

**UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE  
PERSONNEL APPEALS BOARD  
OFFICE OF GENERAL COUNSEL**

In the Matter of	)	
	)	
GAO EMPLOYEES ORGANIZATION, IFPTE,	)	
	)	
Petitioner,	)	
	)	
and	)	No. R-07-01
	)	
UNITED STATES GOVERNMENT	)	
ACCOUNTABILITY OFFICE,	)	
	)	
Respondent.	)	
	)	

**REPORT OF RECOMMENDATIONS  
TO THE PERSONNEL APPEALS BOARD**

Pursuant to 4 CFR §28. 115(a), the General Counsel of the Personnel Appeals Board hereby submits its Report of Recommendations regarding the Representation Petition filed by the GAO Employees Organization, IFPTE<sup>1</sup> (Petitioner or Union) seeking an election to determine if an appropriate unit of employees of the Government Accountability Office (GAO or Agency) wish to be represented for the purpose of collective bargaining by an exclusive representative.

**Background**

On May 8, 2007, the Petitioner filed a petition with the Personnel Appeals Board's Office of General Counsel (PAB/OGC) requesting that it be designated as the exclusive bargaining representative for a proposed unit of employees described therein as including:

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<sup>1</sup> International Federation of Professional and Technical Engineers, AFL-CIO

all permanent employees of the Government Accountability Office (GAO) assigned to a position currently covered by the Analyst Performance-Based Compensation System (APBCS) and whose designated level is Band I or Band II (including, but not limited to, those designated as Band IIA and Band IIB). These permanent employees include, but are not limited to, accountants, advisors, analysts, auditors, communications analysts, economists, investigators, methodologist, specialists, and statisticians....[but] does not include probationary employees such as Band I staff in the Professional Development Program [nor]confidential employees, employees in Security and Safety; supervisors or management officials, such as Band III employees who are designated performance managers.

*See Representation Petition in the matter of GAO Employees Organization, IFPTE and GAO (Petition) at 1-2. (Attachment 1) The Petition further states that the proposed unit is national in scope and comprises approximately 1500 employees. It includes a certificate of service indicating that Petitioner hand-delivered the Petition along with supporting documentation (except for evidence required by 4 CFR §28.113(a)(7)) to the Comptroller General on May 8, 2007.*

Looking to the practice of the Federal Labor Relations Authority (FLRA or Authority),<sup>2</sup> the PAB/OGC, upon receipt of the Petition, examined it to determine whether there were any defects that would prevent or delay the matter from being opened immediately. In this context, a petition is defective if it fails to comply with 4 CFR §28.113, which establishes the substantive requirements for a petition. These include a detailed description of the sought-after unit; identification of any other labor organization known by the petitioner to be interested in

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<sup>2</sup> The GAO Personnel Act mandates that the GAO personnel system provide “for a labor-management relations program consistent with chapter 71 of title 5.” 31 U.S.C. §732(e)(2). Since 1978, the FLRA has been statutorily responsible for providing “leadership in establishing policies and guidance relating to matters under... and... for carrying out the purpose of” chapter 71 of title 5. 5 U.S.C. §7105(a)(1). Given the statutory mandate to comport GAO labor-management relations with the program under 5 U.S.C. §7101 *et seq.*, at governing the federal executive branch, and considering the FLRA’s long-established role in carrying out the purposes of that program, the PAB General Counsel concluded that relying on the FLRA’s practice and procedures as guidance -- where not inconsistent with the PAB regulations or established

representing employees covered by the petition; identification of petitioner's affiliates; a copy of petitioner's constitution, bylaws, roster of officers, and statement of its organizational purpose; a declaration under penalty of perjury by the signer of the petition that its contents were true and correct to the best of his/her knowledge; the signature, title and phone number of the petitioner's representative; and evidence that at least 30% of the employees in the proposed unit support the petition.<sup>3</sup> See 4 CFR §28.113(a).

Upon initial examination, the PAB/OGC determined that the instant Petition contained all of the information required by 4 CFR §28.113 and was, therefore, not defective.<sup>4</sup> On May 9, 2007, representatives from IFPTE and GAO met with the PAB General Counsel as a preliminary matter to review the procedures, standards, and timeframes governing the processing of the Petition. At that time, the parties agreed to the following order of events and timeframes: the ten-day notice period required by 4 CFR §28.114 to commence on May 14, 2007; the PAB/OGC to issue an opening letter to GAO and request for information pursuant to 4 CFR §28.114(b) upon completion of the check on Petitioner's *prima facie* showing of interest; GAO to submit payroll data and other requested information within seven days of receiving the

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practice -- was both appropriate and prudent.

<sup>3</sup> Although not explicitly referred to as such in the PAB regulations, this last requirement is commonly known in labor law as a "showing of interest." Consistent with the practice of the FLRA, the PAB/OGC will hereinafter use that term of art to refer to the evidence showing that the petition is supported by at least 30% of the employees in the proposed unit.

<sup>4</sup> The Petition, as filed, did not include an alphabetical list of the names of the employees constituting the showing of interest. Because such a list is required FLRA regulations, this lapse would render a petition filed with the FLRA defective. See 5 CFR §2422.3. However, the PAB regulations do not require such a list. Consequently, its absence here does not constitute a defect. However, because the alphabetical list significantly contributes to an expeditious examination of the adequacy of the showing of interest, the PAB/OGC requested, and the Petitioner promptly provided, such a list. In the future, the PAB/OGC recommends that all

PAB/OGC's request; the PAB/OGC to provide agenda items to be discussed at the meeting for narrowing the issues by May 21, 2007; parties to address agenda items in preparation for meeting by May 25, 2007; meeting for identifying areas of agreement and narrowing issues in dispute to take place from May 30 through June 1, 2007; General Counsel to submit the Report to the Board pursuant to 4 CFR §28.115 by June 8, 2007.

The PAB/OGC thereafter performed a *prima facie* check of the showing of interest - including assessing whether the cards were signed and dated within a year from the date of filing<sup>5</sup> -- to determine whether, on the face of the Petition, 30% of the alleged 1500 employees in the proposed unit supported the Petition. On May 10, 2007, having determined that the Petitioner's *prima facie* showing of interest was adequate, the PAB/OGC forwarded a copy of the Petition to the Comptroller General along with the request for payroll and other information and a copy of the Notice to be posted along with additional details regarding its distribution.

(Attachment 2)

Prior to the posting, the parties initiated and mutually agreed to a revision of the Notice to include language from the Petition listing some, but not all, of the types of permanent employees encompassed within the Union's proposed unit and identifying those employees who were not included in the proposed unit, namely, probationary and confidential employees, those in Security and Safety, and supervisors and management officials. On May 14, 2007, GAO sent an announcement to all employees through its e-mail system informing them of the Union's

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representation petitions include an alphabetical list of the names of the employees constituting the showing of interest.

<sup>5</sup> The FLRA applies a one-year limitations period where the petition involves a unit of not more than 10,000 employees, and a two-year period where the unit involved is in excess of 10,000 employees. Because the unit at issue in the instant Petition does not involve more than 10,000 employees, the PAB/OGC applied the one-year period.

Petition. See Letter from Barbara Simball to Anne Wagner (June 21, 2007)(with attachments). (Attachment 3) The announcement contained a link to the agreed-upon Notice. *Id.* GAO also included the Notice in the May 16<sup>th</sup> edition of “GAO Notices: Weekly Update” that was emailed to all GAO employees. *Id.* It remains accessible to GAO employees through the GAO intranet. *Id.*

On May 17, 2007, GAO timely responded to the PAB/OGC’s May 10<sup>th</sup> request. As a threshold matter, the Agency stated that it had no information or correspondence relating to potential interested labor organizations,<sup>6</sup> and that there were no existing or recently expired agreements covering any employees in the unit identified in the Petition. (Attachment 4)

In Attachment A to its response, GAO set forth the names and classifications of employees whom GAO believes should be included in the unit identified in the Petition. *Id.*

These include 173 Band Is, 694 Band IIAs, 46 Band IIBs, and 12 Band II Senior Criminal

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<sup>6</sup> Under 4 CFR §28.114, the Agency is required to disclose the identity of any other “potentially interested labor organization.” The PAB regulations do not define the term “potentially interested.” Nor does this language appear, as such, in the FLRA regulations. There, the phrase, “affected by issues raised,” is used to describe parties “having a connection to employees affected by, or questions presented in, a proceeding.” See 5 CFR §2421.21.

However, prior to their revision in late 1995 (see 60 FR 67288 (Dec. 29, 1995)), FLRA regulations did refer to labor organizations with a connection to a representation proceeding as an “interested” party. See e.g., 5 CFR §2422.2(a)(4)(1995). In *Defense Commissary Agency, Defense Commissary Store, Fort Drum, New York*, 50 FLRA 249 (1995), the Authority had to determine whether a union met the definition of an “interested labor organization” so as to trigger a right to be served with a copy of the representation petition. While recognizing the fact-based nature of such an inquiry, the FLRA cited the following criteria as relevant: whether the organization is (1) the petitioning organization; (2) currently recognized or certified exclusive representative; (3) has shown an interest in representing the unit; (4) is identified by the agency as having a possible interest in representing the employees; (5) was named as an interested party in any case closed within the past 2 years involving the same employees sought by the petition. Based on these criteria, none of the information provided by the parties or independently acquired by the PAB/OGC in this matter revealed the existence of a potentially interested labor organization.

Investigators for a total of 925 employees in GAO's proposed unit. *Id.* Attachment B identified the names and classifications of employees whom GAO initially proposed to exclude from the unit as supervisory or confidential employees. *Id.* These include 1 Band IIA and 460 Band IIBs for a total of 461 employees. *Id.* Attachment C included the names and classifications of all employees who were on GAO's payroll for the pay period immediately preceding the date of the filing of the Petition. *Id.*

With GAO's submission of the requested information, the PAB/OGC undertook its final determination regarding the adequacy of Petitioner's showing of interest. Cards that were undated or unsigned were marked as such and not considered. Cards that were dated beyond one year prior to the date of the filing of the Petition were likewise not considered. The remaining cards were each checked off against the Petitioner's alphabetized list and then checked against GAO's payroll data. Upon completion of this process, the PAB/OGC found that at least 30% of Petitioner's proposed unit and/or 30% of the GAO proposed unit supported the Petition. Consequently, the PAB/OGC concluded that an adequate showing of interest was submitted in support of the instant Petition.

The PAB/OGC thereafter provided the parties with an update of the status of the Petition process and a list of agenda items to be discussed at the May 30<sup>th</sup> meeting. (Attachment 5) The parties were to come to the meeting prepared to address any anticipated challenge to the validity of the showing of interest; any agreement with regard to the definition of the unit; proposed dates for a hearing in the event that the parties could not reach an election agreement; any agreement as to the time, place, and manner of the election. *Id.* The parties were invited to propose any other additional issue. *Id.*

In the meantime, the IFPTE representative requested that a GAO employee be granted official time to act as a technical advisor at the meeting and further requested a copy of the GAO proposed inclusions and exclusions from the unit. With regard to the issue of technical advisors, the PAB regulations do not preclude their attendance at the meeting and, recognizing that their input may be helpful, the PAB General Counsel invited each party to bring one additional technical advisor to the May 30<sup>th</sup> meeting.

As to official time for the Union's technical advisor, PAB regulations do not specifically provide for official time for employees in representation proceedings.<sup>7</sup> However, under 5 U.S.C. §7131(c), the FLRA may determine whether an employee who is "participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose...." The implementing regulation at 5 CFR §2429.13 provides that the FLRA may authorize official time when the employee's participation in any of its proceedings is "deemed necessary." In at least two decisions, the FLRA has interpreted this mandate as giving the Regional Director unbridled discretion to make that determination. *See BATF v. NTEU, Chapter 88*, 13 FLRA 558 (1983); *Arizona National Guard v. AFGE Local 2924*, 21 FLRA 715 (1986). The PAB General Counsel therefore concluded, and so notified the parties, that she likewise was empowered to authorize official time for an employee to participate in this representational proceeding. The need to exercise such authority was obviated, however, when GAO thereafter indicated that it had no objection to IFPTE's request for official time.

The PAB regulations likewise did not address whether Petitioner was entitled to a copy of GAO's payroll data produced in response to the PAB/OGC's request for information. However, the FLRA regulations do require service of the list on the petitioner in the event that the Regional

Director requests such a list from the agency. *See* 5 CFR §2422.15(b). Moreover, were the matter to go to election, the Petitioner would be entitled to such information at that time. Since disclosure of the list at this juncture comports with the overarching policy to get all disputed issues identified up front, the PAB/OGC provided a copy of GAO's list of inclusions and exclusions to Petitioner's representative on May 29, 2007.

The parties met as scheduled on May 30, 2007. At that time, GAO representatives notified the PAB/OGC and the Petitioner that they were not prepared to reach an agreement because GAO was seeking outside counsel to assist the Agency in this matter. They further asserted that they were not authorized to commit the Agency to any course of action, in any event, because such an agreement would require the approval of GAO's Executive Committee.

Understanding that GAO was not prepared at that time to agree to any of the agenda items, the PAB General Counsel nevertheless asked the parties to address the agenda items in order to identify any potential areas of consensus and to narrow the issues in dispute. In response, the GAO representatives indicated that they would not challenge the validity of the showing of interest on fraud or forgery grounds, but reserved the right to challenge it if there was an ultimate determination that Band IIB employees were supervisory employees. With regard to the description of the unit, Petitioner's representatives explained their rationale for defining the unit as set forth in the Petition and stated their position that the unit as defined met the legal requirements for an appropriate unit. The discussion focused primarily on the issue of whether Band IIBs were supervisors, the position taken by GAO and rejected by Petitioner. GAO representatives discussed identifying confidential employees and also questioned the rationale behind IFPTE's exclusion of probationary employees.

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<sup>7</sup> The PAB regulations do provide for official time for employees who are asked by the General

The parties also discussed the possible methods of conducting an election and the timeframe for the remaining proceedings. Petitioner raised the question as to whether the Board would allow an election to go forward and resolve the Band IIB eligibility question in a subsequent challenged ballot process. The PAB General Counsel indicated that such an outcome was unlikely where the standard practice was to allow such a procedure only where the employees in question constituted 15% or less of the putative unit. The meeting was adjourned and the parties were directed to be prepared to resume upon GAO's retention of counsel.

In a letter dated May 31, 2007 addressed to the PAB/OGC, the Petitioner expressed frustration with the outcome of the meeting and questioned GAO's commitment to bargaining with a duly elected employee representative. GAO responded in a letter dated June 5, 2007, expressing its belief that the meeting was productive. GAO also stated it was continuing to look at whether it wished to contest the Union's exclusion of probationary employees.

On June 7, 2007, GAO notified the PAB/OGC that it had retained the firm of Venable LLP to represent it in this matter. On June 13, 2007, the PAB/OGC and the parties reconvened the meeting initially begun May 30, 2007 to identify areas of agreement and narrow areas of dispute. The ensuing discussion regarding the proposed unit demonstrated that there was little likelihood that the parties would reach agreement as to the definition of an appropriate unit here. The Petitioner asserted that the unit as proposed in the Petition, including Band IIBs, is appropriate. For its part, GAO asserted that the Band IIBs identified in its Attachment B were properly excluded from the proposed unit because they were supervisory and/or confidential employees.

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Counsel to participate in its investigation of a charge. *See* 4 CFR §28.12(b).

The parties also disagreed as to the proper method for conducting the election, namely whether a manual or mail ballot should be used. The parties did not agree on the question of whether to hold a manual or mail ballot and were not receptive to the General Counsel's proposal to try and meet with an FLRA representative to discuss the respective merits and drawbacks of each election method. The discussion returned again to the issue of the appropriateness of the unit whereupon, the IFPTE representative stated that she would submit GAO's proposed exclusion of the Band IIBs and confidential employees and inclusion of probationary employees to the employees for consideration. The parties agreed to resume the meeting the next day.

During the meeting on June 14, 2007, the Petitioner represented that the employees emphatically rejected GAO's proposal. At that point, the PAB General Counsel determined that there was no likelihood of the parties reaching agreement on the issue of the appropriate unit, and notified the parties that the recommendation to the Board would be to hold an election to resolve the representation questions presented by the Petition.

### **Recommendations**

The PAB regulations provide that

the General Counsel shall prepare a report to the Board which may recommend (1) Approval of any agreement entered into by the parties during the consultations including an agreement as to the appropriate units, on the withdrawal of the petition, or on a joint request to conduct an election to determine which labor organization, if any, the employees select to be their exclusive bargaining representative; (2) Dismissal of the petition as being without merit; or (3) Issuance of a notice of hearing for the purpose of disposing of the remaining issues raised in the petition.

4 CFR §28.115(a). Here, the PAB General Counsel finds no basis upon which to dismiss the Petition. Specifically, there is no election bar to the election sought in this Petition because there has not been a valid election held in the proposed unit within the last twelve months.

*See* 5 U.S.C. §7111(b). Similarly, there is no certification bar to the election sought in this Petition because the Board has not, within the last twelve months, accorded exclusive recognition to a labor organization for the unit described in the instant Petition. *See* 5 U.S.C. §7111(f). Likewise, there is no contract bar to the election sought in this Petition because there is not now in effect a “lawful written agreement between [GAO] and an exclusive representative [other than the Petitioner] covering any employee included in the unit specified in the Petition.” *See* 5 U.S.C. §7111(f).

Furthermore, at the May 30<sup>th</sup> meeting, GAO raised the possibility of challenging the validity of the showing of interest on the grounds of supervisory involvement in the solicitation of signatures. Such a claim, if true, might be grounds for disallowing all or part of the showing of interest and result in a dismissal. *See United States Army Air Defense Artillery Center and Fort Bliss, For Bliss, Texas, 55 FLRA 940 (1999)*. However, as the Authority made clear in that decision, dismissing a petition based on improper agency involvement in the solicitation of the showing of interest “must be based on specific findings concerning both the particular misconduct at issue and the effect of that misconduct on the particular petition.” *Id.* In light of the need for particularized findings regarding alleged supervisory involvement in the solicitation of signatures, PAB/OGC has concluded that such a claim is more appropriately resolved at a hearing.

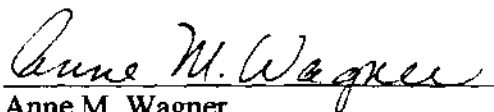
The parties were unable to reach agreement as to the appropriate unit, and therefore, the PAB/OGC recommends that the Board issue a notice of hearing in this matter. *See* 5 CFR §2422.30. Specifically, while agreeing that an appropriate unit would include Band I and Band IIA employees in the Analyst Performance-Based Compensation System (with the exception of confidential employees and employees in security or safety positions), the parties remain

fundamentally at odds concerning the supervisory status, and therefore, eligibility of Band IIB employees. Moreover, while GAO initially appeared to agree with the Union's proposed exclusion of probationary employees, the Agency now contests their exclusion. In addition, there may be disagreement over the confidential status of certain individual employees. Because there are reasonable grounds to believe that a question exists concerning the appropriateness of the proposed unit, the PAB/OGC recommends that the Board issue notice of hearing to resolve this question. *Id.*

Similarly, the parties have failed to identify any common ground as to the time, place, or manner of an election. They particularly disagree as to whether the election should be conducted manually or by mail ballot, with GAO arguing for the former and IFPTE for the latter.

Where, as here, the Petition meets all of the requirements of 4 CFR §28.113(a) and there is no basis upon which to dismiss the Petition, and there is reasonable grounds to believe that a genuine question exists as to the appropriateness of the unit, the PAB General Counsel recommends that the Board issue a notice of hearing to dispose of the issues raised in the instant Petition.

Respectfully submitted,



Anne M. Wagner  
General Counsel  
Personnel Appeals Board

## **NOTICE TO PARTIES**

Pursuant to 4 CFR §28.115(b), the parties have fifteen (15) days from the date of receipt of this Report to submit written comments with the Personnel Appeals Board. The date of receipt is the date that the Report is received by the parties' representative(s) of record. The parties may, however, agree to a shorter period, in which case they must jointly notify the Board of such agreement and the agreed-upon date for filing. Any comments to this Report of Recommendations must be filed, either in person or by facsimile, by 4:00 pm on the date due to

Patricia Reardon-King  
Clerk, Personnel Appeals Board  
820 First Street NE  
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Washington, D.C. 20002

The original version of comments filed by facsimile must be submitted to the Clerk of the Board on the following day.

**CERTIFICATE OF SERVICE**

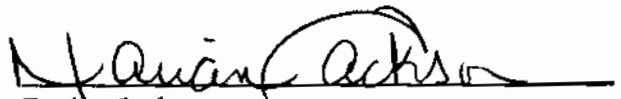
I hereby certify that a copy of the foregoing Report of Recommendations to the Personnel Appeals Board and Notice to Parties were delivered as indicated below this 22nd day of June, 2007 upon the following:

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Date: June 22, 2007