



Federal Aviation Administration

Memorandum

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To: Laura Glading
Director
Labor and Employee Relations (AHL-1)

From: Mike Doherty
Senior Attorney
Employment and Labor Law Division (AGC-100)

Subject: Use of Official Time by Union Representatives during an Emergency Furlough

The purpose of this memorandum is to provide guidance with regard to the extent union representatives¹ may use official time during a lapse in appropriations, commonly referred to as a “government shutdown.” This guidance is based on the Antideficiency Act, 31 U.S.C. § 1341 *et seq*; memoranda issued by the U.S. Department of Justice Office of Legal Counsel (OLC) interpreting and applying the Antideficiency Act in the context of a lapse in appropriations; and guidance issued by the U.S. Office of Personnel Management (OPM) regarding “shutdown” furloughs.

Union representatives may only use official time during an emergency (shutdown) furlough to provide statutorily-required representation when the representational requirement is triggered by an excepted management activity. Union representatives may be on official time only for the duration of the representational need. They may not use contractually negotiated official time for purposes other than statutorily-required representation triggered by an excepted management activity. The furlough status of union representatives (excepted or non-excepted) should be determined by their regular FAA duties, not their representational activities, even if they are normally on official time on a full-time basis, i.e. eighty hours per pay period. If a union representative who would otherwise be excepted from a furlough cannot perform his regular duties

¹ When used herein, “union representatives” means FAA employees who are also designated as representatives by a labor organization. It does not refer to individuals who are not FAA employees, such as employees of labor organizations.

due to a lack of certification or proficiency, he should be placed in a furlough status, unless there are other excepted duties he can perform.

Antideficiency Act Requirements

When a lapse in appropriations occurs, most federal government employees are furloughed for the duration of the lapse, referred to in HRPMP-1.27, Furlough, as an “emergency (shutdown) furlough.”² The first step in identifying which employees are “excepted” from an emergency furlough is to determine which government functions may lawfully be continued during the lapse. The second step is to identify which positions are necessary to carry out those functions. The Antideficiency Act provides the parameters for making those determinations.

The Antideficiency Act codifies two basic restrictions on the operation of government activities or functions. First, it implements the constitutional restriction that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. In other words, federal government officials may not expend funds without a lawful appropriation.

Second, the Antideficiency Act restricts government officials from entering into contracts or incurring obligations prior to funds being appropriated: “An officer or employee of the United States Government or of the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . .” 31 U.S.C. § 1341(a)(1)(B)(emphasis added). Included in this restriction is incurring an obligation to pay employees’ salaries for work performed without an appropriation, unless authorized by law. The government may not accept “voluntary services” from employees during a lapse in appropriations or incur obligations for services with the anticipation of paying them once Congress appropriates funds, absent a lawful exception.

The Antideficiency Act provides a narrow exception to the prohibition against government officials from obligating funds before an appropriation is made. The Act limits that exception to employing the services of employees to perform government functions without an appropriation to “emergency situations,” where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . . As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

² This memorandum does not address a “save money” or non-emergency furlough of the type carried out by the Agency in April 2013 in response to sequestration-related budget restrictions.

31 U.S.C. § 1342.³ The Antideficiency Act, by itself, does not authorize paying employees in emergency situations; it just authorizes government officials to enter into obligations to pay for such labor.

In anticipation of a potential lapse in appropriations and subsequent emergency furlough, LOB/SOs must first identify the functions their organizations perform that meet the criteria in the Antideficiency Act exception, i.e. emergencies involving an imminent threat to the safety of human life or the protection of property, the suspension of which would imminently threaten the safety of human life or the protection of property. When determining which functions to continue during a lapse in appropriations, the Department of Justice has advised agencies to assume the private economy will continue to operate. Encompassed within that assumption is that commercial aircraft, at least in the near term, will need to continue to take off and land during a lapse, necessitating the need for the continuation of the FAA air traffic control function for a time during a short lapse in appropriations to ensure the safety of human life and protection of property.

Furthermore, a limited number of government functions funded through annual appropriations must also continue despite a lapse in appropriations because the lawful continuation of other activities “necessarily implies” these functions will continue as well. In other words, agencies should also continue functions that directly support functions being continued because they meet the criteria of “emergencies involving the safety of human life or protection of property.”

Finally, although the Antideficiency Act does not elaborate on which functions meet the “emergency” criteria, it provides guidance as to which functions do not: “As used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342. The emergencies exception in the Antideficiency Act applies only to cases of threat to human life or property where the threat can reasonably be said to be near at hand and demanding of an immediate response. Therefore, most regular and routine tasks performed by Agency employees do not constitute “emergencies” under the Act and those functions should not be continued during a lapse in appropriations, unless failure to perform them would cause an immediate harm to life or property.

Use of Official Time during an Emergency (Shutdown) Furlough

The Antideficiency Act also dictates the extent to which union representatives may use official time during an emergency (shutdown) furlough. The governing principle is the caveat that “emergencies” do not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342. Thus, routine, non-emergency uses of official time by union representatives are not permissible during lapses in appropriations.

During an emergency (shutdown) furlough, union representatives may only use official time when an otherwise excepted activity triggers representational rights under the Federal Service Labor-

³ The Act’s requirements are enforced through criminal penalties: an officer or employee of the United States who knowingly and willfully violates the Act is subject to a fine of not more than \$5,000; imprisonment for not more than two years; or both. 31 U.S.C. § 1350.

Management Relations Statute (FSLMRS), 5 U.S.C. chapter 71. The use of official time is triggered only in response to an excepted management official engaging in an excepted activity that results in a right to representation under the FSLMRS. OPM Guidance for Shutdown Furloughs at 34 (September 2015)(hereinafter “OPM Guidance”). For example, if an excepted management official has determined an investigation is necessary to protect against imminent dangers to life and property and the investigation includes an employee interview which the employee reasonably believes may result in discipline, the employee is entitled to union representation upon request. 5 U.S.C. § 7114(a)(2)(B).

In those situations, the union’s representational function, itself, constitutes an excepted activity. OPM Guidance at 34-35. In the event the “narrow set of circumstances” arise triggering the need for statutorily required representation, the designated union representative is entitled to use official time for the duration of the necessary representation need. If the designated union representative is excepted from the furlough, he may be relieved of his excepted duties and use sufficient official time to provide the statutorily required representation. If the designated union representative is not excepted, the Agency can recall him from furlough to provide the statutorily required representation. The union representative would be on official time for the duration of his recall. Once the need for representation terminates, the union representative would furloughed again.

As discussed above, the Antideficiency Act does not allow for ongoing, regular functions the suspension of which would not imminently threaten the safety of human life or the protection of property. Therefore, union representatives are not permitted to use official for purposes other than statutorily required representation triggered by an excepted management activity, even if the applicable collective bargaining agreement (CBA) provides them with official time for such purposes. Use of official time in circumstances other than when triggered by an excepted management activity would be contrary to the Antideficiency Act. Contract provisions that are contrary to law are unenforceable. Dept. of the Navy, USMC and AFGE, Local 1881, 34 FLRA 635, 638-39 (1990).

Union representatives who normally would be contractually entitled to use official time for all or part of a pay period would either be deemed excepted or non-excepted, based upon their regular, non-representational FAA duties. If they are excepted, they could not use official time, except in the limited circumstances discussed above, i.e. statutorily required representation triggered by an excepted management activity. If they are non-excepted, they would be furloughed, but could be recalled to perform representational duties on official time in those limited circumstances. Union representatives who would otherwise be excepted but cannot perform their regular duties due to a lack of certification or proficiency should be placed in a furlough status, unless there are other excepted duties they can perform.