OFFICE OF COMPLIANCE
LA 200, John Adams Building, 110 Second Street, S.E.
Washington, D.C. 20540-1999

DENIAL OF PETITION FILED BY U.S. CAPITOL POLICE BOARD FOR RULEMAKING ABOUT CONDUCT OF PRE-ELECTION INVESTIGATORY HEARINGS CONDUCTED UNDER SECTION 220

On November 12, 1996, in a pre-election investigatory hearing of the Office of Compliance, the United States Capitol Police Board ("Employing Office") filed with the Board of Directors of the Office a "petition of the employing office for issuance of regulations." In the petition, the Employing Office requests that the Board issue new regulations governing unit determination hearings in elections conducted under section 220 of the Congressional Accountability Act ("CAA"). The Board will not initiate a rulemaking in response to a petition absent a showing of good and substantial cause. The Employing Office made no such showing here, and the petition is therefore denied.

Signed this 5th day of February, 1997, at Washington, D.C.

Glen D. Nager
Chair of the Board of Directors
Office of Compliance

Member Seitz, joined by Members Adler and Lorber, concurring:

While the Congressional Accountability Act ("CAA") authorizes the filing of petitions for rulemaking, including the amendment or recision of enacted rules, the CAA does not require the Board of Directors of the Office of Compliance to initiate a new rulemaking in response. Like any other regulatory body, the Board must examine the basis of the request, its experience under the existing rule, and the underlying statutory requirement. The Board has only just completed its rulemaking for the rules which are the subject of the current petition, and the initial proceedings under those rules -- which are closely patterned after the analogous Federal Labor Relations Authority ("Authority") regulations -- are in progress.

The Employing Office's petition for a rulemaking requiring that unit determination hearings be conducted under section 405 of the CAA simply echoes arguments made by commenters during the Board's section 220(d) rulemaking. The Board was not previously persuaded by these arguments and concludes that they do not constitute good cause to initiate a rulemaking. For the reasons stated below, I concur.

1. Section 220(d) provides that the Board "shall issue regulations that are the same as the substantive regulations promulgated by the Federal Labor Relations Authority."[1] (Emphasis supplied.) There are two exceptions to this statutory command: First, when the Board determines "for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section"; and, second, when the Board deems a modification necessary "to avoid a conflict of interest or appearance of a conflict of interest." CAA § 220(d)(2)(A) & (B).

The Authority's regulations establish a procedure for unit determinations. That procedure does not remotely resemble a section 405 proceeding. In order to modify the Authority's regulations to require section 405 proceedings, the Board would have to determine that such proceedings would be more effective for implementation of the rights and protections under this section or are necessary to avoid a real or apparent conflict of interest. The use of section 405 proceedings for unit determinations would satisfy neither statutory criterion.

---

[1] The Board has previously determined that all regulations that the Authority promulgated after notice and comment to implement chapter 71 "are appropriately classified as substantive regulations for the purposes of rulemaking under section 220 and 304 of the CAA." See 142 CONG. REC. S5070, S5071-72 (daily ed. May 15, 1996). See also 142 CONG. REC. S11019, S11020 (daily ed. Sept. 19, 1996); 141 CONG. REC. S17605. Regulations that are arguably procedural in content may nonetheless be substantive because "process is frequently the substance of law and regulation"; indeed, in the labor laws, "process is the predominate means by which substantive regulation is effectuated." 142 CONG. REC. at S5072.

Neither the Employing Office nor any commenter has argued that application of section 405 proceedings is necessary to avoid a real or apparent conflict of interest. The Board did not independently reach such a conclusion.

The Board also considered whether use of section 405 proceedings for unit determinations would be more effective for the implementation of "the rights and protections under this section" -- that is, the rights and protections of chapter 71 of title 5 that are applied to the covered employees and employing offices by section 220(a). Neither the Authority nor the National Labor Relations Board ("NLRB") holds adversary hearings to resolve the fact issues corollary to the question of whether employees wish to be represented by a union, and for good reason. The principle issue is whether the employees wish to be represented by a union -- a decision the employees themselves make, and should be permitted to make with reasonable promptness. The Authority and the NLRB resolve the collateral fact questions -- e.g., whether Joe Smith is a supervisor and thus should be excluded from the bargaining unit -- through a factfinding investigation. The primary effect of application of section 405 proceedings to unit determinations would be to delay the employees' decision, and I can perceive no way in which application of section 405 proceedings would be "more effective for implementation of the rights and protections" applied by section 220(a).

It is true, of course, that if the CAA required the Board to eschew the Authority's regulations governing unit determinations and instead to adopt regulations utilizing section 405 proceedings, that would constitute "good cause" to modify the Board's regulations. But I find no such command in the statute. The language in section 220(c)(1) is "seriously ambiguous"[2] and should not be read as a modification of the clear and overriding command in section 220(d) that Congress be subject to the laws and regulations that govern the Executive Branch.

The Employing Office and the Chair rely on section 220(c)(1)'s reference to the Board of all "petition[s] or other submission[s]" that go to the Authority under chapter 71. In describing how such petitions and submissions should be treated, however, the CAA makes a distinction between matters which must be adjudicated and those which need only be investigated:

> The Board shall refer any matter under this paragraph to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The Board may direct that the General Counsel carry out the Board's investigative authorities under this paragraph.

---

[2] See Notice of Adoption of section 220 Regulations, 142 CONG. REC. H7454 (daily ed. July 11, 1996).

As the statute makes clear, the Board does not have to refer matters involving its investigative authorities to a hearing officer. Instead, with regard to such matters, the Board may request the General Counsel to conduct an investigation in its stead or may itself retain the authority to conduct an investigation. The use of the word "may" in the statute makes plain that the Board has discretion not to delegate its investigative authorities and instead to maintain control of an investigation itself; in the regulations that it adopted, the Board adopted the latter course. Through a designee acting in the person of the Board, an investigation is performed, and the Board makes decisions based on the investigative record.[3]

In the labor law context, the investigative authorities of a labor board -- be it the Authority or the NLRB or the National Mediation Board -- include the authority to investigate a petition for representation, to determine whether there is a question concerning representation, to determine an appropriate unit for representation, and to determine who is in that unit. I read the statute in harmony with established law and practice in the area of labor law, thus preserving the Board's authority to investigate matters (and not commit them to adjudication) where the Authority had power to investigate.

This reading of the statute is further supported by the judicial review provisions of the CAA section 220(c)(3) which, like chapter 71 and like the National Labor Relations Act, preclude judicial review in several circumstances, including unit determinations. These statutory choices make a great deal of sense if they draw the line between matters in which the Board is not exercising traditional evidentiary adjudicatory authority (e.g., when it exercises investigative authority), and those in which the Board does so.[4] They make little sense otherwise.[5]

---

[3] See also 142 CONG. REC. H5153, H5156 (daily ed. May 15, 1996).

[4] Indeed, under the CAA, section 405 proceedings generally are the CAA substitute for either an adversary proceeding in federal district court or an adversary proceeding before an administrative agency which would be subject to appellate review. As noted in text, there is no federal court or adversary administrative proceeding to make unit determinations under chapter 71, and there is no direct appellate review of such determinations.

[5] Unlike the Chair, my statutory interpretation task receives little assistance from the use of the word "matter" in the judicial review section to describe unit determinations and arbitral awards. This is because I read section 220(c)(1) to provide that all matters must be referred to a hearing officer under section 405, except such matters as do not require the exercise of traditional evidentiary adjudicatory authority. Accordingly, the use of the word matter to describe, inter alia, unit determinations in the judicial review section is entirely consistent with my interpretation of section 220(c)(1).

In its Notice of Adoption of the section 220 regulations, the Board noted that the

This reading of section 220 also harmonizes what would otherwise be an apparent tension between section 220(d) and section 220(c)(1). Section 220(d) embodies Congress' purpose to subject legislative employees to the labor laws that govern employees in the executive branch. Yet in the Employing Office's and the Chair's view, section 220(d) and the Authority's regulations may have been substantially modified by section 220(c)(1) -- modified in a way contrary to the single most important purpose of the CAA which is to subject Congress to the same laws that have long governed others -- without any indication in section 220(d) that such a dramatic departure from the primary purpose of the Act has occurred. The language in section 220(c)(1) relied upon by the Employing Office and the Chair is too weak a reed to bear this weight. Surely the better reading of section 220(c)(1) is one that preserves the Board's investigative authority (and thus the Authority's regulations) in circumstances when the Authority would have exercised its investigative powers.[6]

In conclusion, the Board's regulations provide for unit determination hearings that mirror those provided under the regulations of the Authority and, as well, under the regulations of its private sector analogue, the NLRB. For the reasons set forth in detail above and in the Board's Notice of Final Rulemaking with respect to section 220(d), nothing in the CAA requires a different regulatory result here. Moreover, nothing in the Board's limited experience under the newly-minted section 220(d) regulations suggests that a different regulatory approach should be taken. Thus, there is no basis for the initiation of a new rulemaking at this time. Cf. American Hospital Assoc. v. NLRB, 499 U.S. 606, 618 (1991); Brae Corp. v. United States, 740 F.2d 1023, 1037-38 (D.C. Cir. 1984).

"language [of section 220(c)(3) appears to limit judicial review to cases involving unfair labor practice issues, because it is only in unfair labor practice cases that the parties include either 'the General Counsel or the respondent to the complaint.'" 142 CONG. REC. H7454 (daily ed. July 11, 1996). As the Board stated in its Notice of Proposed Rulemaking, one of the primary purposes of the section 405 hearing process is to create a record for judicial review, which suggests that Congress intended to require referral to a hearing officer of only those matters requiring an adversarial evidentiary hearing. See 142 CONG. REC. H5153, H5156 (daily ed. May 15, 1995).

[6] The Chair points out that section 220(c)(1) provides that the Board has the investigative authorities of the Authority except to the extent "otherwise provided" in section 220. This language (which appears three times in section 220) is significant only if the remainder of section 220(c)(1) is read to diminish the Board's investigative authorities; I do not read it that way. Equally to the point, section 220(d) contains a Congressional command to the Board to issue the Authority's regulations absent good cause except as stated in one other subsection of section 220 (not subsection 220(c)), and does not indicate that any other subsections of section 220 contain statutory modifications of the Authority's regulations.

2. The Employing Office observes that in statements accompanying the House resolution and concurrent resolution approving the Board's section 220(d) regulations for the House and the instrumentalities, respectively, Congress stated its position that the Board should issue regulations providing that unit determinations shall be conducted under section 405 of the CAA. Subsequent to Congressional approval of the regulations, a Senator stated on the floor that "the term 'any matter' under section 220(c)(1) of [the CAA (requiring hearings under section 405 in particular circumstances)] clearly includes any and all petitions and other submissions submitted to the board under section 220(c)(1) of the act." The Employing Office cites these statements to argue that the Board should conduct a new rulemaking at this time.

These statements, however, do not provide the basis for conducting a new rulemaking. The CAA vests rulemaking authority under section 220(d) only in the Board. The gist of the Chair's analysis is that, absent a change in governing law, Congress cannot direct the Board to adopt one among a number of reasonable interpretations of the CAA or to adopt a particular regulation to implement the CAA. See CAA §§ 220(d), 301(a). I agree.

The Board is obviously aware of the sentiments expressed in the cited statements. And Congress and members of Congress, like all interested parties, may and should in appropriate circumstances express their views and make their arguments to the Board. But, absent a demonstration of good cause, as in the present factual situation, the Board will decline to conduct a new rulemaking.

3. Because the Board concludes that its interpretation of section 220 is best in light of the language, structure, and legislative history of the CAA, the Board has not previously considered whether the Chair's statutory interpretation would give rise to serious First Amendment concerns in unit determinations. In any event, the Chair's discussion provides further support for the statutory construction adopted by the Board which, as he acknowledges, precludes any First Amendment concerns in connection with the Board's unit determinations.

For all of the foregoing reasons, I concur in the Board's denial of the Employing Office's petition for rulemaking.

Chairman Nager, concurring in the judgment.

When the Board first adopted regulations generally to implement section 220 of the Congressional Accountability Act ("CAA") (hereinafter "the 220(d) regulations"), I dissented without opinion from the decision to refer only unfair labor practice questions -- and not questions relating to representation, negotiability and arbitration awards -- to a hearing officer for initial decision pursuant to section 405 of the CAA. But I agree that the pending petition for rulemaking to change those regulations should be denied. I write separately here to explain my reasons both for originally believing that section 220(c)(1) may be better understood to require referral of all petitions or other submissions under section 220 and for nevertheless now agreeing with my colleagues' decision to deny the pending rulemaking petition.

I.

Section 220(c)(1) provides that:

> GENERAL AUTHORITIES OF THE BOARD; PETITIONS. - For purposes of this section and except as otherwise provided in this section, the Board shall exercise the authorities of the Federal Labor Relations Authority under sections 7105, 7111, 7112, 7113, 7115, 7117, 7118, and 7122 of title 5, United States Code, and of the President under section 7103(b) of title 5, United States Code. For purposes of this section, any petition or other submission that, under chapter 71 of title 5, United States Code, would be submitted to the Federal Labor Relations Authority shall, if brought under this section, be submitted to the Board. The Board shall refer any matter under this paragraph to a hearing officer for initial decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The Board may direct that the General Counsel carry out the Board's investigative authorities under this paragraph.

As the Board explained in its Preamble to the section 220(d) regulations, the phrase "any matter under this paragraph" in section 220(c)(1) is capable of alternative possible constructions. See Preamble to the Notice of Adoption of Regulations and Submission for Approval, 141 CONG. REC. H7454-55 (daily ed. July 11, 1996) (hereinafter "Preamble"). At that time, however, I disagreed with the Board's judgment that this statutory phrase is better understood to require referral of just the subset of "petitions or other submission[s]" that concern unfair labor practice questions.

It was my view that the phrase "any matter under this paragraph," both by its own terms and in the context of the statutory subsection in which it appears, is best read to encompass the universe of disputed cases that may be brought to the Board for decision under

section 220. The preceding sentence of the statutory text defines that universe to be "any petition or other submission that, under chapter 71 ... would be submitted to the [FLRA]." The phrase "any matter under this paragraph" is simply too encompassing to be naturally read as including only a subset of those "petition[s] or other submission[s]."

That the statutory phrase "any matter under this paragraph" may be better understood to include not only unfair labor practice petitions but also submissions relating to representation, negotiability and arbitration awards is also suggested by the broader meaning that the term "matter" apparently has when used elsewhere in section 220. Specifically, section 220(c)(3) of the CAA provides in pertinent part that, "[e]xcept for matters referred to in paragraphs (1) and (2) of section 7123(a) of title 5, the General Counsel or the respondent to the complaint ... may file a petition for judicial review...." (Emphasis added) Section 7123(a) of title 5 in turn provides that:

> Any person aggrieved by any final order of the Authority other than an order under --
>
> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
>
> (2) section 7112 of this title (involving an appropriate unit determination),
>
> may ... institute an action for judicial review of the Authority's order....

Since paragraphs (1) and (2) of section 7123(a) of title 5 plainly encompass certain arbitral awards and appropriate unit determinations, the term "matters" in section 220(c)(3) of the CAA would appear to do so as well. Therefore, the term "matter" as used in section 220(c)(1) is also better understood to extend beyond unfair labor practice complaints (to encompass, e.g., petitions relating to arbitration awards and unit determinations). See C.I.R. v. Lundy, 116 S. Ct. 647, 655 (1996) (citations omitted) ("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."'").

The final sentence of section 220(c)(1), which allows the Board to direct the General Counsel to carry out the Board's "investigative authorities," does not appear to limit the "matter[s]" that must be referred to a hearing officer for initial decision under section 405. Nothing in the final sentence of section 220(c)(1) on its face purports to create such a limitation. Moreover, while the Board suggests that its "investigative authorities" encompass the authority to resolve disputed representation issues outside of section 405 hearings because FLRA regulations provide for disputed representation issues to be resolved in non-adversarial

hearings, section 220(c)(1) expressly states that the Board may not exercise the authorities of the FLRA to the extent "otherwise provided in this section." The express statutory requirement that "any matter under this paragraph" be initially resolved in a section 405 hearing appears to be just such a restriction -- especially since section 220(c)(3) tends to confirm that the term "matter" extends to, e.g., unit determinations.

Finally, in my judgment, section 220(d)'s general presumption in favor of the FLRA's regulations -- a presumption that reflects section 220's basic goal of extending the labor laws applicable to the Executive Branch to the Legislative Branch -- is not sufficient reason for construing section 220(c)(1) to require referral of only unfair labor practice complaints for decision under section 405. "Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal." Landgraf v. USI Film Products, 511 U.S. 244, 286 (1994). In the case of the CAA, one of the statutory compromises was generally to require that cases brought to the Board be resolved under section 405 -- i.e., in a confidential, expedited decision process based on a record established through formal adversary procedures administered by a hearing officer. Given the direct reference to the section 405 process in section 220(c)(1), this statutory compromise should be understood in this instance to trump section 220(d)'s presumption in favor of the FLRA's regulations (as well as the statute's basic goal of making the Legislative Branch subject to the same labor laws as the Executive Branch). Accordingly, when the section 220(d) regulations were first before us, I thought that modification of the FLRA's regulations was both necessary and appropriate "for the implementation of the rights and protections under this section," since the text of section 220 suggests that these rights and protections include having all section 220(c)(1) cases initially decided under the provisions of section 405.

II.

The issue for decision now, however, is whether a new rulemaking proceeding should be conducted to revisit and possibly revise the Board's contrary resolution of that question. Notwithstanding my original disagreement with Board, on this issue I am generally of the same mind as my colleagues.

At the outset, I agree with my colleagues that the Board is not statutorily required to grant all petitions for rulemaking. While section 304(f) of the CAA authorizes any interested person to petition the Board for a rulemaking to amend or repeal existing regulations, it leaves to the Board's discretion whether to grant such requests -- just as other statutes leave such judgments to the sound discretion of the responsible agencies.

I further agree with my colleagues that a showing of good and substantial cause should be required before the Board grants such a request. From the perspective of sound administrative law, while an agency is entitled to change its course, "the agency must [be able to] explain why the original reasons for adopting the rule or policy are no longer dispositive,"

Brae Corp. v. United States, 740 F.2d 1023, 1038 (D.C. Cir. 1984), and why its changed position effectuates the statute as well as its previous position. See Office of Communication of United Church of Christ v. FCC, 560 F.2d 529, 532 (2d Cir. 1977). Moreover, from the perspective of sound administrative practice, an agency must be able to manage its limited time and resources so as to fulfill its statutory responsibilities and achieve its administrative priorities. An agency could not do so if it were to commence new rulemaking proceedings without some threshold showing of justification. Indeed, conducting rulemakings without such a threshold showing could place existing regulatory requirements and proceedings under a cloud of uncertainty (and thereby inadvertently encourage undue efforts at delay). Requiring a threshold showing of good and substantial cause appropriately balances the need for regulatory open-mindedness with the need for regulatory stability and reasoned change.

I also agree with my colleagues that the petition for rulemaking at issue here does not establish the requisite good and substantial cause. However, in light of my original disagreement with the pertinent section 220(d) regulations, it is appropriate for me separately to explain my reasons for so concluding.

Since reaching my initial judgment about section 220(c)(1)'s apparent meaning, I have further reflected on the question and am now troubled by an interpretive issue that neither the Board nor any commenter has raised, addressed or resolved. That interpretive issue is whether construing the CAA to require the resolution of all section 220(c)(1) cases in confidential, non-public proceedings would create a serious problem under the First Amendment.

The Supreme Court has held that, under the First Amendment, certain evidentiary or trial-type proceedings of government must generally be kept open to the public. See Press Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8 (1986); Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984). Public access is constitutionally required in such circumstances in order to give "assurance that the proceedings [are] conducted fairly to all concerned, and [to] discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (plurality opinion). See also In re Oliver, 333 U.S. 257, 266-273 (1948). While the reach of this constitutional right of access is still the subject of ongoing judicial exploration and development, some courts have suggested that it may apply to certain types of administrative proceedings. See, e.g., Society of Professional Journalists v. Secretary of Labor, 616 F. Supp. 569. 575-78 (D. Utah 1985), vacated as moot, 832 F.2d 1180 (10th Cir. 1987); First Amendment Coalition v. Judicial Inquiry and Review Board, 784 F.2d 467, 472 (3d Cir. 1986) (en banc); cf. Cal-Almond, Inc. v. U.S. Dept. of Agriculture, 960 F.2d 105, 109-110 (9th Cir. 1992).

In light of these cases and related constitutional and interpretive principles, before the CAA may be construed to require the resolution of all section 220 issues in confidential, non-public proceedings, the question must be asked whether it would create substantial constitutional issues to so construe the statute. In this regard, it must be remembered that the

CAA generally extends to the employing offices and employees of the Legislative Branch the labor laws that define the legal rights and responsibilities of federal sector employers and employees; and, as is important under the public right of access case law, there is a rich history and tradition, in both the federal and private sectors, of having such legal rights and responsibilities resolved in publicly accessible proceedings. Moreover, allowing such public access would further the constitutional interests that are identified as important in the Supreme Court's public right of access cases. Indeed, determining such issues in non-confidential, public proceedings would foster the free speech interests of employers, employees and unions -- free speech interests that, in the private and federal sectors, have themselves long been considered to be legally substantial. See, e.g., NLRB v. Gissell Packing Co., 395 U.S. 575, 618-620 (1969).

Of course, reasonable arguments can also be made concerning why the public's constitutional right of access should not apply in some or all of the Board's proceedings under section 220. In addition, reasonable arguments can be made concerning why, in some or all of these circumstances, the CAA should not be considered unconstitutionally to abridge either the public's right of access or the free speech interests of the participants. And, to all of this discussion, it must be emphasized that, under current doctrine, as the agency charged with statutory responsibility for implementing the CAA, the Board must generally assume the constitutionality of the CAA's terms.

But, for present purposes, it suffices to say that, under controlling interpretive principles, where it is reasonably possible to do so, the Board is also obliged to construe the statute to avoid any serious constitutional problems. See Edward J. DeBartelo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988); Meredith Corp. v. FCC, 809 F.2d 863, 872-874 (D.C. Cir. 1987). Accordingly, before critics of the pertinent section 220(d) regulations may properly conclude that the Board's original construction of section 220(c)(1) is in error and in need of correction by a new rulemaking, they must prove either (1) that there is no serious constitutional question created by resolving all section 220(c)(1) cases in confidential, non-public proceedings or (2) that no other construction of section 220(c)(1) is reasonably possible (so that judicial determination of any consequential constitutional issues is indeed required).

Although these interpretive issues are substantial enough to require further examination and resolution, I have not myself yet reached a final judgment about the merits of either of them; and I do not believe that it is either necessary or appropriate to resolve these interpretive issues at this time. The petition for rulemaking does not mention these interpretive questions. Moreover, the Board has construed section 220(c)(1) without reference to them. Indeed, so long as the Board adheres to its current construction of section 220(c)(1), resolution of these difficult interpretive questions would be premature and would come at an unacceptable administrative and institutional cost: A rulemaking on these issues would consume time and resources that could be better devoted to other Office responsibilities. Furthermore, a rulemaking on these issues would unnecessarily place the Board's newly minted section 220(d)

regulations under a cloud of uncertainty. And commencement of a new rulemaking proceeding about these issues could be misinterpreted as a response to efforts that have been made in court and elsewhere to pressure the Board to change these regulations. Conducting a rulemaking in these circumstances would be neither warranted nor wise.

Finally, as a corollary to this last point, I do not agree with petitioner's suggestion that a new rulemaking proceeding is required either by certain post-enactment resolutions of the Houses, which direct the Board to issue regulations that refer all disputes under section 220 to hearing officers for initial decision under section 405, or by a post-enactment floor statement submitted in the name of a member of Congress, which declares without explanation that the phrase "any matter under this paragraph" in section 220(c)(1) includes any and all petitions or other submissions submitted to the Board.

Neither the resolutions nor the floor statement constitute law that the Board may apply in interpreting and administering the CAA. "Agencies receive their power to impose decisions on private parties from statutory law, and not from advisory instructions of particular committees". IBEW v. NLRB, 814 F.2d 697, 718 (D.C. Cir. 1987) (Buckley, J., concurring). Nor do agencies receive such power from resolutions or floor statements: In our system of limited government through checks and balances, "even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2 of the Constitution." Landgraf v. USI Film Products, 511 U.S. at 263. Cf. INS v. Chada, 462 U.S. 919, 946-951 (1983) (congressional veto of Executive Branch agency regulations held unconstitutional).

Nor do these post-enactment congressional statements constitute authoritative interpretive materials from which the original meaning of the CAA may be derived. The Supreme Court has "observed on more than one occasion that the interpretation given by Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." Ohio Pub. Emp. Retirement System v. Betts, 492 U.S. 158, 168 (1989). As the U.S. Court of Appeals for the District of Columbia Circuit has explained:

> It should go without saying that members of Congress have no power, once a statute has been passed, to alter its interpretation by post-hoc "explanations" of what it means; there may be societies where "history" belongs to those in power, but ours is not among them. In our scheme of things, we consider legislative history because it is just that: history. It forms the background against which Congress adopted the relevant statute. Post-enactment statements are a different matter, and they are not to be considered by an agency or by a court as legislative history. An agency has an obligation to consider the comments of legislators, of course, but on the same footing as it would those of other commentators; such comments may have, as Justice

> Frankfurter said in a different context, "power to persuade, if lacking power to control."

Hazardous Waste Treatment Council v. U.S. EPA, 886 F.2d 355, 365 (D.C. Cir. 1989).

The post-enactment resolutions and floor statement at issue here, however, cannot properly be relied upon by the Board for even such a more limited purpose. The resolutions only give non-legal directions to the Board for specific regulatory actions; and the floor statement is a conclusory declaration (with which I happen to agree) about the supposed meaning of section 220(c)(1). Under established principles of administrative law, such congressional statements may not legally be relied upon as support for agency action. See, e.g., Hazardous Waste Treatment Council v. U.S. Environmental Protection Agency, 886 F.2d at 365; D.C. Federation of Civil Association v. Volpe, 459 F.2d 1231, 1248-49 (D.C. Cir. 1972).

Appropriate congressional comment and oversight are of course specifically contemplated by this statute. But, in evaluating and responding to any such congressional comment or oversight, the Board must recognize that Members of Congress have a self-interest in CAA concerns as employing offices, as well as their usual electoral and political interests in statutory concerns as representatives of constituents and the Nation. Moreover, the Board must recognize that Members of Congress are not part of a judicial or administrative body that meets for the purpose of authoritatively interpreting the original meaning of previously-enacted provisions of the United States Code. And, finally, the Board must be sure to preserve and protect the "independence" of the Office -- as the CAA requires in order to promote public confidence in (and the legality of) the Board's actions. Thus, like other agencies subject to the Rule of Law, the Board may not apply congressional statements so as to "frustrate the intent of Congress as a whole as expressed in statute, nor undermine applicable rules of procedure," Sierra Club v. Costle, 657 F.2d 298, 409 (D.C. Cir. 1981), and must instead base its "decision[s] strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations." D.C. Federation of Civic Associations v. Volpe, 459 F.2d at 1248. For these reasons, the Board may not commence a new rulemaking based on the post-enactment resolutions and floor statement at issue here.

Although I remain dubitante with respect to the pertinent aspects of the Board's section 220(d) regulations, the question before the Board today is whether there is good and substantial cause for commencing a rulemaking proceeding to change those regulations. For the reasons discussed herein, I agree that no such cause has been shown.

SERVICE SHEET

I certify that I have served the persons listed below a copy of the attached Denial of Petition by Hand Delivery:

John T. Caulfield, Esq.
General Counsel
U.S. Capitol Police
119 D Street, N.E.
Washington, DC 20510

Jeffrey C. Poll, Esq.
Office of House Employment Counsel
433 Cannon House Office Building
Washington, DC 20515-5532

Jean Manning, Esq.
Senate Chief Counsel for
Employment
103 Senate Hart Office Building
Washington, DC 20510-7130

Geraldine Gennet, Esq.
Acting General Counsel
U.S. House of Representatives
219 Cannon House Office Building
Washington, DC 20515

Elizabeth J. Head, Esq.
Richard W. Gibson, Esq.
John R. Mooney, Esq.
Mooney, Green, Baker, Gibbon
& Saindon, P.C.
The Colorado Building, Suite 700
1341 G Street, N.W.
Washington, DC 20005-3105

Stephen G. De Nigris, Esq.
Counsel for the Fraternal Order of Police
2117 L Street, N.W., Suite 283
Washington, DC 20037-1524

Michael T. Leibig, Esq.
Zwerdling, Paul, Leibig, Kahn
Thompson & Wolly, P.C.
City Square Building, Suite 200
1060 Page Avenue
Fairfax, VA 22030

Aaron Nisenson, Esq.
Counsel for the International Union
of Police Associations, AFL-CIO
1421 Prince Street, Suite 330
Alexandria, VA 22314

Dated this 5th day of February, 1997, at Washington, D.C.

Cathy H. Jones
Staff Assistant
Office of Compliance