress must have intended to change the policy toward travel and per diem expenses implicitly while changing official time policy expressly. 2 F.L.R.A. No. 31 at 269 n.6.

\(^{121}\) Id. at 269 (quoting 5 U.S.C. § 7101(a) (1982)).

\(^{122}\) Section 5702(a) provides in pertinent part: "Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance." 5 U.S.C. § 5702(a) (1982).
Positing an equalization theory, the FLRA next argued that because management negotiators were uniformly compensated for their travel and per diem expenses, union negotiators were entitled to the same benefit. As evidence of a congressional intent to equalize union and management bargaining positions, the FLRA quoted from Representative Clay's discussion of the House version of section 7131(b): "[Labor] organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." According to the Authority, payment of per diem and travel expenses "would not only more nearly equate the status of union and management negotiators . . . but also would facilitate more effective union representation," accomplishing the stated purpose of the statute. As a postscript, the FLRA noted that it had previously interpreted the concept of official time in section 7131(c) to include an authorization for travel and per diem expenses; it could find no persuasive reason for interpreting the analogous language of section 7131(a) differently.

For these reasons, the FLRA concluded that union negotiators were entitled to travel and per diem expenses. This deceptively simple conclusion has had an enormous impact on labor-management relations in the federal sector. Prior to 1978, union negotiators received as much as fifty percent of official time and, then, only if it had been provided for in the collective bargaining agreement. Further, a series of Comptroller General opinions in 1965 and 1966 emphasized that even if official time were authorized, union representatives generally were not entitled to travel and per diem expenses because collective bargaining benefited only the union and not the federal government. With passage

123. 2 F.L.R.A. No. 31 at 270.
124. Id. (emphasis added by FLRA).
125. Id.
126. Id. The Supreme Court dismissed as insignificant the fact that the FLRA construed two similar provisions of the Act consistently. Bureau of Alcohol, 104 S. Ct. at 445 n.9.
127. 2 F.L.R.A. No. 31 at 270.
128. Id.
129. See supra note 26 and accompanying text.
130. See 44 Comp. Gen. 617 (1965); 45 Comp. Gen. 454 (1966). Later in 1966, the Comptroller General retreated somewhat from his position, adopting Civil Service Commission guidelines regarding travel and per diem expense reimbursement for employee representatives. See 46 Comp. Gen. 21 (1966). Under these guidelines, representatives were generally not entitled to reimbursement for attending negotiations, but could receive reimbursement if the agency head certified that the representative's travel was primarily in the government's interest. Id. at 21–22.
of the Civil Service Reform Act of 1978 and issuance of the FLRA's *Interpretation* in 1979, union negotiators had a right not only to 100% of official time regardless of the contract, but also to reimbursement for their travel and per diem expenses. As a result, the balance of power in federal labor negotiations was dramatically adjusted.

In a recent study on negotiability in the federal sector, one writer specifically noted two significant aspects of the FLRA's *Interpretation* in assessing the impact it has had on agency management and federal employee unions.\(^1\) First, while private sector unions frequently reimburse their negotiators for lost pay and expenses, this is not economically feasible in the federal sector because the predominant voluntary union membership system does not generate sufficient dues income. "From this perspective, the authority's decision may be viewed as constituting implicit recognition that the trade-off for voluntary unionism is the requirement that an agency share an increased proportion of the union's collective bargaining expenses."\(^2\)

Second, under Executive Order 11,491, agencies and unions often conducted negotiations in Washington, D.C., necessitating considerable transportation expense for unions. The resulting financial pressure on unions allowed agencies to employ tactics designed to subvert the negotiation process, eventually encouraging union negotiators to yield to agency demands.\(^3\) The fact that the *Interpretation* required agencies to pay 100% of official time as well as travel and per diem expenses both to management and union negotiators, theoretically provided a greater incentive to reach a quick settlement.\(^4\) Moreover, for agency-wide unions with members scattered over an entire region or the entire country, the FLRA ruling allowed their limited financial resources to be used for activities such as grievance investigation and arbitration. Without federal reimbursement for travel expenses, these unions were forced to exhaust their resources to pay the transportation costs of negotiation.\(^5\)

From a management perspective, the economic impact of the FLRA's *Interpretation* was virtually incalculable. It certainly increased negotiation costs, which ultimately were borne by the tax-

---

2. Id. at 173-74.
3. Id. at 174.
4. Id.
5. Id.
paying public. One Office of Personnel Management (OPM) official observed in 1980 that preliminary cost estimates from only fifteen federal agencies indicated that the cost for union travel and per diem expenses would be in excess of $2,000,000 per year.\(^{136}\) The bill for union expenses in negotiating the 1980 contract for 75,000 Social Security Administration employees totaled $1,100,000.\(^{137}\)

Given the enormous advantage realized by federal employee unions and the huge cost to be absorbed by federal agencies, it is no wonder that OPM vigorously protested the FLRA ruling. However, rather than appealing through administrative channels as required by the Act,\(^{138}\) OPM asked federal agencies to challenge the ruling on a case-by-case basis by refusing to honor requests for official time and travel and per diem expenses.\(^{139}\) This approach forced unions to sue noncomplying agencies to obtain reimbursement for expenses.

In every unfair labor practice charge brought against an agency for failure to pay travel and per diem expenses under section 7131(a), the FLRA found merit in the charge and ordered the agency to pay.\(^{140}\) However, the FLRA’s Interpretation was not as


139. See United States Dep’t of Agriculture v. FLRA, 691 F.2d 1242, 1251 (8th Cir. 1982) (Heaney, J., dissenting), cert. denied, 104 S. Ct. 523 (1983).

successful in the federal courts. Of the four circuit courts addressing the issue, only one upheld the FLRA’s decision. On November 29, 1983, the Supreme Court resolved the circuit conflict by holding that the FLRA lacked the power to require that federal agencies reimburse union negotiators for their travel and per diem expenses. The Court declared the FLRA’s construction of section 7131(a) in its Interpretation unenforceable since such a policy decision is “properly made by Congress.” However, the Court did more than merely dispose of the question regarding the deference owed an agency such as the FLRA—it examined the history of official time, more specifically the history of travel and per diem expenses, before deciding that they are not contemplated by section 7131.

A look at the varying positions adopted by the circuit courts of appeals addressing the travel and per diem issue prior to Bureau of Alcohol illustrates the complexity inherent in the controversy. Since the statute and legislative history were silent regarding travel and per diem expenses, the problem facing the reviewing courts was a familiar one: how to divine congressional intent. Prior to Bureau of Alcohol, only the Ninth Circuit permitted reimbursement; but of the other three circuits addressing the issue only one ruled unanimously against it.

B. Split Among the Circuits: Choosing Sides

1. The Bureau of Alcohol Case

The Bureau of Alcohol case began as one of the first challenges to the FLRA’s Interpretation. In early 1980, the National
Treasury Employees Union requested a meeting with Bureau of Alcohol, Tobacco & Firearms officials to negotiate the proposed relocation of an agency office. The existing collective bargaining agreement between the parties provided for quarterly meetings for which union representatives were granted official time. The agency refused to classify the requested relocation meeting as one covered by the collective bargaining agreement and, therefore, refused the union's request for official time. Subsequently, the union filed an unfair labor practice charge seeking official time as well as travel and per diem expenses for the meeting. Relying on the recently issued Interpretation, the administrative law judge determined that the agency violated section 7116(a)(1) and (a)(8) of the Act by refusing to grant official time and expenses. The FLRA affirmed the findings of the administrative law judge and ordered payment by the agency.

The agency sought review of the FLRA's decision and the FLRA cross-petitioned for enforcement of its order requiring the agency to pay official time and expenses. Under section 7123 of the Act, review of an FLRA decision must be on the record and the decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." The Ninth Circuit noted at the outset, however, that the validity of the

144. 672 F.2d at 734.
145. Id.
146. Id. at 734-35.
147. Section 7116 of the Act sets forth the kinds of misconduct which constitute an unfair labor practice. Failure to pay official time and travel and per diem expenses has been held by the FLRA to violate § 7116(a)(1) and (a)(8). See infra text accompanying notes 275-77. These subsections provide:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

148. 672 F.2d at 735.
150. As with decisions of the National Labor Relations Board in the private sector, the federal courts of appeals have appellate jurisdiction over decisions of the FLRA. 29 U.S.C. § 160(i) (1976) (NLRB review); 5 U.S.C. § 7123(a) (1982) (FLRA review).
151. 672 F.2d at 735.
152. Section 7123(c) provides that the standard of review upon appeal of an FLRA decision shall be reflected in the record in accordance with § 706 of the Administrative Procedure Act, 5 U.S.C. § 706 (1982).
FLRA's decision depended on the validity of the Interpretation. Thus, the court focused on it exclusively.

One of the pivotal issues in each of the appeals involving official time was the degree of deference to be accorded the Interpretation. The Ninth Circuit began its analysis by noting that while section 7134 of the Act grants authority for the FLRA to promulgate rules and regulations, the Interpretation was issued pursuant to section 7105(a)(1) which allows the FLRA to provide policy guidelines for the interpretation and implementation of Title VII of the Act. "As an interpretative rule, therefore, it may be accorded less weight than rules issued pursuant to the delegated rulemaking authority of Congress." The court, nevertheless, determined that the Interpretation would be upheld if it was "reasoned and supportable." This conclusion is a significant factor which distinguishes the Ninth Circuit's decision from those of the Second, Eighth, and Eleventh Circuits. Once the Ninth Circuit determined the proper standard of review, its conclusion that the Interpretation comported with the standard was virtually inevitable.

Although the central issue confronting the Supreme Court in Bureau of Alcohol was the travel and per diem expense question, the lower court case also involved a challenge of the FLRA's conclusion that mid-term negotiations are included in the statutory authorization for official time under section 7131(a). The Ninth Circuit followed the FLRA's analysis in the Interpretation, concluding that Congress intended to include mid-term negotiations within its authorization of official time. Looking to the statutory language of Title VII, the court noted the statutory definition of "collective bargaining" and the obligation of the parties to "meet as frequently as may be necessary" to fulfill their statutory duty to negotiate in good faith. The court found that "collective bar-

---

154. 672 F.2d at 735.
155. Id.
156. Id. (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976)).
157. 672 F.2d at 735. The court stated that "[i]f an agency's construction of a statute is reasonably defensible, it should not be rejected simply because a court might prefer another view." Id. The Ninth Circuit relied on this standard to find the FLRA's Interpretation "reasonably defensible," even though the agency's arguments had some merit.
158. Division of Military & Naval Affairs v. FLRA, 683 F.2d 45 (2d Cir. 1982); United States Dept. of Agriculture v. FLRA, 691 F.2d 1242 (8th Cir. 1982); Florida Nat'l Guard v. FLRA, 699 F.2d 1082 (11th Cir. 1982).
159. Bureau of Alcohol, 672 F.2d at 736.
160. See supra note 109.
161. 672 F.2d at 736.
gaining" was defined by Congress to include all situations in which parties meet "with the objective of conducting good faith negotiations concerning conditions of employment." Given the maxim of statutory construction that whenever the same phrase is used in different parts of a statute it is presumed to be used in the same sense throughout, the court concluded that Congress did not intend the authorization of official time to be limited only to the negotiation of basic agreements.

Focusing next on the legislative history of Title VII, the court concluded that official time for mid-term negotiations was permissible. It accordingly dismissed the agency's contention that section 7131(a)'s silence regarding mid-term negotiations meant that Congress intended to preserve earlier restrictions. Rather, the Ninth Circuit stated that had Congress wanted to restrict the use of official time for mid-term negotiations, it would have done so in precise language. Moreover, the court agreed with the FLRA that an authorization of official time for all negotiations is consistent with the congressional finding that collective bargaining is in the public interest.

Having laid the foundation for the interpretation of congressional intent, the court addressed the travel and per diem expense issue. Once again, the court followed arguments set forth by the FLRA in its Interpretation. Noting the similarity of the language in section 7131(a) and (c) of the Act, the court found it reasonable to conclude that both subsections should be given the same construction with respect to the availability of travel and per diem expenses.

The court found that collective bargaining "in the federal service is in the public interest." Hence, the FLRA correctly concluded that union negotiators on official time were similar to other government employees conducting business for the government and, therefore, were entitled to reimbursement under 5 U.S.C. § 5702.

Moreover, the Ninth Circuit noted that Congress' finding that collective bargaining is in the public interest supports the FLRA's

162. Id.
163. Id.
164. Id. at 737.
165. Id.
166. Id.
167. Id.
168. Id.
effort to equalize the bargaining status of the negotiating parties and that reimbursement undoubtedly lessens management’s financial advantage. The court also rejected the notion that the Interpretation would impair the willingness of union negotiators to bargain, noting that it “yields no more advantage to labor negotiators than that formerly possessed by management negotiators.”\textsuperscript{169} The court concluded that “the FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment.”\textsuperscript{170}

2. The Approach of the Second, Eighth, and Eleventh Circuits

A key difference between the Ninth Circuit’s opinion in \textit{Bureau of Alcohol} and the opinions of the Second, Eighth, and Eleventh Circuits is the degree of deference given the FLRA’s Interpretation.\textsuperscript{171} The Ninth Circuit viewed the FLRA’s discussion of “official business” under 5 U.S.C. § 5702 as merely incidental to its analysis of the intended scope of section 7131(a).\textsuperscript{172} The Second,\textsuperscript{173} Eighth,\textsuperscript{174} and Eleventh\textsuperscript{175} Circuits, on the other hand, found that the FLRA was clearly beyond its area of expertise in equating “collective bargaining in the public interest” with “official business for the government.” Further, they noted that an agency owes no great deference to another agency’s interpretation of a statute.\textsuperscript{176} Thus, these circuits accorded a lesser degree of deference to the FLRA’s decision than that given by the Ninth Circuit, at least with respect to the FLRA’s conclusion that union negotiators involved in contract negotiation were on “official business.”\textsuperscript{177}

Having established that the FLRA Interpretation deserved neither blind acceptance nor outright rejection, each court pro-

\textsuperscript{169} Id. at 738.
\textsuperscript{170} Id.
\textsuperscript{171} See infra notes 176–94 and accompanying text.
\textsuperscript{172} \textit{Bureau of Alcohol}, 672 F.2d at 737–38.
\textsuperscript{173} Division of Military & Naval Affairs v. FLRA, 683 F.2d 45, 48 (2d Cir. 1982).
\textsuperscript{174} United States Dep’t of Agriculture v. FLRA, 691 F.2d 1242, 1247 (8th Cir. 1982).
\textsuperscript{175} Florida Nat’l Guard v. FLRA, 699 F.2d 1082, 1085 (11th Cir. 1982).
\textsuperscript{176} Division of Military & Naval Affairs, 683 F.2d at 48; Department of Agriculture, 691 F.2d at 1246–47; Florida Nat’l Guard, 699 F.2d at 1085.
\textsuperscript{177} The Eleventh Circuit stated that the FLRA’s decision should be accorded only the “deference and respect that its internal logic and thoroughness warrant.” \textit{Florida Nat’l Guard}, 699 F.2d at 1085. The court further noted that even if the Ninth Circuit were correct in applying a “reasoned and supportable” standard, the FLRA’s Interpretation still would not pass muster. Id. at 1085 n.8.
ceeded to attack the FLRA's construction of congressional intent and statutory language. The Second Circuit in *Division of Military & Naval Affairs* stated that the FLRA could not cite any legislative history to support its conclusion that collective bargaining on official time is also "official business." Further, the FLRA's reliance on the congressional finding that collective bargaining is in the public interest was, in the court's view, unfounded. A judicious reading of the legislative history would have indicated that Congress found the "statutory protection of collective bargaining furthers the public interest." Thus, the Second Circuit remained unpersuaded by the FLRA's theory.

The court concluded by comparing the FLRA's ruling to experience in the private sector under NLRB decisions. It noted that payment of union negotiators' travel and per diem expenses is an extraordinary remedy which the NLRB uses only when an employer fails to bargain in good faith. Given the underlying rationale that one universal purpose of collecting union dues is to finance activities such as contract negotiation, and given the absence of a mandate to that effect, the Second Circuit could find no justification for imposing such an "unusual burden" on the government.

Similarly, the Eighth Circuit in *Department of Agriculture* challenged the FLRA's "official business" argument by noting that the *Interpretation* ignores the crucial difference between "the interest of the public at large and the interest of the Government as employer." The Eighth Circuit maintained that the two terms are quite different. While furthering the public interest by their involvement in the collective bargaining process, union negotiators were not necessarily furthering the interest of the government. The court suggested that, carried to its extreme, the FLRA's argument would mean that labor organizations should be funded by the government because they also were in the "public

---

178. 683 F.2d at 48.
179. *Id.*
180. *Id.* (emphasis in original). The court correctly noted that Congress did not grant a blanket endorsement to collective bargaining, but rather mirrored the endorsement found in Executive Order 11,491.
181. *Id.*
182. *Id.* at 49.
183. 691 F.2d at 1248. The distinction is between "interest of the public" as delineated in § 7101 and "official business for government" as set forth in 5 U.S.C. § 5702. *Id.* at n.11.
184. *Id.* at 1248.
Moreover, the court determined that Congress did not explicitly reject Executive Order 11,491's limitations on official time, thus suggesting an acceptance of prior practice.\textsuperscript{186}

The Eighth Circuit also rejected the FLRA's equalization theory. While an argument exists that Congress intended to equalize the positions of labor and management with respect to official time, the court found no such intent regarding per diem and travel expenses.\textsuperscript{187} It further dismissed any contention that refusing to allow unions reimbursement for expenses would lead to management abuse of the collective bargaining process since both parties are statutorily bound to bargain in good faith. The court highlighted that the Act itself creates inequities between labor and management.\textsuperscript{188} Finally, the court curtly rejected the FLRA's argument based on section 7131(c) by noting that no court ever had approved the Authority's construction of that subsection. Consequently, the court deemed any attempt to analogize 7131(c) to section 7131(a) inappropriate.\textsuperscript{189}

The Second and Eighth Circuit rejections of the FLRA's arguments were echoed by the Eleventh Circuit in \textit{Florida National Guard}. It reasoned that neither a finding that collective bargaining is in the public interest nor an intent to equalize the bargaining status of labor and management sufficiently supports the proposition that Congress intended the government to assume the full financial burden of negotiation.\textsuperscript{190} The Eleventh Circuit further argued that congressional silence indicated acceptance of past practice since the legislature presumptively knows the existing executive and judicial viewpoints.\textsuperscript{191} To explain any apparent inequity in allowing official time while denying expenses, the court reiterated the Eighth Circuit's argument that union dues are collected for the purpose of financing negotiation. Thus, governmental financing of the union's entire financial burden would result "in inequality—not equality."\textsuperscript{192}

Underlying each of these opinions was a deep-seated eco-

\textsuperscript{185} \textit{Id.} at n.12.
\textsuperscript{186} \textit{Id.} at 1248-49.
\textsuperscript{187} \textit{Id.} at 1249-50.
\textsuperscript{188} \textit{Id.} at 1250.
\textsuperscript{189} \textit{Id.} at n.18.
\textsuperscript{190} 699 F.2d at 1087.
\textsuperscript{191} \textit{Id.}
\textsuperscript{192} \textit{Id.; see also id.} at 1087-88 n.11 ("If the Authority's position prevailed, the Federal Government would be the only federally regulated employer required to pay the travel and per diem expenses incurred by union negotiators.").
nomic concern. The courts suggested that a broad policy statement indicating collective bargaining was in the public interest was “too thin a reed” to support a ruling which would require a federal expenditure of millions of dollars.\footnote{Division of Military & Naval Affairs, 683 F.2d at 48 (2d Cir. 1982) (citing Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 19 (1980)).} The Eighth Circuit summarized this consideration when it declared:

The FLRA’s Interpretation assumes that Congress authorized additional expenditures to cover travel expenses and per diem without making even an oblique reference to that effect. Because we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for these expenses.\footnote{Department of Agriculture, 691 F.2d at 1247.}

To all three courts, the price tag on the FLRA’s ruling was simply unaffordable in an era of congressional budget slashing. The courts, therefore, were unwilling to interpret between the lines to find a congressional intent supporting such a potentially enormous expenditure. This argument perhaps proved to be far more persuasive than any of the legal arguments offered for or against the Interpretation.

While the Eleventh Circuit’s opinion was unanimous, there were strong dissents in each of the other two cases. In Division of Military & Naval Affairs, Judge Oakes argued that the majority mischaracterized the FLRA’s Interpretation when it suggested that the FLRA improperly construed a statute outside its area of expertise.\footnote{The dissent pointed out that the General Services Administration, not the FLRA, should construe 5 U.S.C. § 5702(a). Division of Military & Naval Affairs, 683 F.2d at 49 (Oakes, J., dissenting).} Further, the dissent noted that the FLRA’s construction of “official business” under section 5702(a) was only incidental to its primary decision regarding section 7131(a).\footnote{Id.} Consequently, Judge Oakes found that the FLRA’s decision was “reasonably defensible” and should have been upheld.\footnote{Id.}

\footnote{Oakes emphasized that of the FLRA’s eight-page Interpretation, only one small paragraph refers to “official business” under 5 U.S.C. § 5702. Id. at 50. The full paragraph on the fifth page of the Interpretation, 2 F.L.R.A. at 269, reads:

Neither the Statute, nor its legislative history expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities. However, it is well established that such expenses are authorized when an employee “is engaged on official business for the Government.” (Chapter 57, Subchapter I—Travel and Subsistence Expenses; Mileage Allowances, 5 U.S.C. § 5701, et seq.) As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining “contributes to the effective
Judge Oakes also found that, while the majority presented some valid arguments, the FLRA’s decision was defensible; thus, the court had an obligation to uphold it. He relied on what he perceived to be a “complete reversal of past practice regarding official time” to support a departure from past practice regarding travel and per diem expenses. The specific finding that collective bargaining was in the public interest further supported the conclusion that, unlike negotiators under the executive order era, labor negotiators under Title VII are engaged in official government business.

In Department of Agriculture, Judge Heaney issued a sharp, two-pronged attack on the majority’s analysis. Unlike Judge Oakes, Judge Heaney argued that the court lacked jurisdiction to hear the agency’s complaint. Specifically, he contended that, because the FLRA’s Interpretation was issued only after public comment in accordance with section 7105 of the Act, an aggrieved party must have sought judicial review under the procedures detailed in the Act and, in any event, must have done so within sixty days. The challenging agency, the United States Department of Agriculture, was one of the agencies which submitted comments objecting to payment of travel and per diem expenses prior to issuance of the Interpretation. The dissent asserted that if the Agriculture Department had been dissatisfied with the FLRA’s decision, its proper recourse would have been to seek direct judicial review of that decision. Instead, the Department of Agriculture, along with other federal agencies, chose a “circuit-by-circuit attack” on the decision, an approach characterized by Judge Heaney as “nonsense,” resulting only in “confusion, contradictory rulings, and a tremendous waste of judicial resources.”

---

683 F.2d at 50 n.2. Judge Oakes concluded from this that a strong argument can be made that the FLRA first determined whether union representatives were entitled to travel and per diem expenses under § 7131(a) and only then concluded that these employees were on “official business” within the meaning of § 5701. Id.
198. 683 F.2d at 50.
199. Id.
200. 691 F.2d at 1250 (Heaney, J., dissenting); see 5 U.S.C. § 7123(a) (1982).
201. 691 F.2d at 1250-51.
202. Id. at 1251.
Judge Heaney also attacked the merits of the majority's decision, noting that: "In my view, regardless of whether one likes the idea of paying travel expenses of federal employees to negotiate with their employer, it seems clear that the FLRA has the authority to make such a determination and its determination is a reasonable one under the circumstances." The circumstances of this case were, in Judge Heaney's view, controlled by an inconsistent past practice regarding both official time and travel and per diem expenses. Thus, he reasoned that the failure of Congress to comment on travel and per diem expenses could not be construed as acceptance of some nebulous past prohibition. Rather, the question was one for the FLRA to decide subject to reversal "only if its determination is unreasonable." Judge Heaney concluded that the FLRA Interpretation was reasonable and that the majority, by reaching a contrary conclusion, improperly interfered with the legitimate policy determination of the FLRA.

In Bureau of Alcohol, Tobacco & Firearms, the Supreme Court failed to address Judge Heaney's contention that the agency's appeal was time-barred and, therefore, should have been dismissed for lack of jurisdiction. While Judge Heaney's point was not raised in either the Ninth Circuit or Supreme Court, it has considerable merit. It is true that under section 7123, an aggrieved party has sixty days within which to appeal a final order of the FLRA. Moreover, while Title VII does not define "final order," under the Administrative Procedure Act "order" refers to a "final disposition . . . declaratory in form." Thus, Judge Heaney appears correct in asserting that the Interpretation was a final order from which an appeal could have been taken. If the Bureau of Alcohol, Tobacco & Firearms had submitted comments to the FLRA prior to issuance of the Interpretation, then, as an aggrieved party, it would have been entitled to appeal the FLRA's decision. However, the circuit-by-circuit attack approach taken

203. Id.
204. Id.
205. Id. at 1252. Judge Heaney took issue with the majority's conclusion, asking: "Where the prior practice is as inconsistent as it was here . . . can it truly be known which prior practice Congress intended to reaffirm by its silence?" Id.
206. Id.
207. Id.
209. 5 U.S.C. § 551(6) (1982); see also Department of Agriculture, 691 F.2d at 1250 n.1.
210. The Bureau of Alcohol, Tobacco & Firearms is a division of the Department of
by federal agencies did little more than waste judicial resources and generate confusion.

C. The Supreme Court's View of Travel and Per Diem Expense Reimbursement

In Bureau of Alcohol, Tobacco & Firearms v. FLRA, the Supreme Court apparently resolved any question concerning travel and per diem expenses. Justice Brennan, writing for a unanimous Court, rejected the FLRA's construction of the official time provisions in 5 U.S.C. § 7131 and reversed the Ninth Circuit, holding that federal agencies are not required to reimburse union negotiators for their travel and per diem costs.

At the outset, the Court considered the degree of deference to be accorded the FLRA Interpretation. On the one hand, the Court recognized that the "Authority is entitled to considerable deference when it exercises its 'special function of applying the general provisions of the Act to the complexities' of federal labor relations." However, this proposition was countervailed by the notion that such administrative decisions are enforceable only to the extent they do not trammel on the policymaking sphere of Congress. Since the disposition of the case required an interpretation of the Civil Service Reform Act, and ultimately a determination of the FLRA's power to establish official time policies consistent with it, the importance of the deference issue cannot be overstated.

Yet by setting the parameters so broadly, the Court subtly circumvented the deference issue. It failed to define the weight owed an FLRA Interpretation, opting instead to consider portions of the Civil Service Reform Act as construed by the agency. As a result, Justice Brennan was compelled to ascertain congressional intent in the face of silence both in the Act and its legislative history. In the course of this analysis, the Court shifted still further from

the Treasury. Judge Heaney's dissent does not indicate whether this agency was one that filed comments prior to issuance of the Interpretation; however, its vigorous opposition to the Interpretation and the persistence of the National Treasury Employees Union make it likely that the agency made its position known prior to the Interpretation.

212. Id. at 441.
213. Id. at 444.
214. Id.
215. The Court noted that this case presented the first opportunity to review an FLRA interpretation of the Act. Id.
the deference issue, ultimately deciding the case by determining the FLRA's power to act where the statute is silent.

Turning first to the status of federal labor relations pre-1978, the Court reviewed official time policies under Executive Orders 10,988, 11,491, and 11,616. It highlighted the early limitations on official time, the subsequent proscription under Executive Order 11,491, and the narrow authorization granted by Executive Order 11,616. Next, the Court addressed the FLRA's argument in support of travel and per diem reimbursement by turning to the Act.

Justice Brennan found that the model of federal labor relations advanced by the FLRA had no support in the legislation. In fact, he declared that to the extent the Act was intended to foster more efficient government, principles of the executive order regime controlled. This finding enabled the Court to rely largely on federal labor policies in effect before 1978 to interpret relevant sections of the Civil Service Reform Act. Applying these tenets, the Court declared that labor-management relations in the federal sector "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." Accordingly, the Court asserted that economic inequalities are inherent in the federal collective bargaining model, and any attempt by the FLRA to equalize the economic positions of labor and management was improper. Such an action, the Court declared, constitutes an outright usurpation of Congress' policymaking power and cannot be tolerated.

D. A Critical Look At Judicial Treatment of the Interpretation

To a large extent, the outcome of the Bureau of Alcohol case depended on the degree of deference accorded the FLRA's Interpretation. In refusing to grant it the degree of deference normally reserved for FLRA decisions, the Second, Eighth, and Eleventh

216. Id. at 445-46; see supra notes 15-66 and accompanying text.
217. 104 S. Ct. at 445-46.
218. Id. at 446-49.
219. Id. at 447. The Court found the congressional declaration that collective bargaining contributes to efficient government to be rooted in executive order principles. The codification of the basic labor framework established by President Kennedy, although not absolutely limiting, certainly established the guidelines for the FLRA, according to Justice Brennan. Id.
220. Id. at 449 (quoting NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960)).
221. 104 S. Ct. at 449.
222. Id. at 450.
Circuits observed that the FLRA relied on a statute outside its area of expertise. However, this relatively weak argument did not sway the Supreme Court. The FLRA's contention that union negotiators participating in collective bargaining engage in official business for the government was a central part of its argument supporting the decision to grant travel and per diem expenses. Importantly, the focus of the FLRA's argument was not on what was meant by "official business" in the context of 5 U.S.C. § 5702(a), but rather on the legislative intent underlying section 7131(a), a statute within its area of expertise. In other words, the issue considered by the FLRA was whether Congress considered collective bargaining to be "official business" when it passed Title VII, not whether Congress had collective bargaining in mind when it enacted section 5702. Thus, the Ninth Circuit and the dissenting judges of the other circuits had a more persuasive argument when they declared the FLRA's discussion of section 5702 to be merely incidental to, rather than dispositive of, its interpretation of section 7131.

While a lesser degree of deference is warranted because the Interpretation was issued as an interpretative rule, it probably should be accorded a greater degree of deference than that given by the Second, Eighth, and Eleventh Circuits. However, for all practical purposes, the issue escaped consideration by the Supreme Court. Since their focus shifted to power, not deference, this particular controversy became moot.

A strong argument can be made that, simply because Congress found collective bargaining to be in the public interest, it does not necessarily follow that union negotiators were on "official business" within the meaning of section 5702. The FLRA's argument relied on the following syllogistic reasoning: (1) persons on official business under section 5702 are entitled to travel and per diem expenses; (2) union negotiators are involved in collective bargaining which furthers the effective conduct of public business and is in the public interest; and, therefore, (3) union negotia-
tors are on official business and entitled to travel and per diem expenses. The basic flaw in this logic is its reliance on the premise that “effective conduct of the public business” is equivalent to “official business of the government.” The two terms are not necessarily synonymous.

The Second Circuit noted that section 7101 states that “statutory protection of collective bargaining furthers the public interest,” implying that the negotiation process itself does not constitute a furtherance of public business. This argument, however, is suspect because the Second Circuit focused only upon a portion of section 7101. Section 7101(a) states unequivocally that “labor organizations and collective bargaining in the Civil Service are in the public interest.” Thus, the proper inquiry is whether being in the “public interest” necessarily furthers the interest of the federal government. The Eighth Circuit made a strong argument that it does not.

This claim was made by citing a series of Comptroller General Opinions issued in 1965 and 1966 for the proposition that employee representation in collective bargaining primarily benefits the employees and their union, and only indirectly benefits the agency by contributing to the effective conduct of its business. The FLRA challenged the precedential value of the Comptroller General Opinions as they related to travel and per diem expenses while on official time under the former executive order policy. Inasmuch as Congress radically changed the official time policy, the FLRA contended that reliance on the Comptroller General Opinions was misplaced. The Eighth Circuit rejected that argument, noting that the decisions shed light on the meaning of “official business” apart from their official time context.

To the extent that those decisions are used for their general interpretation of “official business” as being that which has a di-
rect benefit to the government, the decisions do have a continuing precedential value. A persuasive argument can be made that a general policy statement alluding to "public interest" and to "effective conduct of the public business" may provide an intangible benefit to the public at large. Although the federal agency does not necessarily receive a direct benefit within the requirements of "official business" under section 5702, it is arguable that the populace does.

Under the executive orders, collective bargaining clearly was not considered to further governmental interests. Thus, although union representatives were allowed official time, they were not generally allowed travel and per diem expenses. The Ninth Circuit and the dissenting judges from the other circuits agreed that Title VII represents a complete change in policy from practices under the executive orders. The fact that Congress chose to include a special finding regarding the contribution of collective bargaining to the efficient conduct of public business and, in a broader sense, to the public interest, reflects this change. The FLRA's decision to award travel and per diem expenses therefore actually furthered the expressly stated goal of Congress.

Related to this argument is the FLRA's contention that Congress intended to equalize the positions of union and management negotiators. Although this intent is not expressly stated in Title VII, it may be gleaned from the whole statutory scheme which does equalize the parties with respect to official time. Certainly, if parity is deemed a congressional goal, the award of travel and per diem expenses does much to achieve that end. Without reimbursement for expenses, the unions are still at a tremendous financial disadvantage in the collective bargaining process.

In Department of Agriculture, the Eighth Circuit noted, however, that Congress created certain inequities in enacting Title VII. For instance, union representatives, unlike agency representatives, may receive official time only when they otherwise would be in duty status. Under this construction, if negotiations take place on a weekend, union negotiators would not be compensated for their time unless they normally work weekends. Agency negotiators, on the other hand, theoretically could receive paid time.

236. See supra note 97 and accompanying text.
237. Bureau of Alcohol, 672 F.2d at 736–37.
238. Department of Agriculture, 691 F.2d at 1251–52 (Heaney, J., dissenting); Division of Military & Naval Affairs, 683 F.2d at 50 (Oakes, J., dissenting).
239. 691 F.2d at 1250 (Heaney, J., dissenting).
The Eighth and Eleventh Circuits both argued that, by granting union representatives travel and per diem expenses, the FLRA tipped the balance in favor of the unions, noting that union dues are collected for the purpose of financing negotiations.\(^{240}\) The obvious implication of this argument is that unions will receive a windfall if given federal reimbursement. This in turn will provide a disincentive to reach quick settlements in negotiation. Such an argument is a dangerously deceptive one, especially when combined with the claim that reimbursement for expenses in the private sector is an extraordinary remedy used only in response to the most egregious employer misconduct.\(^{241}\)

Nevertheless, the Supreme Court appears to have adopted this rationale. Despite the vast differences between public and private unions the Court equated them relative to collective bargaining. By recognizing that management and labor are at odds in both the public and private sectors, proceeding "from contrary and to an extent antagonistic viewpoints,"\(^{242}\) the Court sanctioned structural inequality in the federal sector.

The most compelling argument advanced by the Supreme Court for reversal of the Interpretation was that nowhere in either the express language of the statute or in the congressional debates was the issue of travel and per diem expenses mentioned.\(^{243}\) Although the Court acknowledged that Congress intended a policy shift regarding federal labor relations, the critical question remained: did Congress intend to alter the policy so radically as to grant travel and per diem expense? The Court thought not.\(^{244}\)

While "acquiescence by silence" is a troublesome rule of statutory construction, it nevertheless was utilized in *Bureau of Alcohol*. The Court inferred that by its silence, Congress intended to abide by past practice under the executive order regime.\(^{245}\) In fact, the Court found the Act's declaration that "collective bargaining contributes to efficient government and therefore serves the public interest" not to signal labor-management equalization, but to constitute legislative endorsement of federal labor policies under

\(^{240}\) *See supra* notes 187–88 & 190–91 and accompanying text.

\(^{241}\) Private sector practice does not correspond to the federal sector model since federal labor organizations do not have the financial resources currently available to private sector unions. Thus, federal union dues are insufficient to finance both negotiation activities and necessary expenses associated with grievance arbitration.

\(^{242}\) 104 S. Ct. at 449 (quoting NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960)).

\(^{243}\) 104 S. Ct. at 445.

\(^{244}\) *Id.* at 449.

\(^{245}\) *See id.* at n.17.
the executive orders.\textsuperscript{246} Although Judge Heaney's dissent in \textit{Department of Agriculture} suggested that past practice was inconsistent,\textsuperscript{247} the Court was correct in noting that travel and per diem expenses generally were not allowed under the executive orders.\textsuperscript{248}

Congress presumptively is aware of past practice; thus, the failure to address the issue, either in debate or statute, indicates acceptance of it. The FLRA, in issuing its \textit{Interpretation}, relied on broad policy statements found in section 7101 to support its desire to alter past practice. However, it seems clear that the Authority stretched those policies somewhat in justifying its decision. Significantly, the FLRA and federal unions have argued that the \textit{Interpretation} achieves two important policy goals of Title VII, namely: (1) greater equalization of bargaining positions, and (2) a more efficient conduct of public business. By reimbursing unions for travel and per diem expenses, the argument goes, labor and management's positions are effectively equalized. In the process, the disparity between agency and union power is eliminated and the collective bargaining process becomes more effective. However the Supreme Court refused to validate this line of reasoning.

With no legislative history to support it, the FLRA found that Congress intended to adopt an official time policy which finances union negotiation at taxpayer expense, but the Court was unwilling to make such a leap. In an age of increasing budget deficits and acute fiscal consciousness, the Court refused to accept the supposition that Congress intended to impose a huge obligation on the federal government without once referring to the expenditure. In fact, the Court expressly recognized the inherent inequality in labor-management bargaining positions.\textsuperscript{249} Perhaps this, coupled with the huge outlay reimbursement of travel and per diem expenses would require, explains the Court's result.

Yet without travel and per diem expense reimbursement, federal unions are only a little better off than they were before enactment of the Civil Service Reform Act despite a significant policy shift toward more balanced federal sector labor relations. By reversing the Ninth Circuit and overruling the \textit{Interpretation}, the Court cut back on those gains federal unions had made since 1979 and effectively gave controlling weight to economic considerations.

\textsuperscript{246} Id. at 447.
\textsuperscript{247} See supra note 204 and accompanying text.
\textsuperscript{248} See supra note 130 and accompanying text.
\textsuperscript{249} 104 S. Ct. at 449.
E. FPM Letter 711-162: The Controversy Continues

On January 19, 1984, less than two months after the Supreme Court's decision in *Bureau of Alcohol*, Donald J. Devine, Director of the Office of Personnel Management (OPM), issued a guidance in response to the Court's opinion. It advised government agencies that payment of travel and per diem expenses is not contemplated by section 7131 of the Act, and accordingly should be discontinued even if covered by an existing collective bargaining agreement. The Letter further stated that travel and per diem expense reimbursement is outside the scope of bargaining.

After summarizing the decision, OPM set forth its interpretation. It initially declared that travel and per diem expenses are beyond the purview of section 7131(a) of the Act. As such, OPM advised government agencies to discontinue these payments, if made in reliance on the FLRA interpretation of section 7131(a) or "under contract provisions utilizing the general term 'official time.'"

The second point was a drastic departure from the spirit of the Civil Service Reform Act. OPM articulated the rule for agencies to follow in granting travel and per diem expenses: such expenditures are prohibited unless exceptional circumstances show they would be in the government's best interests, as measured by what is most convenient for the agency. This pronouncement will, if effectuated, return federal labor policy concerning official time to 1966 Comptroller General standards. In fact, the Director relied on the Civil Service Commission guidelines enunciated in 1966 to prescribe the narrow set of circumstances that will permit payment of travel and per diem expenses. Ultimately, OPM would have authorization for reimbursement depend not solely on whether the government's best interests are furthered, but on "specific facts and reasons which will demonstrate clearly that the convenience of the agency is best served [by travel and per diem reimbursement]."

---

251. *Id.* at 148.
252. *Id.*
253. *Id.* at 149. OPM added that for payment to be authorized under the rule, the exception "must be supported by a certification from the agency head— and accompanying explanation—that the travel would be in the primary interest of the government." *Id.*
254. *Id.; see* 46 Comp. 21 (1966).
This mischaracterized the Court’s opinion. Although the Court did recognize that payment of travel and per diem expenses is warranted where it serves the convenience of the agency, this was not the sole ground for authorization, as the Director suggested. Rather, an agency may make such payments, according to the Court, when they “serve the convenience of the agency or are otherwise in the primary interest of the government, as was the practice prior to passage of the Act.” OPM’s guidance erased the second factor by stating that “even if a particular situation meets the ‘primary interest of the Government’ test, this does not mean that an agency is required to pay, or necessarily ought to pay” travel and per diems.

The third conclusion drawn in the OPM Letter dealt with the party which determines when travel and per diem reimbursement is necessary. The Letter concluded that discretion “is reserved solely and exclusively to the agency.” Again relying on 1966 Comptroller General standards, Mr. Devine declared that an agency may decide to confer travel status on an employee representative under 5 U.S.C. § 5702 only when a benefit to the government’s primary interest can be demonstrated. Accordingly, the Letter precluded union and FLRA input into the decision, purportedly relying on the Court’s decision.

Apparently this section was designed to eliminate any future bargaining over travel and per diem expenses, and to buttress the order in paragraph 7(a) that agencies paying travel and per diem expenses pursuant to an existing collective bargaining agreement cease doing so. The Letter looked to the Supreme Court’s opinion to support the proposition that the FLRA plays no part in such a determination. However, contrary to the Letter’s assertion, at no point in the decision is the preclusion of the FLRA “clearly

256. Bureau of Alcohol, 104 S. Ct. at 449 & n.17.
257. Id. at 449 n.17 (emphasis added). The Court read the 1966 Comptroller General’s decision as providing reimbursement for travel expenses “if an agency head certified that the employee representatives' travel would be in the ‘primary interest of the government.’” Id. at 446 n.11. This contrasts sharply with Director Devine’s assertion that before authorization for payment is appropriate, a specific factual showing must be made that an agency’s convenience is served by reimbursement. See Letter 711-162, supra note 250, at 149.
258. Letter 711-162, supra note 250, at 149.
259. Id.
260. Id.
261. Id.
262. See id. at 148.
indicated.\textsuperscript{263}

The Letter attempted to isolate the FLRA further from all involvement in travel and per diem expense reimbursement by declaring in paragraph 7(d) that such a determination is not bargainable under the Act.\textsuperscript{264} To garner support for this conclusion, OPM turned, in paragraph 7(e), to the \textit{Bureau of Alcohol} decision, specifically to footnote seventeen.\textsuperscript{265} OPM asserted that the footnote "does not establish an obligation or authorization to bargain over travel and per diem payments for employee union negotiators."\textsuperscript{266} OPM classified the Court's statement that "unions may presumably negotiate for such payments in collective bargaining as they do in the private sector"\textsuperscript{267} as "dictum . . . of no precedential value"\textsuperscript{268} in the federal sector. Expanding upon this, OPM attempted to emasculate the Court's language further by stating that any travel and per diem clauses in existing labor contracts were included only because of the FLRA policy invalidated by the Court.\textsuperscript{269} Thus, OPM reasoned that since the Court's language was dictum and since contracts permitting travel and per diem reimbursement were founded on a policy struck down by the Supreme Court, payment of such expenses has no place in federal labor relations.\textsuperscript{270}

The Letter is simply management's explanation of the Supreme Court decision to lower level managers. Although the Letter appears drastic, it supports the OPM position taken prior to \textit{Bureau of Alcohol}.\textsuperscript{271} OPM placed a strained interpretation on the

\begin{itemize}
\item \textsuperscript{263} \textit{Id.} at 149.
\item \textsuperscript{264} \textit{Id.} at 149–50.
\item \textsuperscript{265} \textit{Id.} at 150. Footnote 17 of \textit{Bureau of Alcohol} appears to be at the hub of the controversy over travel and per diem expenses as a continuing, proper subject of bargaining. The footnote reads:
\begin{quote}
Our conclusion that federal agencies may not be required under § 7131(a) to pay the travel expenses and per diem allowances of union negotiators does not, of course, preclude an agency from making such payments upon a determination that they serve the convenience of the agency or are otherwise in the primary interest of the government, as was the practice prior to passage of the Act . . . . Furthermore, unions may presumably negotiate for such payments in collective bargaining as they do in the private sector . . . . Indeed, we are informed that many agencies presently pay the travel expenses of employee representatives pursuant to collective-bargaining agreements. Letter from Ruth E. Peters, Counsel for Respondent, FLRA, Nov. 9, 1983. . . .
\end{quote}
\textsuperscript{104} \textit{S. Ct.} at 449 n.17 (citations omitted).
\item \textsuperscript{266} \textit{Letter 711-162, supra} note 250, at 150.
\item \textsuperscript{267} \textit{Id.} (emphasis added by OPM).
\item \textsuperscript{268} \textit{Id.} (emphasis in original).
\item \textsuperscript{269} \textit{Id.}
\item \textsuperscript{270} \textit{Id.}
\item \textsuperscript{271} \textit{See supra} notes 138–39 and accompanying text.
Supreme Court's decision by mixing and matching various bits and pieces of the opinion. The Court taught us what Congress did not intend in section 7131 of the Act, yet OPM construed the opinion to tell us what Congress meant in full. This peculiar interpretation of the Court has not gone unaddressed.\textsuperscript{272} One union has already filed suit in an effort to have Mr. Devine's guidance declared null and void.\textsuperscript{273} Perhaps the best answer to the OPM Letter is to be found in a travel and per diem arbitration involving the General Services Administration and the American Federation of Government Employees.\textsuperscript{274} The arbitrator advanced persuasive arguments to support rejection of OPM's contentions that the Bureau of Alcohol decision has foreclosed negotiations on travel and per diem reimbursement, and that clauses in existing collective bargaining agreements providing for reimbursement be abandoned.

Despite the promise of a Supreme Court resolution of the troublesome travel and per diem issue, the FPM Letter has clearly revived the dispute. Like the reimbursement issue, the negotiability question posed by the Letter will ultimately need to be addressed by the FLRA and the federal courts.

IV. THE CURRENT STATUS OF OFFICIAL TIME

Apart from mid-term negotiations and travel expense per diem

\textsuperscript{272} Robert M. Tobias, National President of the National Treasury Employees Union, attacked the OPM Letter, stating: "Though OPM Director Donald Devine is notorious for his attempts to thwart the intent of Congress, he has sunk to new depths with his nose-thumbing at the Supreme Court." \textit{NTEU Sues to Block OPM Effort To Bar Negotiations On Travel}, [Jan.-June] \textit{Gov't Empl. Rel. Rep.} (BNA) No. 1047, at 166 (Jan. 23, 1984). Kenneth T. Blaylock, American Federation of Government Employees National President, also vehemently opposes the OPM letter, characterizing it as "a misreading of [the] Supreme Court's opinion." \textit{OPM Advises Agencies Not To Bargain over Travel, Per Diem For Negotiators}, [Jan.-June] \textit{Gov't Empl. Rel. Rep.} (BNA) No. 1046, at 115 (Jan. 16, 1984).

\textsuperscript{273} National Treasury Employees Union v. Devine, No. 84-0205 (D.C.D.C. Filed Jan. 19, 1984). As set forth in its complaint, the union is seeking both declaratory and injunctive relief:

Plaintiff, National Treasury Employees Union ("NTEU") seeks declaratory judgment that the FPM publication is in excess of the Director's statutory authority, and a usurpation of the role of the Federal Labor Relations Authority, which is statutorily charged with defining the scope of collective bargaining in federal sector labor relations. NTEU further seeks declaratory judgment that the FPM Letter was improperly promulgated and that its directives are contrary to law, and an order requiring the withdrawal of the FPM Letter.

Complaint at 2.

issues decided by the FLRA in its Interpretation, the Authority has answered a number of questions that have arisen under section 7131 and various other sections of the Act. The developing body of case law has had a significant effect on federal labor-management negotiations.

A. Section 7131

Although the FLRA determined in its Interpretation that union representatives were entitled to official time under section 7131(a) for mid-contract negotiations, many other questions arose challenging the scope of that section. In Florida National Guard, the FLRA held that an agency committed an unfair labor practice when it refused to provide official time to an employee who was required to travel to participate in official time activities under section 7131(a).275 In that case, the union president had attended both days of a Federal Service Impasses Panel factfinding hearing, requiring travel time of three hours per day. His regular work day was seven and three-quarter hours, from 6:30 a.m. to 3:15 p.m. The agency, however, awarded six hours of official time, the time actually spent in the hearings. In response to the union’s unfair labor practice complaint, the FLRA found that the union president would have been in a regular duty status from 6:30 a.m. to 3:15 p.m. on those days but for his attendance at the hearings. Consequently, the Authority found that he was entitled to seven and three-quarter hours of official time for each of the two days.276

In several other cases, however, the FLRA restricted the scope of official time under section 7131(a). In one case, the FLRA refused to find an unfair labor practice where an agency refused to bargain over the makeup of its negotiating team. By reducing its force of negotiators, the agency limited the union’s collective bargaining team to an equal number of negotiators on official time. In support of its refusal to find an unfair labor practice, the FLRA cited a previous decision in which it held that a proposal for a minimum number of negotiators from each party was not negotiable.277

In another Interpretation and Guidance, the FLRA held that official time need not be granted to union negotiators engaged in

276. Id. at 367.
supplemental bargaining. According to the FLRA, section 7131(a) requires the payment of official time only at the negotiation level where the Civil Service Reform Act requires collective bargaining. According to the Act, supplemental bargaining occurs at the parties' discretion. Therefore, because the parties were not obligated to engage in the extra bargaining, the Act did not require official time for such activity.\textsuperscript{278}

In another apparent restriction on the use of official time, the FLRA ruled that official time need only be paid to union negotiators who are members of the bargaining unit covered by the agreement. The FLRA supported this decision by examining the statement of purpose in Title VII and other provisions of the Civil Service Reform Act. Accordingly, an unfair labor practice charge filed for refusal to pay official time was dismissed because the union, representing fire fighters from the Air Base Wing Headquarters, requested the Wing to authorize official time for fire fighters also represented by the union who were employed by the Defense Electronics Supply Center.\textsuperscript{279} But aside from these restrictive cases, the FLRA has generally construed section 7131(a) liberally.

Prohibitions against official time for internal union activities contained in section 7131(b) also have generated several interpretive questions. The typical case involves a refusal by an agency to negotiate over a union proposal that would grant official time to certain union representatives. The agency generally contends that the proposal would violate section 7131(b) because it would allow the union representative to conduct internal union business on duty time. The FLRA must then decide if a proposal does violate section 7131(b) or if it is negotiable under section 7131(d).\textsuperscript{280}

In \textit{American Federation of Government Employees, Local 2823,}\textsuperscript{281} the first case interpreting section 7131(b), the FLRA nar-


\textsuperscript{280} For the full text of § 7131(b) and (d), see supra notes 98 & 100.

narrowly construed the term "internal union business." It addressed the negotiability of a union proposal seeking to grant the union president or his designees two hours of official time daily for preparation of reports required under section 7120 of the statute. The FLRA held that the union proposal was negotiable and not inconsistent with section 7131(b).\(^{282}\) In its analysis, the FLRA examined the plain meaning of section 7131(b) and determined that on its face the statute does not expressly define "internal union business." Instead, the provision cites some examples of activities that are related to the "internal business of a labor organization," for example, solicitation of membership, election of labor organization officials, and collection of dues. The FLRA concluded that no relationship existed between these activities and the activities contained in the union's proposal.\(^{283}\)

The FLRA next examined the legislative history of section 7131(b) and concluded that a narrow construction of "internal union business" was consistent with congressional intent regarding the provision.\(^{284}\) The FLRA pointed out that the language of the official time provision in the version of the bill which was eventually enacted and signed into law was identical to that of both the House Committee and House bills.\(^{285}\) The report that accompanied the House Committee bill indicated that this provision was intended to require "that matters solely relating to the internal business of a labor organization be performed when an employee is in a non-duty status."\(^{286}\) The FLRA noted further that proponents of the bill intended the provision on official time to apply only to activities regarding the "structure and institution" of the labor organization. The FLRA reasoned that the examples noted in section 7131(b) had been included because the purpose of those activities related to maintenance of the union's institutional structure.\(^{287}\)

The FLRA asserted that the reports which were the subject of the union's proposal in \textit{Local 2823} did not relate solely to the structure and institution of the labor organization. Rather, the re-

\(^{282}\) \textit{Id.} at 10.

\(^{283}\) \textit{Id.} at 5.

\(^{284}\) \textit{Id.} at 5–7; see also \textit{Department of Health & Human Services, 11 F.L.R.A. 7, F.L.R.A. No. 5} (1983) (FLRA enforced arbitration award holding legislative chairman's activities not violative of section 7131(b)).

\(^{285}\) \textit{2 F.L.R.A. No. 1} at 5–6.

\(^{286}\) \textit{Id.} at 6 (emphasis in original); see \textit{H.R. REP. No. 1403, 95th Cong., 2d Sess. 58–59} (1978).

\(^{287}\) \textit{2 F.L.R.A. No. 1} at 8.
ports' purpose was to provide a disclosure mechanism to aid in implementing the public policy of the statute. 288 Accordingly, the FLRA declared the union proposal negotiable.

Relying on this decision, the FLRA has consistently found a number of union proposals granting official time to be negotiable. For example, a union proposal "providing that equal official time to prepare for contract negotiations be allotted to the union and management negotiators" 289 was held to be negotiable under section 7131(d). The FLRA concluded that preparation for contract negotiations could not be construed as "internal union business," but was a subject of mutual concern to both the union and management. 290 Similarly, a proposal to grant "reasonable official time . . . to union representatives for preparations for negotiations, and impasse resolutions and counterproposals" was held to be a matter of mutual concern and, thus, negotiable under section 7131(d). 291 The FLRA reached the same conclusion concerning a proposal that "all preparation of proposals and impasse resolutions shall be on duty time." 292

One could conclude from these cases that performance of internal union business during duty hours will be declared non-negotiable unless the employee is in a non-duty status. 293 In one case, 294 however, the FLRA reviewed an administrative law judge's decision which held that the agency had violated section 7116(a) by maintaining a rule prohibiting solicitation of union membership during all paid breaks. The judge noted a long recognized distinction between "duty time" 295 and "actual working time" to the effect that no-solicitation rules which seek to prohibit solicitation during all duty time violate the rights of employees. The FLRA

288. Id. at 9.
293. See H. ROBINSON, supra note 131, at 168.
295. Duty time, or clock time, refers to the entire block of time that an employee is actually present at the work site. Id. at 162.
adopted the administrative law judge’s decision concerning the no-solicitation rule and added that such time (paid free time) “falls within the meaning of the term ‘non-duty status’ as used in section 7131(b).”

_National Treasury Employees Union_ involved the question of whether a union proposal providing for distribution of chapter announcement cards by a union representative on official time was consistent with the agency’s duty to bargain. The FLRA held that the union proposal did not violate section 7131(b), reasoning that “advising employees of the union’s status as the exclusive representative contributed to implementing the labor-management relationship and is not solely related to the institutional structure of the union.”

It appears that the FLRA will continue to interpret section 7131(b) narrowly, consequently broadening the range of bargainable or negotiable proposals under section 7131(d). Presently, the only proposals not considered to be negotiable are those relating solely to the structure and institution of the labor organization, such as: solicitation of membership, election of labor organization officials, and collection of dues. All other proposals which do not violate any government-wide rule, regulation, or federal law will be negotiable and within the agency’s duty to bargain. While the FLRA has rarely interpreted provisions of section 7131(c), its authorization of official time for participants in FLRA proceedings is clear. The phrase “any phase of any proceeding before the Authority” includes the investigation of unfair labor practice charges and representation petitions as well as participation in

---

296. _Id_; see also National Fed’n of Fed. Employees, Local 75, 8 F.L.R.A. 403, F.L.R.A. No. 85 (1982) (proposal recognizing Union right to solicit membership during nonwork time in nonwork areas and work area, when no employee is working; held negotiable).


298. _Id_. at 519.

299. _See_ American Fed’n of Gov’t Employees, Local 1692, 3 F.L.R.A. 304, F.L.R.A. No. 47 (1980). In many cases interpreting § 7131(b), the decision has resulted in a redefinition of the range of subjects negotiable under § 7131(d). In _National Treasury Employees Union, 3 F.L.R.A_. 495, F.L.R.A. No. 78 (1980), the FLRA denied a request for a general statement of policy concerning the interpretation of § 7131(d). The union requested that the FLRA determine whether employees on official time under § 7131(d) who represent an exclusive bargaining agent are entitled to reimbursement from agencies for their travel and per diem expenses. The FLRA held that the standards governing the issuance of general statements of policy and guidance precluded making such a statement since other means for resolving the issue existed. _Id_. at 497.

300. H. ROBINSON, _supra_ note 131, at 167.

301. For the text of subsection (c), see _supra_ note 70.
hearings and representation elections. The term “Authority” as used in section 7131(c) is interpreted to include the General Counsel, any administrative law judge, regional director, hearing officer, or other designated agent of the Authority. Further, the FLRA has declared that any employee receiving official time under section 7131(c) shall also receive travel time as well as travel and per diem expenses. In the only FLRA decision to address the scope of section 7131(c), the Authority held that an employee who had been instructed by an FLRA field attorney to meet with her in preparation for an unfair labor practice case was entitled to official time and expenses under the statute.

B. Official Time Cases Outside the Context of Section 7131

There have been several cases in which the FLRA has been asked to resolve negotiability or unfair labor practice disputes concerning official time outside the context of section 7131. Most of these cases have involved a negotiability dispute over a union proposal to grant official time for union-sponsored training. In National Federation of Federal Employees, Local 951, for example, the union offered the following proposal:

a. For each employee, 8 hours per year for education.
b. For each Union member, an additional 8 hours per year for grievance and other training.
c. For each Union officer, an additional 16 hours per year for advanced grievance training.
d. Officers and stewards recognized by Management will be granted excused leave to attend off premises Union Sponsored Training. Requests for such excused leave must be provided to the Regional Personnel and Management Officer as far in advance as practical but in any event not later than 5 working days in advance of the training session.

The agency refused to bargain over the proposal, asserting that it violated the Comptroller General’s rulings regarding the use of official time. Specifically, the agency claimed that, under the Comptroller General’s decisions, the use of official time must be confined to employee representatives and may not be used for other bargaining unit members unless jointly sponsored by union

303. Id.
304. Id.
307. Id. at 884.
and management.\textsuperscript{308} In addition, the agency contended that section (d) of the proposal would also conflict with Comptroller General decisions as it failed to impose limits on the officers' and stewards' use of official time for union-sponsored training.\textsuperscript{309}

The FLRA found that sections (a), (c) and (d) of the union proposal did not violate any government-wide rule or regulation, including the Comptroller General decisions and, thus, were within the agency's duty to bargain.\textsuperscript{310} The FLRA ruled that the Comptroller General's decisions did not place an absolute limit on the amount of official time authorized for union-sponsored training, but merely established "broad guidelines for agencies to use in granting such leave to accommodate the particular circumstances\textsuperscript{311} of each agency. However, the FLRA held that section (b) of the union proposal was not within the duty to bargain because it provided benefits to union members which were not provided to nonmembers.\textsuperscript{312} Such a proposal violated section 7114(a)(1) which "mandates that an exclusive representative is responsible for representing the interests of all employees in the unit,"\textsuperscript{313} regardless of labor organization membership.

In a similar case, the FLRA approved a union proposal granting as much as forty-eight hours of administrative leave within a twelve-month period for union officials to attend union-sponsored training.\textsuperscript{314} Likewise, the Authority found in another case that a union proposal granting eighty hours of official time each year for representatives' union-sponsored training was within the agency's duty to bargain because it was mutually beneficial and did not violate any standards established by the Comptroller General.\textsuperscript{315} In both cases, the FLRA cited its decision in National Federation of Federal Employees, Local 951 to support its conclusion.\textsuperscript{316}

In 1977, the Comptroller General reconsidered his 1966 administrative leave ruling in view of the burgeoning field of federal labor relations. He ruled that:

\begin{itemize}
  \item \textsuperscript{308} Id. at 885.
  \item \textsuperscript{309} Id.
  \item \textsuperscript{310} Id.
  \item \textsuperscript{311} Id.
  \item \textsuperscript{312} Id. at 886.
  \item \textsuperscript{313} Id.; see also 5 U.S.C. § 7114(b) (1982).
  \item \textsuperscript{315} American Fed'n of Gov't Employees, Local 1733, 5 F.L.R.A. 295, F.L.R.A. No. 40 (1981).
  \item \textsuperscript{316} 5 F.L.R.A. No. 40 at 296; 4 F.L.R.A. No. 101 at 786.
\end{itemize}
The guidance in our 1966 decision was deliberately stated in nondefinite terms in order to provide agencies with flexibility to accommodate the myriad situations they face as a result of their individual circumstances and particular requirements. While the majority of agencies would not be justified in granting more than 8 hours of administrative leave per year for employee representatives to attend union-sponsored training, we recognize that some agencies must have limited authority to exceed this guideline by reasonable amounts of time.\(^{317}\)

Thus, proposals to grant official time or administrative leave will be found to be within an agency's duty to bargain if the proposal (1) does not discriminate against nonunion employees, (2) does not violate the broad guidelines set forth by the Comptroller General, and (3) does not violate any other government-wide rule or regulation.\(^{318}\)

V. Recommendations Concerning Official Time

The use of official time by union representatives in federal sector labor-management relations has increased significantly since passage of the Civil Service Reform Act of 1978. This has resulted in increased costs to the taxpaying public, provoking criticism not only from agency management but also from the press and special interest groups that keep a watchful eye on public sector unions.

The Public Research Council and Americans Against Union Control and Government have argued that public sector unions have too much power and should be curbed. In 1978, the former group, in an attempt to ascertain the total amount of official time that federal employees representing unions spend on labor relations activities, filed Freedom of Information Act requests with agencies having union bargaining units.\(^{319}\) Critics seem to sense that the official time devoted to labor relations activities of federal employees considerably exceeds the time spent on analogous activities in the private sector since in the latter such time is usually authorized only for arbitration hearings and interviews with supervisors in connection with a grievance. However, the public sector model contemplates more extensive employee activity, perhaps explaining the dissatisfaction.


\(^{318}\) *See supra* text accompanying notes 306-15.

There are a number of guidelines agency management might follow to curtail potential abuse of official time. An agency could negotiate specific regulations; that is, at the bargaining table, management might insist on detailed official time provisions, specifying amounts of time to be authorized and procedures to be followed in obtaining and reporting official time. For example, management might insist on reaching an agreement precisely detailing the maximum number of hours or maximum percentage of worktime that any single union representative could be away from the job. Thus, management might oppose using "reasonable time" in agreements since the term has proved to be vague and uncertain in its enforcement. Similarly, if the union wants to increase the amount of official time, management could require proof that the increase is needed.

If management does not negotiate an absolute maximum limit on official time, it might desire to provide for a pool of union representatives, each of whom would be limited in the number of hours a week that he or she could be away from work. Through this mechanism, management could be assured that no single job would be severely affected by absenteeism.

Specific procedures regarding use of official time might also be established. For example, the collective bargaining agreement might clearly spell out whether a union representative need obtain prior management approval for release on official time. Clearly the best place to establish procedures for recording and authorizing official time is at the bargaining table. By conferring with the union, considering its proposals, and either implementing them or rejecting them for reason, a more desirable official time structure will evolve.

An efficient system for authorizing and recording the use of official time will also help minimize official time abuses. Federal Personnel Manual Letter 711-161 gives agencies broad discretion concerning the maintenance of official time records.\textsuperscript{320} Agencies

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{320} Office of Personnel Management, \textit{FPM Letter 711-161} (July 31, 1981). At a minimum, agency official time records are to collect information in the following categories: (1) official time spent in negotiation or renegotiation of a collective bargaining agreement or pursuant to a contract reopener clause; (2) official time for mid-term negotiations; (3) official time in connection with ongoing labor-management relations; (4) official time for grievances and appeals; and (5) travel and per diem expenses. \textit{Id.} at 3-4.

Although OPM stressed that agencies are free to maintain more detailed records if they so choose, it cautioned that agencies were required to consult with unions before implementing a new recordkeeping system. The Letter also warned that agencies should not negate any contractual provisions in effect on the date of the Letter. \textit{Id.} at 3.
\end{itemize}
\end{footnotesize}
may wish to consider the following factors in implementing record-keeping procedures. First, an agency should discourage excessive use of official time for frivolous discussions. Second, some means are needed to ensure that the time is not being used for internal union business, such as those proscribed under section 7131(b). Third, there should be included some mechanisms for striking a balance between meeting the work needs of the agency and avoiding management interference with legitimate representational rights of employees.

To accomplish these objectives, the following procedures may be useful: (1) the union representative should check with the immediate supervisor and indicate the type of activity to be pursued (grievance discussion, conference, bargaining session, hearing, etc.) as well as the amount of time anticipated for it; (2) an employee might be required to call ahead to the department where he intends to go to arrange a convenient time for consultation; (3) at the destination the employee should report to the supervisor on duty and a record should be made of arrival and departure times; (4) on returning to his workplace, an employee should report to the supervisor and record the total time used on a tally sheet—actual bills for travel and per diem expenses might also be presented; and (5) if management has negotiated a maximum number of hours for official time, it should be certain that no employee representative exceeds that amount without notice to the employer so that management does not risk establishing a practice of permitting employees to exceed negotiated maximums. Ideally, these procedures could help federal agencies accommodate their responsibilities while also maintaining the high level of productivity essential to functioning as a federal agency.

VI. CONCLUSION

As federal labor organizations have grown in number and power, the concept of official time has become increasingly essential to effective union representation. Without an official time policy, union negotiators are at a huge disadvantage. Negotiation becomes the ideal rather than the reality. Congress acknowledged the public importance of a productive, cooperative bargaining structure by adopting the Civil Service Reform Act of 1978. Implicit in the radical changes brought about by the Act is a recognition that, unless the bargaining positions of labor and

management negotiators are reasonably equal, the negotiation process will not achieve its intended purpose. Accordingly, Congress enacted section 7131 to guarantee that union negotiators are given paid time off from their work duties to participate in the negotiation process. The task of reasonable equalization begun by Congress was encouraged by the FLRA’s Interpretation, which granted union negotiators the right to travel and per diem expenses associated with negotiation. However, the Supreme Court inhibited the trend toward equalization by overruling the Interpretation in Bureau of Alcohol.

The significance of the Authority’s ruling cannot be underestimated. Unlike their private sector counterparts, federal sector unions must engage in agency-wide negotiations, necessitating large transportation costs. Moreover, the voluntary union security system prevalent in the federal sector yields less dues income to cover such costs. Despite the obvious need for travel and per diem expenses, costs to taxpayers have been enormous, and are constantly rising.

In Bureau of Alcohol, the Supreme Court apparently gave greater sway to stark economic implications. The public interest in effective labor negotiations, which was furthered by the FLRA, was overridden by economic and policy considerations. Apparently, OPM carried this view to its extreme in FPM Letter 711–162 by effectively banning travel and per diem expense reimbursement in the federal sector. As a result of the Supreme Court’s ruling and OPM’s interpretation, the FLRA and the courts will be forced to address the travel and per diem issue once again. Still, the statutory changes in official time found in the Civil Service Reform Act will continue to exert a profound influence on federal sector collective bargaining.