AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

AFGE

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April 9, 1996

Mr. Glen Nager
Chair of the Board of Directors
Office of Compliance, Room LA-200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20450

Dear Mr. Nager:

The American Federation of Government Employees (AFGE), AFL-CIO, is the largest union representing federal and District of Columbia employees. AFGE respectfully submits the following response to the request for comment on the Advance Notice of Proposed Rulemaking (ANPR), and/or to the rulemaking process itself, as appropriate, regarding the Congressional Accountability Act of 1995 (CAA).

The history of labor relations in the federal sector has been generally one of positive interaction with genuine public benefit. One starting point is the Lloyd-LaFollette Act of 1912, which provided federal employees the right to join a union which did not claim the right to strike, the right to petition Congress or to testify without fear of reprisal, and the right to receive in writing reasons for proposed dismissals or terminations. Progress continued with President Kennedy's Executive Order 10988, which for the first time directed federal agencies both to recognize and bargain with unions representing federal workers.

President Nixon furthered the benefits of the federal sector labor relations program with Executive Order 11491. This development established the negotiability of binding arbitration and dues check-off in the federal sector, and established bodies to administer the Order, resolve negotiated impasses, and mediate disputes. In 1978, Congress enacted the Civil Service Reform Act (Public Law 95-4544), codifying the Executive Orders into law, and establishing the Office of Personnel Management, the Merit System Protection Board, and the Federal Labor Relations Authority (FLRA).

With the passage of the Congressional Accountability Act of 1995, extending rights protections and responsibilities under Chapter 71 of Title 5 United States Code, the legislative branch has wisely decided that "the statutory protection of the right of employees to organize, bargain collectively, and participate through labor

organizations of their own choosing in decisions which affect them (A) safeguards the public interest, (B) contributes to the effective conduct of public business, and (C) facilitates and encourages the amicable settlement of disputes . . . involving conditions of employment."

In undertaking rulemaking to implement this legislation, the Office of Compliance should carefully extend the bi-partisan history of continuity and progress which has always found that a sound federal sector labor-management relations program serves the public interest.

With respect to the effective date of inclusion for certain covered employees under Section 220(e), AFGE urges that the Board authorize implementing regulations to take effect on or as close as possible to the October 1, 1996 effective date of the Act itself.

Where Section 220 (d) authorizes the Board to issue regulations that "shall be the same as substantive regulations promulgated by the Federal Labor Relations Authority . . . except that the Board may determine, for good cause shown . . . that a modification of such regulations would be more effective for the implementation of the rights and protections under this section . . . " it is AFGE's position that "for good cause" and any other departure from FLRA precedent should be narrowly construed.

AFGE is opposed to a newly applied distinction between "substantive" and "interpretive" regulation whose effect is to avoid recourse to the Federal Services Impasses Panel (FSIP).

In our view, if a negotiation between an office and the exclusive representative reaches impasse and is not resolved by the Federal Mediation and Conciliation Service or by other third party mediation, either party should be able to request the FSIP to consider the matter; or the parties should be able to agree to a procedure for binding arbitration (but only if the procedure is approved by the FSIP). If the parties do not reach a settlement after assistance by the FSIP, it should be able to conduct hearings on the matter and resolve it by action which is binding on the parties during the term of the agreement.

Congressional inclusion in the federal sector labor-management scheme would be hollow, and ultimately not facilitate the amicable settlement of disputes, without provision for the functions of the FSIP. In this time of shrinking government, manufacturing a separate impasse resolution route for Congressional offices will not be an efficient or cost-effective substitute for the expertise of the FSIP. AFGE supports the use of the existing FLRA and Merit Systems Protection Board apparatus for matters such as enforcing agreements or determining exclusions, but would be open to establishing the Board itself as a final avenue of appeal on precedent-setting matters distinct to the Congressional workplace. However, we oppose the

development of a third "parallel track" body of decisions alongside the private sector and public sector determinations.

Having found that labor organizations and collective bargaining in the civil service are in the public interest, that interest must not be thwarted by abolishing the role of the FSIP in collective bargaining through a strained rule-making interpretation. The point is not so much to avoid all conflict through restrictive implementing regulation. Rather, for Executive Branch agencies and for those legislative branch employees at the Library of Congress and the Government Printing Office already covered, Title 5 and the case law built around it have a proven and effective record of problem-solving.

Similarly, AFGE feels that the referenced subchapters of 5 C.F.R. at section 2411-2416 and 2420-2430 of the FLRA regulations, which implement and apply the Freedom of Information Act, the Privacy Act and the Sunshine Act in the FLRA's processes should be extended with little modification to the processes of the board. Internal matters of the Board may be governed by different technical changes in nomenclature, or delegations of authority and other variations on FLRA regulation, but FLRA precedent should be examined closely.

Regarding the reference to modifications to FLRA regulations to avoid conflict of interest and because of Congress' constitutional responsibilities, the FLRA regulations already exclude employees in many of the potential areas of conflict of interest. All management officials, supervisors and certain categories of employees described in 5 U.S.C. 7112 (b) are excluded by law from recognized bargaining units in the federal sector. Such categories include all confidential employees, employees engaged in personnel work or in administering the chapter, employees engaged in intelligence and other work which directly affects national security, and employees engaged in investigative work. These exclusions, and the case law around them, may already be sufficient to exclude employees for whom bargaining unit status might constitute a conflict of interest or conflict with constitutional responsibilities.

Should the Board establish other exclusions "to avoid a conflict of interest or appearance of conflict of interest", and to take into account the "constitutional responsibilities of Congress", it is our opinion that the actual meaning of those exclusions would be determined by relying on the record of Congressional debate and on further development of case law.

We feel that determinations as to exclusion from coverage under section 220 should not be made on an office wide basis, but rather should be based on performance of specified duties and functions in the referenced office. This regime would further the public interest in consistency and predictability regarding these matters, and FLRA precedent suggests that individual offices would still retain sufficient flexibility on staffing matters. AFGE favors inclusion rather than exclusion from coverage as a

general principle, believing that inclusion has a positive and democratic character, and should not be impugned as dangerous or inimicable to the interests of a Congressional office as an employer. Similarly, we favor a very narrow determination of the bases for exclusion of any specified office from coverage under the Act.

Thank you for your consideration of these comments.

Sincerely,

Peter Winch
National Organizer