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GAO

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Washington, DC 20548

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Office of
General Counsel

In Reply
Refer to:

B-202820

April 9, 1981

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Edward C. Gallas
Personnel Appeals Board
441 G Street, NW.
Washington, D.C. 20548

Dear Mr. Gallas:

[Proposed Regulations]

On March 10, 1981, the GAO Personnel Appeals Board published, at 46 Federal Register 15884-15888, a proposed ~~rule~~ dealing with representation issues and other labor-management relations matters in ~~the General Accounting~~ GAO Office. The Board requested comments on the proposed regulations, including comments concerning the Board's authority to issue them.

In response to that request we are presenting to you the comments of the management of GAO on the Board's proposed regulations. We will first present our position on the matter of the Board's authority to issue the regulations and then our views on specific provisions in the regulations.

POSITION ON BOARD AUTHORITY TO ISSUE LABOR RELATIONS REGULATIONS

The Board's authority in the area of labor-management relations is limited to the authority to adjudicate specified cases and the authority to issue the operational or procedural regulations necessary for the adjudication of those cases. The Board has no authority to issue substantive labor-management regulations, and neither the Comptroller General nor any party to a dispute arising under the Act is bound by actions of the Board which are in excess of the Board's authority.

Both the language and the legislative history of the GAO Personnel Act make the division of authority between the Comptroller General and the Board clear. The function of the Comptroller General is quasi-legislative; he determines the substantive provisions

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of the labor-management program. The function of the Board is adjudicatory. Section 3(a) of the Act states:

> "The Comptroller General shall * * * establish by regulation a personnel management system for the General Accounting Office * * * which shall meet the requirements of subsections (b) through (h)." (Emphasis added.)

Subsection (e) states, in pertinent part:

> "The personnel system * * * shall provide for a labor-management relations program, consistent with chapter 71 of title 5, United States Code."

In its report on H.R. 5176, which was subsequently enacted as the GAO Personnel Act, the House Post Office and Civil Service Committee stated, at page 5, "H.R. 5176 requires the Comptroller General to issue regulations providing for labor-management relations which are consistent with title 5 of the Civil Service Reform Act." House Report No. 96-494, 96th Congress, 1st Session (1979). (Emphasis added.) At page 10 of that 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 in that branch (see 5 U.S.C. 7102). Section 3(e) also requires the personnel system to provide for a labor-management relations 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.)

The report of the Senate Committee on Governmental Affairs (Senate Report No. 96-540, 96th Congress, 1st Session, 1979) on S. 1879, which was identical to H.R. 5176 as to labor relations, states, at page 5:

"Section 3(e) provides that while not subject to chapter 71 of title 5, United States Code, GAO is required to establish a labor-management relations program which must achieve the ends set forth therein. The Federal Labor Relations Authority will not have jurisdiction over GAO's program. It will be administered by the Comptroller General * * *." (Emphasis added.)

Section 4(h) of the Act sets forth the Board's labor-management authority to "* * * consider, decide, and order corrective or disciplinary action (as appropriate) in cases * * *" (emphasis added) in the areas specified in that provision of the Act.

Senate Report No. 96-540 on S. 1879 states, at page 5, regarding the Board's role in GAO's labor-relations program:

"* * * controversies arising under [the program] will be resolved by the GAO Personnel Appeals Board in accordance with the provisions of section 4 of this bill." (Emphasis added.)

On page 7, the report states:

"Section 4(h) authorizes the Board to consider, decide, and order corrective or disciplinary action (as appropriate) arising from such matters as * * * (4) labor-management relations matters as specified in this subsection * * *." (Emphasis added.)

There is nothing in section 4, or any other portion of the Act, which confers on the Board the power to establish a labor-management relations program for GAO. The Board has not been authorized by Congress to determine policy in the area of labor relations, or to issue substantive regulations. The Board's function is strictly adjudicatory and its authority to issue regulations under section 4(m)(2) is limited to the "operational procedures" necessary for the adjudication of such cases.

Moreover, even assuming the Board had been given the type of policy role conferred upon the Federal Labor Relations Authority (FLRA), the summary of arguments in favor of the Board's authority to issue substantive regulations, contained in the Supplementary Information portion of the proposed rule, greatly exaggerates the role of the FLRA. The role of the FLRA is to interpret and apply the provisions of chapter 71 to particular cases, just as the role of the Board is to interpret and apply the provisions of GAO Order 2711.1 to individual cases. The FLRA may not, by regulation, change or rewrite the substantive provisions of 5 U.S.C. chapter 71. Thus, where a term is specifically defined in 5 U.S.C. chapter 71, the FLRA regulations simply incorporate that provision of the statute by reference. See 5 C.F.R. 2421.2. The FLRA has no authority to issue regulations containing definitions different from those contained in 5 U.S.C. chapter 71.

The Board is expressly authorized by section 4(h)(4), (5), and (6) of the Act to adjudicate representation cases and unfair labor practice cases "* * * under the system established by section 3(e)* * *" of the Act and "any other matter appealable to the Board under that system."

The labor-management system established by the Comptroller General is GAO Order 2711.1, October 1, 1980, Labor-Management Relations. Paragraph 5 of that Order,

at pages 6-7, lists the powers and duties of the Board. In addition to representation and unfair labor practice cases which are specifically referenced in the Act, the Order gives the Board authority to adjudicate negotiability disputes, exceptions to arbitration awards and standard of conduct cases, to issue policy statements upon request, and to take other action necessary to administer GAO Order 2711.1.

Pursuant to section 4(m)(2) of the Act, and the additional authority conferred upon the Board by GAO Order 2711.1, the Board is authorized to issue the "operational" regulations necessary to adjudicate the types of cases listed above. While it may choose to include certain substantive provisions for informational purposes, if included, such provisions must be completely consistent with GAO Order 2711.1. Most emphatically, neither the Act nor GAO Order 2711.1 gives the Board authority to write its own labor-management program which conflicts with or is inconsistent with the program established by the Comptroller General pursuant to section 3(e) of the Act.

The limitation on the Board's authority to issue regulations is especially clear. Section 4(m)(2) of the Act authorizes the Board only to "establish its operating procedures." Nothing in section 4, or in any other part of the Act, confers upon the Board the broad policy and regulatory powers given to the FLRA pursuant to 5 U.S.C. 7105(a). These powers cannot be inferred; they must be granted by statute or regulation.

The powers and duties of the Board in the area of labor relations could also be compared to a panel of arbitrators. Such a panel could, to the extent authorized by the contract, prescribe the procedures to be used in adjudicating cases before it. If the contract contained a provision requiring consistency with practices in the industry, the panel could also, in the context of a particular case, interpret and apply the contract in a manner consistent with its view of the practices in the industry. However, the panel could not properly construe a mandate to conform to practices in the industry as authority to preemptively rewrite the entire collective-bargaining agreement to suit its view of practices in the industry. Neither arbitrators nor officials appointed to administrative bodies are

authorized to determine the substantive provisions of the enabling legislation or collective-bargaining agreement. With the limited exception of interest arbitration, such powers are not characteristically granted, and they are never freely implied.

The Board is bound to adjudicate cases pursuant to GAO Order 2711.1. In the context of a particular case, it may consider the issue of whether the controlling provision of GAO Order 2711.1 is consistent with 5 U.S.C. chapter 71 and its determination on this issue is limited by the authority to adjudicate specified cases and the authority to issue the operational or procedural regulations necessary for adjudication of those cases.

COMMENTS ON SPECIFIC PROVISIONS OF PROPOSED RULE

1. §28.63 Definitions. As noted above, the GAO Personnel Act gives GAO the authority and responsibility to establish a labor-relations program for GAO, and it exercised that authority by promulgating GAO Order 2711.1. That Order contains definitions of employee, supervisor, management official, confidential employee, and professional employee which are the definitions the Board must utilize. Therefore, while the Board will necessarily have to interpret those definitions in applying them to cases brought before it, the Board cannot replace those definitions with ones of its own. We note that the definitions of supervisor and professional employee contained in § 28.63 differ substantively from those in the Order. We recommend that the following language be substituted:

> §28.63 Definitions.
>
> In subparts E and F the terms "Employee," "Supervisor," "Management official," "Confidential employee," "Professional employee," "Labor organization," "Exclusive representative," "Collective bargaining," "Collective bargaining agreement," "Grievance," "Appropriate unit," and "Dues," shall have the meanings set forth in paragraph 3 of GAO Order 2711.1.

2. §28.65 Who may file petitions. GAO has determined in GAO Order 2711.1, in exercise of its authority under

the GAO Personnel Act, who may file petitions. However, we have no objection if the Board wishes to incorporate this data in its regulations for informational purposes.

Regarding section 28.65(a)(5), consistent with H.R. Rep. 96-494, page 10, GAO elected, in promulgating GAO Order 2711.1, not to provide a means for labor organizations which do not have exclusive recognition to obtain a dues allotment system. 5 U.S.C. 7115(c) was regarded as appropriate for unions in very large but centralized agencies, in which unions might have considerable strength but be unable to achieve exclusive recognition. It is not appropriate for GAO. The Board does not have authority to provide for dues allocation systems outside the framework of exclusive recognition. Therefore, § 28.65(a)(5) should be deleted.

Section 28.65(a)(6) should also be omitted. Neither the Act nor GAO Order 2711.1 authorizes consolidation of unit procedures and, as explained above, the Board has no authority to independently prescribe such procedures. Consolidation procedures were provided for in 5 U.S.C. chapter 71 and Executive Order 11491 to reduce the extensive unit fragmentation that had developed under the years of labor relations under Executive orders. See the explanation concerning the reasons for these unique procedures in the Report and Recommendations of the Federal Labor Relations Council on the Amendment to Executive Order 11491, as Amended, Labor-Management Relations in the Federal Service, January 1975, at pages 34-35. GAO has no such unit fragmentation problem since it currently has no certified units. Consistent with H.R. Rep. No. 96-494, page 10, the Comptroller General elected to combat the problem of unit fragmentation by providing for minimum appropriate units. See paragraph 8 of GAO Order 2711.1. This provision will obviate the need for consolidation procedures and prevent the GAO program from becoming unnecessarily complicated.

Section 28.65(b) should be revised as follows:

> "(b) Notwithstanding the provisions of (a) of this section, no petition may be filed pursuant to (a)(1) and (2) of this section where an election has been held within the preceding 12 months or where a valid collective-bargaining agreement is

in effect, except that such a petition may be filed not more than 105 days and not less than 60 days prior to the expiration of the initial 3-year term of the contract, or at any time after the expiration of the initial 3-year term of the contract." (New language underscored.)

This revision is necessary as the proposed rule creates the impression that any contract can act as an indefinite bar to an election. Compare 5 C.F.R. 2422.3 which provides for an "open period" on a 3-year contract, and no bar after expiration of the first 3 years of a contract.

3. § 28.67 Contents of representation petitions. In § 28.67(a)(4) the words "and to the Assistant Secretary of Labor for Labor-Management Relations" should be deleted. See comments on § 28.93(b) and (c).

Consistent with our comments on § 28.65(a)(5) and (6) above, § 28.67(e) should be omitted.

4. § 28.69 Pre-investigation proceedings. In § 28.69(c), the phrase "* * * and to whether an election should be held," should be deleted. Paragraph 7 of GAO Order 2711.1 requires an election in each instance, and there is no precedent in the Federal sector for certification of an exclusive representative without an election. Both Executive Order No. 11491 and 5 U.S.C. chapter 71 require an election.

The following language should be added to subsection (d):

"* * * or submits other evidence that it is the exclusive representative of the employees involved." Compare 5 C.F.R. 2422.5(a) and para. 7c of GAO Order 2711.1.

5. § 28.73 Conduct of elections. Subsection (a) should be revised. Under the GAO Personnel Act the Board is not empowered either to delegate any of its functions to an outside organization or to hire temporary employees. The Act does not give the Board contracting or hiring authority, with the exception of the express right to select a General Counsel.

§ 28.73(b) should also be revised. It refers only to the obligations of GAO and creates the impression that while GAO's conduct is suspect, the conduct of a labor organization is not. The Board's authority to dictate a reasonable time, place, date, etc., of an election is undisputed and there is no basis for assuming GAO will not "cooperate in all reasonable ways." Moreover, these details of the election are prescribed in the notice which is directed by the Board. Subsection (b)(2) is especially offensive and one-sided as it appears to assume only GAO would engage in conduct which affects the outcome of an election. While only management has the obligation to remain neutral, all of the parties are required to refrain from conduct which tends to interfere with the employees' expression of free choice. The types of conduct which could form a basis for setting aside the results of an election are many and varied and are best handled pursuant to procedures for determining objections to an election. See our comments below. There is no need to separately list certain obligations of GAO in subsection (b) which suggests that only GAO's conduct is suspect. We recommend that the following language be substituted for subsections (a) and (b):

(a) The Board shall conduct or supervise any election.

(b) Appropriate notices setting forth the details of the election shall be posted by GAO as directed by the Board.

§ 28.73(d)(3) should be revised as follows to conform to paragraph 7a of GAO Order 2711.1.

(3) Where one or more of the labor organizations on the ballot has received the vote of 30% or more of the employees eligible to vote, but no choice has gained a majority of the votes cast, the Board may order a run-off election between the two choices receiving the largest number of votes in the original election, unless, because of a tie vote or for some other reason, the result is inconclusive; and * * *. (New language underscored.)

We note that subsection (e) refers only to challenged ballots and does not provide for resolution of objections to an election. Compare 5 C.F.R. 2422.20. We recommend that procedures for the resolution of objections to an election be specifically included.

6. § 28.81 Authority of the Board. Subsection (a) should be revised as follows:

> (a) The procedures in this subpart relate, in part, to the Board's functions "to consider, decide, and order corrective or disciplinary action (as appropriate) in cases arising from * * * any labor practice prohibited under the labor-management system established * * *" by the Comptroller General pursuant to section 3(e) of the Act. [Act, Sec. 4(h)(6).]

In line with our comments on the Board's authority above, subsection (b) should be deleted. The establishment of a labor-management system is the responsibility of the Comptroller General, not the Board.

7. § 28.83 Unfair labor practices - Board procedures. Since unfair labor practices are not enumerated or defined in the Act, we recommend the following revision in §28.83:

> "§ 28.83 Unfair labor practices--Board procedures.
>
> "An allegation that unfair labor practices within the definition of GAO Order 2711.1 * * *."

We have two recommendations regarding subsection (a). First, as 5 U.S.C. 7118(a) does not directly apply to GAO, the comparable provision of GAO Order 2711.1--paragraph 14e--should be cited instead. Second, since GAO Order 2711.1 requires (except in two instances) that the party alleging an unfair labor practice first file a charge with the charged party and allows the filing of a complaint with the Board only after at least 30 days have elapsed from the filing of the charge. The Order also provides, in keeping with this procedure, that a filing with the Board is timely if made within 9 months of the

alleged unfair labor practice. Therefore, the last portion of § 28.83(a) should be changed to read as follows:

> "* * * which occurred more than 6 months before the filing of an unfair labor practice charge with the charged party, as provided in paragraph 14b of GAO Order 2711.1, or more than 9 months before the filing of a complaint with the General Counsel."

In § 28.83(b), the portion beginning with the word "prior" should be modified so that the terminology is consistent with that in paragraph 14 of GAO Order 2711.1. Under the Order, an unfair labor practice filing with the Board is termed a complaint, not a petition. If the General Counsel is to take cases before the Board upon finding that a complaint has merit, the General Counsel's action could be deemed "the issuance of a formal complaint."

8. § 28.85 Board authority beyond unfair labor practices. The Board does not have authority in the area of national consultation rights or negotiation impasses. As stated earlier, the GAO Personnel Act gives GAO the authority and responsibility to establish a labor-relations program for GAO, and that authority was exercised by the promulgation of GAO Order 2711.1. The Order does not provide for the granting of national consultation rights. And while it does provide a procedure for the resolution of negotiation impasses, only the Chair of the Board--not the Board itself--is to be involved.

Further, the Board does not have the broad authority described in the last sentence of the section. GAO Order 2711.1, in paragraph 5i, gives the Board the power to "issue general statements of policy or guidance on labor-management relations matters" but only "upon request from GAO, a labor organization, or a lawful organization not qualified as a labor organization." It does not give the Board the power to issue such statements on its own motion nor the authority described in the Board's proposed rules.

Given the foregoing, this section is improper and should be deleted.

9. § 28.87 National Consultation Rights. This section should be deleted. See comment 8 above.

10. § 28.89. Negotiability issues - compelling need. This section should be deleted and the Board should prescribe negotiability procedures comparable to those prescribed at 5 U.S.C. chapter 71 and 5 C.F.R. Part 2424. While we recognize that procedures different from those used by the FLRA may sometimes be appropriate for GAO's labor-management program, we object to the Board's proposal to use unfair labor practice procedures to resolve negotiability issues. The Act mandates that GAO's program be consistent with 5 U.S.C. chapter 71, and the use of unfair labor practices procedures for litigation of negotiability issues was specifically considered and rejected during the passage of 5 U.S.C. chapter 71. We believe it is inappropriate for the Board to adopt a procedure which has been specifically rejected by Congress.

The Carter administration's proposed labor-management statute, Amendment No. 2084 to S. 2640, May 15, 1978, contained separate negotiability procedures similar to those dictated by Executive Order 11491. See section 701, proposed amendment to 5 U.S.C. 7169(e), Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee on Post Office and Civil Service, Committee Print No. 96-7, 96th Cong., 1st Sess. 466-67 (1979). (Legislative History of Title VII). In contrast, the Clay Labor-Management Bill supported by the AFL-CIO (H.R. 13, January 4, 1977), the Ford Labor-Management Bill (H.R. 1589, January 10, 1977), and the Clay/Ford Labor-Management Bill (H.R. 9094, September 14, 1977), contained no such procedures. Under these latter House bills, supported by various Federal sector labor organizations, there were no separate negotiability procedures and such issues were to be resolved under unfair labor practice procedures or, where appropriate, under impasse procedures, as they are in the private sector.

After considerable negotiations between those favoring the position of the administration, and those favoring the position of the various Federal sector labor organizations, the Committee Print of the labor-management statute reported by the House Committee on Post Office and Civil Service reflected the following compromise:

> The committee intends that disputes concerning the negotiability of proposals and matters affecting working conditions, except for questions of "compelling need" under section 7117, be resolved through the filing and processing of unfair labor practice charges under section 7116 and section 7118. Under the Executive order program, a separate procedure for resolving negotiability disputes was provided. The method of resolution provided here is analogous to that in the private sector under the National Labor Relations Act.

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 50 (1978), Legislative History of Title VII, supra, at 696.

This compromise was further diluted when the so-called "Udall Amendment" was introduced. The Udall Amendment represented the final compromise position of those in the House who supported the position of the Carter administration, and those in the House (Clay, Ford, etc.) whose position was supported by Federal sector labor organizations. That compromise bill provided for separate negotiability procedures on any matter, as had been the practice under Executive Order 11491. It required unions to use separate negotiability procedures on both "compelling need issues" and management rights issues, as well as all other issues involving questions of higher law or regulations. See proposed 5 U.S.C. 7117(c)(1) of the Udall Amendment, 124 Cong. Rec. H. 9629, September 13, 1978, Legislative History of Title VII, supra, at 916. The Udall Amendment compromise was ultimately enacted and is now codified at 5 U.S.C. 7117(c).

In view of the above, we believe it is entirely inappropriate for the Board to fail to prescribe separate negotiability procedures comparable to those mandated by 5 U.S.C. chapter 71 and Executive Order 11491. Federal sector labor organizations lobbied heavily for the approach proposed by the Board in § 28.89 and their view was rejected by Congress as inappropriate for the Federal sector. We believe the Board must, therefore, reject this approach and prescribe separate negotiability procedures.

11. § 28.91 Negotiation impasses. This section should be deleted. As discussed above, the Board has only the authority given to it by the Act and GAO Order 2711.1. Neither the Act nor GAO Order 2711.1 authorizes the Board to prescribe impasse procedures. The Board is most definitely not authorized to prescribe impasse procedures which directly conflict with paragraph 13 of GAO Order 2711.1. Moreover, contrary to proposed § 28.91(c), impasse decisions under 5 U.S.C. chapter 71 are not considered final decisions appealable to the courts.

12. § 28.93 Standards of Conduct for Labor Organizations. In line with our comments above, subsection (a) of this section should be revised to incorporate paragraph 15a of GAO Order 2711.1. If the Board chooses to include such standards, the language should be identical to that in paragraph 15 of the GAO Order.

We also recommend the following revisions to this section:

> § 28.93(b) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, supervisor, confidential employee, employee in the Office of Internal Review, employee in the Office of Security, or employee engaged in personnel work in other than a purely clerical capacity (including an employee in Personnel Law Matters, Office of the General Counsel), or by any other employee if the participation or activity would result in a conflict of interest or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.
>
> (c) In the case of any labor organization which by omission or commission has willfully and intentionally called or participated in a strike, work stoppage or slowdown, or picketed in a manner which interfered with the operations of a Government agency, or has

condoned such activity, the Board shall, upon an appropriate finding it has made of such a violation--

(1) revoke the recognition status of the labor organization; or

(2) take any other appropriate disciplinary action.

(d) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Board, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(e) A labor organization which has or seeks recognition under these rules, shall adhere to principles enunciated in the regulations issued by the Assistant Secretary regarding standards of conduct for labor organizations in the public sector. Complaints of violation of this section shall be filed with the Board.

As apparent, our proposed subsection (b) compares to the Board's proposed subsection (d) but revises the language in order to be consistent with paragraph 4b of GAO Order 2711.1.

Our proposed subsection (c) is identical to the Board's proposed (e). Our proposed subsections (d) and (e) are similar to the Board's proposed (b) and (c), except that revisions have been made to reflect the fact that the Board does not have authority to assign such a role to the Assistant Secretary. Under GAO Order 2711.1, the Board--and the Board alone--has such authority in standards-of-conduct cases. Neither the Act nor the Order authorizes the Board to assign such a role to an official of another Federal agency.

In view of the deletions regarding procedures before the Assistant Secretary, we recommend that a new subsection be included to prescribe the procedures the Board

will use to handle complaints in standards-of-conduct cases, and the range of action which the Board may take in the resolution of cases filed under this section. In our view the Board's proposed subsections (f), (g), (h), and (i) should be omitted.

13. § 28.95 Review of Arbitration Awards. Subsection (a) is unclear and could be construed to permit consideration of appeals of grievance decisions under an agency grievance system. As this section should apply only to awards rendered pursuant to a negotiated agreement, we recommend the following revision:

> "(a) Either party to an arbitration proceeding conducted pursuant to a collective bargaining agreement in accordance with GAO's labor-management relations program may file an * * *."

In subsection (d)(1) we recommend that "Order" be added to "law, rule or regulation." As GAO regulations are called Orders, we think the suggested change will increase reader understanding of the Board regulations.

Since these comments propose substantial revisions, including the addition of entirely new procedures for negotiability disputes, objections to elections, and standards of conduct complaints, we recommend that the Board, after consideration of our comments, first issue interim regulations with a reasonable comment period. Thus, the parties concerned will have an opportunity to comment on these new procedures before they are enacted in final form.

Sincerely yours,

Harry R. Van Cleve
Acting General Counsel

Felix R. Brandon II
Director of Personnel