

American Federation of Labor and Congress of Industrial Organizations



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April 11, 1996

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

Dear Mr. Nager:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 77 national and international unions representing over 13,000,000 working men and women, submits these comments on the Advance Notice of Proposed Rulemaking issued by the Board of Directors of the Office of Compliance ("the Board") with respect to the extension of Chapter 71 of Title 5, United States Code, relating to Federal Service Labor-Management Relations, to "covered employees" under § 220 of the Congressional Accountability Act of 1995, P.L. 104-1 ("CAA" or "the Act").

Our comments are in two parts. In Part I, we address the Board's general obligation under § 220(d) of the Act to "issue regulations to implement" § 220. We urge the Board to follow the lead of the Federal Labor Relations Authority ("FLRA"), the National Labor Relations Board ("NLRB"), and the National Mediation Board ("NMB") by issuing regulations that establish the basic processes the Board will follow in the various types of cases over which it has jurisdiction under § 220, without prejudging the issues of substantive law that may arise in such cases. As we explain, we believe the Board can follow this path without definitively answering the nicest of the questions posed in the Board's notice concerning the meaning of § 220(d).

In Part II, we focus on § 220(e)'s directive to the Board to "issue regulations .. on the manner and extent to which the requirements and exemptions" of the federal service labor management relations law should apply to covered employees in a long list of specified offices, including the office of any Member of the House, any Senator, or any Senate or House committee. As we show, nothing in § 220(e) warrants any blanket exemption for particular offices (except possibly the Office of Compliance itself) or for particular categories of employees, other than supervisors, managers, and confidential employees.

1. Section 220(d) -- As noted above, § 220(d) of the Act contains a general directive to the Board to "issue regulations to implement this section." The subsection contains one specific instruction: the Board's regulations "shall be the same as substantive regulations" promulgated by the FLRA unless the Board determines that a modification in an FLRA regulation either (A) "would be more effective for the implementation of the rights and procedures under this section" or (B) is "necessary to avoid a conflict of interest or an appearance of a conflict."

The directive to the Board to issue implementing regulations parallels the directive contained in 5 U.S.C. § 7134 to the Federal Labor Relations Authority to "prescribe rules and regulations to carry out the provisions" of Chapter 71 of Title 5. Pursuant to that mandate, the FLRA has determined to exercise its rulemaking authority to the extent of "prescrib[ing] the procedures, basic principles or criteria" under which that Agency will discharge its various functions. 5 C.F.R. § 2420.1. But the FLRA has not issued regulations defining the substantive rights of employees and agencies under Chapter 71.

Thus, for example, the FLRA regulation on "representation proceedings," 5 C.F.R. § 2422, addresses such issues as who may file petitions; the time limits for filing; and the procedures for investigating, conducting hearings, and rendering decisions, but does not attempt to define what constitutes an "appropriate unit." Similarly, the regulation on "unfair labor practice proceedings," id. § 2423, establishes the framework for adjudicating such cases but does not further define what practices are unlawful.

The FLRA's approach to rulemaking closely follows the path that the NLRB has pursued during its sixty-year history. The NLRB

-- which is authorized, but not mandated, to issue regulations by § 6 of the National Labor Relations Act, 29 U.S.C. § 156 -- has by rule defined the processes that it follows in the various types of cases that come before it, including unfair labor practice cases, 29 C.F.R. §§ 101.2 to .16; and representation cases, *id.* §§ 101.17 to .21. But with the rarest of exception, the NLRB has not sought to define substantive rights by regulation. The same is true of the NMB in implementing the portion of the Railway Labor Act, 45 U.S.C. §§ 151 et seq, within its jurisdiction. See 29 C.F.R. §§ 1201 et seq.

In our view, the basic approach that the FLRA and the NLRB have adopted is one that the Board of Directors of the Office of Compliance should follow as well. Like the FLRA and the NLRB, this Board has an inescapable need to establish the procedures it will follow in the various classes of cases it has jurisdiction to hear. Experience shows that doing so through rulemaking works.

At least at this early stage in the process of implementing the CAA, the sounder course is to follow the FLRA-NLRB -NMB approach and resolve the substantive issues posed by the application of chapter 71 to the legislative branch through the processes of case-by-case adjudication. Those processes will, of course, enable the Board to focus on concrete facts and submissions. And given that the application of chapter 71 to the legislative branch -- with its singular structure, positions, and functions -- may well pose substantive legal issues with which neither the FLRA nor the NLRB has ever grappled, attempting to pretermitt such case-by-case adjudication through rulemaking at this stage would be imprudent in the extreme.

In defining, by regulation, the processes the Board will follow, it does not seem to us necessary to grapple with the nice questions of statutory interpretation posed in the Advance Notice of Proposed Rulemaking. The FLRA's regulations may or may not be "substantive regulations" that the Board must follow, but those regulations at the very least are sound procedural guides that the Board is free to follow in the exercise of its general rulemaking authority under §§ 303 and 304. And, to the extent the Board chooses to depart from FLRA procedures in order to effectuate the Congressional Accountability Act, such departures would be permissible either as an exercise of the Board's discretion or, if

the FLRA regulations were deemed to be "substantive" in nature, under the "good cause provisions," see § 220(d)(2)(A).

Thus, we would urge the Board to proceed to develop FLRA/NLRB-type procedures without becoming bogged down in disputation over the substantive-procedure or substantive-interpretive dichotomy or over the meaning of the phrases "good cause" and "conflict of interest" in § 220(d).

2. Section 220(e) -- As previously noted, in addition to the general rulemaking directive discussed above, § 220(e) specifically instructs the Board to issue regulations on the application of chapter 71 to employees in specified offices or types of offices. The largest question raised by this subsection, as the Board's Advance Notice indicates, is whether the Board should grant a blanket exclusion to certain categories of "employing offices" (e.g., a Member's personal or a committee office) or to certain categories of employees (e.g., Legislative Assistants or Administrative Assistants). As we proceed to show, nothing in the Act warrants such categorical exclusions.

(a) We start with the statutory language. Section 220(e) instructs the Board to develop regulations which "to the greatest extent practicable" are "consistent with the provisions and purposes of chapter 71." That instruction, we believe, must be read in conjunction with 5 U.S.C. § 7101, the section in chapter 71 that states the "purposes" of the chapter and that declares that "the statutory protection of the right of employees to organize" both "safeguards the public interest" and "contributes to the effective conduct of public business." Read against this backdrop, the instruction to the Board to act in accordance with chapter 71 in and of itself invites coverage as broad in scope as chapter 71 provides for executive branch employees.

Section 220(e) goes on to qualify the instruction quoted above by directing the Board to exclude employees if -- but only if

the Board determines that such exclusion is required because of --

(i) a conflict of interest or appearance of a conflict of interest; or

(ii) Congress' constitutional responsibilities.

It is important to note that, in enacting this language, Congress did not purport to find that including any particular category of employees would, in fact, create a "conflict," an "appearance of conflict," or would be inconsistent with "Congress' constitutional responsibilities." Nor did Congress direct the Board to so find. Rather, what Congress did was to authorize the Board to make such findings and to require the Board to grant exclusions if, in the Board's judgment, an "exclusion is required."

In other words, § 220(e) asks -- but does not answer -- the question of whether there are categories of employees whose inclusion would create conflicts of interest or would interfere with Congress' constitutional responsibilities. The legislative history, such as it is, suggests that Congress commissioned this inquiry "as an extra measure of precaution,"¹ and that Congress was focused not so much on exclusions from coverage but on the nature and identity of the organizations that act as bargaining representatives.² The legislative history indicates, too, that Congress did not intend to provide the Board "a standardless license to roam far afield from ... executive branch regulations."³ Within these exceedingly broad limits, the Board writes on a clean

¹ 141 Cong. Rec. S.444-45 (Sen. Grassley); see also S. Rep. 103-397, 103rd Cong. 2d Sess. at 8 (1994) (report of Senate Government Affairs Committee on H.R. 4822, the bill that framed the basis for the CAA).

² The Section-by-Section Analysis prepared by Senator Lieberman and placed into the Congressional Record by Senator Grassley, after noting the provision for rulemaking with respect to "employees who are employed in positions in offices with a direct connection to the legislative process," states that a "conflict of interest would include, for example, whether certain classes of employees should be precluded from being represented by unions affiliated with non-congressional or non-Federal unions." 141 Cong. Rec. S 626; see also S. Rep. 103-397, supra, at 24.

³ 141 Cong. Rec. S 626 (Lieberman section-by-section analysis of CAA).

slate -- and without further legislative guidance -- in deciding whether exclusions are "required because of ... conflict[s] of interest ... or Congress' constitutional responsibilities."

(b) In answering that question, it is important to bear in mind that Congress is not the only institution with "constitutional responsibilities." The President is charged with the constitutional duty of faithfully executing the laws. To discharge that duty, the President is dependent upon the employees of the executive branch. And, the unions that represent, or seek to represent, executive branch employees are every bit as interested in how the Executive discharges its constitutional functions as in how Congress discharges its functions. Yet under chapter 71, executive branch employees, except for supervisors, managers, and confidential employees and those involved in investigative or national security work or employed by a handful of specified agencies, see 5 U.S.C. § 7103(a)(2), (a)(3), (b), are free to join and be represented by the union of their choice.

We know of nothing in the functions of the legislative branch that suggests that union representation of legislative branch employees is any different than representation of executive branch employees or poses unique concerns. If, as Congress determined in enacting the Civil Service Reform Act, executive branch employees -- other than those in managerial, supervisory, or confidential positions and those in national security, investigative and labor relations work -- can belong to a union without creating a "conflict of interest" and without threatening the Executive's performance of its "constitutional responsibilities," then there simply is no basis for concluding that the unionization of legislative branch employees -- other than those who would be exempted under chapter 71 -- would have such an effect. Accordingly, there is no basis in § 220(e) for the Board to add any categorical exemption to the statutory exemptions.⁴

⁴ Because the definitional provision of chapter 71, 5 U.S.C. § 7103, is not in terms made applicable to the legislative branch by the CAA, see CAA § 220(a)(1), it is not crystal clear that the exemptions contained in chapter 71 apply to the legislative branch, although a number of the provisions of chapter 71 that are applicable assume the existence of such exemptions. See,

(continued...)

(c) One final point needs to be made. Congress enacted the CAA because it came to the conclusion that, as Representative Shays put it in introducing the bill to the House:

If a law is right for the private sector, it is right for Congress. Congress will write better laws when it has to live by the same laws it imposes on the private sector and the executive branch. [141 Cong. Rec. H 94.]

Senator Grassley elaborated on these points in his opening statement to the Senate:

In this country, no one is above the law. But just as the Presidency suffered a tremendous loss of public confidence when an individual thought he was above the law, Congress suffered as Members thought they were above the law. Indeed, to me, this was one of the major reasons why Congress lost touch with the people. ... In November, the American people demanded that Congress be affected by the laws it passes.

* * *

When we pass this bill, we begin to restore the American people's faith in Congress. [Id. at S 440-41.]

To broadly exclude legislative offices from the reach of chapter 71 -- or to exclude large categories of employees who would otherwise be covered by chapter 71 -- thus would run directly contrary to the overall policies of the CAA. Congress has wisely decided that it will no longer follow the maxim "do as I say, not as I do." As part of that judgment, Congress has chosen to be

⁴(...continued)

e.g., 5 U.S.C. § 7112(b) (bargaining unit not appropriate if it includes a management official, supervisor, or confidential employee). The Board may want to clarify this point by regulation.

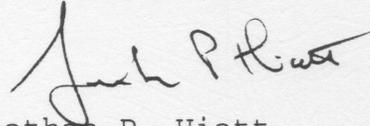
The Board also may want to clarify the status of employees of the Office of Compliance. Those employees occupy positions analogous to employees of the FLRA and the latter are exempted from chapter 71. See 5 U.S.C. § 7103(a)(3)(F).

bound by the same basic set of labor law rules that private sector employers face under the NLRA and that the executive branch faces under the Civil Service Reform Act. Having made those judgments, Congress cannot be understood to have directed this Board to create categorical exceptions that would dramatically shrink the scope of chapter 71 as it is now applied to the legislative branch of government.

For these reasons, the AFL-CIO urges the Board to promulgate proposed regulations under § 220 that establish the basic procedures the Board will follow but that do not create any categorical exemptions for particular covered offices or covered employees.

Thank you for your consideration of these comments.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Jonathan P. Hiatt". The signature is written in a cursive, somewhat stylized font.

Jonathan P. Hiatt
General Counsel