

71 FLRA No. 178

NATIONAL RIGHT TO WORK LEGAL DEFENSE
FOUNDATION, INC.
(Petitioner)

0-PS-39

DECISION ON REQUEST
FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

August 19, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Background

The National Right to Work Legal Defense Foundation (the Foundation) has requested, under § 2427.2(a) of the Authority's rules and regulations,¹ that the Authority issue a general statement of policy or guidance holding that the Federal Service Labor-Management Relations Statute (the Statute) does not permit parties to bargain over, or union representatives to use, official time for lobbying activities that are subject to the Anti-Lobbying Act (the Act).²

Under § 7131(d) of the Statute, parties may negotiate amounts of official time that are "reasonable, necessary, and in the public interest" and that may be used "in connection with any . . . matter covered by this chapter."³ Section 7102(1) of the Statute provides that employees have the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities."⁴

The Act states:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service,

advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities.⁵

In *U.S. Department of the Army, Corps of Engineers, Memphis District, Memphis, Tennessee (Army)*, the Authority considered whether the Act prohibits the granting of official time to union representatives to lobby Congress.⁶ The Authority found that § 7102(1) of the Statute, which grants "employees, acting in their representational capacity, . . . the right to present the views of their labor organization to Congress,"⁷ together with § 7131(d), which provides that "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"⁸ constituted an express authorization by Congress from the prohibitions in the Act.⁹ Thus, the Authority held that the Statute authorizes the use of federal funds, in the nature of official time, to allow union officials to lobby Congress on representational matters.¹⁰

⁵ 18 U.S.C. § 1913.

⁶ 52 FLRA 920, 925-26 (1997) (Member Armendariz concurring in part and dissenting in part).

⁷ 5 U.S.C. § 7102(1).

⁸ *Id.* § 7131(d).

⁹ *Army*, 52 FLRA at 933.

¹⁰ *Id.*

¹ 5 C.F.R. § 2427.2(a).

² 18 U.S.C. § 1913.

³ 5 U.S.C. § 7131(d).

⁴ *Id.* § 7102(1).

In its request, the Foundation argues that Congress did not expressly authorize the use of appropriated funds for lobbying activities through the Statute, and, therefore, the Statute does not permit parties to bargain over, or union representatives to use, official time for lobbying activities that are subject to the Act. In support, the Foundation says that while § 7102(1) allows union representatives to present their labor organization's views to Congress, no section of the Statute *expressly* authorizes the federal government to pay employees engaging in such activity. In this regard, the Foundation asserts that § 7131(d) does not mention lobbying. Moreover, the Foundation contends that its question is most appropriately resolved through a statement of policy or guidance because it would be difficult to resolve through other means.

II. Decision

In light of the Foundation's request, the Authority invited interested parties to submit comments with respect to the suggested policy posed by the Foundation.¹¹ The responses submitted were thoroughly and carefully considered, and the Authority finds that granting the Foundation's request is warranted because "resolution of the question presented would have general applicability under the . . . Statute."¹²

In view of the Authority's regulations and the interested parties' submissions, we take this opportunity to clarify Authority precedent on the application of the Act to the use of official time for lobbying under § 7102(1) and § 7131(d) of the Statute.

The Authority was faced squarely with the issue that the Foundation now raises in the *Army* case in 1997. In *Army*, the grievant sought official time to lobby Congress during the union's "Lobby Week" in Washington, D.C. on the following topics: "protection of [f]ederal pay and benefits; [g]overnment downsizing and reorganization; health care reform; civil service reform; protection of temporary employees; and [equal employment opportunity] reform."¹³ The Authority cited a 1989 opinion where the Department of Justice opined that the Act "did not prohibit 'public speeches by [e]xecutive [b]ranch employees aimed at generating public support for [a]dministrative policies and legislative proposals."¹⁴ The Authority found that "[t]he same reasoning supports a conclusion that the [Act] does not prohibit the [u]nion's

lobbying activities."¹⁵ Accordingly, the Authority found that there were "significant questions" as to whether the union's lobbying activities were within the definition of the items that Congress prohibited in the Act.¹⁶

For guidance on the Act, the Authority looks to the agency tasked with its enforcement. The Department of Justice, through its Office of Legal Counsel (OLC), provides legal advice to executive agencies under powers delegated to it by the Attorney General of the United States. In 2005, the General Counsel of the Department of Commerce requested a legal opinion from the OLC on whether federal employees who are union representatives may use official time to engage in grass roots lobbying in which, on behalf of their unions, they ask members of the public to communicate with government officials in support of, or in opposition to, legislative or other measures. In *Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives* (the 2005 opinion),¹⁷ the OLC opined that "federal employees are barred from [engaging in grass roots lobbying on official time]" under the Act, but "whether any particular activity would violate the [Act] will depend on the specific facts."¹⁸ It went on to state that the Act applies "only 'in the absence of express authorization by Congress,'" and, citing *Army*, it found that the Statute provided express authorization for union representatives to use official time for *direct* lobbying on representational issues" under § 7102(1) of the Statute.¹⁹

Thus, the entity tasked with enforcing the Act has provided a legal opinion that direct lobbying on official time is not prohibited by the Act. The Authority's decision in *Army*, addressing only *direct* lobbying, is consistent with that holding. However, in accordance with guidance from the Department of Justice, the plain text of the Statute, and Authority precedent, we clarify that the Statute does not expressly authorize "indirect" or "grass roots" lobbying by union representatives on official time, as the Department of Justice and OLC have defined those terms. Therefore, "indirect" or "grass roots" lobbying by union representatives on official time is prohibited by the Act.

¹¹ Notice of Opportunity To Comment on a Request for a General Statement of Policy or Guidance on Official Time for Certain Lobbying Activities, 85 Fed. Reg. 16,915 (March 25, 2020).

¹² 5 C.F.R. § 2427.5(c).

¹³ *Army*, 52 FLRA at 921.

¹⁴ *Id.* at 931 (citation omitted).

¹⁵ *Id.*

¹⁶ *Id.* We note that the Act was amended after the Authority's decision in *Army*, broadening its coverage. See Pub. L. No. 107-273, § 205(b), 116 Stat. 1758 (2002). The amendments had no effect on the Authority's rationale in *Army*.

¹⁷ 29 Op. O.L.C. 179 (2005).

¹⁸ *Id.*

¹⁹ *Id.* at 181.

“Central to” the OLC’s analysis in the 2005 opinion was “the distinction between direct and ‘grass roots’ lobbying.”²⁰ This distinction, the OLC noted, “has been *extensively* applied in decisions of our Office and the Government Accountability Office . . . dealing with lobbying government officials.”²¹ As relevant to the use of official time for lobbying, “direct lobbying” would be, for example, *direct communications* between union representatives and government officials on “any legislation, law, ratification, policy or appropriation” related to representational matters,²² whereas “indirect” or “grass roots” lobbying would be a union representative “encourag[ing] members of the public,” including other union members, “to pressure . . . Congress,” or other government officials, with respect to “any legislation, law, ratification, policy or appropriation.”²³ “Indirect” or “grass roots” lobbying might involve, for example, “a clear appeal by” a union to its members “to contact congressional members in support of” the union’s position on pending legislation.²⁴

While § 7102 guarantees union representatives the right to engage in “direct lobbying[, it] does not mention the presentation of views to members of the public . . . [or] a request that the public contact government officials.”²⁵ Therefore, the OLC concluded, the Statute does not constitute an express authorization that would create an exception to the Act for indirect lobbying.²⁶ The Authority hereby adopts the analysis set forth in the 2005 opinion.

To the extent that *Army* or any other previous Authority decisions²⁷ may be read to suggest that *any* union lobbying on official time is expressly authorized by Congress under the Statute, the Authority now clarifies that only “direct” lobbying is expressly authorized. “Indirect” or “grass roots” lobbying is prohibited by the Act and is not expressly authorized by the Statute.²⁸ We agree with the 2005 opinion that any suggestion that § 7102(1) expressly authorizes “[c]ommunicating *with the public* . . . to make common cause with the employees’ collective[-]bargaining representative”²⁹ goes “astray from the statutory text.”³⁰ That is, the Statute’s guarantee of the right to directly “present the view of [a] labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities”³¹ cannot “reasonably be said to give an ‘express authorization’ for urging the public to communicate with government officials.”³²

The dissent – failing to comprehend that the Act is triggered only when appropriated funds are being used – entirely, and unjustifiably, misconstrues the Authority’s decision in *U.S. Department of Transportation, FAA Great Lakes Region, Des Plaines, Illinois (DOT)*.³³ In that case, the Authority upheld a remedy directing an agency to “permit [u]nion representatives to ‘ask employees to support the [u]nion’s views and

²⁰ *Id.* at 179. We note that the OLC provided citations to several previous Comptroller General and OLC opinions and guidelines applying the distinction between “direct” and “grass roots” lobbying. In this opinion, like the 2005 opinion, “indirect” and “grass roots” lobbying are used synonymously.

²¹ *Id.* (emphasis added).

²² *Id.* at 179-80.

²³ *Id.*

²⁴ *Id.* at 180; *see also id.* at 179 (“The essence of a ‘grass roots’ campaign is the use of ‘telegrams, letters, and other private forms of communication expressly asking recipients to contact Members of Congress.’”).

²⁵ *Id.* at 184-85.

²⁶ *Id.* at 185.

²⁷ *See, e.g., HHS, SSA*, 11 FLRA 7, 8 (1983) (finding no violation of the Act where a union representative called Members of Congress to discuss the agency’s appropriations); *see also Ass’n of Civilian Technicians Razorback Chapter 117*, 56 FLRA 427, 430 (2000) (finding a provision negotiable that allows union officials to engage in representational lobbying concerning legislation or appropriation and therefore excluded from the Act); *SSA, Balt., Md.*, 54 FLRA 600 (1998) (*SSA*) (finding that the Act did not prohibit union officials from using official time to lobby). Regarding *SSA*, we note that some union representatives were granted official time to attend a legislative conference “to prepare the[m] . . . to lobby Congress on representational issues.” *SSA*, 54 FLRA at 603. Consistent with our decision here, we conclude that the type of training at issue in *SSA* – training union representatives *how* to lobby – does not constitute “direct” lobbying and is not expressly authorized by § 7102(1) of the Statute.

²⁸ *See The 2005 Opinion*, 29 Op. O.L.C. at 185 (“‘Grass roots’ lobbying is at the core of the statutory prohibition” in the Act).

²⁹ *Id.* (quoting *Dep’t of the Air Force, 3d Combat Support Group, Clark Air Base, Republic of the Philippines*, 29 FLRA 1044, 1062–63 (1987)).

³⁰ *Id.*

³¹ *Id.* at 186 (quoting 5 U.S.C. § 7102(1)).

³² *Id.* at 185-86 (citation omitted); *see also id.* (“In the communications that are intended to result from ‘grass roots’ lobbying, members of the public, not the union representatives would be making the presentation, and the views that government officials would receive would be presented as the public’s views, rather than ‘the views of the labor organization.’”).

³³ 64 FLRA 1184 (2009).

positions on legislative issues during nonworking times.”³⁴ The crucial phrase from that remedy, that the dissent either avoids or overlooks, is “during nonworking time.”³⁵ In plain terms, the remedy in *DOT* concerned union representatives’ and union members’ right to lobby Congress while in an *unpaid* and non-work status. Nothing in the Act, or this policy statement, affects federal employees’ ability to lobby Congress – whether it be directly or indirectly – during their unpaid time. Instead, as we have succinctly stated, the Act precludes the use of official time – *i.e.*, appropriated funds – for indirect lobbying. Thus, the dissent’s reliance on that case is misplaced, as *DOT* did not involve the use of official time.³⁶

Moreover, the finding in *DOT* that union members are not “members of the public,” within the meaning of the 2005 opinion, due to a “special relationship” with a union, cannot withstand scrutiny.³⁷ Indeed, the 2005 opinion *dealt with this very issue*, citing approvingly the Authority’s decision in *U.S. Air Force, Lowry Air Force Base, Denver, Colorado (Lowry)*.³⁸ *Lowry* held that an agency’s direction to an employee not to send a union-drafted letter to a congresswoman did not interfere with the employee’s § 7102(1) right “to present the views of the labor organization to . . . Congress,” because the letter was “intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union.”³⁹ If the OLC’s 2005 opinion intended to create a bright-line rule that union members are not “members of the public” for purposes of the Act, its citation to *Lowry* would make no sense. With respect to the views of individual union members who have been encouraged by their union to pressure Congress, or other government officials, under their own name, it is the individual “member[] of the public, not the union representative[]” who is “making the presentation,” and the “views that government officials receive” are “presented as the public’s views, rather than ‘the views of the labor organization.’”⁴⁰ There is simply no logical reason why communications to or from individual union

members under their own names that are not presented as “the views of the labor organization” by an employee acting for a union “in the capacity of a representative” should be treated any different from any other communications from a member of the public.⁴¹

Based on the above, we grant the Foundation’s request⁴² but confine our decision to clarifying that the Statute expressly authorizes only ‘direct’ lobbying and does not expressly authorize any other type of “indirect” or “grass roots” lobbying on official time.⁴³

³⁴ *Id.* at 1186 (citation omitted).

³⁵ *Id.* (citation omitted).

³⁶ With regard to the Authority’s discussion, in *DOT*, of the Act’s applicability, that discussion constituted dictum and, consequently, is not precedential. See *AFGE, Council of Prison Locals # 33, Local Union No. 922*, 69 FLRA 480, 480 n.2 (2016) (a judicial comment made while delivering a judicial opinion that is unnecessary to the decision in the case is not precedential).

³⁷ See *DOT*, 64 FLRA at 1187 (stating that union members do not “equate[]” to “members of the public”) (citation omitted).

³⁸ *The 2005 Opinion*, 29 Op. O.L.C. at 187 n.9 (citing *Lowry*, 16 FLRA 952 (1984)).

³⁹ *Lowry*, 16 FLRA at 964 (emphasis added).

⁴⁰ *The 2005 Opinion*, 29 Op. O.L.C. at 186.

⁴¹ See *id.*

⁴² The dissent opposes the Authority “accommodating a request” from the Foundation. Dissent at 9. We remind the dissent the Authority’s Regulations specifically permit the head of “any lawful association not qualified as a labor organization” to ask the Authority for a general statement of policy or guidance, with an exception not relevant here. 5 C.F.R. § 2427.2(a) (emphasis added).

⁴³ Although the Foundation’s request for a general statement of policy or guidance did not rely on Executive Order 13,837, it would be short-sighted not to review this policy for consistency with the Executive Order. As relevant here, Section 4 of the Executive Order states: “(i) Employees may not engage in lobbying activities during paid time, except in their official capacities as an employee.” Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335, 25,337 (May 28, 2018). Also, under Section 5, agencies are directed to “give special attention to ensuring taxpayer-funded union time is not used for . . . (ii) lobbying activities in violation of [the Act], or in violation of section 4(a)(i) of this order.” *Id.* at 25,338. Consistent with these provisions and the Act, the Statute’s express authorization for direct lobbying can be undertaken only be an “employee” acting “in the capacity of a representative . . . to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities.” 5 U.S.C. § 7102(1).

Member DuBester, dissenting:

In a recent decision, the Authority denied a request for a general statement of policy or guidance regarding the prohibition of official time for activities related to the internal business of a labor organization.¹ We denied that request because resolution of the question presented was so “dependent upon the circumstances of the case at issue” that it would be “more appropriately addressed in a case or controversy,” not a general statement of policy or guidance.² The Authority has recently denied other requests for policy statements on similar grounds.³ The majority’s decision granting the request before us today perfectly illustrates the wisdom of our previous denials.

Addressing a request for a policy statement by the National Right to Work Legal Defense Foundation, the majority today purportedly “clarif[ies]” that,⁴ for purposes of applying the Anti-Lobbying Act (the Act),⁵ the Federal Service Labor-Management Relations Statute (the Statute) “does not expressly authorize ‘indirect’ or ‘grass roots’ lobbying by union representatives on official time.”⁶ In reaching this conclusion, the majority misconstrues relevant language of the Office of Legal Counsel (OLC) memorandum upon which it purports to rely as well as Authority precedent interpreting that memorandum. And rather than “clarifying” this issue for our parties, the majority’s decision provides only confusing and contradictory guidance for determining what type of lobbying activity would be affected by its decision.⁷

The majority recognizes, as it must, that the Statute provides express authorization, within the meaning of the Act, for unions to engage in direct lobbying while on official time.⁸ The rationale for this well-settled principle was comprehensively articulated by our decision in *U.S. Department of the Army, Corps of Engineers, Memphis District, Memphis, Tennessee (Army)*.⁹

In *Army*, the Authority concluded that the Statute “constitutes ‘an express authorization by Congress’ for using Federal funds to grant official time to employees to lobby Congress on representational matters.”¹⁰ It based this conclusion upon § 7102(1) of the Statute, which protects the right of employees, acting in their representative capacity, “to present the views of [their] labor organization” to Congress.¹¹ It also relied upon § 7131(d) of the Statute, which authorizes unions and agencies to negotiate the use of official time “in connection with any other matter covered” by the Statute.¹²

The Authority has consistently affirmed this principle in subsequent cases addressing the use of official time for lobbying activities.¹³ Moreover, the majority has not identified a single Authority decision – much less a “proliferation of cases” involving this question¹⁴ – that would arguably require us to clarify, through issuance of a policy statement, the issue addressed in today’s decision.¹⁵

Nevertheless, accommodating a request from an organization that is neither a union nor an agency subject to our jurisdiction,¹⁶ the majority concludes that it must “clarify Authority precedent on the application of the Act to the use of official time for lobbying” based upon a 2005 memorandum issued by the Department of Justice OLC.¹⁷ Even assuming that the Authority is compelled to follow the analysis set forth in the 2005 memorandum – a

¹⁰ *Id.* at 933 (quoting 18 U.S.C. § 1913).

¹¹ 5 U.S.C. § 7102(1).

¹² *Id.* § 7131(d).

¹³ *See, e.g., AFGE Local 12*, 61 FLRA 209, 216 (2005); *Ass’n of Civilian Technicians Razorback Chapter 117*, 56 FLRA 427, 430-31 (2000) (*ACT*).

¹⁴ 5 C.F.R. § 2427.5(b) (“In deciding whether to issue a general statement of policy or guidance, the Authority shall consider . . . whether an Authority statement would prevent the proliferation of cases involving the same or similar question.”).

¹⁵ Apart from *Army*, the majority references only three “previous Authority decisions” that its decision is intended to “clarif[y].” Majority at 5 & n.27 (citing *ACT*, 56 FLRA 427; *SSA, Balt., Md.*, 54 FLRA 600 (1998); *HHS, SSA*, 11 FLRA 7 (1983)). All three decisions concluded that official time could be awarded for union representatives to lobby Congress without offending the Act.

¹⁶ The National Right to Work Legal Defense Foundation describes itself as a “nonprofit, charitable organization” whose “mission is to eliminate coercive union power and compulsory unionism abuses through strategic litigation, public information, and education programs.” National Right to Work Legal Defense Foundation, *About Us*, <https://www.nrtw.org/about> (last visited August 17, 2020).

¹⁷ Majority at 3; *see also id.* at 4 (citing *Application of 18 U.S.C. § 1913 to “Grass Roots” Lobbying by Union Representatives*, 29 Op. O.L.C. 179 (2005) (*2005 OLC Memorandum*)).

¹ *Nat’l Right to Work Legal Def. Found., Inc.*, 71 FLRA 531 (2020) (Member DuBester concurring).

² *Id.* at 531.

³ *See, e.g., U.S. Dep’t of Educ. & USDA*, 71 FLRA 509 (2020) (Member DuBester concurring); *USDA, Office of Gen. Counsel*, 71 FLRA 504 (2019); *U.S. Dep’t of VA*, 71 FLRA 492 (2019).

⁴ Majority at 4.

⁵ 18 U.S.C. § 1913.

⁶ Majority at 4.

⁷ *Id.* at 7.

⁸ *Id.* at 5.

⁹ 52 FLRA 920 (1997) (Member Armendariz, concurring in part and dissenting in part).

proposition the Authority has previously declined to adopt¹⁸ – the majority’s reliance upon the memorandum to justify its policy statement is flawed on multiple levels.

At the outset, it is hard to miss the irony that the same OLC memorandum upon which the majority relies for its decision actually warns, in its opening paragraph, that “whether any particular activity would violate [the Act] will depend on the specific facts.”¹⁹ But more disturbing is the majority’s mischaracterization of the memorandum’s substantive analysis.

Specifically, in distinguishing between “direct” and “grass roots” lobbying, the memorandum concludes that while § 7102 of the Statute authorizes “direct” lobbying by union representatives, this authorization does not include “the presentation of views to members of the public, let alone a request that the *public* contact government officials.”²⁰ It also explains that “grass roots” lobbying would include campaigns “designed to encourage members of the public to pressure Members of Congress to support” legislative proposals.²¹

In other words, the memorandum concludes that union lobbying activities would not be “authorized” by § 7102 of the Statute to the extent that a union enlists *members of the public* to engage in these activities. Selectively quoting the memorandum, the majority concludes that this “grass roots” lobbying would encompass “a union representative ‘encourag[ing] members of the public,’ *including other union members*, ‘to pressure . . . Congress.’”²²

¹⁸ See *U.S. Dep’t of Transp., FAA Great Lakes Region, Des Plaines, Ill.*, 64 FLRA 1184, 1187 & n.7 (2010) (concluding that, because “[t]here is nothing in the [2005] OLC Memorandum . . . that equates federal employees represented by a union with ‘members of the public,’” there is “no need to address whether the OLC Memorandum is binding on the Authority”); see also *id.* at 1187 n.6 (“Member Beck observes that OLC opinions are generally viewed as binding within the Executive Branch,” but “notes that, as an independent, quasi-judicial agency, the Authority ‘cannot in any proper sense be characterized as an arm or an eye of the executive.’” (quoting *Humphrey’s Ex’r v. U.S.*, 295 U.S. 602, 628 (1935))).

¹⁹ 2005 OLC Memorandum, 29 Op. O.L.C. at 179; see also *id.* at 187 “[w]hether any specific activity amounts to ‘grass roots’ lobbying within the prohibition of [the Act] depends, of course, on the facts of the case, and we cannot determine such issues in the abstract.”)

²⁰ *Id.* at 184-85 (emphasis added).

²¹ *Id.* at 179 (quoting *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 301 (1989) (1989 OLC Memorandum)).

²² Majority at 4 (quoting 2005 OLC Memorandum, 29 Op. O.L.C. at 179-80) (emphasis added); see also *id.* (“‘Indirect’ or ‘grass roots’ lobbying might involve, for example, ‘a clear appeal by’ a union to its members ‘to contact

The problem is that the italicized words in the preceding sentence are the majority’s, and are not part of the OLC’s memorandum. In fact, the 2005 memorandum never explicitly equates “members of the public” with the union’s own members.

This omission is significant because the Authority has previously rejected the very interpretation the majority now ascribes to the 2005 memorandum. In *U.S. Department of Transportation, FAA, Great Lakes Region, Des Plaines, Illinois (DOT)*,²³ the Authority concluded that the agency could be required, as part of a remedy for its unfair labor practice, to permit the union’s president, and “any other [u]nion representative, to discuss with employees the [u]nion’s views and positions on legislative issues and ask employees to support the [u]nion’s views and positions on legislative issues during nonworking time.”²⁴

Citing the 2005 memorandum, the agency argued that the remedy was contrary to the Act because it would require the agency to “permit allegedly illegal ‘grass roots’ lobbying.”²⁵ The Authority, however, rejected this argument, concluding that “[t]here is nothing in the OLC Memorandum or Comptroller General case law it cites that equates federal employees represented by a union with ‘members of the public.’”²⁶

On this point, the Authority reasoned that “[w]hen a union is communicating with those whom it represents, it is dealing with persons with whom it has a special relationship – a relationship that distinguishes those persons from ‘members of the public.’”²⁷ And because the remedy did not make “any reference to contacting members of the public,” the Authority concluded it did not involve “grass roots” lobbying as defined in the 2005 memorandum.²⁸

The Authority’s interpretation of the 2005 memorandum in *DOT* is squarely inconsistent with the majority’s analysis. This inconsistency is not cured by the majority’s assertion that the “discussion, in *DOT*, of

congressional members.”) (quoting 2005 OLC Memorandum, 29 Op. O.L.C. at 180) (emphasis added).

²³ 64 FLRA 1184.

²⁴ *Id.* at 1185.

²⁵ *Id.* at 1186.

²⁶ *Id.* at 1187; see also *id.* (“Although the OLC Memorandum discusses as ‘grass roots’ lobbying circumstances where federal employees using official time contact members of the public, the OLC Memorandum does not discuss as instances of ‘grass roots’ lobbying any situations where federal employees contact other federal employees.”) (internal citations omitted).

²⁷ *Id.*

²⁸ *Id.*

the Act's applicability . . . constituted dictum" and is therefore "not precedential."²⁹

To the contrary, the agency in *DOT* specifically argued that the remedy for its unfair labor practice was contrary to the Act as interpreted in the 2005 memorandum. And the Authority rejected this argument not, as the majority suggests, because the lobbying activity at issue would be conducted "during nonworking times," but rather because the remedy only pertained to "communications . . . between Union representatives and unit employees," and did not, therefore, "make any reference to contacting members of the public."³⁰

The majority also claims our decision in *DOT* "cannot withstand scrutiny" because, otherwise, the OLC's citation to our decision in *U.S. Air Force Base, Lowry Air Force Base, Denver, Colorado (Lowry)*³¹ in its 2005 memorandum "would make no sense."³² But the majority fails to explain how the OLC's reference to *Lowry* – which involved an employee's letter to Congress that was "intended to be adopted and sent by individual employees as a statement of their own individual views and not as their presentation to the Congress of the views of the Union"³³ – undermines our conclusion in *DOT*. Indeed, one should presume the Authority was *aware* of its decision in *Lowry* when it issued *DOT*.

Equally troubling is the majority's essentially incoherent explanation for how its decision should be applied to future cases. The majority identifies only one Authority decision that it believes would be affected by its policy statement. But rather than helping to "clarify" this issue for our parties, its explanation only further confuses matters.

Specifically, the majority notes that in *SSA, Baltimore, Maryland (SSA)*,³⁴ the Authority found that the Act did not prohibit union representatives from using official time to lobby members of Congress during the union's legislative conference.³⁵ The majority appears to take no issue with this conclusion, which is consistent with our decision in *Army*.

But it notes that, as part of the arbitration award at issue in *SSA*, union representatives were also awarded official time to attend training during the conference "to prepare the[m] . . . to lobby Congress on

representational issues."³⁶ And it concludes that because this type of training "does not constitute 'direct' lobbying," it "is not expressly authorized by § 7102(1) of the Statute."³⁷

To the extent that the majority is attempting to signal that *SSA* was wrongly decided because the award of official time for these training activities violated the Act – and even this is not clear – its analysis misses the point. The question of whether the use of official time to engage in lobbying activities offends the Act's prohibitions is not answered by determining whether the lobbying constitutes "direct" lobbying or "grass roots" lobbying. Rather, the determinative question is whether the activity in question is proscribed by the Act to begin with. Here, the majority has not even attempted to explain how an award of official time to train union members to engage in lobbying activities as representatives of the union is prohibited by the Act.³⁸

In sum, the majority's poorly reasoned and hastily crafted policy statement will not "prevent [a] proliferation of cases" involving the matter it addresses.³⁹ To the contrary, it will generate confusion and uncertainty regarding an issue that, until today, did not appear to be creating confusion or uncertainty among the parties the Authority regulates. As with the majority's decision in *OPM*,⁴⁰ its decision today constitutes nothing more than "the sort of judicial activism that is squarely inconsistent with the Authority's decision-making responsibilities."⁴¹

Accordingly, I dissent.

²⁹ Majority at 6 n.36.

³⁰ *DOT*, 64 FLRA at 1187.

³¹ 16 FLRA 952 (1984).

³² Majority at 6.

³³ *Lowry*, 16 FLRA at 964.

³⁴ 54 FLRA 600 (1998).

³⁵ Majority at 5 n.27.

³⁶ *Id.* (quoting *SSA*, 54 FLRA at 600).

³⁷ *Id.*

³⁸ There is no question that official time negotiated under § 7131(d) of the Statute may be used for "[u]nion-sponsored training that relates to representational activity." *NTEU*, 45 FLRA 339, 364 (1992). The majority also fails to mention that the same office which drafted the 2005 memorandum upon which it relies also reviewed, in a 2001 memorandum, the Authority's decision in *SSA*. In that memorandum, which is actually referenced in the 2005 memorandum, the OLC found no fault with the Authority's decision in *SSA*. Whatever flaws the majority now finds with this decision is a mystery that will have to be solved in future litigation.

³⁹ 5 C.F.R. § 2427.5(b).

⁴⁰ 71 FLRA 571 (2020).

⁴¹ *Id.* at 579 (Dissenting Opinion of Member DuBester).