

**Unions in the House of Representatives
in the 118th Congress**

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March 2023**

About Us

Kevin Mulshine served as deputy general counsel for the Architect of the Capitol. He previously served as Senior Advisor and Counsel on the first staff of the Office of Compliance /Office of Congressional Workplace Rights (OCWR). Mulshine was a staff assistant for a House Member from New Jersey, then graduated from the Howard University School of Law. He was a senior attorney to the National Labor Relations Board General Counsel where he was a union steward. He is an inactive member of the DC Bar.

Demand Progress Education Fund is a 501(c)3 charitable organization that educates the public on the impacts of concentrated power over our economy and democracy.

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This report contains general information and is not legal advice or counsel. For these reasons, please consult with the Office of Congressional Workplace Rights or an attorney for counsel. Having legal resources on hand is important as Congressional Accountability Act coverage is newly expanded to House staffers. All opinions expressed here are of the author, Kevin Mulshine.

Introduction

The House of Representatives made history in May 2022 when it granted employees of the House of Representatives the ability to exercise their collective bargaining rights by approving a decades-old labor regulations issued by the Office of Congressional Workplace Rights pursuant to the Congressional Accountability Act of 1995. As we described in our previous report, *Union Organizing Rights on Capitol Hill*, that approval allowed for the implementation of a section of the Congressional Accountability Act that protects employees engaged in labor organizing, collective bargaining, and other concerted activities. Federal employees, including those at the Architect of the Capitol, Library of Congress, and Capitol Police, have enjoyed these rights for decades.¹

When the House of Representatives adopted a new rules package in January 2023, it likely was not successful in suspending or eliminating the rights of staff in the House of Representatives to unionize under the Congressional Accountability Act. Specifically, the resolution likely will fail as an unlawful and ineffective act by the House to suspend the application of duly issued OCWR regulations.

Thus, employee protections under the Congressional Accountability Act (CAA), including the enforcement of negotiated collective bargaining agreements, will likely remain intact, so long as the administrative framework holds. In deciding whether to organize and select a union to represent office staff, employee activists in the House of Representatives may rely on the statute and have little fear of a loss of legal protections for their actions.

This report expands upon this answer to the question of whether the new rules successfully suspend the labor rights of House employees under the CAA and how staff in the House of Representatives can assert their rights to organize unions in the 118th Congress.

¹ “Union Organizing Rights on Capitol Hill,” Demand Progress Education Fund https://s3.amazonaws.com/demandprogress/reports/Union_Organizing_Rights_on_Capitol_Hill-Demand_ProgressEF_report.pdf

Do the new House Rules successfully suspend the labor rights of House employees under the CAA?

In May 2022, the House passed H.Res. 1096 in which the House approved labor rights regulations promulgated by the Office of Congressional Workplace Rights (OCWR) in 1996.² These regulations, and the implementation of the CAA labor rights provisions, awaited approval by Congress for 26 years. The Board unanimously reaffirmed their regulations earlier in 2022. To go into effect, the regulations required approval from either house (or both houses) of Congress. The passage of H. Res. 1096 in May 2022 triggered the CAA's application to House employees.

The OCWR took official notice of the House passage of H.Res. 1096 and determined that the labor section of the law would become effective for House employees in mid-July 2022. This determination was made exactly as the terms of the Congressional Accountability Act requires.³

On January 9, 2023, at the start of the 118th Congress, the House of Representatives adopted H.Res. 5 that contained the Rules package for the House.⁴ A separate order in the Rules package contains the following language:

RESTORING LEGISLATIVE BRANCH ACCOUNTABILITY – The regulations adopted pursuant to House Resolution 1096, One Hundred Seventeenth Congress, shall have no force or effect during the One Hundred Eighteenth Congress.

The House Majority issued a section-by-section analysis of the House Rules that contained an opaque explanation of that provision.⁵ It adds little to the rule provision as it states:

Restoring Legislative Branch Accountability. Subsection (b) states regulations adopted pursuant to House Resolution 1096, 117th Congress will have no force or effect in the 118th Congress.

² H.Res. 1096 (117th Congress) <https://www.congress.gov/bills/117th-congress/house-resolution/1096>; Notice of Proposed Rulemaking, Office of Compliance (Aug. 19, 1996) <https://www.govinfo.gov/content/pkg/CREC-1996-09-04/pdf/CREC-1996-09-04-pt1-PgH10019-4.pdf>

³ The Senate has yet to approve the CAA's application of labor rights in that body.

⁴ See sec. 3(b) of H.Res. 5, available online at <https://rules.house.gov/sites/republicans.rules118.house.gov/files/BILLS-118hresPIH-118th-rules-of-the-house-of-reps-V3.pdf>

⁵ Section-by-section explanation of the House Rules Package <https://rules.house.gov/sites/republicans.rules118.house.gov/files/118-Rules-of-the-House-of-Representatives-SxS-V2.pdf>

Some news reports suggested that this provision was aimed at rolling back the rights of House staff to unionize and collectively bargain. If that was the intent, the House of Representatives does not appear to have achieved that purpose for the following reasons.

Each house of Congress has an immutable and ongoing authority under the Constitution to make its own rules. This is well-recognized by courts and the CAA itself notes this constitutional rule-making authority.

Nonetheless, while the intention of the Rule package's separate order appears to be a suspension of OCWR regulations that allowed additional staff to form congressional unions in the 117th Congress, this rule-making exercise fails to achieve that goal.

First, the House did not follow the process set out in the Congressional Accountability Act to amend or suspend OCWR regulations. The Congressional Accountability Act provides an explicit process, including a period of public notice and comment, through which OCWR regulations are issued and may be amended or suspended. This process for changing OCWR rules is under the control of that office's Board of Directors, and requires the approval of each chamber of Congress for any changes. The House did not follow that process here. Indeed, the OCWR Board is unlikely to consider a request to change the House-approved Section 220(e) regulations that had been awaiting approval for so long and that the Board had unanimously reaffirmed. The CAA itself was enacted to do away with historical exemptions of Congress from vital employment rights and labor protections.

Second, the House may not unilaterally suspend the properly implemented regulations of the OCWR, an independent office of the Legislative branch. While the House has the constitutional authority to adopt rules concerning its operations, its authority does not reach entities outside of the House of Representatives. The OCWR is "an independent office within the legislative branch of the Federal Government."⁶ To change the operations of the OCWR, both houses of Congress must pass a bill to amend the law, and it must be signed by the president. In trying to skirt this process, the separate order language in the House Rules package offends the OCWR's integrity and independence under law.

Third, the Congressional Accountability Act was passed as a waiver of sovereign immunity, a concept that holds that the government cannot be sued except if a law clearly and expressly allows such a lawsuit. For the House to extinguish the rights

⁶ 2 U.S.C. sec. 1381.

granted to federal employees in its employ, the House must do so with clear and unequivocal language. The separate order in H.Res. 5 is hardly a model of clarity, as discussed below. The wording of that separate order “Restoring Accountability” leaves the reader guessing as to its goal. It is necessary that such a provision be clear and unequivocal. H.Res. 5 spectacularly fails to do so.

Fourth, and this is a key point: even if the vague House Rules separate order reached its apparent goal of repealing H.Res 1096, House staff would still have the right to unionize under the CAA. The repeal of H.Res 1096 only concerns one short set of 1996 OCWR regulations that simply state the intention of the OCWR to consider exemptions from the CAA on a case-by-case basis. Since 1996, the OCWR has relied on other, more comprehensive, regulations covering the receipt of representation petitions and the holding of union elections. These regulations remain intact and in effect. In fact, these regulations similarly allow for the OCWR to weigh exemptions from coverage of the law on a case-by-case basis.⁷ To end the right of House staff to unionize, the House Rules package separate order would have had to comprehensively address this other body of regulations and nullify them as applied to the House. H. Res. 5 fails in this regard.

⁷ Substantive Regulations Adopted by the Board of Directors of the Office of Compliance and Approved by Congress Extending Rights and Protections Under the Federal Service Labor-Management Relations Statute, Part 2422

<https://www.ocwr.gov/rules-regulations/substantive-regulations-adopted-by-the-board-of-directors-of-the-office-of-compliance-and-approved-by-congress-extending-rights-and-protections-under-the-federal-service-labor-management-relations-statute/>

How staff in the House of Representatives can assert their right to unionize in the 118th Congress

How might the new House Rules provision be challenged in the OCWR process?

As briefly noted in our report from last year, *Union Organizing Rights on Capitol Hill*, employees in an office may file a representation petition to the OCWR seeking an election to certify a union representative. In processing such a petition, the OCWR would ask their employing office to reply with information about the office staff makeup and to consent to, or reject, the proposed bargaining unit. In that reply, the employing office may raise the House Rules wording in its objection to the petition. In that case, the OCWR may need to decide whether it proceeds to an election.

Thus far, only employees in member offices headed by Democrats have filed representation petitions. Democratic members all voted against the House Rules package in the 118th Congress, and their resistance to a representation petition on that ground is unlikely. In the absence of an employing office asserting the House Rules as a defense against a petition, it is unclear whether any other entity, even the House leadership, could intervene in the OCWR process to protest the holding of an election and the establishment of a collective bargaining relationship.

If the OCWR itself were to refuse to proceed based on the House Rules, the employee group could file objections to the OCWR Board of Directors, and the Board's decision may be appealed to the Federal Circuit Court of Appeals. The Board is unlikely to rule against the CAA rights of employees, which the Board had so recently unanimously affirmed and implemented as a matter of law.

Thus, in practical terms, employees in Democratic offices should have clear sailing to have their efforts to unionize recognized by the OCWR, and employees in Republican offices may have some turbulence but should be able to effectuate their rights under the CAA as well.

Of course, the GOP leadership of the House oversight committees may put pressure on the OCWR leadership by calling them to testify on the continued administration and enforcement of the CAA provisions. That would be a political, not a legal, challenge to the work of the OCWR. In that event, the OCWR Board and statutory officers would need to show some resolve as to the OCWR's independence as an office outside of the House with unassailable responsibilities under the law. The House tried to exert similar pressure on the Board in the mid-1990s and was unsuccessful in forcing the OCWR to retract its regulations.

Admittedly, this is an unprecedented situation. Until now, despite the OCWR's rocky start in 1996, neither house of Congress had attempted to limit the application of OCWR regulations. In federal administrative law, however, a history of attempted interference by Congress in the work of federal independent agencies has developed over the decades since the passage of the Administrative Procedure Act (APA)⁸ and from the first establishment of federal independent agencies in the 1930's and before. Indeed, the APA provides for formal congressional review of agency rulemaking.⁹ The OCWR itself is not covered by this APA provision. Even under that law, one-house veto of agency rulemaking is not allowed.¹⁰

In sum, this latest attempt by the House leadership is likely to fail as an unlawful and ineffective act by the House in the 118th Congress to suspend the application of duly issued OCWR regulations. Thus, employee protections in the CAA, including the enforcement of negotiated collective bargaining agreements, will likely remain intact, so long as the administrative framework holds. In deciding whether to organize and select a union to represent office staff, employee activists in the House of Representatives may rely on the statute and have little fear of a loss of legal protections for their actions.

⁸ 5 U.S.C. sec. 500 et seq.

⁹ 5 U.S.C. sec. 801 et seq.

¹⁰ See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983)