OFFICE OF COMPLIANCE
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INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION NOS. 246 AND 639, AFL-CIO	)	
Petitioner,	)	
and	)	**Case No. 03-LM(AC)-01**
	)	**Date: July 11, 2003**
OFFICE OF THE SENATE SERGEANT AT ARMS,	)	
Employing Office.	)	

Before the Board of Directors: Susan S. Robfogel, Chair. Barbara L. Camens; Alan V. Friedman; Roberta L. Holzwarth; Barbara Childs Wallace, Members.

DECISION AND ORDER

I. INTRODUCTION

The Petitioner labor organization seeks to amend the December 19, 2002 certification for the Employing Office's Capitol Facilities Branch to substitute Teamsters Local 639 for Teamsters Local 246 as the certified exclusive bargaining representative. The Petitioner asserts that Local 246 merged with Local 639.

The Employing Office filed "Objections to Petition for Amendment to Certification of Representative," and contends that (1) procedurally the Office's Executive Director, or his designee, lack authority to investigate the petition; and (2) substantively the petition should be denied.

We have determined, for the reasons stated below, that the Employer's procedural argument lacks merit. We, therefore, direct the Executive Director, or his designee, to investigate the issues arising from the petition. Absent a consensual resolution or petition withdrawal, the Board will decide the merits issue following the completion of the aforementioned investigation.

II. PARTIES' POSITIONS

The Employing Office interprets Section 220(c) of the Congressional Accountability Act ("CAA"), *2 U.S.C. §1351(c)*, to authorize only the Board, or the Office's General Counsel, by Board direction, to investigate representation-related petitions encompassed by *5 U.S.C. §7511.* The Employing Office submits that Section 220(c), in requiring that any petition or submission be submitted to the Board, but permitting the Board to direct that the General Counsel carry out the Board's investigative authorities under that paragraph, "limited the Board's authority to delegate its investigative responsibilities, and the Board may delegate those responsibilities only to the General Counsel." Accordingly, the Employing Office argues that the Office's promulgated regulation (*§2422.30*: *142 Cong. Rec. S11642-01*[Senate Approval, September 28, 1996]; *142 Cong. Rec. H9898-02* [House Approval, August 2, 1996] assigning this representation investigation function to the Executive Director, conflicts with the CAA and therefore is "unenforceable and cannot stand."[1]

The petitioner expressed no position on this procedural issue and confined its response to the merits of its amendment to certification petition.

III. DISCUSSION

Section 220(c)(1) imbues the Board with the authority of the Federal Labor Relations Authority under 5 U.S.C. §7511, *inter alia*, to investigate representation petitions; while Section 220(c) of the CAA *provides that the Board "may" direct the General Counsel to carry out the* Board's investigative function under the paragraph. In contrast, section 220(c)(1) mandates that the Board "shall refer any matter under this paragraph to a hearing officer for decision . . ." pursuant to section 504 ((b)-(h)).[2] The use of the permissive form regarding investigatory delegation to the General Counsel and the mandatory form concerning hearing officers intimates the Congressional intent to permit alternative investigatory *loci*.

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[1] In late calendar 2002 the Executive Director investigated a representation petition that resulted in a consent election and the certification of bargaining representative in this very bargaining unit. (*Case No. 02-LM-01*). However, the Employing Office's counsel did not challenge the authority of the Executive Director to investigate representation petitions until the filing of the instant collateral petition.

[2] In adopting the Labor-Management Regulations the Board explicitly rejected that suggestion of some commenters to its Notice of Proposed Rulemaking that matters for mandatory assignment to hearing officers included representation petitions. *142 Cong. Rec. H-7454* (July11, 1996).

The Office's Labor-Management Regulations are substantive regulations, adopted under the published rulemaking and comments process, pursuant to CAA Section 304 (*2 U.S.C. § 1384*). These regulations which, *inter alia,* authorize the Board to assign representation petition investigations to the Executive Director, were promulgated on October 1, 1996 (*142 Cong Rec S 12062*), as a result of House approval (*H. Res. 504*, *H.Con. Res. 207*) and Senate approval (*H. Con. Res. 207*, *S. Res. 304*). Therefore, since the inception of this Labor-Management program, Congress approved the Board's assignment to the Executive Director, or his/her designee, the representation petition investigatory tasks; while the Board maintained the ultimate decision-making function. The Executive Director serves as the Office's Chief Operating Officer and carries out the responsibilities of the Office under the CAA, except as otherwise specified in the Act. *Section 302(a)(4), CAA.* The Executive Director has processed and investigated all representation petitions throughout the seven year history of this program.

It is well established that agency regulations promulgated pursuant to delegated legislative authority have the force and effect of law. See *Pierce Administrative Law Treatise (4th Ed.)*, Section 6.2 Agency Power to Issue Rules; *U.S. v. Storer Broadcasting Co.,* 351 U.S. 192 (1956); *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943). Such regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute. *Chevron U.S.A. v. National Resources Defense Council et al.,* 367 U.S. 837, 843-844 (1984). Reviewing courts tend to grant deference to agency regulations, such as those under challenge herein, issued following a notice and comment rulemaking process. *Kay Coles James v. Elisabeth von Zemenszky, and Merit Systems Protection Board*, 301 F.3d 1364, at 1365 (Fed. Cir. 2002). If the intent of Congress is clear, that is the end of the matter, for the agency's implementing regulations and the reviewing court must give effect to the unambiguously expressed intent of Congress. If Congressional intent is not clear, courts ordinarily will defer to an agency's construction of a statute it is charged with enforcing if it is reasonable and not in conflict with the expressed intent of Congress. *U.S.A. v. Louise Mango*, 199 F.3d 85 (2nd Cir. 1999), citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S 121, 131(1985); *National Labor Relations Board v. Oklahoma, No. 01-9516 (10th Cir. June 18, 2003).*

As noted by United States District Court Judge Riccardo M. Urbina, and discussed,, *supra, CAA Section 220(c)*(1) is not unambiguous and it has some inherent ambiguities. *U.S. Capitol Police Board v. Board of Directors of the Office of Compliance, et al.,* Civil Action: 96-cv-2256 RUM (D.D.C., November 15, 1996). While we respectfully disagree that any ambiguity exists regarding the Board's authority to delegate representation case investigative functions to the Executive Director, the Board validly acted to resolve any such ambiguity through its subject substantive regulations. The Congressional approval of those regulations effectively clarified and resolved any extant ambiguity.

The Board's explicit discretionary statutory authority to direct the General Counsel to investigate representation petitions is not at odds with the Office's substantive Labor-Management Regulations, promulgated pursuant to CAA *Section 220(d)*, which assigned that

function to the Office's Executive Director. CCA *Section 220(c)* is reasonably read as a permissive authorization to the Board subject to an alternative arrangement pursuant to the Board's substantive rulemaking authority under *Section 304* of the CCA. See *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 195 (1956); *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672, 689 (D.C. Cir. 1973). Moreover, the Courts have been sensitive to the real world need of federal agency heads and administrative tribunals to redelegate their operational, but not ultimate decisional authority, to lower level officials within their organizations. *See, e.g., NLRB v. Duval Jewelry Company of Miami*, 357 U.S. 1 (1958); *Fleming v. Mohawk Wrecking & Lumber Co., et al.* 331 U.S. 111 (1947); *U.S.A. v. Louise Mango*, *supra*; *NLRB v. John S. Barnes Corp.,*178 F. 2nd 156 (7th Cir. 1949).

The Employing Office relies upon *Halverson v. Slater*, 129 F.3d 180 (D.C. Cir. 1997), where the Court of Appeals held that a controlling statute authorizing the Secretary of Transportation to delegate certain powers to Coast Guard officials prohibited him from delegating those powers to non-Coast Guard officials. That case is distinguishable from that *sub judice* because it involved a delegation to a completely distinct organization from that of the Coast Guard. Moreover, subsequently the Court of Appeals for the District of Columbia articulated that the controlling maxim - *expressio unius est exclusio alterius* ("the mention of one thing implies the exclusion of another") - is often misused.:

> [S]ometimes Congress drafts statutory provisions that appear preclusive of other unmentioned possibilities just as it sometimes drafts provisions that appear duplicative others simply, in Macbeth's words, "to make assurance double sure." That is Congress means to clarify what might be doubtful that the mentioned item is covered without meaning to exclude the unmentioned ones. [citation omitted]. **The maxim's force in particular situations depends entirely on context**, whether or not the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives. That will turn on whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed "the one thing" would have likely considered the alternatives that are arguably precluded. For that reason, we think the maxim should be used as a starting point in statutory construction not as a close-out bid.
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> *Karen Shook, et al. v. District of Columbia Financial Responsibility and Management Assistance Authority*, 132 F.3d 775, 782 (D.C. Cir. 1998).[emphasis supplied].

The Court of Appeals' *Shook* decision, with particular resonance herein,distinguished between an agency delegation of power to an "outsider," in contrast to its executive director and small professional staff under the agency's control and supervision. *132 F.3d 775, 784*. The Office of Compliance Executive Director is an arm of the Board. *See, CAA Section 302(a)*, *2* U.S.C. §1382(a). Morever, the Board, in this regard, has delegated only ministerial investigatory functions to the Executive Director. Significantly, we find that the doctrine of *expressio unius est exclusio alterius* is not applicable to this situation because *CAA Section 220(c)(1)* did not express a mandatory delegation authority; it simply provided that the Board "may" delegate the investigative authority to the General Counsel.

While the Chair, with Board approval, appoints the General Counsel, the Board only may remove the General Counsel for specified cause and through the Speaker of the House of Representatives and the President *pro tempore* of the Senate. *Section 302(c), CAA*. Unlike the Executive Director, whose role is to serve the Board and operate the Office, the General Counsel maintains an independent role in prosecuting cases before the Board pursuant to *Sections 210, 215 and 220* of the *CAA*. The General Counsel is also authorized to petition for judicial review from Board decisions that are not in his/her favor. *Section 407(1)(C)&(D)*, *CAA*.

In enacting the CAA Congress clearly did not intend to preclude the Board from assigning the investigation of representation petitions to its Executive Director or his/her designee. The Executive Director and his/her two statutory deputies are appointed and may be removed by the Chair, subject to Board approval. *Sections 302(a) & (b), CAA*. The Executive Director serves as the Office's Chief Operating Officer, and carries out of the responsibilities of the Office under the CAA except as otherwise specified in the Act. *Section 302(a)(4).* The Executive Director and his/her staff are a direct adjunct to the Board and report to the five-person Board, which serves on a *per diem* basis.[3]

The Executive Director's functions are integral and fully answerable to the Board. In this respect, with the Board's authorization, the Executive Director provides the Board with supportive services that a *per diem* Board realistically could never be expected personally to perform; e.g., the labor-intensive tasks of processing and investigating representation case petitions, conducting elections, etc.. It is a common practice for administrative tribunals to assign such ministerial functions to its lower level officials.

In *Section 220(c)* Congress specifically permitted the Board to assign its investigatory function to the General Counsel, even though the Board and the General Counsel stand at arms length when the General Counsel exercises his/her prosecutorial authority. This additional option for investigatory assistance in no way imports that Congress wished to deprive the Board of the services of its Executive Director in performing that fact gathering function.

The Employing Office brief also does not reflect that in November 1996, in *U.S. Capitol Police Board v. Board of Directors of the Office of Compliance, et al.,* Civil Action.: 96-cv-2556 RMU (D.D.C., November 15, 1996), the U.S. Capitol Police Board unsuccessfully sought a district court temporary restraining order to prevent the Executive Director from conducting a

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[3] The present Board of Directors is composed of five private sector attorneys, experienced in employment law (located across the United States), as contemplated by *Section 301 of the CAA*.

representation petition investigatory hearing.[4] The employing office argued there, as in this case, that the Executive Director was acting *ultra vires* because the Board lacked authority to assign the investigative function to its Executive Director.

The district court concluded that it lacked subject matter jurisdiction over the case. In ruling, U.S. District Court Judge Ricardo M. Urbina stated: "I note that Section 220(c)(1) of the CAA is not clear, and it is not unambiguous, as suggested by the plaintiff. To the contrary, I find looking at it and its context and based on what's been provided here and what counsel have said about it, it has some inherent ambiguities." [*Transcript of TRO Telephone Hearing Before the Honorable Ricardo M. Urbina,* November 12, 1996, Tr. 38]. Therefore, the Court rejected the Police Board's identical argument that section 220(c)(1) lodges no discretion with the Board to assign representation case investigations to the Executive Director.

Based upon the foregoing, we conclude that the Employing Office's procedural objection lacks merit.

IV. ORDER

The Employing Office's procedural objection is overruled. The Executive Director, or his designee, is directed to investigate this amendment to certification petition.

IT IS SO ORDERED.

Issued, at Washington, D.C.: July 11, 2003

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[4] The U.S. Capitol Police Board was also represented by the Office of the Senate Chief Counsel for Employment.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July 2003, I delivered a copy of this Decision and Order of the Board of Directors to the following parties by the below identified means:

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