

## **Office of Government Ethics**

**92 x 6 -- 02/25/92**

### **Letter to a Deputy Agency Ethics Official dated February 25, 1992**

This responds to the request of [an attorney in your office] whether 18 U.S.C. § 209 would bar [agency] employees who are officials of [a Union] from accepting compensation from the [Union] for services they provide to the Union during normal duty hours. As I understand it, the employees in question devote 100% of their official duty time to Union activities in accordance with [a specific section of] the agreement between the [agency] and the [Union]. They receive full Government salaries for these activities; the compensation they would receive from the Union would be in addition to their Government salaries.

Section 209 of Title 18 prohibits any person from receiving "any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States . . ." with certain exceptions not relevant here. The statute contains a parallel provision prohibiting anyone from making such payments where receipt would be a violation.

As described in the incoming request, section 209 has four elements. The statute prohibits (1) an officer or employee (2) from receiving salary or any contribution to or supplementation of salary (3) from any source other than the United States (4) as compensation for services as an employee of the United States. If all four elements of the offense are met, violations of the statute can result in criminal penalties.

It appears clear that the first three elements of the statute would be satisfied if the employees accepted a supplementation of salary from the [Union]. The central question is whether the salary would be received as compensation for services as an employee of the United States. In effect, the issue to be addressed is whether an employee's activities during official duty hours on behalf of the [Union] are services as an employee of the United States within the meaning of 18 U.S.C. § 209.

There has been some debate whether an employee's activities

during regular working hours as a representative of a labor union should be considered the conduct of official duty for all purposes. The question most commonly arises in circumstances where an employee claims entitlement to his Government salary for Union-related services performed during working hours or asks for reimbursement of travel expenses incurred in carrying out official Union activities. The question of an employee's entitlement to receive his normal Government salary is governed by Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. § 7131. Section 7131(a) states that "[a]ny 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 proceedings, during the time the employee would otherwise be in a duty status." The provision is intended to ensure that employee union negotiators will continue to receive Government salary during collective bargaining sessions. See *BATF v. FLRA*, 464 U.S. 89, 99 (1983). Section 7131(c) permits the Federal Labor Relations Authority to determine whether an employee appearing before it may be authorized official time when the employee "would otherwise be in a duty status." Finally, Section 7131(d) requires an agency and an exclusive representative to agree on the amount of official time an employee may be granted to participate in labor relations and personnel matters covered by 5 U.S.C. Chapter 71. Activities relating to the internal business of a labor organization must be performed "during the time the employee is in a nonduty status." 5 U.S.C. § 7131(b).

The Agreement between the [Union] and the [agency] grants official time to Union stewards to participate in activities such as negotiations, FLRA proceedings, grievances, tax audits of employees, arbitrations, and adverse actions. When an employee is on "official time" in carrying out these activities, he receives his full Government salary even though he is acting on behalf of the Union. His salary may be paid for these activities where the agency and the Union agree that the amount of time granted is "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d).

In construing the meaning of the term "official time" in Section 7131(a), the Supreme Court has found that permission to engage in Union activities on official time does not warrant the conclusion that employees are also engaged in official business for the Government. Accordingly, the Court concluded that the Government was not required to provide travel expenses and a

per diem allowance to facilitate the activities of employees who were acting as Union officials. *BATF v. FLRA*, 464 U.S. at 107. The Court noted that nothing in the Civil Service Reform Act suggests that Union representatives must "be treated as though they were 'on the job' for all purposes." *Id.* at 104. The Court specifically stated that "[t]he fact that other federal statutes, with different purposes, may be construed to apply to employee negotiators does not demonstrate that . . . Congress intended to treat union negotiators as engaged in official business of the Government." *Id.* at 106. Additionally, the Court found that

There is . . . nothing inconsistent with paying the salaries, but not the expenses of Union negotiators. Congress might well have concluded that, although Union representatives should not be penalized by a loss in salary while engaged in collective bargaining, they need not be further subsidized with travel and per diem allowances.

*Id.* at 104.

The Court in *BATF* rejected the argument that an employee is entitled to travel and per diem expenses incurred while engaged in activities on behalf of a Union. It did not address the significance of an employee's pay status for purposes of other Federal laws and regulations. However, the Court's reasoning clearly indicates that Union negotiators could be, and sometimes are, considered "on the job" while conducting Union activities. For example, the provisions of the Federal Employees Compensation Act (5 U.S.C. § 8101) and the Federal Tort Claims Act (28 U.S.C. § 1346(b)) appear to apply to Union representatives. See *BATF v. FLRA*, 464 U.S. at 106, n.16. If Congress believed that the activities of a Union negotiator should not be considered "services as an officer or employee of the United States" for purposes of pay, it could have simply barred employees from receiving their Government salaries during the time they are engaged in Union activities. In our view, where Congress has specifically provided that the Federal Government must continue to pay employees their usual Government salaries during the time they are engaged in Union activities, those employees should be considered "on the job" for purposes of pay and compensation. Any additional payments made as compensation for these services, received from the Union or otherwise, would be inconsistent with the provisions of 18 U.S.C. § 209 and would therefore be impermissible.

In responding to this request, we have consulted with the Office of Legal Counsel at the Department of Justice. Please do not hesitate to contact this Office if you have further questions.

Sincerely,

Stephen D. Potts  
Director