



**American Federation of Government
Employees**

**National Citizenship and Immigration
Services Council 119
C/O Local 0235 – AFGE
P. O. Box 4091
Sunnyside, NY 11104**



February 14, 2020

Mr. Kenneth T. Cuccinelli, II
Acting Deputy Director
U.S. Department of Homeland Security

Mr. Mark Koumans
Acting Director
U.S. Citizenship and Immigration Services
Department of Homeland Security

Re: Illegal Agency Directive Restricting Official Time

Dear Acting Deputy Secretary Cuccinelli and Acting Director Koumans,

We represent 13,500 unionized employees of the U.S. Citizenship and Immigration Services (USCIS). We write to object to Mr. Koumans' January 22, 2020 email advising of the Agency's unilateral decision to significantly restrict Official Time used by union representatives. The decision was made without agreement; it is therefore contrary to law. We therefore demand the Agency retract its directive.

Background

Official Time is part of the collective bargaining agreement (CBA) between USCIS and NCIS 119,¹ permitting union representatives to carry out non-agency work during the workday. Article 7(a)(1) explains that the purpose of Official Time "is to provide time in which to perform union

¹ Available at https://www.uscis.gov/sites/default/files/USCIS/About%20Us/New%20Employee%20Onboarding%20Program/USCIS_2016_CBA.pdf

representational functions during normal working hours, without loss of pay or charge to annual leave.”

In Article 7(d), the parties agreed to allocate Official Time as follows: “a base of 10,000 hours plus 2.7 hours per bargaining unit employee to be allotted on a quarterly basis” Based on 13,500 bargaining unit employees, which totals 36,450 hours (2.7 hours per employee). Thus, bargaining unit employees are provided no less than 46,650 hours of Official Time in which to perform union representational functions.

Mr. Koumans’ January 22, 2020 communication breaches the CBA. It states that no individual USCIS employee may use “more than 520 hours of union official time during fiscal year 2020” and that “employees who serve as union representatives must perform assigned work for at least 75% of their paid time during the 2020 fiscal year.”

The claimed authority for the January 22 Koumans announcement is Executive Order 13837 (EO), signed by President Trump on May 25, 2018. Section 4(a)(ii)(1) purports to effectively restrict Official Time for all USCIS employees to no more than one quarter of paid time on non-agency business.

Implementation of the EO was initially enjoined by the federal district court in August 2018. *AFGE v. Trump*, 318 F. Supp. 3d 370 (D.D.C. 2018). However, the injunction was ordered vacated on July 2019, *id.*, 929 F.3d 748 (D.C. Cir. 2019), when the DC Circuit held that any legal challenge to the EO must be pursued administratively, via the FLRA Federal Labor Relations Authority (FLRA) – not through district courts – followed by judicial review in the courts of appeals. The FLRA has yet to rule on the issue.

Statutory Authority Prohibiting Restriction

The Agency nonetheless relies on the DC Circuit’s order to impose the Official Time restrictions set out in Mr. Koumans’ January 22 communication. Because the restrictions were not agreed upon, they are contrary to the Federal Service Labor-Management Relations Statute (FSLMRS), specifically 5 USC § 7131(a). That section states that Official Time is authorized for “[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement”

Most importantly, the Statute is clear in that Official Time is a negotiable provision. Section 7131(d)(2) provides that Official Time shall be granted “in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.” (Emphasis added). In this case, the Agency imposed its restrictions without any agreement.

Action Demanded

Because the FSLMRS expressly makes Official Time the subject of negotiated agreement, we demand the withdrawal of the announced Official Time restriction. Consistent with the DC

Circuit's order, we can expect further legal review to take place, first by the FLRA and later by the appropriate appellate courts.

Sincerely,

A handwritten signature in cursive script, appearing to read "Danielle Spooner", written in dark ink.

Danielle Spooner, President
NCISC, AFGE, AFL-CIO
802-309-9843

Cc: Henry Kerner, Director, Office of Special Counsel
Joseph V. Cuffari, Department of Homeland Security Inspector General
AFGE GCO



**U.S. Citizenship
and Immigration
Services**

June 11, 2020

Danielle Spooner
President
National Citizenship and Immigration Services Council 119
American Federation of Government Employees, AFL-CIO
C/O Local 0235, AFGE
Post Office Box 4091
Sunnyside, New York 11104

Dear Ms. Spooner:

This is in response to your February 14, 2020 letter addressed to me and Deputy Director Mark Koumans on the subject of official time. I am also aware from Agency officials that some of the same concerns you raised in your letter serve as the basis for pending grievances filed by the Union against the Agency.

In compliance with the 2016 Collective Bargaining Agreement (CBA) between the Agency and Union, I will refrain from addressing the substance of your correspondence that is being addressed through the grievance process. Those grievances have been assigned to appropriate Agency personnel who will provide a response within the timeframes outlined in the CBA.

On the issue of whether the Agency is following the law, allow me to reiterate that I, along with the Agency officials under my leadership, remain committed to following the laws we are duty bound to uphold as well as government rules and regulations implementing those laws. This includes the Federal Services Labor Management Relations Statute you cite in your letter and the President's Executive Orders. As stated in Deputy Director Koumans' January 21, 2020, memorandum to the workforce, the President's Executive Orders are in full force and effect, and U.S. Citizenship and Immigration Services has implemented them. Therefore, the Union's disagreement with the letter of the law and the President's Executive Orders does not provide a legitimate basis for Agency non-compliance.

Thank you again for your letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Cuccinelli II".

Ken Cuccinelli II