

GS-13/14 Management & Policy Advisory Council and Career Level Council v. U.S. General Accounting Office

Docket No. 116-600-GC-89

Date of Decision: September 20, 1991

Cite as: GS-13/14 Management & Policy Advisory Council v. GAO (9/20/91)

Before: Personnel Appeal Board, en banc (Roger P. Kaplan, Chair; Paul A. Weinstein, Vice Chair; Jessie James, Jr., Isabelle R. Cappello and Alan S. Rosenthal, Members)

***Expiration of the term of Board member Jonathan Kaufmann, assigned to hear and render an initial decision in this case, occurred before such decision was rendered. On April 23, 1991, a notice was served on the parties that the Board itself would decide this case.**

Authority of PAB

Labor Relations

Statements of Policy and Guidance

Effect of GAO Regulations

Corrective Action

Timeliness

Continuing Violations

Ripeness

Standing

DECISION

This is a proceeding brought under the provisions of the General Accounting Office Personnel Act of 1980 (GAOPA), 31 U.S.C. §732, et seq., as amended 102 Stat. 1599 (1988), and the rules and regulations promulgated thereunder and published at 4 CFR Parts 27 and 28, pertaining to the Personnel Appeals Board (PAB or Board) created by the GAOPA.

On October 13, 1989, Petitioners, represented by the Personnel Appeals Board General Counsel, filed a Petition for Review challenging the validity of two provisions of the Labor Management Relations Order, Order 2711.1, of the United States General Accounting Office (GAO).

Petitioners alleged that paragraph 4.c of GAO Order 2711.1,¹ which prohibits GAO evaluators or persons performing evaluator-related work from affiliating with a labor organization that represents employees who work for agencies or programs subject to GAO audit, is inconsistent with provisions of the Federal

Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. §7112(c)(chapter 71). That provision of the FSLMRS prohibits employees of the executive branch of the government who administer any provision of law relating to labor-management relations from joining any labor union or other organization that represents employees to whom such labor-management law applies; or any union that is directly or indirectly affiliated with a labor organization representing persons governed by such labor-management relations law. The GAOPA (31 U.S.C.Sec.(e)(2)) requires the GAO's labor-management relations program to be "consistent with" chapter 71.

Petitioners also alleged one other inconsistency between GAO Order 2711.1 and the FSMLRS. However, that matter has been settled to the mutual satisfaction of the parties and, therefore, is no longer an issue in this case.

As relief, Petitioners requested that the Board strike paragraph 4.c from GAO Order 2711.1 as being inconsistent with chapter 71 of title 5 of the United States Code.

On November 16, 1989, Respondent filed its Answer to the Petition for Review. In its Answer, Respondent pled five affirmative defenses to the Petition for Review: (1) Petitioners' complaint failed to state a claim upon which relief can be granted; (2) the Board lacks jurisdiction over the subject matter of this case; (3) the issues set forth in the Petition for Review are not ripe for hearing by the Board; (4) paragraph 5.i of GAO Order 2711.1² does not apply to this matter, but even if it did, this case would not be an appropriate case for the Board to exercise its discretion to issue a statement of policy or guidance; and (5) the Petitioners lack standing to bring this case.

On February 9, 1990, Respondent filed a motion to dismiss the Petition for Review. Respondent rested its motion on five basic grounds: lack of subject matter jurisdiction, untimeliness, ripeness, lack of standing, and failure to exhaust administrative remedies.

On June 12, 1990, the Administrative Judge issued an order denying Respondent's motion to dismiss, without prejudice.

On November 15, 1990, the Petitioners filed a motion for summary judgment. On December 4, 1990, Respondent filed its opposition to Petitioners' motion for summary judgment, and its own cross motion for partial summary judgment.

The hearing on the merits of this matter was conducted on December 3 and 4, 1990. Seven witnesses were examined and 63 exhibits were admitted into evidence. Twenty-one stipulations were filed by the parties.

On February 8, 1991, the parties filed their post-hearing briefs.

On May 6, 1991, Petitioners filed a motion for extraordinary relief based upon the fact that the Board's regulations do not contain a procedure for reconsidering a decision when it is rendered by the Board itself, rather than by an administrative judge. The motion requests that either the Board announce that it will follow the procedures set forth in 4 C.F.R. 28.87 or that the Board announce, prior to a decision on the merits of the case, a procedure for reconsideration of its decision on the merits.

On June 26, 1991, the Board heard oral argument on all the issues in this case, pursuant to a Board Order entered on May 22.

On July 26, 1991, the Board ordered the parties to file memoranda relating to one of the issues then in the case.

On August 6, 1991, the parties filed a joint motion for enlargement of time to file memoranda because they were entering into settlement negotiations regarding the issues in this case. The Board granted this motion and extended the time to file the memoranda to August 9.

On August 9, 1991, the General Counsel filed a motion for partial dismissal, with prejudice, of the Petition for Review "as it relates to the issue of the definition of the term 'supervisor'." The General Counsel represented that the parties "had reached an agreement that resolves the issue of whether the definition of supervisor in paragraph 3.f. of GAO Order 2711.1 is consistent with Chapter 71 of title 5 of the U.S. Code."

FINDINGS OF FACT

Relating to non-affiliation issue

1. GAO is a legislative branch agency with "specific responsibility for investigating, auditing and reporting to Congress on the activities of the executive branch." (S. Rep. No. 96-540, 96th Cong., 1st Sess. (1979))

2. In order for GAO to fulfill its mission, it must remain objective and independent. GAO also seeks the appearance of objectivity in order to fulfill effectively its mission. (Tr. 74-75, 86-88, 99-110, 112-118, 129-133, and 138-151.)³

3. GAO produces about 1,300 products (reports or testimonies) a year. It has between 900 to 1,000 jobs ongoing at any given time; and it receives, on an average, 100 requests a month from Congress to undertake additional projects. (Tr. 87, 129) Most of the entities audited by GAO evaluators are unionized, either wholly or in part. (Petitioners' Response to Respondent's Request for Admissions No. 78) However, GAO concedes that most of the work performed by GAO does not directly involve unions in the federal sector. (OTR. 50)

4. Unions are often interested in GAO's reports, testimony, or briefing papers. Furthermore, federal employee unions sometimes request Congress, through the GAO, to conduct an investigation into the executive branch agency in which they have a bargaining unit. GAO has a history of investigating union - management disputes in the Postal Service concerning the contracting out of jobs. On one occasion, GAO investigated disagreements between unionized nurses and management at a VA hospital concerning picketing at the site and accusations of bad-faith bargaining. At times, GAO evaluators contact unions to obtain information and comments for GAO reports. Such contacts have been made to solicit union comment on draft reports involving the Government Printing Office, the airline and railroad industry about safety and training issues, and the use of replacements for striking employees. At times, evaluators and union representatives testify at the same hearing before Congress. On pay reform legislation, all of the major unions testified in favor of higher pay for federal employees. (Tr. 49-50, 70-85, 112-118, 153-160, 163-166 and Respondent's Exhibits 19, 29 and 60)

5. In GAO's General Government Division (GGD), there are issue areas of interest to unions because GGD evaluates federal pay, benefits, downgrading of jobs, working conditions, and performance appraisal systems. GGD's evaluators examine labor-management disputes in the Postal Service and evaluate the

Internal Revenue Service, some of whose employees are unionized. GGD is currently examining the collective bargaining process in the Federal Government and, in the course of that work, has developed a questionnaire with the input of union officials. Unions have taken positions on issues studied by GGD, especially on a law enforcement retirement benefits review and pay reform legislation. Both GAO and unions have testified on these matters. (Tr. 38, 47-49, 70-71, 78-79 and Respondent's Exhibit 16)

6. GAO's Human Resources Division (HRD) evaluates labor matters, which include oversight of the National Labor Relations Board (NLRB), the Federal Labor Relations Authority (FLRA), and the Merit Systems Protection Board (MSPB). HRD also evaluates occupational health and safety, equal employment opportunity, pensions, social security, and health issues. (Tr. 111-118 and Respondent's Exhibits 20 and 21)

7. Also of interest to unions is HRD's oversight of the Department of Labor. That function has produced reports such as "Preventing Conflicts of Interest by Employees Enforcing Labor Union Laws," (Respondent's Exhibit 26) and "Dislocated Workers: Labor-Management Committees Enhance Re-employment Assistance." (Respondent's Exhibit 28) Another report recently issued concerns delays in case processing at the NLRB and recommends statutory changes to correct the problem. (Respondent's Exhibit 18 and Tr. 114-115)

8. The manpower group in GAO's National Security and International Affairs Division (NSIAD) deals with a range of issues of concern to unionized employees, including wages, benefits and working conditions. So does its federal procurement group, where evaluators from NSIAD determine whether a function should be performed by federal employees or contractors. Unions are interested in NSIAD's weapons systems reviews because union jobs might be created or destroyed based on NSIAD's findings concerning whether a particular weapon should be produced. NSIAD's recommendations on whether to close a military base might impact on jobs in a particular region. NSIAD also does some work on foreign trade issues such as export assistance. (Tr. 163-165)

9. GAO's Resources, Community and Economics Development Division (RCED) audits many unionized entities. Its audits of the Department of Energy concern work regularly performed by contractors, some of whom are unionized. HRD evaluators also have worked on reports requiring them to survey union representatives of the air traffic controllers and railroad unions. In addition, they have written a report evaluating security weaknesses at nuclear power sites, prompted when unionized security guards went on strike at one site. Still further, they have examined various aspects of the emission program in the auto industry, of the timber industry, of the mining industry, and of the meat and poultry inspection programs. All of these audits affected the jobs and working conditions of union members. (Respondent's Exhibits 35-40 and Tr. 152-160)

10. In addition to these audits and evaluations, GAO conducts General Management Reviews (GMR's) in which it evaluates an agency's goals, organizational structure, and personnel systems to determine whether the agency is effectively carrying out its mission. By 1995, GAO plans to complete a GMR for every major agency. In conducting these reviews, GAO evaluators receive input from management and union officials. GAO's goal is to produce positive change through these reviews. (Tr. 71-75) Because GAO has no formal power to force agencies to make these changes, it has to convince the "players," including "the decision-makers or the people that are affected," of GAO's objectivity. (Tr. 74-75)

11. GAO publishes a booklet entitled Government Auditing Standards. It provides standards to be followed in auditing government organizations, programs, activities, and functions, as well as in auditing government funds received by contractors, nonprofit organizations, and other non-government organizations. The standards pertain to the auditor's professional qualifications, the quality of audit effort, and the characteristics of professional and meaningful audit reports. (Respondent's Exhibit 56, Chapter 1, paragraph 1) Chapter 3 describes general standards for conducting audits. One is that: "In all matters relating to the audit work, the audit organizations, and the individual auditors, whether government or public, should be free from personal and external impairments to independence, should be organizationally independent, and should maintain an independent attitude and appearance." (Chapter 3, para. 11) Among the "Personal Impairments" that constitute circumstances in which auditors might not be impartial or be perceived to be impartial are "professional...relationships." (Chapter 3, para. 16a)

12. To prevent conflicts of interest, GAO has promulgated ethics regulations. (Tr. 126) They state that "[g]overnment service requires unusually high standards of honesty, integrity, impartiality, and conduct by employees to assure the proper performance of government business and to maintain the confidence of citizens in their government. This is especially true of service in GAO because of the unique functions and special trust placed upon GAO." (Respondent's Exhibit 59, GAO Order 2735.1, Chapter 1, para. 6 and Respondent's Exhibit 58, GAO Order 2735.2, Chapter 1, para. 6) GAO evaluators are routinely trained to insure they are familiar with the requirements regarding conflicts of interest. (Tr. 34, 39, 127-128)

13. Financial disclosure forms are an additional means of preventing conflicts of interest. (Tr. 34-35) GAO requires that each evaluator, GS-7 and above, fill out a financial disclosure form, which requests information regarding financial holdings, liabilities, and gifts received. The form is reviewed every time an employee is assigned to a job under a new supervisor. (Tr. 126-127) GAO employees are prohibited from participating in assignments in which they have either a financial or nonfinancial interest. (Respondent's Exhibit 58, GAO Order 2735.2 Chapter 1, para. 12)

14. A GAO assignment manager raised a conflict of interest issue as to his assignment to evaluate how the Forest Service was implementing a program and whether it was producing information that was helpful to Congress (Tr. 9-10). He had personally worked on the design of the program, in a cooperative effort between GAO and the Forest Service. (Tr. 8) The Forest Service had awarded individual plaques to the GAO staff, as well as a large one to the GAO division which hangs outside the office of the Assistant Comptroller General. This conflict of interest issue was documented and raised with an upper level management official. (Tr. 11) It was determined that the "organization and the individuals were in fact and in appearance independent and that if there were any conflicting terms of [the assignment manager's] factual independence, that [he] should raise it at whatever point in time it occurred and at that point in time remove [himself] from the job." (Tr. 11-12)

15. If GAO evaluators were allowed to join an affiliated union, it is the "fear" of GAO that reviews of possible conflicts would have to be done on a case-by-case basis, in every instance possibly involving unions, and that "would really kind of bring GAO to a halt because [it] would be sitting and waiting to check these things all the time." (Tr. 130-131 and 145) GAO also foresees a restraint on its ability to put staff wherever needed. (Tr. 87-88, and 106) GAO also fears that staff would be denied the opportunity to work on the jobs that they would like, which would not be helpful to their development. (Tr. 106)

16. In the opinion of GAO officials, even if GAO could isolate those individuals who were members of an affiliated union, the perception of a conflict would still exist. (Tr. 99, 131-132, 144-145) Aside from the matter of the union status of GAO evaluators, they are "accused of being biased all the time when [they] do audits" by the officials of audited agencies, who ask: What are your qualifications to do this work? Who are you?" (Tr. 51)

17. Addressing a situation where a union requested Congress to have GAO review the downgrading of some employees of the Bureau of Prisons, one of Petitioners' own witnesses conceded that this would present, "[p]otentially", an appearance of a conflict of interest were the GAO evaluators to be members of the union that raised the issue. He also conceded that management officials might refuse to cooperate in such an instance. He also conceded that it is not untypical for unions to seek congressional review of management actions. The situation at the Bureau of Prisons would be one where he would raise the issue of a conflict of interest with his supervisor. (Tr. 49-51)

18. Through its review processes and exit conferences conducted in conjunction with all GAO audits, GAO achieves a considerable measure of assurance that no biased evaluator can seriously undermine the validity of an audit's findings.

At the front end of a job, there is a lot of give and take in developing an audit plan "to lay out exactly what's going to happen." Several layers of supervisors are involved, up to the Directorate level. There is a "continual interplay between the GAO evaluators and the Assignment Manager and the staffers on the Hill trying to articulate exactly what is being sought in the job in terms of an objective." The audit plan ultimately developed "would outline, to a great deal of specificity, if you were going to a number of places, what the questions would be." On a smaller job, there would be a mid-point review by the key people and management from the Division. On larger jobs, there is sometimes a one-third point review. Somewhere at the tail end of the job there would be a report conference. These reviews would involve several levels of supervisory personnel, occasionally even up to the Assistant Comptroller General. On a daily basis, the site senior would supervise the work. Maybe biweekly or monthly, there would be visits by one or two field officers. The Assignment Manager and the Assistant Director meet at least monthly to discuss the job progress. (Tr. 12-16)

Judicial notice is taken of the routine exit conferences where officials of the agency subject to a GAO report are given an opportunity "to insure that the facts are correct and accurate." See e.g., Management News, dated June 10-14, 1991, page 4. While the review process does not check on whether GAO evaluators "have put into those work papers everything that was relative and balanced between the various positions" (Tr. 133), the exit conferences give officials of the agency being investigated the opportunity to correct any serious gaps. Exit conferences are held by GAO's senior managers or other high level staff. See GAO's General Policy Manual, Chapter 14.0, pages 14.0-4-5 (July 1991).

19. Employees of the NLRB who have a role in the enforcement or administration of the National Labor Relations Act, are represented by an independent labor organization which represents its employees but no other federal employees. This organization is unaffiliated with any other labor organization. (Stipulation 12) Unlike employees of the NLRB, GAO evaluators do not directly enforce or administer any labor laws in the course of their audit work. (Stipulation 11 and Response 12 to Petitioners' First Set of Interrogatories, attached to Petitioners' motion for summary judgment as attachment B)

20. Employees of the MSPB who have a role in the enforcement or administration of laws relating to labor-management relations, belong to an independent organization which represents all MSPB GS-905 attorneys nationwide. This organization is unaffiliated with any other labor organization. (Stipulation 13)

21. Professional employees of the Interstate Commerce Commission (ICC) belong to the Professional Association of the Interstate Commerce Commission, an independent organization which represents ICC employees but no other federal employees. This organization is unaffiliated with any other labor organization. (Stipulation 14)

22. Some employees of the Library of Congress (LC) belong to the Congressional Research Employees Association, which represents certain LC employees but no other federal employees. This organization is unaffiliated with any other labor organizations. (Stipulation 15)

23. Some employees of the Department of Interior (DOI) belong to the Policeman's Association of the District of Columbia, an independent organization which represents certain DOI employees but no other federal employees. This organization is unaffiliated with any other labor organization. (Stipulation 16)

24. The American Federation of Government Employees (AFL-CIO) (AFGE), an affiliated union, represents units of employees of the Department of Labor (DOL) who have a role in the enforcement or administration of the following statutes: Mine Safety and Health Act (30 U.S.C. §801); Occupational Safety & Health Act (29 U.S.C. §651 *et. seq.*); Fair Labor Standards Act (29 U.S.C. §201); Federal Employees Compensation Act (5 U.S.C. §8101); Job Training Partnership Act (29 U.S.C. §1501); Bureau of Apprenticeship and Training Act (29 U.S.C. §50); Employment Service Act (29 U.S.C. §49); Unemployment Insurance Service Act (42 U.S.C. §1101); Davis-Bacon Act (40 U.S.C. §276); and Service Contract Act (41 U.S.C. §351). (Stipulation 8)

25. AFGE represents a unit of employees of the Equal Employment Opportunity Commission (EEOC) who have a role in the enforcement or administration of Title VII of the Civil Rights Act (42 U.S.C. §2000e) and the Age Discrimination in Employment Act (29 U.S.C. §621 *et. seq.*). The AFGE also represents employees who have a role in enforcing the Rehabilitation Act (29 U.S.C. §791 *et. seq.*). (Stipulation 9)

26. AFGE represents a unit of employees of the Office of Personnel Management (OPM) who have a role in the administration of health benefits of federal government employees (5 U.S.C. §8902). (Stipulation 10)

27. The employee positions identified in findings 24, 25, and 26 were included in collective bargaining units of AFGE prior to passage of the Civil Service Reform Act of 1978. (Stipulation 11)

28. GAO approves of its professional staff, including evaluators, joining professional organizations such as the Association of Government Accountants (AGA), the American Institute of Certified Public Accounts (AICPA), the American Association of Accountants (AAA), the Classification and Compensation Society (CCS), the American Society of Public Administrators (ASPA), and the Public Employees Round Table (PERT). (Stipulation 17)

29. GAO approves of its professional staff, including evaluators, becoming actively involved as officers, board members, committee chairs, etc. in professional organizations such as those recited in finding 28. (Stipulation 18)

30. GAO sometimes provides funding for GAO evaluators to attend meetings and conferences of professional organizations such as those referenced in finding 28. (Stipulation 19)

31. In the opinion of the Assistant Comptroller General for Operations, the professional organizations listed in finding 28 do not represent employees in the workplace, and that is the "big distinction" between membership in such organizations and in a union, which stands "right in the middle of the relationship between the employee and management." (Tr. 134-135 and 142-143)

32. In the opinion of the Assistant Comptroller General for GGD, membership in such professional organizations as are named in finding 28, above, allows GAO employees to "grow"; and it is "embodied in the ethic of GAO that [it] can't succeed if [its] people don't continue to grow." (Tr. 88) The difference that he sees between such associations and unions is that people would join an affiliated union "because they think that that union could represent them better in terms of getting specific things that they feel they need to get with their employer." (Tr. 90)

33. AFL-CIO has taken positions on such issues as child-care, better working conditions, making the job easier for single parents, or parents who have children -- "that's the type of stuff that the Federal sector would get involved with." (Tr. 103)

34. GAO does not have a policy prohibiting membership in organizations by employees, other than affiliated unions, on the ground that such union membership can create a conflict of interest with the kind of work GAO performs. Nor does it ordinarily inquire into employee membership in organizations. GAO relies upon its employees to identify to their supervisors any potential conflict of interest arising from membership in an organization they are assigned to audit. When a potential conflict question is raised, sometimes GAO will put someone else on the audit. On other occasions GAO "will build in certain protection against that kind of bias." (Tr. 140) One such protection is to "make sure that the supervisor and the people working with this person are not subject to that same question." This is called "appropriately sandwich[ing]." (Tr. 151 and also 93-94, 103, 122-123, 137-150)

35. For example, it is "very difficult to find staff in the Northwest who don't have some position on the balance between the timber industry and the forests for spotted owl." Yet GAO has no prohibition against members of this staff belonging to the Sierra Club or similar organizations. There are only a "handful of these jobs a year in the Northwest." (Tr. 140-141)

36. The problem that agency officials profess to have with GAO evaluators and attorneys belonging to an affiliated union is not the actual conflict of interest, for which there concededly would be a small potential, but rather an appearance of a conflict of interest which they deem to be more likely. (Tr. 99-100, 133 and 149-150)

37. Numerous organizations that have GAO members, take positions on policy issues before the Congress. These same issues are involved in GAO audits. One former GAO employee, who conducted audits of the Forest Service, belonged to the Isaac Walton League, a conservation organization. He also belonged to the National Rifle Association. These organizations typically wrote letters to him asking him to write to Congress about the forest. His supervisor knew of his Isaac Walton League membership. No question of conflict of interest ever came up. (Tr. 21-22)

38. A GAO Band II evaluator, who deals primarily with compensation and classification issues in the Federal government, is also a member of the Classification and Compensation Society. This Society is composed primarily of employees of other Federal executive agencies; and it takes positions on legislative issues before Congress. He had been an officer of the Society. His supervisors knew of his involvement and are members themselves. No issue of conflict of interest was raised. (Tr. 40-43)

39. GAO employees are members of the American Society for Public Administration, which takes general positions on the need to make sure that public employees have a good environment in which to work, on the political aspect of the career service, and the need to make sure that pay is comparable so that public agencies can attract and retain a good quality work force. (Tr. 92-93)

40. Membership in the National Organization for Women (NOW) would not disturb GAO. This is so even though a staff member might be a NOW member and working on issues relating to women and child care upon which NOW has taken positions. (Tr. 121-122)

Relating to timeliness issue

41. GAO Order 2711.1 was issued on December 3, 1981. (Joint Exhibit 1)

42. About a year to 18 months prior to the hearing, the Assistant Comptroller General for Operations was informed that the GS-13/14 Council had raised inquiries about the non-affiliation rule in GAO Order 2711.1. (Tr. 128-129)

43. Prior to the issuance of GAO Order 2711.1, both the GS-13/14 and the Career Level Councils submitted written comments on the draft order. (Attachments 1A and 1B to Respondent's motion to dismiss the petition for review) Both raised the remaining issue set forth in the Petition for Review--the restriction on joining affiliated unions.

44. Petitioners' arguments were considered and rejected by GAO, in a memorandum to them from the Special Assistant to the Comptroller General dated October 8, 1980. (Exhibit 2 to Respondent's motion to dismiss the Petition for Review)

45. The Petition for Review bringing this issue to the Board was filed on October 13, 1989.

DISCUSSION AND CONCLUSIONS

I. The issues in this case are within the Board's jurisdiction and are justiciable.

At pages 15-20 of its post-hearing brief, Respondent reduces its arguments on these points to the following: the Board lacks subject matter jurisdiction; the petition is untimely; the issues are not ripe; and the Petitioners lack standing.

1. The subject-matter jurisdiction of this Board is rooted in the Congressional intent that this Board is to provide GAO employees with the same scope of protection as executive branch employees receive under the combined umbrellas of the EEOC, the MSPB and its Special Counsel, and the FLRA. For the purpose of labor-management issues, the jurisdiction of the Board was made comparable to that of the FLRA. See General Accounting Office v. GAO Personnel Appeals Board, 698 F.2d 516, 523, 531-532 (D.C. Cir. 1983). In that case, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Board is

an independent agency, co-equal to the GAO in enforcing and adjudicating GAO employees' rights under the GAOPA, and that any interpretation of its authority under the GAOPA is entitled to be given the special deference reserved for agencies charged with setting in motion the new machinery of their enabling legislation. *Id.* at 523, 528 and 531-532.

It is equally well settled that the FLRA, like the NLRB with respect to the private sector, is vested with broad rulemaking and interpretive powers. See American Federation of Government Employees, AFL-CIO, Council of Social Security District Office Locals, San Francisco Region v. Federal Labor Relations Authority, 716 F.2d 47, 50 (D.C. Cir. 1983); and Army-Air Force Exchange Service, et al. v. Federal Labor Relations Authority, 659 F.2d 1140, 1144 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945. The FLRA must resolve issues in a manner that encourages Federal employees to exercise their rights under the labor-management relations provisions of the Civil Service Reform Act. American Federation of Gov't. Employees, 716 F.2d at 50-51. The Personnel Appeals Board must act in a similar manner. Only the courts are empowered to review and overturn the Board's interpretation of its authority. For its part, the GAO totally lacks that power. General Accounting Office, 698 F.2d at 523-24. If the manner in which the Board construes or interprets the GAOPA (which incorporates 5 U.S.C. Sec. 7100, by express reference) is reasonably defensible, then that construction or interpretation must be upheld. Department of Defense v. FLRA, 659 F.2d at 1144.

As part of its role in the Federal labor-management relations program, the FLRA has the authority to issue general statements of policy or guidance where appropriate. (See *e.g.*, 5 U.S.C. §7105(a)(1); 45 Fed. Reg. 24231-24232 (April 9, 1980); and 5 CFR 2427.1 (January 1, 1990)). In light of its specific legislative mandate, the PAB must be deemed to have similar authority. GAO recognizes this in its Order 2711.1, para. 5. See footnote 2, above. The Petitioners in this action fall within the group of organizations covered by Order 2711.1, para. 5, which may request from the Board a general statement of policy or guidance. Thus, the PAB has jurisdiction to issue a decision in this matter.

Respondent agrees that the Board has jurisdiction to issue general statements of policy or guidance, but argues that that authority flows only from Section 5(i) of its Order 2711.1, which does not give the Board jurisdiction to invalidate the Order itself. (See page 16 of Respondent's post-hearing brief.) This argument is inconsistent with both the legislative history and the case law development of the GAOPA. Congress intended that GAO employees enjoy the same rights and protection under the GAOPA as executive branch employees have under the Civil Service Reform Act of 1978. (See discussion in General Accounting Office, *supra*, at 698 F.2d 528-532.) Moreover, the intent of Congress was not that the Board be subject to the veto power of the Comptroller General, or have the powers of the Board under the GAOPA circumscribed by the authority of the Comptroller General. Rather, the legislative objective was to give the Board the same "wide discretion" as the Comptroller General in contributing to the establishment of the GAO's independent personnel system. *Id.* at 531-532. Any contrary interpretation of the authority of the Board would be inconsistent with Congressional intent as to the division of functions between the Board and the GAO. *Id.* at 532. Thus, Respondent's motion to dismiss as regards the jurisdiction of the Board to issue policy decisions regarding the interpretation of labor-management relations issues under GAO Order 2711.1 is denied.

As to GAO's argument that the Board lacks jurisdiction to invalidate the Order itself, Congress gave to the Board authority to order "corrective...action in a case arising from...a matter appealable to the Board under the labor-management program...consistent with Chapter 71 of title 5." (31 U.S.C. §753(a)(6) and §732(e)(2)). Chapter 71 expressly grants to the FLRA the power and duty "to require an agency ... to

cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter." (See 31 U.S.C. §7105(g).) This statutory grant of authority is recognized in the Board's regulations concerned with its general authority to order corrective action. (See 4 C.F.R. §28.130.)

2. As to the issue of the timeliness of a request for a general statement of policy or guidance, no time limits on such requests are set in the applicable statutes (FSLMRS or GAOPA).⁴ Nor do the FLRA regulations pertaining to such requests have any time limits. (See 5 CFR §2427.) Nor does GAO Order 2711.1 have any such time limits. This Board's regulations are silent, altogether, on the subject of policy or guidance statements.

This Board has established procedures "generally applicable to the processing of all matters presented for consideration by the Board." (See 4 CFR §28.9(a).) As to charges relating to "personnel actions," other than adverse and performance-based ones, the Board's regulations require that such charges be filed within 20 days after the effective date of the action or 20 days after the charging party knew or should have known of the actions. (See 4 CFR §28.11(b)(2).) This is the Board regulation upon which Respondent rests its untimeliness argument; and it is undisputed that Petitioners waited more than eight years to bring this matter before the Board. (See FF 41-45.)

However, it is only in the broadest sense that GAO Order 2711.1, setting up its "Labor-Management Relations Program", can be viewed as a "personnel action" to which the time limit in 4 CFR 28.11(b)(2) applies. "Personnel actions" are usually defined as actions which relate to matters such as hiring, promotion, and performance appraisals, and not to the establishment of an entire program, as here. (See 5 U.S.C. §2302(a)(2))

At best, Petitioners have not been given clear notice that the time limit in 4 CFR 28.11(b)(2) applies to their request for policy guidance; and this constitutes good cause for the Board to waive the time limit, pursuant to 4 CFR §28.4(b).

Further, the fact that an agency might have promulgated an order or a rule a number of years before an appeal is filed to challenge that order does not immunize the order or rule from attack, even where there is a statutory limitations period that has expired. Parties may challenge an order or rule on the basis that the agency exceeded its statutory authority in issuing it, that it was adopted in a procedurally defective manner, that it had a substantive defect other than the agency's lack of authority to issue it, or that it conflicts with the statute from which its authority is derived or upon which the rule or order is based. See National Labor Relations Board Union, et. al v. Federal Labor Relations Authority, 834 F.2d 191, 195-199, (D.C. Cir. 1987), where the attack on an FLRA regulation came almost seven years after the appeal was filed, and there was a 10-day statute of limitations. Petitioners here are attacking GAO Order 2711.1 on the ground that it is inconsistent with the statute upon which the order is based.

Finally, GAO Order 2711.1 is "capable of continuing application [and] limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." National Labor Relations Board, 834 F.2d at 196, citing Functional Music, Inc. v. F.C.C., 274 F.2d 543, 546 (D.C. Cir. 1958), cert. denied, 361 U.S. 813. Undoubtedly, there are employees now represented by Petitioners who were not yet GS-13s or career level employees, or even employees, in 1981 when GAO Order 2711.1 was promulgated. This Board's regulations provide that: "Charges relating to continuing violations may be filed at any time." (See 4 CFR §28.11(b)(5).)

3. As to the issues of ripeness for review and the standing of Petitioners to bring this matter before the Board, Respondent relies on the same arguments--that "the provisions in question have never been applied by the Comptroller General; there is no record evidence of any employee being excluded from a bargaining unit, prohibited from joining a union, or discouraged from doing so ...[; and] there is no evidence that this regulation has resulted in any hardship to any employee." (See page 18 of Respondent's post-hearing brief.)

The answer to these arguments is found on the face of Order 2711.1, which is a final order of the Comptroller General and, as such, is binding upon all GAO employees. On its face, GAO Order 2711.1 has a chilling effect upon attempts of GAO employees to assist, freely, in the formation of, and to join, the union of their choice. The only choice open to those affected by the GAO Order at issue is an independent union with no affiliation, directly or indirectly, with unions representing other government employees (Federal, State or local) or representing employees in the private sector who work on programs or projects subject to GAO audit. As one of GAO's officials testified, GAO employees might think that an affiliated union "could represent them better in terms of getting specific things that they feel they need to get with their employer." (See FF 32.)

Forming a union is normally difficult. Employees should have a clear set of options consistent with the law. A decision on the questions presented here for review will clear the way for GAO employees to proceed with whatever organizational efforts are determined to be within their statutory rights.

Respondent insists that any such decision await the violation by its employees of its Order 2711.1. This asks too much. Employees should not have to violate an agency order before seeking clarification of its legality. Both their agency, and the statute giving them organizational rights, confer upon them the right to seek advice from a reviewing authority -- in this case the Board.

Respondent relies upon three FLRA decisions denying requests for a general statement of policy or guidance -- 3 FLRA 361 (1980), 7 FLRA 524 (1991), and 23 FLRA 411 (1986). In each of these decisions, FLRA applied its standards governing issuance of such statements, which are:

- (a) Whether the question presented can more appropriately be resolved by other means;
- (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases;
- (c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor-Management Relations Statute;
- (d) Whether the question currently confronts parties in the context of a labor-management relationship;
- (e) Whether the question is presented jointly by the parties involved; and
- (f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor-Management Relations Statute.

See 5 CFR §2427.5.

This Board has yet to adopt any standards. In their absence, it is appropriate to consider those of the FLRA for the purpose of the request by Petitioners, even though this Board is not bound by either the decisions of executive branch boards or agencies or their procedures for reaching them. See General Accounting Office v. General Accounting Office Personnel Appeals Board, 698 F.2d 516, 531 (D.C. Cir. 1983) and 707 F.2d 1559-60 (D.C. Cir. 1983).

In considering the FLRA standards, a number of those used by FLRA persuades this Board that now, rather than later, is the most appropriate time to resolve the issues being raised in this case.

The issues have general applicability under the FSLMRS. They involve important questions of whether and how the parties' current labor-management relationship will become a formal one under 5 U.S.C. §7100.

The Comptroller General's ban on affiliation with other federal sector unions is not an issue that can be more appropriately dealt with in another proceeding. It would make little sense to require the employees to go through the proceedings to affiliate with, for example, a federal sector union, undergo the requisite showing of interest procedures, only to find that the process, in its entirety, was a wasted effort due to the Comptroller General's ban on affiliation. Moreover, as a practical consideration, the ban on affiliation would serve as a real deterrent to any other union's desire to organize GAO employees. It is doubtful that another labor organization would commit the resources necessary to launch or support a recognition drive in the face of an agency order barring affiliation in the first instance. Therefore, in the absence of the Board's acceptance of this matter for issuance of a policy statement, the ban on affiliation might never be challenged.

There are of record no pending labor-management matters between the parties which could be disrupted by the issuance of a general statement on the issue presented. And its issuance would promote the stability of the labor-management program at GAO by resolving a long-standing issue between them.

Having concluded that the Board has jurisdiction and that the issue presented is justiciable, the Board now turns to the issue raised as to whether GAO's interpretation of Chapter 71 is entitled to particular deference, and then to the substantive issue.

II. GAO's interpretation of Chapter 71 of Title 5 is entitled to no particular deference.

Respondent urges that "great deference" is due to its Order 2711.1 and that this Board should not overturn the portion here in dispute "unless proven to be arbitrary, capricious or an abuse of discretion." (See pages 21-23 of Respondent's post-hearing brief.) Petitioners argue that, since the Comptroller General is not interpreting his organic statute, this Board owes no particular deference to his interpretation. (See pages 12-15 of Petitioners' post-hearing brief.)

An agency is only entitled to deference as to its own organic statute. See, e.g., Illinois National Guard v. F.L.R.A., 854 F.2d 1396, 1400 (D.C.Cir.1988), holding that the FLRA is not entitled to deference when called upon to resolve an apparent conflict between two statutes, the Schedules Act and the Technician Act, neither of which it administers.

In this matter, the Comptroller General is not interpreting the organic act of GAO. The GAOPA requires the Comptroller General to implement a labor-management relations program. The GAOPA, however, does not prohibit affiliation with labor organizations due to a conflict of interest. That is covered by 5

U.S.C. Chapter 71, which is the organic act of another agency, the FLRA. With respect to chapter 71, this Board is not required to give any particular deference to GAO's interpretation of that chapter.

Respondent relies upon a PAB order and regulation to support its argument to the contrary. (See footnote 10 on page 22 of its post-hearing brief.) The order was entered in Patrick v. GAO, No. 25-100-17-83, on January 12, 1984, and involved a position classification determination by GAO to which this Board accorded deference. For its part, the regulation relied upon by GAO, 4 CFR 28.111, states that: "Board decisions [concerning collective bargaining units] will be made with due regard for relevant provisions of GAO Orders and "with the objective of insuring that the GAO labor relations program is consistent with Chapter 71 of Title 5, United States Code, which prescribes the standards for the labor relations program in the executive branch." Emphasis added. Thus, the order is distinguishable on its face and the regulation is not inconsistent with the Board's conclusion that no particular deference is due to GAO's interpretation of the FSLMRS, which is the organic statute of another agency, the FLRA.

III. The portion of GAO Order 2711.1 remaining at issue is not consistent with Chapter 71.

GAO claims for itself "considerable latitude", under the GAOPA, in fashioning a labor-management relations program--so much latitude that it can delimit the choice of its employees who perform evaluator-type and legal duties, as to their collective-bargaining agents. (See page 24 of Respondent's post-hearing brief.) Nothing in the language or legislative history of the GAOPA, or in the expressed congressional intent in enacting it, allows for this narrowing of employee rights.

A. The form, language and legislative history of the GAOPA

There is no doubt that in the GAOPA Congress gave "wide discretion to the Comptroller General in designing the personnel management system", but it also "limit[ed] the flexibility in areas of important employee rights", including "labor organization rights." (H.Rep.96-494, 96th Cong., 1st Sess.(1979) at page 4) This is apparent from examining the three categories into which the provisions of the GAOPA falls.

(1) There are provisions that require the Comptroller General to adopt exactly the same statutory provisions as exist in the executive branch, such as merit system principles, prohibited personnel practices, and prohibited political activities. (See 31 U.S.C. Secs.732(b)(1),(2) and (3).)

(2) There are provisions that exempt GAO from virtually all executive branch provisions and allow the Comptroller General to exercise broad discretion in creating new systems, such as the exemption from the Classification Act and, except for certain policy considerations and a ceiling limitation, the exemption from the General Schedule pay system. (See 5 U.S.C. §5102(a) and 31 U.S.C. §732(b)(6) and (c)(2).) Because of these exemptions, GAO has created a new personnel system for its auditors. (See footnote 1 to Respondent's response to interrogatory 5a, attached to Petitioners' motion for summary judgment.)

(3) Finally, there are provisions that direct the Comptroller General to create a system that is "consistent with" the executive branch system. The "consistent with" provisions are six in number, and include the creation of a labor-management program, the program here at issue. (See 31 U.S.C. §732(e)(2).) The other five concern provisions for preferences to individuals, basic pay, grade and basic pay retention, reduction in grade and removal, and other personnel actions. (See 31 U.S.C. §§732(b)(5) and (6),(c)(5), and (d)(3) and (4).)

The second category, in which the Comptroller General has broad discretion to create a new personnel system, is obviously the reason for the third category. Congress realized that new systems could create a ripple effect and would make it impossible for each and every provision of executive branch law to apply to any new GAO personnel system. Thus the need for the "consistent with" provisions.

House Report No. 96-494 discusses the "consistent with" phrase in three places. The first is in reference to the grade and pay retention provision. At page 9 of the Report, it is stated that:

The Committee recognizes that the GAO personnel system will differ in many respects from similar systems in the executive branch. The grade structure may differ and pay levels and step rates within those levels may differ. Although many aspects of the executive branch personnel system, for example grade and pay retention, may be desirable for the GAO system, these aspects may not work properly if strictly applied to the GAO system because of differences between that system and the executive branch. The statutory executive branch grade and pay retention provisions may not work properly when applied to the grade and pay system eventually developed by GAO. For this reason the bill does not make the statutory grade and pay retention applicable to GAO, but rather requires the Comptroller General to provide grade and pay retention which is consistent with what is required by law in the executive branch. The GAO program need not incorporate each and every provision applicable in the executive branch. The Committee believes this approach will permit the flexibility necessary to ensure that the rights of GAO employees to grade and pay retention under the GAO system will be no less than similar rights accorded to executive branch employees. (Emphasis in the Report.)

The second discussion in the House Report regarding the intent underlying the "consistent with" phrase applies to the provision the Board is here concerned with -- the labor-management relations program created at GAO under the GAOPA. At page 10 of the Report it is stated:

Section 3(e) requires the GAO personnel system to provide procedures to ensure that each employee of GAO has the right, freely and without fear of penalty or reprisal, to form, join, and assist an employee organization, or to refrain from such activity. This is the same right accorded to executive branch employees under the statutory labor-management relations program of that branch (see 5 U.S.C. 7102). Section 3(e) also requires the personnel system to provide for a labor-management program consistent with chapter 71 of title 5, United States Code. Chapter 71 contains the statutory provisions governing the executive branch labor-management relations program. Again, the Committee recognizes that the form of the GAO personnel system may be such that certain provisions of chapter 71 would not work properly if made strictly applicable to GAO. Also it would be inappropriate for GAO to be subject to rules and regulations of the Federal Labor Relations Authority established under chapter 71. Therefore, the bill requires that the GAO labor-management relations program be "consistent with" chapter 71. The committee stresses that while it intends that GAO employees will enjoy equivalent rights and benefits as employees covered by chapter 71 the GAO program is not bound to incorporate each and every provision of chapter 71. (Emphasis added).

"Again," the Report relates the "consistent with" language to "the form of the GAO personnel system."

The last reference in the House Report to the "consistent with" phrase also occurs at page 10 where it comments on unacceptable performance and disciplinary actions and states that: "The bill requires the GAO system to be 'consistent with' what is required in the executive branch for the same reasons stated in

connection with section 3(c)[the pay provision discussed above] and 3(e)[the labor-management relations provisions discussed above]."

Thus, we conclude that Congress allowed flexibility to the GAO in regard to its labor-management relations program only insofar as it relates to the "form of the GAO personnel system." The justification offered by GAO as to the portions of its Order No. 2711.1 here involved has nothing whatsoever to do with the form of its personnel system enacted since the passage of the GAOPA. GAO's justification for the non-affiliation rule relates to the mission of GAO -- about which Congress was fully aware long before it enacted the GAOPA.

B. Other indicia of Congressional intent

Congress was also made aware, by a GAO official at the hearings considering the GAOPA, that GAO took "the position that most of [its] auditors would be excluded from any labor relations program." (See pages 14-15 of Hearings before the Subcommittee on the Civil Service of the Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess. H.R. 3339 (1979).)

Yet Congress did not expressly exclude GAO auditors from the labor relations program at GAO. Nor is there any plausible evidence that Congress intended to restrict the rights of GAO employees to choose their bargaining agent when it required GAO to implement a labor relations program "consistent with" chapter 71.

Chapter 71's only non-affiliation rule is found in 5 U.S.C. §7112(c), which provides that: "Any employee who is engaged in administering any provision of law related to labor-management relations may not be represented by a labor organization which-- (1) represents other individuals to whom such provision applies; or (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies." Chapter 71's non-affiliation rule prevents conflicts of interest, or the appearance of conflicts of interest, in only those narrow circumstances.

GAO employees do not administer laws relating to labor-management relations within the meaning of chapter 71. (FF 19) And even where employees have administered a law requiring the regulation and investigation of union officials, they were not precluded from joining an affiliated union, because the law they administered did not implicate the collective bargaining process or any other matter directly affecting labor-management relations. See U.S. Dept. of Labor, Pension and Welfare Benefits Administration and National Union of Pension Investigation and Auditors, 38 F.L.R.A. 10 (1990).

Aside from the rationale discernible from the form, language and legislative history of the GAOPA already discussed, there is other, persuasive evidence that Congress did not intend for GAO to exclude affiliated unions from organizing and representing GAO employees engaged in investigatory type duties (called auditors and also evaluators). Prior to the passage of the Civil Service Reform Act (of which chapter 71's labor-management relations program is a part) employees at EEOC, DOL and OPM were members of AFGE (a union affiliated with the AFL-CIO) and were also engaged in the investigation and/or prosecution of workplace issues such as job discrimination, occupational safety and health, job training, unemployment insurance, wages and hours of work, health benefits for workers, and child care. (FF 24, 25, 26, 27 and 33) In fashioning the limited non-affiliation provision of Section 7112(c), discussed above, Congress apparently found no reason to extend it to cover the potential conflict-of-interest situations upon which GAO predicates its non-affiliation order here at issue--namely the situations where its evaluators might be perceived as biased when they belong to affiliated unions, and investigate

workplace issues at agencies where their union also had bargaining rights. Nothing restricts EEOC, DOL or OPM employees from investigating entities that are also affiliated with their chosen bargaining agent.

In view of congressional intent to grant to GAO employees the "same rights and protections as employees in the executive branch," (page 15 of H.Rep. 96-494, 96th Cong., 1st Session, October 2, 1979), it cannot be concluded that Congress meant to restrict GAO employees as to their bargaining agents, when executive branch employees, doing similar investigatory work, are not so limited.

Nor can it be concluded that GAO cannot adequately deal with any conflict-of-interest situations that might arise should its evaluators choose an affiliated union to represent them. After all, GAO is accustomed to meeting challenges to its objectivity; and it has well-developed processes for dealing with them. (See FF 12, 13, 14, 17, 18 and 34.) GAO claims that it would be administratively cumbersome, indeed "practically impossible", to apply those processes to employees who join affiliated unions and would limit its ability to place staff where needed and where staff may want to work. (See FF 15 and page 36 of Respondent's post-hearing brief.) Just how many employees may ultimately join a union, and how seriously this may impact upon GAO's resources, is unknown. But, assuming arguendo, that some administrative inconvenience will result if employees join affiliated unions, this factor does not override the statutory right of GAO employees freely to form, join or assist a labor organization of their own choosing, affiliated or not. Congress has found that the right of employees to put their employers to this inconvenience is "in the public interest." (See 31 U.S.C. §7101(a).)

Based upon all the above reasons, the Board concludes that paragraph 4.c of GAO Order 2711.1 is inconsistent with the provisions of the FSLMRS and therefore must be stricken as in violation.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Paragraph 4.c of GAO Order 2711.1 is stricken;
2. The parties' motion and cross-motion for summary judgment are denied, as moot;
3. The parties have thirty (30) days from the date of this order to request reconsideration of this decision, and that
4. The motion for partial dismissal, with prejudice, as to the definition of "supervisor", in paragraph 3.f of GAO Order 2711.1, is granted.

Notes

1. Paragraph 4.c of GAO Order 2711.1 states:
c. To avoid conflicts of interest and the appearance of conflicts of interest, employees classified as GAO Evaluators, employees otherwise classified who are performing comparable work, and employees classified as Attorney-Advisors shall not be represented by a labor organization which:
(1) Represents other individuals employed by the Federal Government, or by state or local government, or individuals employed in the private sector who work on programs or projects subject to GAO audit; or
(2) Is affiliated, directly or indirectly, with a labor organization which represents employees mentioned in subparagraph 4c(1) above.

2. Paragraph 5 of GAO Order 2711.1 states, in pertinent part: The Board shall, to the extent provided in this order and in accordance with such regulations as it may prescribe: ...

i. In its discretion, upon request from GAO, a labor organization or a lawful organization not qualified as a labor organization, issue general statements of policy or guidance on labor-management relations matters;
.... .

3. "TR" refers to the hearing transcript of December 3 and 4, 1990. "OTR" refers to the transcript of the June 26, 1991, oral argument before the Board.

4. The only two cases cited by Respondent in support of its argument both involved statutory time limits--Yakus v. United States, 321 U.S. 414, 427-428 (1941) and Eagle Picher Industries v. U.S. Environmental Protection Agency, 759 F.2d 905, 911 (D.C. Cir. 1985). (See page 16 of Respondent's post hearing brief.)