

## **Bargaining Guidance after the August 25 Court Order on the EOs**

### **WE WON**

As you are aware, the United States District Court for the District of Columbia found in favor of AFGE, instructing all agencies not to implement key provisions of the Executive Order.

### **WHAT CHANGES**

The Court's Order enjoined executive branch agencies from implementing or giving effect to sections 5(a), 5(e), and 6 of Executive Order 13,836 (also known as "The Collective Bargaining Procedures Order"); sections 3(a), 4(a), and 4(b) of Executive Order 13,837 (also known as "The Official Time Order"); and sections 3, 4(a), and 4(c) of Executive Order 13,839 (also known as "The Removal Procedures Order"). The following list includes the specific provisions of Executive Orders that were enjoined. Effective immediately, all agencies are ordered not to give effect to the following:

- The imposition of a 25 percent cap on the use of official time. 13837(4)(a)(ii).
- The prohibition against employees' right to petition and communicate with Congress. 13837(4)(a)(i).
- The ban on the use of official time by union representatives to prepare and present grievances. 13837(4)(a)(v).
- The one-hour per bargaining unit employee formula to be applied to set an aggregate cap on the use of official time. 13837(3)(a).
- The limitations placed on unions' use of agency facilities, such as office space and computers. 13837(4)(a)(iii).
- The exclusion of challenges to performance ratings and incentive pay from the scope of the negotiated grievance procedure. 13839(4)(a).
- The limitation of performance improvement periods (PIPs) to 30 days, with agencies alone having the discretion to apply longer periods. 13839(4)(c).
- The direction to agencies to press for the exclusion of removals from the scope of the negotiated grievance procedure. 13839(3).
- The prohibition against bargaining over the "permissive" subjects. 13836(6).
- The limitation on ground rules bargaining to six weeks, and the limitation on bargaining term agreements to six months. 13836(5)(a).
- The prohibition on bargaining approaches other than written proposals (IBB, etc.). 13836(5)(e).
- The prohibition on reimbursement for non-agency business. 13837(4)(a)(iv).
- The prohibition on using official time without advanced notice. 13837(4)(b).

### **WHAT STAYS THE SAME**

Among the provisions that were found lawful and may be put into effect include:

- The direction to agency management to implement general goals set out in Section 1, and reporting requirements for negotiations that last longer than six months. 13836(5)(b).
- The direction to agency management to file ULPs for bad-faith bargaining. 13836(5)(c).

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- The direction to pursue discipline for official time abuse. 13837(5)(a).
- The requirement that agencies develop a procedure for official time usage. 13837(5)(b).
- The requirement to report official time authorized over the 1-hr formula. 13837(3)(b).
- The requirement that agencies not bind themselves to using progressive discipline. 13839(2)(b).
- The direction that agencies do not limit their discretion to remove employees based on the discipline imposed on different employees for comparable conduct. 13839(2)(c).
- The direction that agencies issue decisions on disciplinary actions within 15 days of proposals, when practicable. 13839(2)(f).
- The direction that agencies should not limit discretion on using Chapter 75 for performance removals. 13839(4)(b)(i).
- The requirement that agencies not limit discretion to require the use of Chapter 43 procedures before removing an employee. 13839(4)(b)(ii).
- The direction that agencies should not limit discretion on removals to require the use of progressive discipline. 13839(4)(b)(iii).
- The prohibition on clean record settlements. 13839(5).
- Various provisions related to data collection. 13839(6).

Please note: AFGE has an active lawsuit seeking to block certain other provisions of the other two EOs: 13,839 Removal Procedures and 13,836 Collective Bargaining. We don't have a ruling on those challenges yet. We hope to prevail in our case to strike down these provisions as well.

### WHAT IT MEANS

This means the Agency is legally prohibited from giving effect to the blocked provisions of the Executive Order. What that means for you depends upon where your Agency is in the process of EO implementation. **Do not refuse an order from your agency, even if you believe that it is now unlawful based on the court's decision. Comply with the order and then take action such as informing the agency in writing why you believe its actions are illegal or filing a grievance.**

### If the Agency Hasn't Done Anything Yet:

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.
- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.

### If the Agency has filed a Demand to Bargain But You Haven't Begun Bargaining:

- 1) Send a letter to the Agency telling them they can't implement any of the barred provisions and requesting to meet to discuss the order.

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- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its demand to bargain.

### **If You Have Begun Bargaining:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.
- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its demand to bargain.
- 4) If they have furnished proposals, tell them that it is an unfair labor practice and violates the Court's Order for an agency to offer proposals in order to comply with the provisions of the Executive Orders that have been declared unlawful.

### **If you Have Agreed to Changes But Are Still Bargaining:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.
- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its demand to bargain.
- 4) If they have furnished proposals, tell them that it is an unfair labor practice and violates the Court's Order for an agency to offer proposals in order to comply with the provisions of the Executive Orders that have been declared unlawful.
- 5) Serve notice that the Union is withdrawing from tentatively-agreed-to provisions giving up rights in order to come into conformance with barred provisions of the Executive Orders. Changed circumstances allow for withdrawing or renegotiating tentatively-agreed-to articles; reopening TA'd proposals may be justified by many factors, including changes in the law. *Div. of Military and Naval Affairs, State of N.Y.*, 7 FLRA 321, 338 (1981).

### **If You are At Impasse:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.

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- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its demand to bargain.
- 4) If they have furnished proposals, tell them that it is an unfair labor practice and violates the Court's Order for an agency to offer proposals in order to comply with the provisions of the Executive Orders that have been declared unlawful
- 5) Serve notice that the Union is withdrawing from tentatively-agreed-to provisions giving up rights in order to come into conformance with barred provisions of the Executive Orders. Changed circumstances allow for withdrawing or renegotiating tentatively-agreed-to articles; reopening TA'd proposals may be justified by many factors, including changes in the law. *Div. of Military and Naval Affairs, State of N.Y.*, 7 FLRA 321, 338 (1981).
- 6) Reach out to the Field Services Department for assistance.

### **If you Are in a Negotiability Appeal:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.
- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its demand to bargain.
- 4) If they have furnished proposals, tell them any proposals that further the barred provisions are unlawful, non-negotiable, bad faith and constitute civil contempt of court.
- 5) As allowed by ground rules, serve notice that the Union is withdrawing from tentatively-agreed-to provisions giving up rights in order to come into conformance with barred provisions of the Executive Orders. Changed circumstances allow for withdrawing or renegotiating tentatively-agreed-to articles; reopening TA'd proposals may be justified by many factors, including changes in the law. *Div. of Military and Naval Affairs, State of N.Y.*, 7 FLRA 321, 338 (1981).
- 6) Reach out to the Field Services Department for assistance.

### **If You Have Agreed to Change the CBA and Are Done Bargaining:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.

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- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to return to status quo or come into violation of the court order.
- 4) If the agency refuses, file a demand to bargain, as allowed by your CBA.

### **If the Agency Has Unilaterally Imposed:**

- 1) Send a letter to the Agency telling them they cannot implement any of the barred provisions, and request to meet to discuss the order.
- 2) When you meet, tell the Agency they cannot lawfully implement the barred provisions of the EO.
- 3) Invite the Agency to withdraw its changes and return to status quo immediately. Tell them any implementation of the barred provisions are unlawful and constitute civil contempt of court.
- 4) If they refuse, reach out to your District and/or National for assistance in enforcement.

AFGE will keep you updated on any decisions regarding the remaining two Executive Orders and what they mean for your Local or Council.