

3-21-2017

# Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues

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# Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues

## **Abstract**

[Excerpt] Title VII of the Civil Service Reform Act of 1978, commonly referred to as the “Federal Service Labor-Management Relations Statute” (FSLMRS), recognizes the right of most federal employees to engage in collective bargaining with respect to their conditions of employment. Although the FSLMRS does not permit the negotiation of matters that are specifically provided for by federal law, such as wages and retirement benefits, federal unions have bargained with management over a variety of other subjects, such as the availability of daycare facilities and the allocation of parking spaces. Under the FSLMRS, unions may also negotiate for the availability of “official time,” paid time off from assigned government duties to engage in activities related to labor-management relations. The ability to negotiate for official time has been of particular interest to Congress. Legislation that would require the reporting of official time and limit how such time is used has been introduced in the 115th Congress.

This report provides background on the FSLMRS and discusses key rights afforded to federal employees and management under the statute. The report also examines the availability of official time and reviews some of the significant official time cases decided by the Federal Labor Relations Authority (FLRA), the federal agency that administers the FSLMRS.

## **Keywords**

Federal Service Labor-Management Relations Statute, FSLMRS, Civil Service Reform Act of 1978, CSRA, federal employees

## **Comments**

### **Suggested Citation**

Shimabukuro, J. O. (2017). *Collective bargaining and the Federal Service Labor-Management Relations Statute: Selected legal issues* (CRS Report R44794). Washington, D.C.: Congressional Research Service.



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# **Collective Bargaining and the Federal Service Labor-Management Relations Statute: Selected Legal Issues**

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March 21, 2017

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R44794

## Summary

Title VII of the Civil Service Reform Act of 1978, commonly referred to as the “Federal Service Labor-Management Relations Statute” (FSLMRS), recognizes the right of most federal employees to engage in collective bargaining with respect to their conditions of employment. In 2016, 27.4% of all federal employees were members of a union. While the union membership rate for federal workers has declined slightly over the past ten years, it continues to exceed the union membership rate of 6.4% for private-sector employees.

Under the FSLMRS, a labor organization becomes the exclusive representative of a collective bargaining unit following a secret ballot election in which a majority of the employees in the unit vote favorably for the union. Once selected, the union is responsible for representing the interests of all employees in the bargaining unit, even if an individual has chosen not to join the union. Unlike organized employees in the private sector, federal employees are prohibited from engaging in a strike.

The FSLMRS does not permit the negotiation of matters that are specifically provided for by federal law, such as wages and retirement benefits. However, federal unions have bargained with management over a variety of other subjects, such as the availability of daycare facilities and the allocation of parking spaces. In addition, under the FSLMRS, unions may negotiate for the availability of “official time,” paid time off from assigned government duties to engage in activities related to labor-management relations. The ability to negotiate for official time has been of particular interest to Congress. Legislation that would require the reporting of official time and limit how such time is used has been introduced in the 115<sup>th</sup> Congress.

This report provides background on the FSLMRS and discusses key rights afforded to federal employees and management under the statute. The report also examines the availability of official time, and reviews some of the significant official time cases decided by the Federal Labor Relations Authority (FLRA), the federal agency that administers the FSLMRS.

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**T**itle VII of the Civil Service Reform Act of 1978, commonly referred to as the “Federal Service Labor-Management Relations Statute” (FSLMRS), recognizes the right of most federal employees to engage in collective bargaining with respect to their conditions of employment.<sup>1</sup> Although the FSLMRS does not permit the negotiation of matters that are specifically provided for by federal law, such as wages and retirement benefits, federal unions have bargained with management over a variety of other subjects, such as the availability of daycare facilities<sup>2</sup> and the allocation of parking spaces.<sup>3</sup> Under the FSLMRS, unions may also negotiate for the availability of “official time,” paid time off from assigned government duties to engage in activities related to labor-management relations.<sup>4</sup> The ability to negotiate for official time has been of particular interest to Congress. Legislation that would require the reporting of official time and limit how such time is used has been introduced in the 115<sup>th</sup> Congress.<sup>5</sup>

This report provides background on the FSLMRS and discusses key rights afforded to federal employees and management under the statute. The report also examines the availability of official time and reviews some of the significant official time cases decided by the Federal Labor Relations Authority (FLRA), the federal agency that administers the FSLMRS.

## **The Federal Service Labor-Management Relations Statute**

Prior to the enactment of the FSLMRS, federal employees were permitted to engage in collective bargaining pursuant to two executive orders. Executive Order 10988, issued by President Kennedy in 1962, granted federal employees the right “to form, join and assist any employee organization or to refrain from such activity.”<sup>6</sup> Under that order, once recognized as the exclusive representative of employees in an appropriate bargaining unit, an employee organization could negotiate an agreement that would cover all employees in that unit.<sup>7</sup>

Executive Order 11491, issued by President Nixon in 1969, further developed the framework for federal labor-management relations by establishing the (1) Federal Labor Relations Council, a predecessor to the FLRA, and (2) Federal Service Impasses Panel (FSIP), an entity that continues to provide assistance to resolve negotiation impasses.<sup>8</sup> Executive Order 11491 also identified unfair labor practices that were prohibited for management and labor organizations.<sup>9</sup>

In 1978, the right to engage in collective bargaining became recognized in statute through the FSLMRS, which codified many of the concepts included in the executive orders.<sup>10</sup> In addition to providing for the right to engage in collective bargaining, the FSLMRS also established the

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<sup>1</sup> P.L. 95-454, tit. VII, 92 Stat. 1111, 1191-1218 (1978).

<sup>2</sup> AFGE and Air Force Logistics Command, Wright-Patterson AFB, 2 F.L.R.A. 603 (1980).

<sup>3</sup> AFGE Local 2139, Nat’l Council of Field Labor Locals and U.S. Dep’t of Labor, 61 F.L.R.A. 654 (2006).

<sup>4</sup> 5 U.S.C. § 7131(d).

<sup>5</sup> H.R. 1293, 115th Cong. (2017); H.R. 1364, 115th Cong. (2017).

<sup>6</sup> Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

<sup>7</sup> *Id.* at 553-54.

<sup>8</sup> Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969).

<sup>9</sup> *Id.* at 17613-14.

<sup>10</sup> P.L. 95-454, tit. VII, 92 Stat. 1111, 1191-1218 (1978).

FLRA, which, among other duties, supervises union elections, adjudicates unfair labor practice complaints, and resolves questions concerning the negotiability of bargaining proposals.<sup>11</sup>

Under the FSLMRS, a labor organization becomes the exclusive representative of a collective bargaining unit following a secret ballot election in which a majority of the employees in the unit vote favorably for the union.<sup>12</sup> Once selected, the union is responsible for representing the interests of all employees in the bargaining unit, even if an individual has chosen not to join the union.<sup>13</sup> Unlike organized employees in the private sector, federal employees are also prohibited from engaging in a strike.<sup>14</sup>

According to the Bureau of Labor Statistics, in 2016, 27.4% of all federal employees were members of a union.<sup>15</sup> While the union membership rate for federal workers has declined slightly over the past ten years, it continues to exceed the union membership rate for private-sector employees.<sup>16</sup> In 2016, only 6.4% of private-sector employees were members of a union.<sup>17</sup> This disparity in union membership rates has been noteworthy to some given the inability of federal employees to negotiate over wages and major employee benefits.<sup>18</sup>

## **Who Is Covered by the FSLMRS**

While the FSLMRS applies to most federal agencies, several agencies are specifically excluded from coverage under the statute. The FSLMRS defines the term “agency” to exclude the Government Accountability Office (GAO), the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, the FLRA, the FSIP, the U.S. Secret Service, and the U.S. Secret Service Uniformed Division.<sup>19</sup> The ability to engage in collective bargaining has been provided to GAO employees pursuant to section 732(e) of title 31, U.S. Code.<sup>20</sup> However, employees of the other named agencies do not have the right to engage in collective bargaining.

The FSLMRS also authorizes the President to exclude additional agencies and agency subdivisions from coverage if he determines that an agency or subdivision has a primary function of intelligence, counterintelligence, investigative, or national security work, and the statute cannot be applied “in a manner consistent with national security requirements and considerations.”<sup>21</sup> The

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<sup>11</sup> 5 U.S.C. § 7105.

<sup>12</sup> *Id.* § 7111(a).

<sup>13</sup> *Id.* § 7114(a)(1).

<sup>14</sup> *Id.* § 7311(3).

<sup>15</sup> News Release, Bureau of Lab. Stat., Union Members – 2016 (Jan. 26, 2017), <http://www.bls.gov/news.release/pdf/union2.pdf>.

<sup>16</sup> News Release, Bureau of Lab. Stat., Union Members – 2006 (Jan. 25, 2007), [https://www.bls.gov/news.release/archives/union2\\_01252007.pdf](https://www.bls.gov/news.release/archives/union2_01252007.pdf). In 2006, 28.4% of all federal employees were members of a union.

<sup>17</sup> *See* Union Members – 2016, *supra* note 15.

<sup>18</sup> *See, e.g.,* Samuel Estreicher, *The Paradox of Federal-Sector Labor Relations: Voluntary Unionism Without Collective Bargaining Over Wages and Employee Benefits*, 19 EMP. RIGHTS & EMP’T POLICY J. 283, 284 (2015) (questioning why federal employees select union representation when “in most federal agencies there is no collective bargaining over wages or pensions, healthcare, and other major employee benefits because these matters are governed by federal statute or regulation.”).

<sup>19</sup> 5 U.S.C. § 7103(a)(3).

<sup>20</sup> 31 U.S.C. § 732(e) states that GAO’s personnel management system must provide “for a labor-management relations program consistent with chapter 71 of title 5.”

<sup>21</sup> 5 U.S.C. § 7103(b)(1).

President has exercised this authority to exclude numerous additional agencies and subdivisions from coverage under the FSLMRS, including the Defense Intelligence Agency and the Bureau of Alcohol, Tobacco, Firearms, and Explosives.<sup>22</sup>

## What Can Be Negotiated Under the FSLMRS

The FSLMRS states that “[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right.”<sup>23</sup> The right recognized by the FSLMRS includes the ability “to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees.”<sup>24</sup> The FSLMRS further defines the phrase “conditions of employment” broadly to include personnel policies, practices, and matters that affect working conditions.<sup>25</sup> The phrase does not encompass, however, policies, practices, and matters “to the extent such matters are specifically provided for by Federal statute.”<sup>26</sup> Thus, to the extent federal law provides for pay, retirement benefits, health coverage, and other items, such subjects are not negotiable.<sup>27</sup> In *U.S. Dep’t of Defense v. FLRA*, an early case involving the FSLMRS, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) confirmed that the scope of the duty to bargain is subject to “important limitations,” notably those matters that are provided for by federal law.<sup>28</sup>

In addition, the FSLMRS identifies management rights that are generally not negotiable, except with regard to the procedures that will be used to implement an agency’s proposals. Section 7106(a) of the FSLMRS identifies the following as nonnegotiable:

- the mission, budget, organization, number of employees, and internal security practices of the agency;

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<sup>22</sup> Exec. Order No. 12171, *reprinted as amended* in 5 U.S.C. § 7103 at 58-59 (2012).

<sup>23</sup> 5 U.S.C. § 7102.

<sup>24</sup> *Id.* § 7102(2).

<sup>25</sup> *Id.* § 7103(a)(14).

<sup>26</sup> *Id.* § 7103(a)(14)(C). Courts have also concluded that employees have no right to bargain over matters that Congress has committed to an agency’s unfettered discretion. *See U.S. Dep’t of the Air Force v. FLRA*, 844 F.3d 957 (D.C. Cir. 2016) (finding no obligation to bargain over access to a shopette because 10 U.S.C. § 2484(c)(2) grants the Department of Defense unfettered discretion to “maintain the exclusive right to operate convenience stores, shopettes, and troop stores ... ”); *Illinois Nat’l Guard v. FLRA*, 854 F.2d 1396 (D.C. Cir. 1988) (no obligation to bargain over an alternative work schedule when Secretary of the Army given unfettered discretion to prescribe hours of duty for technicians under 32 U.S.C. § 709).

<sup>27</sup> *See, e.g.*, 5 U.S.C. § 5332(a)(1) (“The General Schedule, the symbol for which is ‘GS’, is the basic pay schedule for positions to which this subchapter applies. Each employee to whom this subchapter applies is entitled to basic pay in accordance with the General Schedule.”). The employees of at least seven agencies, however, are believed to have the ability to negotiate over pay. According to the U.S. Office of Personnel Management, employees of the Bonneville Power Administration, the Federal Aviation Administration, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the Office of the Comptroller of the Currency, the Securities Exchange Commission, and the National Credit Union Administration may negotiate over wages. In addition, employees of the Department of Defense Domestic Dependent Elementary and Secondary Schools and white collar non-appropriated fund employees of the Department of Defense are also believed to have the ability to negotiate over pay. This authority appears to have been provided either by statute or by judicial or administrative decision. *See U.S. OFFICE OF PERSONNEL MGMT., Executive Branch Agencies With Bargaining Units That Have Authority to Negotiate Pay as of 01/05/2011* (on file with author).

<sup>28</sup> 685 F.2d 641, 644 (D.C. Cir. 1982).

- hiring, assigning, directing, laying off, and retaining the agency's employees, or suspending, removing, reducing in grade or pay, or taking other disciplinary action against employees;
- assigning work, making determinations with respect to contracting out, and determining the personnel by which agency operations shall be conducted;
- with respect to filling positions, making selections for appointments from among properly ranked and certified candidates for promotion, or from any other appropriate source;
- taking whatever actions may be necessary to carry out the agency mission during emergencies.<sup>29</sup>

Courts have noted that section 7106(a) ensures that the collective bargaining system established by the FSLMRS does not “undermine the effectiveness of government through unwarranted intrusion on management prerogatives.”<sup>30</sup> At the same time, however, section 7106(b) of the FSLMRS provides that nothing in the section “shall preclude any agency and any labor organization from negotiating ... procedures which management officials of the agency will observe in exercising any authority under this section[.]”<sup>31</sup> The FSLMRS and the two subsections are meant to “establish a balance between the nonnegotiable substantive rights of management and the negotiable procedures to be followed when management exercises its substantive rights.”<sup>32</sup>

In *Dep't of Defense, Army-Air Force Exchange Service v. FLRA*, the D.C. Circuit considered when a bargaining proposal that purports to address how management implements changes actually interferes with the rights of management under section 7106(a).<sup>33</sup> Specifically, the D.C. Circuit deemed a proposal requiring the exhaustion of a collective bargaining agreement's review procedures before a removal or suspension was “procedural” in nature, and upheld the FLRA's decision that the proposal was negotiable because it would not have the effect of stopping management from “acting at all.”<sup>34</sup>

In *Dep't of Defense, Army-Air Force Exchange Service*, the court viewed the proposal as merely requiring the use of existing review procedures that would not unreasonably delay management action or frustrate management's authority under section 7106(a).<sup>35</sup> The court maintained that the so-called “acting at all” standard for evaluating procedural matters was a “reasonable and natural construction” of section 7106: “The management power to act that is protected by Section 7106(a) may be limited by the procedures under Section 7106(b), but only so far as the procedures do not have the effect of eliminating management authority by preventing its ‘acting at all.’”<sup>36</sup>

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<sup>29</sup> 5 U.S.C. § 7106(a).

<sup>30</sup> U.S. Dep't. of Health and Human Services v. FLRA, 844 F.2d 1087, 1090 (4th Cir. 1988). *See also* Navy Charleston Naval Shipyard v. FLRA, 885 F.2d 185 (4th Cir. 1989) (discussing Congress's intent to preserve management prerogative from the pressures of bargaining).

<sup>31</sup> 5 U.S.C. § 7106(b)(1).

<sup>32</sup> Veterans Admin. Med. Center. v. FLRA, 675 F.2d 260, 262 (11th Cir. 1982).

<sup>33</sup> 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

<sup>34</sup> *Id.* at 1153-54.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1153.

In that same case, the D.C. Circuit also upheld the FLRA's determination that a series of proposals that conditioned job assignments on seniority were not negotiable because the proposals were viewed to be "substantive" matters and the negotiations over such proposals would "directly interfere" with an agency's ability to assign work.<sup>37</sup> The court agreed with the FLRA's finding that compelling the selection of an employee for an assignment based on seniority removed the agency's discretion to make decisions based on the judgment and reliability of the individual.<sup>38</sup> In the court's view, these proposals directly interfered with the right of the agency to assign employees under section 7106(a).<sup>39</sup>

In recognizing the use of the two different standards, the D.C. Circuit distinguished between proposals that are procedural and those that are actually substantive.<sup>40</sup> A proposal that directly implicates how work is actually performed, like those specifying criteria for personnel assignments, is substantive and should be subject to the "directly interfere" standard.<sup>41</sup> Other proposals that are less direct, such as the exhaustion of review procedures, are procedural and should be subject to the "acting at all" standard.<sup>42</sup>

In a subsequent decision, the D.C. Circuit acknowledged that the distinction between procedural and substantive proposals is "not always crisp."<sup>43</sup> Nevertheless, the court emphasized that the basic approach to analyzing such proposals "is to determine whether they specify criteria by which decisions must be made, or whether they have less direct substantive repercussions."<sup>44</sup>

The "acting at all" and "directly interfere" standards continue to be used to evaluate agency proposals involving the procedures management will follow when it exercises its rights under section 7106(a).<sup>45</sup> For example, a proposal to delay an employee's suspension until at least 10 days after the date of a decision letter ordering the suspension was found to be procedural and negotiable because it would not bar the agency from acting at all.<sup>46</sup> In another case, the D.C. Circuit concluded that a proposal to allow a union member to sit on a panel charged with formulating the criteria to be used in rating candidates for promotion was substantive and directly interfered with management's rights under section 7106(a).<sup>47</sup> The court explained:

[T]he proposal at hand contemplates direct union participation in the decisionmaking process. It would have a union member join in the deliberations of the rating and ranking panel, serving as one of three decisionmakers in that phase of the promotion process ... In this light, the union's proposition amounts to nothing less than a bid to share management's decisionmaking authority[.]<sup>48</sup>

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<sup>37</sup> *Id.* at 1161.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1159.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1153.

<sup>43</sup> *Defense Logistics Council of AFGE Locals v. FLRA*, 810 F.2d 234, 237 (D.C. Cir. 1987).

<sup>44</sup> *Id.*

<sup>45</sup> See PETER BROIDA, A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW AND PRACTICE 502-505 (2015).

<sup>46</sup> *U.S. Dep't of Interior, Bureau of Land Mgmt. v. FLRA*, 873 F.2d 1505 (D.C. Cir. 1989).

<sup>47</sup> *Nat'l Federation of Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834 (D.C. Cir. 1987).

<sup>48</sup> *Id.* at 842.

## Negotiated Grievance Procedures

Section 7121(a)(1) of the FSLMRS requires collective bargaining agreements to include procedures for the settlement of grievances.<sup>49</sup> A “grievance” is any complaint by an employee related to his employment, and any complaint by a union concerning any matter related to the employment of any employee.<sup>50</sup> A grievance also includes any complaint by an employee, union, or agency concerning the effect, interpretation, or alleged breach of a collective bargaining agreement, or any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.<sup>51</sup> While it would seem that a multitude of employment-related issues could be resolved through a negotiated grievance procedure, section 7121(c) provides that the following may not be resolved through such a procedure:

- any claimed violation of subchapter III of 5 U.S.C. chapter 73;<sup>52</sup>
- grievances concerning retirement, life insurance, or health insurance;
- suspensions or removals under section 7532 of title 5, U.S. Code;<sup>53</sup>
- grievances concerning any examination, certification, or appointment;
- the classification of any position which does not result in the reduction in grade or pay of an employee.<sup>54</sup>

The FSLMRS requires that a negotiated grievance procedure provide for expeditious processing and allow binding arbitration for any grievance that is not satisfactorily resolved.<sup>55</sup> For specified personnel actions that may be reviewed under a statutory procedure by the Merit Systems Protection Board (MSPB),<sup>56</sup> but could also be resolved through a negotiated grievance procedure, an aggrieved employee can raise the matter under either procedure, but not both.<sup>57</sup> A negotiated grievance procedure is believed by some to offer more advantages to the employee.<sup>58</sup> For example, because an arbitrator is selected by both the agency and the union, the employee could arguably receive an outcome that is more favorable than one decided by the MSPB.<sup>59</sup>

Under section 7122(a) of the FSLMRS, most arbitration awards may be reviewed by the FLRA.<sup>60</sup> If the FLRA determines that an award is deficient because it is contrary to any law, rule, or regulation, or is deficient on other grounds similar to those applied by federal courts in private-sector labor-management relations, the agency may take such action as it considers “necessary,

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<sup>49</sup> 5 U.S.C. § 7121(a)(1).

<sup>50</sup> *Id.* § 7103(a)(9)(A), (B).

<sup>51</sup> *Id.* § 7103(a)(9)(C).

<sup>52</sup> *Id.* §§ 7321-7326.

<sup>53</sup> *Id.* § 7352.

<sup>54</sup> *Id.* § 7121(c).

<sup>55</sup> *Id.* § 7121(b).

<sup>56</sup> *See, e.g., id.* § 7701.

<sup>57</sup> *Id.* § 7121(d), (e).

<sup>58</sup> *See* Estreicher, *supra* note 18 at 289-90.

<sup>59</sup> *Id.*

<sup>60</sup> 5 U.S.C. § 7122(a). Arbitration awards involving removals and reductions in grade based on unacceptable performance, as well as other removals, suspensions, reductions in grade or pay, and furloughs of 30 days or less are not reviewable by the FLRA, but are subject to judicial review under 5 U.S.C. § 7703.

consistent with applicable laws, rules, or regulations.”<sup>61</sup> The FLRA’s decision is not subject to judicial review unless it involves an unfair labor practice.<sup>62</sup>

## **Unfair Labor Practices**

Section 7116 of the FSLMRS identifies various prohibitions that both an agency and a labor organization cannot take called “unfair labor practices.”<sup>63</sup> For example, an agency is prohibited from discouraging union membership through discrimination against an employee with regard to his tenure, promotion, or conditions of employment.<sup>64</sup> Similarly, a union may not interfere with or coerce an employee in the exercise of any right under the FSLMRS.<sup>65</sup>

If an agency or union is charged with having engaged in an unfair labor practice, an FLRA regional director, acting on behalf of the agency’s General Counsel, will investigate the charge and determine whether to issue a complaint.<sup>66</sup> During the investigation, the parties are required to cooperate fully and are given an opportunity to present their evidence and views.<sup>67</sup> If the regional director determines that formal proceedings are necessary, he will file a complaint with the Office of Administrative Law Judges.<sup>68</sup>

If the parties do not reach a settlement following the issuance of the complaint, an Administrative Law Judge (ALJ) will conduct a hearing to receive evidence and inquire into the relevant and material facts.<sup>69</sup> During the hearing, the General Counsel has the burden of proving the allegations of the complaint by a preponderance of evidence.<sup>70</sup>

Following the hearing, the ALJ will prepare a written decision that provides a statement of the issues, relevant findings of fact, conclusions of law, and a recommended disposition or order.<sup>71</sup> This decision can be reviewed by the FLRA. However, if the FLRA does not review the ALJ’s decision, it becomes the agency’s final decision.<sup>72</sup>

If it is determined that an unfair labor practice has been committed, the violator will be ordered to cease and desist from such misconduct.<sup>73</sup> Reinstatement and back pay may also be ordered if management has engaged in an unfair labor practice.<sup>74</sup> Any person aggrieved by the FLRA’s order may seek judicial review of the order in the U.S. court of appeals in the circuit in which the person resides or transacts business or in the D.C. Circuit.<sup>75</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* § 7123(a)(1).

<sup>63</sup> *Id.* § 7116.

<sup>64</sup> *Id.* § 7116(a)(2).

<sup>65</sup> *Id.* § 7116(b)(1).

<sup>66</sup> 5 C.F.R. § 2423.8(a).

<sup>67</sup> *Id.* § 2423.8(b).

<sup>68</sup> *Id.* § 2423.20(a).

<sup>69</sup> *Id.* § 2423.31.

<sup>70</sup> *Id.* § 2423.32.

<sup>71</sup> *Id.* § 2423.34(a).

<sup>72</sup> *Id.* § 2423.41(a).

<sup>73</sup> 5 U.S.C. § 7118(a)(7)(A).

<sup>74</sup> *Id.* § 7118(a)(7)(C).

<sup>75</sup> *Id.* § 7123(a).

## Official Time

The FSLMRS requires that employees who represent a union in the negotiation of a collective bargaining agreement be granted official time—paid time off from assigned government duties—for such activity.<sup>76</sup> Section 7131(d) of the FSLMRS also permits the negotiation of additional official time “in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.”<sup>77</sup> The FLRA has interpreted this section to require the negotiation of official time proposals that involve employees performing labor-management relations activities beyond negotiation of a collective bargaining agreement.<sup>78</sup> Accordingly, section 7131(d) limits management’s ability to assign work pursuant to section 7106(a). In *Military Entrance Processing Station Los Angeles and AFGE Local 2866*, the FLRA observed: “Section 7131(d) ‘carves out an exception’ to management’s right to assign work; otherwise, that right ‘would preclude any negotiation of official time provisions, since official time always affects an agency’s ability to assign work.’”<sup>79</sup>

In *AFGE Local 2761 and Dep’t of the Army, Army Publications Distribution Ctr.*, the FLRA identified some of the activities for which official time is available based on the FSLMRS’s legislative history:

Examples of representational activities for which official time may be used include the investigation and attempted informal resolution of employee grievances; participation in formal grievance resolution procedures; attendance at, or preparation for, meetings of committees on which both the labor organization and management are represented; and discussion of problems in contract administration with management officials.<sup>80</sup>

Other activities perhaps less directly related to collective bargaining have been considered labor-management activities for which official time may be available, as well. For example, in *Nat’l Federation of Federal Employees, Local 2050 and Environmental Protection Agency*, the FLRA found negotiable a proposal involving official time for employees who serve as union representatives and respond to media inquiries about matters affecting the bargaining unit’s conditions of employment.<sup>81</sup>

In *Nat’l Federation of Federal Employees Local 122 and Dep’t of Veterans Affairs*, the FLRA concluded that section 7131(d) permits an agency and a union to negotiate a proposal authorizing official time for employees to lobby elected officials in support of or opposition to legislation that could affect their working conditions.<sup>82</sup> Noting that the FSLMRS provides employees who act as union representatives the ability to present the views of the union to Congress, the FLRA reasoned that official time may be negotiated because a union “may have particular representational interests in lobbying Congress because Congress may determine directly many

<sup>76</sup> *Id.* § 7131(a).

<sup>77</sup> *Id.* § 7131(d).

<sup>78</sup> *See, e.g.*, U.S. Dep’t of Justice, Immigration & Naturalization Service and AFGE Nat’l Border Patrol Council, 37 F.L.R.A. 362, 370 (1990) (“Section 7131(d) of the Statute provides that representatives of 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.’ The Authority has held that official time negotiated under this section is to be used for ‘labor-management relations activity.’”) (citation omitted).

<sup>79</sup> 25 F.L.R.A. 685, 688 (1987) (quoting *AFGE, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1530-31 (D.C. Cir. 1986)).

<sup>80</sup> 32 F.L.R.A. 1006, 1012 (1988).

<sup>81</sup> 45 F.L.R.A. 289 (1992).

<sup>82</sup> 47 F.L.R.A. 1118 (1993).

conditions of employment of Federal employees.”<sup>83</sup> The FLRA emphasized, however, that official time is appropriate only if the employee is functioning as a union representative and the lobbying relates to matters that pertain to the bargaining unit’s conditions of employment.<sup>84</sup>

Section 7131(d) has also been interpreted to allow some union members to spend all of their time working on union-related matters; that is, official time would cover an employee’s entire work day. In *AFGE Council of Locals 214 v. FLRA*, the D.C. Circuit rejected the FLRA’s position that an official time proposal that would allow for some employees to spend 100% of their time handling union representational functions was negotiable only at the election of the agency.<sup>85</sup> The FLRA maintained that because the proposal was “integrally related” to the number of employees or positions assigned to a project or organizational entity, an agency could, but was not required to, negotiate.<sup>86</sup> The D.C. Circuit concluded, however, that the FLRA’s interpretation of the FSLMRS failed to give effect to section 7131(d): “The result of the FLRA’s construction here is to drain the official time provision of any reasonable meaning and thus to frustrate the intent of Congress.”<sup>87</sup>

While the FLRA expressed concern that a 100% official time proposal could impair an agency’s ability to function effectively, the D.C. Circuit maintained that its decision required only that the parties negotiate such a proposal. The court noted that an agency “has no obligation to abandon what it conceives to be the best interests of the agency merely because it must negotiate on an official time proposal.”<sup>88</sup>

However, there are limits as to what can be considered official time. In *AFGE Local 2761*, the FLRA concluded that an official time proposal that would have allowed designated union representatives to attend employee funerals was not negotiable.<sup>89</sup> The FLRA explained: “The Union does not show, and it is not apparent to us, that the use of official time to attend an employee’s funeral relates to any labor-management activities under the [FSLMRS].”<sup>90</sup>

In 2002, the Office of Personnel Management (OPM) began requiring federal agencies to report the number of official time hours used by their employees in the preceding fiscal year.<sup>91</sup> Until recently, OPM produced annual reports on the government-wide use of official time.<sup>92</sup> OPM’s most recent report, however, was published in 2014 and includes official time statistics for fiscal

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<sup>83</sup> *Id.* at 1124. 5 U.S.C. § 7102(1) states that each employee has the right “to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities[.]”

<sup>84</sup> *Id.* at 1125-26.

<sup>85</sup> 798 F.2d 1525 (D.C. Cir. 1986).

<sup>86</sup> *Id.* at 1526-27.

<sup>87</sup> *Id.* at 1528.

<sup>88</sup> *Id.* at 1530.

<sup>89</sup> *AFGE Local 2761 and Dep’t of the Army, Army Publications Distribution Ctr.*, 32 F.L.R.A. at 1012.

<sup>90</sup> *Id.* See also U.S. Dep’t of Justice, Immigration & Naturalization Service and AFGE Nat’l Border Patrol Council, 37 F.L.R.A. 362, 371 (noting that official time is also not available to represent a former employee in an unemployment compensation hearing or to assist an employee with a private matter involving the police).

<sup>91</sup> U.S. OFFICE OF PERSONNEL MGMT., *Memorandum for Heads of Executive Departments and Agencies* (June 17, 2002), <https://www.chcoc.gov/content/official-time-labor-management-relations>.

<sup>92</sup> See U.S. OFFICE OF PERSONNEL MGMT., *Labor-Management Relations: Reports on Official Time*, <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/#url=Overview> (last visited Mar. 15, 2017).

year 2012.<sup>93</sup> OPM officials have reportedly maintained that the agency is not required to report official time, and that it plans to issue future official time reports on a biannual basis.<sup>94</sup>

Legislation that would require OPM to submit official time reports to Congress has been introduced in the 115<sup>th</sup> Congress. H.R. 1293 would amend section 7131 to require OPM to report, for the previous fiscal year, the total amount of official time granted to employees, the specific types of activities for which official time was provided, and the total amount of compensation afforded to employees in connection with their official time activities.<sup>95</sup> This information would have to be provided cumulatively, as well as for each individual agency.<sup>96</sup>

A second bill has been introduced in the 115<sup>th</sup> Congress to prohibit the availability of official time for lobbying. H.R. 1364, the Official Time Reform Act of 2017, would amend section 7131 to provide that an employee may not be granted official time “for purposes of engaging in any political activity, including lobbying activity.”<sup>97</sup> H.R. 1364 would also disallow any day spent principally on official time, in excess of an aggregate 365 days, from becoming part of an employee’s creditable service for purposes of the Civil Service Retirement System or the Federal Employees’ Retirement System.<sup>98</sup> According to the bill, an employee spends a day “principally on official time” if at least 80% of his day is spent on official time.<sup>99</sup>

The House Committee on Oversight and Government Reform ordered both measures to be reported in March 2017.<sup>100</sup>

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<sup>93</sup> U.S. OFFICE OF PERSONNEL MGMT., *Labor-Management Relations in the Executive Branch* (Oct. 2014), <https://www.opm.gov/policy-data-oversight/labor-management-relations/reports/labor-management-relations-in-the-executive-branch-2014.pdf>.

<sup>94</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-105, *UNION ACTIVITIES: VA COULD BETTER TRACK THE AMOUNT OF OFFICIAL TIME USED BY EMPLOYEES 6* (2017), <http://www.gao.gov/assets/690/682250.pdf> (“OPM officials stated that it is not required to report official time, and has no statutory or regulatory role for monitoring or enforcing agencies’ use of official time.”)

<sup>95</sup> H.R. 1293, 115th Cong. § 1(a) (2017).

<sup>96</sup> *Id.*

<sup>97</sup> H.R. 1364, 115th Cong. § 2(a)(2) (2017).

<sup>98</sup> *Id.* § 3.

<sup>99</sup> *Id.*

<sup>100</sup> See Eric Katz, *Pension Reforms, Punishments for Porn Watchers Advance*, GOV’T EXEC. (Mar. 10, 2017), <http://www.govexec.com/pay-benefits/2017/03/committee-approved-bills-would-make-pension-reforms-punish-porn-watchers/136010/>.