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MEMORANDUM FOR AGENCY HEADS

FROM: T. MICHAEL KERR
Assistant Secretary for
Administration and Management

SUBJECT: Union Officials Engaging in Telework/Flexiplace in an
Official Time Status

Union representatives who perform union work on 100 percent official time from the NCFLL and AFGE were able, until 2005, to participate in telework arrangements. By memorandum dated July 1, 2005, the Department of Labor rescinded this privilege, reasoning that "telework arrangements must be for the sole purpose of performing Agency work." However, in light of changes in case law and statutory authority, Union officials on official time may now be permitted to participate in Agency telework arrangements. The July 1, 2005, memorandum is hereby repealed. All telework/flexiplace arrangements should be established in accordance with the Departmental Personnel Regulations and existing Collective Bargaining Agreements. If there are any questions or concerns regarding flexiplace requests please contact Maria Jordan, OASAM, Human Resources Center, at 202-693-7613.

The remainder of this memorandum provides background and guidance concerning union officials engaging in telework/flexiplace while performing representational work in an official time status. For the reasons outlined below, these practices may be permitted in light of recent case law.

5 U.S.C. §7131 ("§7131") reads, in pertinent part, that "except as provided in the preceding subsections of this section – (1) any employee representing an exclusive representative, or (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by 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 legislative history of §7131(d) indicates that not only the amount, but all other matters concerning official time, are the appropriate subject of bargaining. See EPA and AFGE Local 238, 63 F.L.R.A. No 13 (December 12, 2008). Thus, Union officials are eligible for a certain amount of official time to perform their duties within the statute.

Public Law No. 106-346 §359 ("§359") of October 23, 2000, requires each executive agency to establish a policy under which eligible employees of the agency may participate in telecommuting to the maximum extent possible without diminished employee performance. The Department of Labor administers the telework program through Department Personnel Regulation Chapter 610, Hours of Duty, Alternative Work Schedules and Telecommuting, dated October 1, 2004, and the Department's Collective Bargaining Agreements.

Collective Bargaining Agreements between the Department and the NCFLL and AFGE Local 12, respectively, contain the following provisions pertaining to telework/flexiplace:

NCFLL – The existing Agreement became effective July 2, 2002. Article 28 delineates procedural aspects of the program and stipulates a recognition of circumstances where it is mutually beneficial for employees to perform work at sites other than the traditional office or at locations other than where typical field work is performed.

Local 12 – The existing Agreement became effective March 20, 2005. Article 12 delineates procedural aspects of the program and stipulates that Flexiplace is voluntary, permitting approved employees to work from home or at other approved sites away from the office for all or part of the workweek.

The Federal Labor Relations Authority (“Authority”) has recognized – through three separate opinions – that Union officials on 100 percent official time may participate in telework arrangements pursuant to the requirements of §7131 and §359. In AFGE Local 222 and HUD, 60 F.L.R.A. No. 68 (October 8, 2004), the Authority held that §359 neither permitted nor prohibited union officials from performing representational duties while in telework status. The Authority held that §359 merely set forth telework parameters, but was silent on whether union officials enjoyed a right to perform representational duties while on telework status.

EPA and AFGE Local 238, 63 F.L.R.A. No 13 (December 12, 2008) again addressed this issue, holding that a union official may perform representational duties on official time at a remote location. Finding that §359 did not specifically address whether Union officials could perform representational duties in a telework arrangement, the Authority held that 5 U.S.C. §7131 is instead the more appropriate authority for consideration. Citing legislative history, the Authority found that, “the legislative history indicates that §7131(d) makes not only the amount but also ‘*all other matters* concerning official time for unit employees engaged in labor-management relations activity subject to negotiation....” Id. (emphasis in the original). Therefore, the Authority held that, unless another law specifically prohibits a union official from performing representational duties while on a telework agreement, “the location at which official time is to be exercised is a mandatory subject of bargaining.” Id.

In AFGE Local 236 and GSA, 63 F.L.R.A. No. 82 (April 17, 2009), the Authority again held that §7131 is the proper authority for determining whether to allow union officials to perform representational duties while on telework. In this case, the Authority determined that §359 set forth only the statutory basis for an Agency to establish a telecommuting program, but that it did not address whether union officials were permitted to perform representational duties while on telework arrangements. As the Authority determined that §359 did not permit or prohibit union officials from doing representation work while on telework, it also held that §7131 and the accompanying legislative history required the Agency to bargain over the use of official time by union officials to perform representational work.

Based upon these developments, and consistent with the Agency’s commitment to fostering a positive internal labor-management relationship, the Agency is rescinding its prohibition on

flexiplace and telework arrangements for union officials. Any future arrangements should be established in accordance with the Departmental Personnel Regulations and existing collective bargaining agreements.

Thank you for your cooperation.