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104TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 104–230

FEDERAL EMPLOYEE REPRESENTATION IMPROVEMENT ACT OF 1995

AUGUST 4, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 782]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 782) to amend title 18 of the United States Code to allow members of employee associations to represent their views before the United States Government, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

99–006

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employee Representation Improvement Act of 1995".

SEC. 2. REPRESENTATION BY FEDERAL OFFICERS AND EMPLOYEES.

(a) EXTENSION OF EXEMPTION TO PROHIBITION.—Subsection (d) of section 205 of title 18, United States Code, is amended to read as follows:

"(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of that officer's or employee's duties, from acting without compensation as agent or attorney for, or otherwise representing—

"(A) any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings; or

"(B) except as provided in paragraph (2), any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or groups's members are current officers or employees of the United States or of the District of Columbia, or their spouses or dependent children.

"(2) Paragraph (1)(B) does not apply with respect to a covered matter that—

"(A) is a claim under subsection (a)(1) or (b)(1);

"(B) is a judicial or administrative proceeding where the organization or group is a party; or

"(C) involves a grant, a contract, or other agreement (including a request for any such grant, contract, or agreement) providing for the disbursement of Federal funds to the organization or group.".

(b) APPLICATION TO LABOR-MANAGEMENT RELATIONS.—Section 205 of title 18, United States Code, is amended by adding at the end the following:

"(i) Nothing in this section prevents an employee from acting pursuant to chapter 71 of title 5 or section 1004 or chapter 12 of title 39.".

PURPOSE AND SUMMARY

H.R. 782 would amend current law to protect the right of Federal employees as representatives of their employee organizations to communicate with Federal departments and agencies in appropriate circumstances. This action is necessary due to a November 7, 1994, Department of Justice interpretation of 18 U.S.C. § 205, opining that if an employee representative expresses the views of an employee organization or association before a governmental agency, that employee is subject to prosecution. Included among such associations are credit unions, child care centers, health and fitness organizations, recreational associations, and professional associations. The unfortunate effect of this interpretation of the law is that it has had a chilling effect on communications between federal employees and management on issues where communication should be fostered, not discouraged.

H.R. 782 incorporates recommendations made by the Administration. These recommendations differ from the introduced bill by providing certain specific limitations on when an employee can represent an employee organization. As reported by the Committee, H.R. 782 will continue to prohibit employees from representing organizations or groups in claims against the government, in formal adversarial matters, or in competition with the private sector for the assistance the Government provides through actual cash disbursements, as opposed to services, equipment and facilities.

Therefore, under the language of H.R. 782, an employee may not represent an organization or group in a claim against the Government, in a judicial or administrative proceeding where the organization or group is a party, or where the organization or group is seeking money from the Government.

BACKGROUND AND NEED FOR THE LEGISLATION

Section 205 was enacted as part of the comprehensive reform of the government ethics laws in 1962 (P.L. No. 87–849).[1] In general, Section 205 prohibits a Federal employee from acting as the representative of any organization, whether or not made up of other government employees, in its dealings with any part of the Federal Government except Congress. Prior to the issuance of the Department of Justice interpretation in November 1994, which held that meetings between the Federal employees who served as representatives of an employee organization and officials of the employing department or agency were constrained under Section 205, Federal employees routinely represented their employee organizations before senior management officials without fear of prosecution.

In August of 1994, the National Association of Assistant U.S. Attorneys (NAAUSA) lobbied against the crime bill's "safety valve" provision, which would have allowed judges to bypass harsh mandatory sentences for first-time, non-violent drug offenders. The "safety valve" would have led to the retroactive early release of many prisoners serving mandatory minimum sentences for drug charges. The NAAUSA position was at odds with the position of the Department of Justice. At an August 15, 1994, meeting between Justice officials and leaders of NAAUSA who were federal employees, the Justice officials cautioned the group that the group could be violating the law. The early release provision was eventually dropped from the crime bill.

Subsequently, Attorney General Janet Reno requested an opinion from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel "as to whether and how the provisions of 18 U.S.C. § 205 apply to communications between employee members of the National Association of Assistant United States Attorneys and officials of the Department."[2]

On September 28, 1994, in a response to a request from assistant Attorney General Dellinger, the Office of Government Ethics (OGE) issued an opinion letter stating that Federal employee associations or organizations, except labor unions,[3] are subject to 18 U.S.C. § 205. The OGE letter stated:

> As a general proposition, it seems clear that Section 205 would bar an employee from representing an employee organization before the Government unless the representa-

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[1] 18 U.S.C. § 205(a)(2) provides as follows:

(a) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, other than in the proper discharge of his official duties—

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in Section 216 of this title.

18 U.S.C. § 205(d) provides as follows:

(d) Nothing in subsection (a) or (b) prevents an officer or an employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

[2] Memorandum of Assistant Attorney General Walter Dellinger to Attorney General Janet Reno, November 7, 1994.

[3] 5 U.S.C. § 7102(1) provides a specific statutory exemption for employee members of labor organizations which "includes the right to act for a labor organization in the capacity of a representative, and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the Executive branch of the Government."

> tion was part of the employee's official duties. There is no indication that Congress intended to generally exempt employees from the prohibition of Section 205 when representing employee interest groups. (citation omitted).[4]

The letter continued, explaining that although Section 205 does not prohibit self-representation, an employee could not communicate his own views to the government as the representative of an organization which held those same views without violating Section 205. By its terms, the statute applied only to "any covered matter" which is defined in Section 205(h) as including any "other particular matter." The OGE letter acknowledged that:

> [T]here may be situations where a member of an employee organization wishes to represent the organization to the Government on a matter which is not a "particular matter" within the meaning of Section 205. In such a case, the representation would be made in connection with a broad policy matter that is directed to the interests of a large and diverse group of persons rather than one that is focused on the interests of a discrete and identifiable class.

Even in this instance, however, OGE found that there may be other aspects of the communication incident to the representation which could be considered to be connected with "particular matter."

In conclusion, the OGE letter recognized that their interpretation of Section 205 appeared to impose an "unreasonable burden on the ability of employee organizations to communicate with the Government".

On November 7, 1994, the Department of Justice issued its opinion concerning application of the provisions of 18 U.S.C. § 205 to communications between employee members of NAAUSA and officials of the Department of Justice. This opinion letter was based, in large part, on the letter of the Office of Government Ethics and tracked OGE's opinions as to the applicability of the statute.

The Department of Justice opinion concludes that "there is no general exception for employment related matters or employee associations from the restrictions of Section 205. A deliberation, decision, or action focused upon the interests of AUSAs or another discrete and identifiable class would be a 'covered matter,'[5] and accordingly, communications between a current Federal employee acting as a representative of NAAUSA and the Department on those matters would violate the statute."[6]

HEARINGS AND SUBCOMMITTEE CONSIDERATION

The Committee's Subcommittee on the Constitution held one day of hearings on H.R. 782 and related bills on May 23, 1995. The Subcommittee heard testimony on H.R. 782 from Representative Frank Wolf.

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[4] Letter from Stephen D. Potts, Director, Office of Government Ethics to Assistant Attorney General Walter Dellinger, Office of Legal Counsel, 2 (September 28, 1994).

[5] 18 U.S.C. § 205(h) defines a "covered matter" for purposes of the statute as: "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter."

[6] *Memorandum of Assistant Attorney General Walter Dellinger to Attorney General Janet Reno*, 12 (November 7, 1994).

On June 21, 1995, the Subcommittee met in open session and adopted an amendment in the nature of a substitute offered by Chairman Canady. The Subcommittee favorably reported the bill to the Full Committee by a voice vote, a quorum being present.

COMMITTEE CONSIDERATION AND VOTES

On July 12, 1995, the Committee met in open session and ordered reported the bill H.R. 782 without amendment by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 782, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 20, 1995.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 782, the Federal Employee Representation Improvement Act of 1995, as ordered reported by the House Committee on the Judiciary on July 12, 1995. This bill would allow members of federal employee associations, such as credit unions and child care centers, to represent their group's positions on certain issues before government agencies.

CBO estimates that enacting H.R. 782 would result in no cost to the federal government or to state or local governments. The bill would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

JUNE E. O'NEILL.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 782 will have no significant inflationary impact on prices and costs in the national economy

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

SECTION 1. SHORT TITLE

This Act may be cited as the "Federal Employee Representation Improvement Act of 1995".

SECTION 2. REPRESENTATION BY FEDERAL OFFICERS AND EMPLOYEES

Section 2 of H.R. 782 amends Section 205(d) of Title 18 of the United States Code. Generally, Section 205 prohibits Federal employees from representing others in actions against the Government. Currently, Section 205(d) exempts employees who act as an agent or attorney, without compensation, for anyone who is the subject of personnel administration proceedings before the Government in connection with those proceedings. Section 2 further extends the exemption of 205(d) to allow Federal employees to represent others in actions before the Government in certain circumstances.

Subsection 205(d)(1)(A)

The amendment to 205(d)(1)(A) leaves current law intact with the exception of the minor change of the word "his" to "that officer's or employee's" modifying the word "duties" in the statute. The representation must still be without compensation in order to fall within the exception.

Subsection 205(d)(1)(B)

As amended, Section 205(d)(1)(B) allows an individual to represent a non-profit "cooperative, voluntary, professional, recreational" or similar organization if a majority of the organization's members are government officers or employees.

As used in subsection (d)(1)(B), the term "group" includes a component or subgroup of a non-profit cooperative, voluntary, professional, recreational, or similar organization. This provision is intended to treat in the same manner an employee who represents such a non-profit organization which contains a component or subgroup, a majority of whose membership is composed of Federal employees, such as the Federal Career Service Division of the Federal Bar Association, the Government Engineer Division of the American Society of Civil Engineers, the Federal Section of the International Personnel Management Association, or the Federal Librarians Roundtable, a component of the American Library Association. Any component or group of an employee organization must also be

composed of a majority of members who are current officers or employees of the Untied States or of the District of Columbia, or their spouses or dependent children.

Subsection 205(d)(2)

Subsection (d)(2) sets forth the circumstances in which a federal employee may *not* act as agent or attorney representing an employee organization. There are three situations in which an employee is prohibited from representing the views of the organization or group. The first situation in (d)(2)(A) involves claims against the Government. The second situation in (d)(2)(B) prohibits the prescribed action during formal adversarial matters where the organization or group is a party. The third situation expressly disallows Federal employees from lobbying for grants, contracts and cash on behalf of an employee organization. Due to limited Federal resources, employee organizations should be on the same footing as other looking for Federal funds. Subsection (d)(2)(C) would ensure this.

Subsection 205(i)

This subsection is included to state that the amendment to Subsection (d) does not prevent an employee from acting pursuant to the chapter on Labor Management Relations of title 5 or the Employee-Management Agreements set forth in chapter 12 of title 39 or the Supervisory and Other Managerial Organizations in Section 1004 of title 39.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 205 OF TITLE 18, UNITED STATES CODE

§ 205. Activities of officers and employees in claims against and other matters affecting the Government

(a) * * *

* * * * * * *

[(d) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for, or otherwise representing, any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.**]**

(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of that officer's or employee's duties, from acting without compensation as agent or attorney for, or otherwise representing—

(A) any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings; or

(B) except as provided in paragraph (2), any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit, if a majority of the organization's or groups's members are current officers or employees of the United States or of the District of Columbia, or their spouses or dependent children.

(2) Paragraph (1)(B) does not apply with respect to a covered matter that—

(A) is a claim under subsection (a)(1) or (b)(1);

(B) is a judicial or administrative proceeding where the organization or group is a party; or

(C) involves a grant, a contract, or other agreement (including a request for any such grant, contract, or agreement) providing for the disbursement of Federal funds to the organization or group.

* * * * * * *

(i) Nothing in this section prevents an employee from acting pursuant to chapter 71 of title 5 or section 1004 or chapter 12 of title 39.