

August 25, 2018

MEMORANDUM

TO: Chapter Presidents

RE: Executive Order Litigation—Historic Victory

SUMMARY: A federal district court has struck down nine anti-union Executive Order provisions challenged in NTEU’s lawsuit.

By now, you are all familiar—too familiar—with the three anti-union Executive Orders (EOs) that President Trump issued on May 25, 2018. The EOs weaken employee protections and union rights in several, targeted ways. They would bar union representatives from using official time to help employees with grievances of any type. They would cap overall official time and restrict access to agency office space. They would bar grievances over performance ratings and incentive pay, even if the employer’s decision is flawed or discriminatory. They would limit grievances over removals and limit PIP periods to 30 days.

After President Trump issued the EOs, NTEU sprang into action. It has worked to help chapter leaders understand and navigate the practical effects of the EOs. It has filed grievances, engaged its members, and educated the public on the improper bargaining tactics that some agencies have used in the wake of the EOs. And it has sought, through a lawsuit filed in federal district court, to have several of the EO provisions struck down as unlawful.

The litigation, initiated very shortly after the EOs were issued, has been an intense—and critically important—exercise. NTEU challenged 11 provisions in the EOs as being unlawful, arguing that they illegally conflict with the federal civil service regime that Congress created. NTEU detailed those conflicts in its papers seeking summary judgment and during an approximately four-hour oral argument on the litigation on July 25. In addition to NTEU’s lawsuit, three other lawsuits have been filed challenging one or more of the EOs, and the four lawsuits have been consolidated in a single proceeding before Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia.

Late last night, Judge Jackson issued several rulings in NTEU’s favor. In particular, she declared nine of the executive order provisions that NTEU challenged to be unlawful, and she ordered that the government cannot enforce them. These provisions include:

1. The imposition of a 25% cap on the use of official time;
2. The prohibition against using official time for lobbying;
3. The ban on the use of official time by union representatives to prepare and present grievances;

4. The one-hour per bargaining unit employee formula to be applied to set an aggregate cap on the use of official time;
5. The limitations placed on unions' use of agency facilities, such as office space and computers;
6. The exclusion of challenges to performance ratings and incentive pay from the scope of the negotiated grievance procedure;
7. The limitation of performance improvement periods (PIPs) to 30 days, with agencies alone having the discretion to apply longer periods;
8. The direction to agencies to press for the exclusion of removals from the scope of the negotiated grievance procedure; and
9. The prohibition against bargaining over the "permissive" subjects described in 5 U.S.C. 7106(b)(1).

The Court declined to invalidate two provisions that NTEU challenged. Those provisions would allow agencies to disregard the concepts of progressive discipline and the consistency of penalties with those imposed on others. We are considering our options with respect to these provisions.

Copies of the federal district court's order, issued last night, and its opinion, issued this morning, are attached for your information. I will keep you informed of further developments in this matter as they occur. I will send out additional communications next week addressing the immediate impact of the Court's decision on current bargaining.

Anthony M. Reardon
National President

Attachments