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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-200341 (MRV)

DEC 29 1980

The Honorable Alice Daniel
Assistant Attorney General
Civil Division
Department of Justice

Attention: Robert Kapp, Director
Appellate Section

Dear Ms. Daniel:

We understand that the Department of Justice has appealed to the U.S. Court of Appeals for the Ninth Circuit a ruling by the Federal Labor Relations Authority that 5 U.S.C. § 7131(a) creates an obligation upon Federal agencies to expend appropriated funds for the travel and per diem expenses of employees negotiating a collective bargaining agreement on behalf of a labor union. The case in question involves the Bureau of Alcohol, Tobacco and Firearms, Western Region (ATF), Department of the Treasury. 4 FLRA No. 40, September 29, 1980.

In view of the jurisdiction of our Office over the expenditure of appropriated funds, 31 U.S.C. §§ 71, 74, and 82d, we consider it appropriate to submit to you our views on that issue. In that regard, we enclose for your information a copy of our letter of today to the Director, Office of Dependents Schools, Department of Defense.

Section 7131(a)(b) and (c) of title 5, U.S. Code provides:

"(a) 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.

"(b) 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 non-duty status.

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"(c) 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."

Under Executive Order No. 10988 dated January 19, 1962, the concept of collective bargaining in the Federal service was recognized as contributing to the effective conduct of public business. Executive Order No. 11491, dated October 29, 1969, as amended, the successor to Order No. 10988, and the predecessor to 5 U.S.C. ch. 71, recognized labor-management relations as being in the public interest, and authorized an agency to agree in negotiations to allow a union representative to have up to 40 hours of "official time" for negotiations. The Senate version of the labor-relations bill considered in the 95th Congress would have continued by statute the limited official time authorization in Executive Order No. 11491. The House version, however, provided for official time for negotiations on the broader basis enacted in 5 U.S.C. 7131(a), above.

The position of the Federal Labor Relations Authority is that, since section 5 U.S.C. § 7101(a) provides that collective bargaining "contributes to the effective conduct of public business" and is "in the public interest," an employee while negotiating a collective bargaining agreement as a union representative is engaged in "official business of the Government." The Authority points out that employees engaged in official business of the Government may be allowed travel and per diem under 5 U.S.C. §§ 5701-5706. The Authority says it follows that travel and per diem expenses are allowable as a matter of right both under section 7131(a) and its regulations under 7131(c).

In arriving at its conclusion, the Authority recognized that neither the statute, nor its legislative history adverts to the payment of travel expenses or per diem during participation in the negotiation of a collective bargaining agreement. The Authority points out, however, that Representative Clay in discussing the proscription of official time for employees engaged in internal

union business under section 7132(b) of the House bill (enacted as section 7131(b) of the statute) stated that 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." Further, the Authority says that under its regulations, 5 C.F.R. 2429.13, any employee whose participation in any phase of any proceeding before the Authority, including the investigation of unfair labor practices charges, "is deemed necessary by the Authority" shall be granted official time for such participation. That regulation, issued under 5 U.S.C. 7131(c), above, further provides that in such circumstances "necessary transportation and per diem expenses shall be paid by the employing activity or agency."

It is clear that section 7131(a) gives a mandatory entitlement of "official time" to an employee representing a labor union which is an exclusive representative in the negotiation of a collective bargaining agreement. Thus, an employee negotiating an agreement on behalf of an exclusive representative is entitled to his usual compensation without charge to his leave account. Likewise, it is clear that the "official time" to be authorized to an employee participating on behalf of a labor organization in any phase of proceedings before the Authority is to be determined by the Authority pursuant to section 7131(c).

As indicated above, the statutory statements of purpose that collective bargaining is in the public interest and contributes to the effective conduct of public business has been recognized officially since 1962. We are not aware of any opinion by this Office, any court, or the Federal Labor Relations Council, that held or even suggested, prior to the enactment of section 7131 that "official time" used by a union representative for collective bargaining gives an entitlement to travel and per diem expenses. This Office has, however, addressed the subject of such travel and per diem expenses on occasion. We have held that employee representatives of unions who were required to travel in connection with negotiations under Executive Order No. 10988 may not in the absence of legislation, have such travel regarded as official business for purposes of reimbursing the employees for travel expenses. See 44 Comp. Gen. 617 (1965). We recognized in that decision that such negotiations may contribute to the effective conduct of public business but viewed the employee union representative's presence at the negotiations as being primarily in the interest of the

employee organization. Also in 45 Comp. Gen. 454, (1968) we held that representatives of employee organizations who travel to meetings held in connection with the implementation of Executive Order No. 10988 do so primarily for the benefit of their organization even if there may be a mutual benefit to the Government.

Those decisions were modified by 46 Comp. Gen. 21 (1966) which held that the proposed guidelines of the Civil Service Commission established adequate standards for the reasonable and uniform exercise of discretionary administrative authority for agencies to decide under what conditions it would be proper for them to pay the travel expenses of employee organization representatives. The guidelines required the issuance of a certificate by the agency concerned showing the travel to be in the primary interest of the United States accompanied by a brief explanation of the basis for those certifications. Those guidelines stated that, as a general practice, travel expenses should not be paid to attend negotiations sessions for the purpose of negotiating an agreement. The guidelines recognized, however, that there would be cases in which travel expenses to negotiation meetings would be in the primary interest of the Government. The example given was where the Government decided to hold a meeting at a site selected by the agency and found it to be more economical to pay travel costs for the employee organization representatives than it would be to pay travel costs for the agency representatives. The decision further held that travel expenses paid by agencies in accordance with those guidelines, to representatives of employee organizations in connection with negotiation of a collective bargaining agreement would not normally be questioned by our Office in the absence of misrepresentation, bad faith or arbitrary action in making the prescribed certification.

The basic question now is whether the Authority can mandate the obligation of the appropriations of Federal agencies for such expenses, thus divesting the agencies of control of their appropriated funds. The Authority says sections 7131(a) and 7131(c) vest it with such power. We disagree. Those sections address the matter of "official time" only. The question of payment of travel expenses is a separate determination. We find no support in the language of section 7131(a), or its legislative history, concerning the allowing of official time which creates an entitlement to travel expenses. Nor do we find any support for a similar determination by the Authority under section 7131(c), which gives it authority over "official time" in connection with attendance at proceedings of the Authority.

Our position is that, for a determination to be made that agencies have been divested of control of their appropriated funds, there must be a clear and specific showing in a statute that Congress intended such a result. Here we have found no indication that the Congress intended that "official time" authority in section 7131 was to include payment of travel expenses on either a discretionary or mandatory basis. In fact, the history of "official time" off from regular duties is to the contrary. The only difference between the "official time" provisions of the Executive Order and the statute is that the latter broadened the authority for use of official time. We have found no support historically or otherwise for the Authority's conclusion that the Congress intended to give the term "official time" other than its established meaning, that is, time off without loss of pay from the regular duties of the employee's position. Accordingly, our view is that the Authority cannot under existing law mandate an agency to make payment of travel expenses to employees who represent unions in the negotiation of a collective bargaining agreement or at proceedings before the Authority under section 7131. Moreover, our view is that an application of section 7131(a) which does not cover travel and per diem expense payment does not preclude the parties from negotiating for payment of travel and per diem to employees in the course of representing labor organizations in negotiations, provided that an agreement to pay such expenses is justified as being primarily in the interest of the Government.

We understand that, although a notice of appeal has been filed in the ATF case, no final decision has been made by the Solicitor General as to whether to further prosecute the appeal. Our purpose in this letter is to state our view on the important issue involved in that case, but we understand there are other cases on the same issue which are still in the administrative process and we express no opinion on the subject of which particular case should be prosecuted in the Courts of Appeals.

Sincerely yours,

MILTON J. SOCOLAR

Milton J. Socolar
General Counsel

Enclosure