COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-40342
FPC-78-78

June 16, 1978

The Honorable Abraham Ribicoff, Chairman
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

As a supplement to our testimony on April 12, 1978, commenting on S.2640, the Civil Service Reform Bill, we offer the following comments on the Administration's recently submitted proposed new title on "Labor-Management Relations."

The proposed title VII--Labor-Management Relations--would establish a statutory base for a labor-management relations system for Federal employees. Since 1962, labor-management relations in the executive branch of the Federal service have been governed primarily by a series of executive orders promulgated by the President. The program has developed rapidly with 58 percent of the civilian (non-postal) work force currently represented in bargaining units and 52 percent covered by negotiated agreements. Because of the rapid expansion of the program and its importance to the efficient operation of the United States Government, we believe that the time has come for Congress to enact comprehensive legislation to govern this area. A well balanced labor-management relations program should increase the efficiency of the Government. It will foster constructive participation by Federal employees in the general conduct of Government business and in determining those conditions of employment in which they have an obvious and vital concern. We have, however, several concerns about a number of provisions in the bill which we discuss below and in more detail in the attachment.

Subsection 7164(k) of the bill would make the decisions of the Federal Labor Relations Authority final and conclusive and not subject to review by any other Government official or any court. The prohibition against review by any other official could be construed as authorizing the Authority to make final and binding decisions concerning the legality of payments of appropriated funds in connection with labor-management matters without reference to the Comptroller

General. Under 31 U.S.C. §§ 74 and 82d, the Comptroller General has the duty to render decisions regarding the legality of expenditures of appropriated funds to heads of agencies and to certifying and disbursing officers.

In establishing the General Accounting Office in 1921, the Congress recognized the need for a central administrative office, independent of the executive branch, to render authoritative decisions on the interpretation of Federal laws and their application to the expenditure of funds appropriated by the Congress. The General Accounting Office fills this role and serves the needs of agencies and employees for a source of rulings on the complex body of Federal laws. At the same time, the General Accounting Office provides the Congress with a means of assurance that the taxpayers' funds appropriated for the programs of the Government are expended in accordance with the statutes passed by Congress and the regulations implementing those statutes.

In the area of personnel law the employment benefits provided by Congress and the restrictions imposed by Congress must be fairly and uniformly applied to employees of different departments and agencies. This we have done for many years and we have acquired an expertise in personnel law matters. As a result a body of precedent has been developed concerning compensation, leave, official travel expenses, and relocation allowances.

In the labor-management area, we have issued numerous decisions at the request of both agencies and unions. The Federal Labor Relations Council and the Assistant Secretary of Labor have relied upon us to determine if the expenditure of funds authorized by a decision or award is consistent with law and applicable regulations. In this way, the possibility of ordering a party to violate a law, or a decision of the Comptroller General is avoided.

This system has worked well and should be continued. If however, the Federal Labor Relations Authority is granted final authority to pass upon the legality of expenditures, the result would be a dual system for Federal employees. Employees covered by collective-bargaining agreements would

be entitled to payment under one system, and employees not covered by collective-bargaining agreements would be entitled to payment under a different system. Since arbitration covers a wide range of issues, and involves the interpretation and application of many statutory and regulatory requirements, the resulting differences could be extensive. The statutes governing terms and conditions of employment for Federal employees are intended to be uniformly applied and interpreted. Entitlements to statutory benefits should not depend on coverage or lack of coverage under a collective-bargaining agreement.

We believe that our role in the program has been a positive one. We have upheld most of the arbitration awards that have been referred to us. Executive Order 11491 specifically provides that negotiated agreements are subject to existing and future laws and the regulations of appropriate authorities, including the Federal Personnel Manual. Arbitration awards must therefore be in accord with such laws and regulations. In a few cases, we have had to rule against awards which failed to meet that standard, but we are reluctant to overturn awards. Our standard of review has been to give great deference to the arbitrator and we will overturn an arbitrator only where an agency head's decision to the same effect would also be invalid under applicable laws and regulations.

Our decisions have liberalized the interpretations of the Back Pay Act (5 U.S.C. § 5596), and have enabled employees to receive backpay for agency violations of nondiscretionary provisions in labor-management agreements and in agency regulations. Likewise, our decisions have enabled employees to receive backpay for extended details to higher grade positions. We have also recently taken action to improve our review of labor-management relation matters. On April 5, 1978, we published proposed regulations in the Federal Register, designed to give notice of pending cases to interested parties and to speed up our processing of labor cases. A number of favorable comments were received and we are now preparing the regulations in final form.

In view of the above, we recommend that the prohibition on review of the Authority's decisions by other officials in the proposed subchapter on labor management relations be deleted--see subsections 7164(k) and 7171(j)--and that the following proviso be added to that subchapter:

> "Provided, that nothing in this subchapter shall serve to preclude an agency head or an authorized certifying or disbursing officer of an agency from exercising their statutory right under 31 U.S.C. §§74 and 82d to request an advance decision from the Comptroller General of United States as to the legality of any payment."

Similarly, with respect to the limitation on judicial review, such a limitation would undermine confidence in the program, and reinforce the present view that labor-management relations in the Federal sector is not sufficiently independent of the executive branch. The strong role of the Office of Personnel Management set forth in subsection 7164(h), combined with the lack of judicial review, would also tend to create the impression of management bias. We see no reason for precluding judicial review of decisions of the Authority. Decisions of other agencies on personnel matters are subject to limited judicial review, and in both the private and public sector, labor-management decisions are reviewed by the courts. There appears to be no reason to treat decisions of the Authority in a different manner. Accordingly, we recommend that this subsection be deleted and provisions for judicial review similar to those of the National Labor Relations Act be added.

One of the major changes and improvements over the Executive Order program is the creation of the Federal Labor Relations Authority which would consolidate the third-party functions in the Federal labor-management relations program now fragmented among the Federal Labor Relations Council and the Assistant Secretary of Labor.

The concept of an independent labor relations authority or board has been included in legislation introduced in

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recent sessions of Congress to provide a statutory basis for the Federal labor relations program. As we stated in our testimony before you on April 12, 1978, the General Accounting Office has supported the establishment of a central labor relations body to consolidate the third-party functions. We believe that such a central body is needed and would be perceived by both labor organizations and agency management as a credible and viable third-party mechanism. However, as noted in the attached analysis, we have a number of reservations on specific provisions in the legislation relating to the independence of the members of the Authority, and the role of the Office of Personnel Management in the Authority's proceedings.

We also favor providing a statutory basis for binding arbitration in the Federal sector, and expanding the scope of arbitration to include issues now considered solely under statutory appeals procedures. From the technical standpoint, however, we have recommended several changes. In particular, we believe the statutory rights to be included in the expanded scope of arbitration require more specific identification.

We support legislative clarification of the Back Pay Act, but the language proposed in section 702 of the bill requires careful study. We would be happy to work with the committee staff on this issue.

Sincerely yours,

R.F. Keller

Acting Comptroller General
of the United States

Attachment

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Attachment

Subsection 7162(c)(4) and (5)

These provisions would permit the agency head, in his sole judgement and under certain circumstances, to exclude his agency or an entity within the agency from coverage under the legislation. While circumstances warranting such exclusion may exist, we believe that, consistent with the purpose of this legislation, such a determination by an agency head be reviewed and approved by the Federal Labor Relations Authority.

Subsection 7162(c)(8)

The Tennessee Valley Authority which was excluded from coverage under Executive Order 11491 in 1976, is also excluded from Title VII. While TVA's "private-sector" like program may have warranted exclusion from the Order, in a GAO report to Congress dated on March 15, 1978 (FPCD-78-12), we questioned TVA's continued exclusion from either the National Labor Relations Act or any forthcoming legislation applicable to other Federal employees. We are concerned with TVA employees' lack of accessibility to procedures available to both private and Federal sector employees that would enhance their participation in and control of the bargaining process. We therefore suggest the Committee reexamine TVA's exclusion from both Title VII and the NLRA.

Section 7163

As we have noted, we favor the creation of the Federal Labor Relations Authority. However, we have a number of reservations on specific provisions related to the FLRA's establishment and operation.

Subsection 7163(b) permits a member of the Authority to hold another office or position in the Government where provided by law or by the President. This is in contrast to the prohibition on outside employment by members of the proposed Merit System Protection Board. We believe that a similar prohibition, without exception, should apply to members of the Authority, as well as to the General Counsel [subsection 7163(g)] because of the importance of securing their neutrality and independence.

Subsection 7163(d)(2) provides that "any member of the Authority may be removed by the President." However, no grounds for removal are specified. Because the effectiveness of the Authority depends on its operating independently of the executive branch, we believe that it is crucial that its membership be protected and insulated from political pressures. Although it may appear unlikely that the President would actually exercise this authority, the potential may affect one of the determinants of the success of the program, that is, the parties' perception of the Authority's independence. We suggest, therefore, that this section be amended to provide that members of the Authority may be removed by the President "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." These standards are applied to members of the National Labor Relations Board under the NLRA. We note that this is similar to the standard applied to Merit System Protection Board members, i.e., subsection 1201(d) provides that "a Board member may be removed by the President only upon notice and hearing and only for misconduct, inefficiency, neglect of duty, or malfeasance in office." We recommend that these standards also be applied to the removal of the General Counsel as is done in the case of the General Counsel of the NLRB.

Subsection 7163(e) provides that a vacancy in the Authority shall not impair the right of remaining members to exercise all of the powers of the Authority. This appears to be inconsistent with subsection 7163(b) which establishes a three member board with balanced political affiliation. We suggest that the President be required to promptly nominate a new member with the appropriate political affiliation in order to avoid operating at less than full complement.

Section 7164

Subsection 7164(c)(4) permits the Authority to consider exceptions to final decisions and orders of the Federal Service Impasses Panel. We question the need for and wisdom of allowing such a review. Current Executive Order procedures do not provide for such review and we do not believe that the history of the Panel's operation would indicate that such a change is warranted. Permitting appeal of FSIP decisions

could unduly delay the negotiation process and deter settlement by the parties.

Subsection 7164(h) provides that the Authority "is expressly empowered and directed to prevent any person from engaging in conduct found violative of this subchapter." This language appears to be based on the National Labor Relations Act, but is somewhat unclear in the context of this bill. While the Authority is given cease and desist authority in subsection (i), this bill does not give it the type of injunctive and enforcement powers authorized under the NLRA. If no injunctive authority was intended, the language could be revised to provide that the Authority is empowered to carry out the provisions of this subchapter.

Subsection 7164(h)(1)(2) and (3) delineate the role and authority of the Office of Personnel Management in the Authority's procedures. We question firstly, the need for the specific statutory provisions, in subsection (1) and (2), permitting the Authority to request an opinion from OPM, and giving OPM intervenor status in cases pending before the Authority. Such matters are generally more appropriately included in an agency's procedural regulations. Secondly, subsection (3), permits the OPM to request that the Authority reopen and reconsider its decision on the ground that the decision was based on an erroneous interpretation of law or of controlling regulations. In light of the purposes of the legislation, we believe this provision could undermine the concept of independence and finality of the Authority's determinations. While we recognize that the Authority's decisions must be in compliance with law and controlling regulation, we believe this can be achieved by the Authority submitting such questions to either the OPM, GAO or other appropriate authorities during its proceedings. This procedure is currently followed by the Federal Labor Relations Council.

Subsection 7164(j) establishes an independent General Counsel within the Authority. In previous comments on proposed labor legislation for Federal employees, GAO has supported such an independent General Counsel whose role is similar to that of the General Counsel of the National Labor Relations Board. We believe that empowering the General Counsel with prosecutorial authority in unfair labor practice

complaints will ensure a more equitable and expeditious handling of cases.

Subsection 7169(b)

Subsection 7169(b) defines the duty to bargain in good faith, but makes no specific reference to cooperating with impasse procedures. In the absence of the right to strike, it may be advisable to specifically include the obligation to cooperate with the impasse proceures set forth in section 7173.

Subsection 7169(d) and 7170(b)

These subsections define the permissible and prohibited subjects of bargaining in the management rights area. Subsection 7169(e) incorporates exisiting procedures for resolution of negotiability disputes. The only major change from present Executive Order provisions is that mission, budget, organization, and internal security practices of the agency, which are presently considered permissible subjects of bargaining, are transfered to the listing of prohibited subjects.

Agencies have had a number of years of experience in applying the management rights provisions under the Order and the Federal Labor Relations Council has grappled with interpreting and applying these terms in many of its negotiability determinations. We feel that some of the terms themselves are ambiguous and are difficult to apply in specific bargaining situations in a rational and consistent manner. Because of this, the question of what management rights should be excluded from bargaining needs to be carefully reexamined. We do not have a position on which of the management rights delineated in Title VII (and the Executive Order) are or are not necessary. However, we think that a better approach might be to have both management rights and negotiability procedures set out in the Authority's regulations rather than in the legislation. This may give the authority more flexibility in making necessary modifications based on its own experience. We have recently undertaken a survey of this area to determine what the parties have actually done in applying the Order's management rights provisions. However, the work will not be completed until late 1978.

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Section 7171

This section provides a statutory basis for binding arbitration in the Federal sector and substantially expands the permissible scope of arbitration. It authorizes use of arbitration for adverse actions and removals or demotions for unacceptable performance, and is intended to authorize arbitration for all matters now covered exclusively by statutory appeals procedures except examination, certification and appointment, suitability, classification, political activities, retirement, life and health insurance, national security, and the Fair Labor Standards Act (FLSA).

We favor use of binding arbitration in the Federal sector and support its use in adverse actions, and removals or demotions for unacceptable performance. These issues are largely evidentiary or factual, and are well suited to arbitration proceedings. In this regard, we recently recommended in a report entitled "Grievance Systems Should Provide all Federal Employees an Equal Opportunity for Redress," (FPCD-77-67/ June 13, 1978) that the CSC take necessary steps to expand the scope of negotiated grievance procedures to permit inclusion of matters now covered by statutory appeal procedures, except those for which a separate procedure can be justified.

We do believe, however, that subsection (d), which permits the use of a negotiated grievance procedure for "any matter within the authority of an agency" should be clarified. Those statutory appeal matters not specifically included or excluded from coverage under the negotiated grievance procedure under subsections (d) and (e) may or may not be "a matter within the authority of an agency". We suggest that to avoid confusion and litigation, the Committee should consider identifying the specific statutory issues intended to be included in the scope of arbitration. For example, is the intent of subsection (d) to permit arbitration of EEO issues now considered under Part 713 of CSC regulations; or reduction-in-force issues now considered under Part 351 of the CSC regulations.

Also, we note that while subsection (e) permits the employee to elect either the negotiated grievance procedure or the Merit System Protection Board procedure for appeals of

adverse actions and removals or demotions for unacceptable performance, no such choice is permitted for other statutory appeal matters which may come under the negotiated grievance procedure. Accordingly the Committee in clarifying the terminology of subsection(d) should also consider whether a similar choice should be provided for other statutory appeal procedures.

We also believe the exemption of FLSA claims under subsection (d) should be deleted, and arbitration of FLSA issues authorized. Overtime claims under title 5 U.S.C. have long been arbitrated in the Federal sector and we see no reason to permit arbitration of title 5 overtime claims, but exclude FLSA claims. Overtime claims in the Federal sector often require the interpretation and application of both title 5 and the FLSA. Federal employees have been covered by the overtime provisions in title 5 and the FLSA since 1974. The implementing regulations to the FLSA provide that employees covered by both statutes should receive payment under the statute which gives them the greater benefit. The FLSA issues, are therefore, often mixed issues. Accordingly, we recommend that arbitration of overtime claims based upon the FLSA be permitted.

Under subsection (k) arbitration decisions on matters covered under sections 4303 and 7512 (adverse actions and removals or demotions for unacceptable performance) may be appealed directly to the courts. This contrasts with arbitration awards, in other matters which, under subsection (j) may be appealed to the Authority. We recommend that an administrative level of review be provided for appeal of an arbitration award either to the Authority or the MSPB, rather than the direct review by the courts provided in subsection (k).

Since many of the arbitration awards will likely go beyond the boundaries of the collective bargaining agreements and involve interpretation of laws and regulations, an administrative review appears warranted. Precise grounds for reveiw of arbitration awards could be established by regulation.

Subsection 7174(e) provides that where questions arise as to whether an issue can properly be raised under unfair labor

practice procedures, or must be raised under an appeals procedure, those questions should be referred to the agency which administers the related appeals procedure. A similar provision appears at subsection 7771(g) regarding coverage under the negotiated grievance procedure. We recommend that such questions be referred instead to the Authority, which in turn can seek an opinion from the agency with appropriate jurisdiction. Considering the number and complexity of overlapping appeals procedures in the Federal sector, we believe the burden of finding the right agency or office is best placed on the Authority, rather than on the individual employee. Moreover, referral of such issues to the Authority will insure uniform precedent and ready access to published decisions.

Section 7176

Section 7176 authorizes dues withholding agreements and incorporates many of the specific provisions now contained in the Subpart C, Part 550 of the regulations of the CSC. We believe a general provision authorizing dues withholding is sufficient, and the specific conditions governing dues withholding are best prescribed by regulation. Accordingly, we recommend that subsection (b) be omitted, and subsection (a) be revised to provide for dues withholding pursuant to regulations issued by the OPM.