MEMORANDUM DATE: August 6, 1996

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: NATIONAL TREASURY EMPLOYEES UNION

Respondent/Union

and Case Nos. WA-CO-50300
WA-CA-50302

STUART E. BERNSEN

Charging Party/Individual

and

PENSION BENEFIT GUARANTY CORPORATION

Respondent/Agency

and

STUART E. BERNSEN

Charging Party/Individual

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

NATIONAL TREASURY EMPLOYEES UNION Respondent/Union	
and STUART E. BERNSEN Charging Party/ Individual and PENSION BENEFIT GUARANTY CORPORATION Respondent/Agency and STUART E. BERNSEN Charging Party/ Individual	Case Nos. WA-CO-50300 WA-CA-50302

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 9, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

ELI NASH, JR.
Administrative Law Judge

Dated: August 6, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

NATIONAL TREASURY EMPLOYEES UNION Respondent/Union	
and STUART E. BERNSEN Charging Party/ Individual and PENSION BENEFIT GUARANTY CORPORATION Respondent/Agency and STUART E. BERNSEN Charging Party/ Individual	Case Nos. WA-CO-50300 WA-CA-50302

Martha Finlator and John Mceleney, Esq.
For the Respondent Union

Raymond M. Forester and Holli Beckerman Jaffe, Esq.
Patrick S. Menasco and Philip R. Hertz, Esq.
For the Respondent Agency

David Powers and Stuart E. Bernsen, Esq.
For the Charging Party

Christopher M. Feldenzer, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On March 10, 1995, Stuart E. Bernsen (hereafter called Bernsen or the Charging Party) filed an unfair labor practice charge alleging a violation of section 7116(a)(1), (3), (5) and (8) and 7120(e) by the Pensions Benefit Guarantee Corporation (hereafter called Respondent or PBGC) and a violation of section 7716(b)(8) by the National Treasury Employees Union (hereafter called Respondent NTEU or THE Chapter) based on the assertion that Holli Beckerman Jaffe (hereafter called Jaffe) is a confidential management employee and has an actual and apparent conflict of interest because she serves as both an ethics official[1] and Chapter President.[2] Thereafter, on September 11, 1995, the Washington, D.C. Regional Director issued a Consolidated Complaint and Notice of Hearing alleging that the Respondents violated the Federal Service Labor-Management Relations Statute, as amended (herein called the Statute) by continuing Jaffe in those positions despite the existence of an apparent conflict of interest.

A hearing on the Consolidated Complaint was held in Washington, D.C. at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were timely filed by Respondent and the General Counsel and have been carefully considered.[3]

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence I make the following:

Statement of the Facts

A. Background.

After investigation, the General Counsel proceeded to trial solely on the issue of whether an apparent conflict of

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1 Jaffe, technically can be called an "ethics official" but, is more correctly simply an ethics counselor.

2 Several motions were taken under advisement and some subpoena requests were deferred pending the decision in this matter. After careful review of the motions and subpoena requests and in light of the decision in this matter, all motions and subpoena requests not specifically granted during the course of the hearing are all hereby denied, in their entirety.

3 Respondent PBGC's request for special permission to file a reply brief is denied.

interest was created by Jaffe's serving as ethics counselor while she was Chapter President.4

The two principal characters in the case are Jaffe, the instant President of NTEU Chapter 211, who won that office in October 1994 and Bernsen, the immediate past President of Chapter 211, who lost his office to Jaffe and whose subsequent actions certainly tend to show that he was embarrassed by his loss.

In October 1994, in what must have been a total surprise to Bernsen, Jaffe unseated him as Chapter President. Bernsen ran with eight other candidates, on what was called the "Progressive" slate. To his apparent chagrin, Bernsen was the only "Progressive" slate member not elected in the October 1994 election. Bernsen, obviously upset by the notoriety, began efforts to reverse the outcome of the election by filing a plethora of charges alleging election irregularities. It is certainly my view that Bernsen continued to try smearing Jaffe during the course of this hearing. Of particular note are the questions Bernsen asked on cross-examination, the rambling and irrelevant questions appeared to be designed to elicit embarrassing answers from not only Jaffe but agency management as well, and in fact served no useful purpose.

First, Bernsen filed an appeal of the election with NTEU. That appeal alleged *inter alia* that Jaffe was ineligible to run for the office of President because of "actual and/or apparent conflicts of interest, including conflicts of interest due to her position with the Employer as Agency Ethics Official. This violates 5 U.S.C. 7120(e)." That election appeal was denied on March 21, 1995.

On January 11, 1995, Bernsen filed a complaint with the Department of Labor (hereafter called DOL or the Assistant Secretary) alleging, *inter alia*, that:

> Holli Jaffe was not qualified to be a candidate for President of NTEU Chapter 211 and is disqualified from serving as Chapter President due to her . . . employment as a PBGC Ethics Official. Her confidential status and actual and apparent conflicts of interest between her Agency duties and her duties as Union President violates 5 U.S.C. 7120(e).

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4 Section 7116(a)(3) and (5) allegations alleged in the charge were withdrawn by the Charging Party prior to the hearing.

This matter was decided by DOL on June 5, 1996. On June 14, 1996, Counsel for the General Counsel, after giving notice to the parties, submitted the DOL decision to me, requesting that official notice be taken inasmuch as the decision was not available at the time of the hearing and to the extent that it addresses certain jurisdictional issues raised by the Respondents. Since the document is in the public domain, I hereby, take judicial notice of that decision. Since, however it appears that there are insufficient facts stated in the DOL decision to make it of any precedential value in the instant proceeding, it is found, therefore, not to be particularly helpful in resolving the instant matter. It is worthy of note, however, that DOL in its decision defers to the Authority regarding the issue of an "actual or apparent conflict of interest."

Bernsen apparently also drafted and prepared complaints for others to file with DOL regarding Jaffe's eligibility and other matters concerning the election.

Following his defeat by Jaffe, Bernsen also started to distribute fliers throughout PBGC accusing Jaffe of misconduct and ineligibility to serve as President of NTEU Chapter 211. The fliers, particularly those made available on the record, at the very least misstate actions and conclusions of the Authority and the General Counsel.5 Bernsen did not testify on his own behalf nor was he called to testify by the General Counsel. His position as voiced by his counsel apparently is that the questionable literature that he distributed is protected by the First Amendment. Others, particularly the Respondents consider it a sign of bitterness and poor taste. Bernsen's actions certainly help set the tone for this case and reveal a motivation that is not so difficult to understand, he did not know how to lose.

Sometime around October 24, 1994, Bernsen supporters on the Chapter's Executive Board, which as previously noted, was composed mostly of Bernsen's "Progressive" slate member's Snead and Seitz "tag-teamed" and "took shots at" newly elected Jaffe based on allegations apparently scripted by Bernsen. These accusations included a conflict of interest charge. After Jaffe responded in the meeting, the Executive Board apparently dropped its complaints and settled into a productive working relationship with her. In any event, there is no indication that the executive board members did not have a compatible working relationship and the conflict of interest

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5 Bernsen apparently filed a challenge to Jaffe's serving as a delegate at an NTEU convention, alleging that she had a conflict of interest. It is undisputed that the convention committee found no conflict and, therefore seated Jaffe.

accusation does not appear to have surfaced in any other executive board meetings.

Despite Bernsen's post-election campaign, no employee (other than Bernsen and the two "Progressive" slate-mates at the October 24, 1994 Executive Board meeting) has complained that they perceive any conflict of interest between Jaffe's ethics counselor duties and her service as Chapter President. Since it is claimed that the Executive Board members who accused Jaffe were biased in favor of Bernsen, the undersigned searched the record for complaints by employees other than the two executive board members, but found none.

B. Government ethics programs including the PBGC program.[6]

1. Requirements

In accordance with Federal law the Ethics in Government Act of 1978 and government-wide regulations of the Office of Government Ethics (hereafter called OGE), 5 C.F.R. §§ 2600 et seq., PBGC maintains an ethics program to educate all employees of their responsibilities under the Standards of Ethical Conduct for Employees of the Executive Branch (hereafter called Standards or Standards of Conduct) 5 C.F.R. § 2635, and to make certain "determinations" under the Standards. PBGC's ethics program is supervised by its Designated Agency Ethics Official (hereafter called DAEO), General Counsel James J. Keightley. The DAEO is assisted by an Alternate Agency Ethics Official (hereafter called (AAEO), Jay Resnick, who acts as DAEO in the DAEO's absence. A third individual, Associate General Counsel Philip R. Hertz, also has delegated authority to make ethics "determinations" under the Standards. Keightley, Resnick and Hertz, as the "agency designees," 5 C.F.R. § 2635.102 (b), are the only persons with authority to make ethics determinations ("to make any determination, give any approval or to take any other action required or permitted by [the Standards of Conduct] with respect to another employee.") See 5 C.F.R. § 2635.102(b). They are assisted in ethics work by a group of ethics counselors, but these ethics counselors have not been delegated authority to make any determinations under the Standards. Thus, for example, an ethics counselor can assist Keightley, Hertz or Resnick

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6 Bernsen also filed other unfair labor practice charges alleging improper activity by PBGC, Jaffe and NTEU towards himself and a PBGC employee Noisette Smith. He persisted in trying to investigate and argue that matter in the instant hearing. When the matter was deemed irrelevant by the undersigned, his Counsel sought to amend the consolidated complaint to include a section 7116(a)(3) violation although forewarned that he could not do so.

in determining whether, pursuant to 5 C.F.R. § 2635.605(b), to authorize an employee who is seeking employment, to work on a matter affecting a pros-pective employer; however, the decision to authorize such an activity is reserved to the "agency designees" (Keightley,

Hertz and Resnick).7

Attorneys and paralegals at PBGC may volunteer to be ethics counselors. If accepted, they are then assigned ethics duties collateral to their other work. In October 1994, the Ethics Counselors included Jaffe, Jeff Altenburg, Bruce Campbell, Ray Forster, David Kemps, Liz King, Lelia Williams and Roxanne Seig. While serving as an ethics counselor, Jaffe has also been a Chapter steward, Vice President and President, Altenburg and former Counselor Dan Schofield stewards, Resnick a union member, and Forster and Kemps LMR attorneys. Whatever privilege protects employees confiding with union represen-tatives generally, applies also to employees who talk to union representatives such as Jaffe, Altenburg or Schofield in their union representative capacity.

Counselors' position descriptions and performance standards are identical to those of other attorneys. They are evaluated on all work performed, including their ethics duties. Counselors usually spend between 15 and 25% of their official duty time on ethics matters. Counselors are not paid differently from other PBGC employees. Counselors receive ethics counselor training from OGE, from PBGC, and through the circulation of materials distributed by OGE. For example, they are provided manuals on the review of financial disclosure reports. They attend ethics conferences sponsored by OGE, and also discuss ethics questions and advice among themselves, with Resnick and Hertz, and with OGE.

The counselors must apply the ethics Standards. Thus, while they are valued for their judgment, they are not "free agents" and cannot make ethics "determinations" under the Standards or otherwise authorize or approve any action requiring approval under the Standards. Because ethics violations and discipline are not in their purview, counselors receive no training in investigation of possible ethics violations, discipline of employees, or taking "corrective action" for ethics violations. The counselors were told they were not and would not be the "ethics

7 Ethics Counselors could be, but at PBGC are not generally, called Deputy Ethics Officials.

police." However, counselors, like all Federal employees, have a duty to disclose waste, fraud, abuse and corruption to appropriate authorities. 5 C.F.R. § 2635.101(b)(11). Jaffe, while acting as an ethics counselor, discovered through an inquiry by one employee that another (departing) employee had violated an ethics requirement. She properly reported that violation to a senior ethics official, who referred the matter to the Inspector General.

2. Training PBGC employees

Ethics Counselors' duties include training PBGC employees on the Standards of Ethical Conduct for Employees of the Executive Branch. 5 C.F.R. § 2635 and § 2638.701. They train new employees about ethics and also conduct annual ethics training for about half of the agency's employees, stressing at all times the importance of seeing an ethics counselor for guidance before taking any possibly improper action. Thus, new employees receive at their initial PBGC job orientation, copies of the "all employees" memorandum on "New Standards of Ethical Conduct for Employees of the Federal Government" and the OGE publication "Standards of Ethical Conduct for Employees of the Executive Branch." These documents and the introductory orientation program alert employees to their ethical responsibilities. They are then given a list of ethics counselors to contact for any questions. Employees also receive occasional "all employee" memos on ethics issues, which identify the ethics counselors. Finally, employees are told during their training that by obtaining ethics advice prior to engaging in conduct, the employee may obtain certain immunity pursuant to 5 C.F.R. § 2635.107(b) if it turns out, contrary to the counselor's advice, that the conduct was improper.

3. Responding to inquiries

Counselors receive telephone, electronic or in-person inquiries from employees on numerous areas including potential conflicts of interest and waivers, post-employment restric-tions, outside employment requests, seeking employment restrictions, and Hatch Act. The counselors gather the significant facts, research and discuss the situations with OGE, other sources, other counselors, Resnick or Hertz, and then formulate a recommendation. The counselor either gets formal written approval from Resnick or Hertz, or as the counselor becomes more experienced, may respond directly to the inquiry, copying Resnick or Hertz for their review. As noted above, employees may not be disciplined if they act in good faith based upon the advice of a counselor given after full disclosure. 5 C.F.R. § 2635.107(b).

4. Review of financial disclosure forms

Counselors' duties also currently include the first level review of financial disclosure reports, Forms 450 and 278. The counselor reviews the forms for completeness, obtains additional information from the filer if needed, drafts letters informing filers of potential conflicts of interest between the filer's financial interests and PBGC case duties, and then recommends approval of the disclosure form and memorandum by Resnick or Hertz. The counselors cannot approve the disclosure forms or conflict memorandums themselves.

5. Determinations

As noted in the "determinations" memorandum under § 2635.102(b) ethics determinations concerning Federal employees may be made only by the "Agency designees" -- Keightley, Hertz and Resnick. Areas of inquiry include gifts, waivers of disqualifying financial interests, authorizations to participate in matters despite conflicting financial interests or seeking employment with an employer involved in a matter, and permission to serve as an expert witness in cases. While requests for authorization and other "determinations" may come into the counselors, and the counselors may develop the facts necessary for the determination, they lack authority to make the required determination. It is clear that only the "agency designees," -- Keightley, Hertz and Resnick -- can make such determinations.

6. Outside employment requests

Ethics Counselors assist employees in drafting requests for approval of outside employment, when these requests are required under PBGC's ethics regulation, 29 C.F.R. § 2602.88. Counselors, again, cannot approve the requests. No employees have grieved denials of approval (and the record contains no evidence that approval has ever been denied) for outside employment, although employees can grieve a denial under the collective bargaining agreement.

C. Jaffe's specific duties and responsibilities as an ethics counselor

Jaffe started work as a staff attorney at Respondent PBGC around September 1990. Jaffe volunteered for ethics counselor duties and has performed those duties since about April 1991. Approximately 25 percent of her work time is spent on ethics work, including all the major functions of counseling, financial disclosure reporting and training. It

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8 This regulation sunsets on August 7, 1996. PBGC management has decided not to publish a supplemental regulation that would require employees to obtain approval before engaging in outside employment.

should be noted that in all aspects of the ethics duties, a counselor may be involved with nonbargaining unit as well as bargaining unit employees.

The most frequent ethics work done by Jaffe appears to be counseling employees and providing *ad hoc* responses to employee inquiries concerning ethics regulations. Concerning that part of her ethics duties, Jaffe testified that she receives approximately one ethics-related telephone inquiry every day. These inquiries may involve relatively simple issues, e.g., whether an employee may go to lunch with a particular person, or a more complicated one such as outside employment requests or whether an employee may work on a particular matter in which they have a financial interest. Typically Jaffe provides an E-mail response to the employee to confirm the telephone conversation and copy the same E-mail message to her supervisor, Resnick. If additional guidance has been omitted by Jaffe, Resnick will either remind her to provide such additional guidance to the employee or simply write the employee himself.

Jaffe reviews both SF-450's and SF-278's. SF-450's are due on October 31 each year and she reviews approximately 50 per year. Typically, Jaffe spends approximately 5 hours per week reviewing these SF-450's. If the employee does have a financial interest in one of the entities which PBGC regulates, a memorandum is sent to that employee from the ethics counselor advising the employee that they may not participate in PBGC cases affecting those entities. While there are fewer SF-278 filers, the reporting requirements are more extensive and as such the review process can be much more time-consuming. Currently, SF-278's are reviewed by ethics counselors in the Spring of each year (May 15).

With respect to the exercise of training responsibilities, Jaffe is involved in conducting training classes as well as preparing and disseminating informational memoranda and articles. Jaffe trains employees on the OGE Standards of Ethical Conduct, the criminal provisions of 18 U.S.C. §§ 203, 205, 207 and 208 as well as Hatch Act requirements. Jaffe does this once for a portion of PBGC employees and also provides a brief training session to new employees as part of their new employees' orientation (which could occur as often as four times per year). The record discloses that Jaffe drafts informational memoranda, such as the one authored by her on February 8, 1994, addressed to all PBGC employees concerning "The Hatch Act Reform Amendments of 1993." This particular memorandum contained, *inter alia*, a section regarding "Prohibited Activities" which provided, as follows:

PBGC employees may not:

use official authority or influence for the purpose of interfering with or affecting the result of an election;

knowingly solicit, accept, or receive a political contribution from any person, unless: 1) that person is a member of the same federal labor organization or federal employee organization as the employee; 2) that person is not a subordinate of the employee; and 3) the contribution is for the multi candidate political committee of the labor or employee

organization to which both the employee and person belong;

run for the nomination or as a candidate for election to a partisan political office; (footnote omitted) or

knowingly solicit or discourage the participation in any political activity of any person who: 1) has an application for any contract, ruling, license, permit, or certificate pending with PBGC; or 2) is the subject of a participant in an ongoing audit, investigation, or enforcement action being carried out by the PBGC.

* * *

This memorandum gives only an overview of the new law. Whether an activity is permitted likely, will depend on the facts of the particular situation. Therefore, since a violation of the Hatch Act may result in removal from your position, you should consult with an ethics official before engaging in any partisan political activities. If you have any questions, call Holli Beckerman Jaffe at extension 3952, or the Office of Special Counsel, the agency charged with administering the Hatch Act, at 653-8944. (Emphasis added)

In September 1995, Jaffe also prepared an article for the agency's "In Box" newsletter entitled "Permissible, Prohibited Political Activities Under Hatch Act" which covered the same subject matter.

On March 4, 1992, Jaffe in her role as ethics counselor also sent a memorandum, through Resnick and Hertz to five other PBGC managers concerning "Regulation on Stock Acquisition and Holding." The memorandum provided as follows:

> Attached is "Law Firm Policies Regarding Insider Trading and Confidentiality," published in the November 1991 issue of The Business Lawyer. We are distributing it to give you some ideas on how law firms are dealing with the problem of inside information. Although it is not perfectly analogous to our situation, we believe it is good background information for our March 10, 1992, meeting where we will consider a regulation to prohibit the acquisition and/or holding of stock by all or some PBGC employees.

On March 23, 1992, Jaffe sent a similar memorandum to the same PBGC managers entitled, "Synopsis of Inside Information

Regulation Meeting." The opening paragraph of this memorandum provided as follows:

> There is concern that PBGC employees who have access to inside information may use the information to acquire or sell stocks, bonds and other financial instruments, or that the access to such information may create the appearance of insider trading. As you know, such dealings would violate securities law in the former case, 15 U.S.C. §78u-1 et seq. (1988), and agency ethics regulations in the latter, 29 C.F.R. § 2602.6(a) (1991). On March 10, 1992, Jim Wolbarsht, Steve Faherty, Andrea Schneider, Phil Hertz, Jay Resnick and I met to discuss this topic and what steps the agency may take to prevent violations and/or appearance problems. (Emphasis added)

I see no policy making role that Jaffe played in connection with this memorandum.

D. Jaffe's responsibilities as NTEU Chapter 211 President

The NTEU is the exclusive representative of a bargaining unit about 400 professional and nonprofessional employees at Respondent PBGC. There are about 40-50 attorneys in the bargaining unit. Chapter 211 is an agent of NTEU for purposes of representing bargaining unit employees at PBGC. The current collective bargaining

agreement has been in effect since October 12, 1995. The prior collective bargaining agreement had been in effect since February 28, 1991 through October 1995.

Prior to October 1994, when she was elected Chapter President, Jaffe served as a steward and as both an appointed and elected vice president for Chapter 211. Thus, in March 1992, she was appointed to fill the unexpired term of a union vice-president. Thereafter in October 1992, she was elected to a new term as vice president -- this was the same election at which Bernsen was elected president.

During her tenure as vice president, Bernsen, as already noted, assigned Jaffe two cases to handle as steward because of ethics expertise. The record discloses that Jaffe is not the only ethics counselor who has acted in a dual capacity as an ethics counselor and Chapter official. In fact, it seems to be a common occurrence. Thus, Altenburg was also shown to have been asked by Chapter 211 to serve as a Chapter steward on a case because of his ethics expertise. Bernsen also expressed confidence in Jaffe by appointing her chief negotiator. No employees complained about any conflict of interest when Jaffe sought the office of President in the next election, running against Bernsen. Strange as it seems, her ethics duties were never an issue during the election campaign, but became crucial only after she had vanquished Bernsen. Only Bernsen, who did not testify, could tell us why this issue was overlooked at that time or for that matter, why he saw no conflict in Jaffe serving as she had prior to his losing to her in 1994.

Jaffe spends approximately 50 percent of her time performing Chapter work and is responsible for the overall management of the Union. Her duties, as defined in the Union Constitution, include, as follows:

> (1) To administer the affairs of Chapter 211 in accordance with the provisions of the National Constitution and Bylaws, and the Chapter Bylaws;
>
> (2) To issue proper notice calling meetings of the Chapter and the Executive Board pursuant to Article IV, Section 1(B); Article V, Sections 2 and 3(A); Article VI, Sections 4 & 5; and Article X,
> Section 3, of these Bylaws, and preside at these meetings;
>
> (3) To appoint and dissolve all committees and their chairperson, other than any standing committees created pursuant to these Bylaws, and to appoint all stewards and the Chief Steward;

(4) To represent and act as spokesperson for the Chapter in all matters, and signing all documents pertaining to the official business of the Chapter; and

(5) To perform all other duties as are necessary to protect and advance the interests of the membership.

Since becoming President in October 1994, Jaffe has negotiated various issues with PBGC. These have included negotiating an increase in Metro Check (transit subsidy); a new collective bargaining agreement; the reorganization of PBGC's Information Resource Management Division (IRMD); inclusion of PBGC Assistant General Counsel secretaries in the bargaining unit as well as alternative work schedules for such attorneys; including staff attorneys on the Legal Management System Committee and the Office of General Counsel Reorganization Committee. Two significant ethics-related issues which Jaffe negotiated on behalf of the Union included the "Standards of Conduct and Outside Employment" provisions (Article 45) of the collective bargaining agreement as well as a new outside employment regulation.

The most recent collective bargaining agreement negotiations at PBGC took place from April 1995 through October 1995. While Jaffe was not the chief negotiator for

NTEU, she did participate in all the negotiating sessions. During these negotiations, Article 45[9]("Standards of Conduct and Outside Employment") which had existed in the previous contract was removed at the Union's request. Also, since

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[9] Article 45 ("Standards of Conduct and Outside Employment") provided as follows:

> Section 45.1
>
> It is the responsibility of each employee to: (1) know and be aware of the PBGC's regulations on the Responsibility and Ethical Conduct of Employees (29 CFR Part 2602) and on Post-Employment Conflicts of Interest (29 CFR Part 2604); and (2) adhere to the standards of conduct and rules contained therein.
>
> Section 45.2
>
> A. Employees are required to notify and secure approval from the Employer prior to entering into outside employment.
>
> "Outside Employment" includes among others:
>
> (1) Self-employment,
>
> (2) Employment with or without compensation.
>
> B. The Employer agrees to apply its authority to control outside employment by bargaining unit employees in a fair and equitable manner.
>
> C. The Employer will approve or disapprove any written request of an employee to engage in outside employment within five (5) workdays of the Employer's receipt of the request, unless the employment involves the application of professional skills utilized by the employee in his/her regular duties. In such instances, a decision will be issued within (15) workdays.
>
> D. The request to work outside of PBGC will only be denied by the Employer for just cause.
>
> Section 45.3
>
> Employees shall not engage in any outside employment or similar type outside activities requiring advance approval, with or without compensation which:
>
> A. interferes with the efficient performance of

becoming Chapter President in October 1994, Jaffe has negotiated, on behalf of the Union, a new outside employment regulation with PBGC. These negotiations were conducted one-on-one with her supervisor and Alternate Agency Ethics Official Jay Resnick.

Finally, as President, Jaffe controls access to the grievance-arbitration machinery in the parties' collective bargaining agreement. This includes: responding to the initial requests for representation from PBGC employees; conducting an initial interview with such employees; determining which steward has related expertise to handle the matter; and ultimately making such a steward assignment. On average, Jaffe conducts at least two meetings per week with employees in her office as Chapter President.

E. Ethics related discipline of Respondent PBGC employees

While the undersigned sees no real relevancy in citing disciplinary actions of Respondent PBGC employees *ad nauseam,* the parties apparently thought it useful so it is included in the factual presentation although it does not appear to the undersigned as either relevant or helpful.

Since 1991, the PBGC has taken action to discipline employees on five separate occasions regarding their alleged failure to adhere to the OGE prescribed standards of ethical conduct. PBGC's authority to take such actions, pursuant to the OGE regulations, was spelled out in the February 1, 1993, Memorandum from Ethics Counselor Bruce Campbell, provided in relevant part, as follows:

> . . . The most important principle for employees to keep in mind is that employment with PBGC is a public trust requiring employees to place loyalty to the Constitution, laws, and ethical principles above private gain.
>
> If an employee fails to comply with the Standards, the PBGC may initiate appropriate corrective and/ or disciplinary action. Corrective actions are any actions that the PBGC determines are necessary to correct a past or continuing violation of the Standards. Corrective actions may require payment of moneys, change of assignment, disqualification, divestiture, termination of an activity, counseling, or the creation of a diversified or blind trust.

> 5 C.F.R. § 2635.102(e). Disciplinary actions that PBGC may undertake include reprimand, suspension, demotion and removal from position. 5 C.F.R. § 2635.102(g). In addition to the administrative actions that may be imposed by PBGC, an employee may be subject to civil or criminal penalties, including monetary fines, for violating any of the criminal statutes. 5 C.F.R. § 2635.106.
>
> Consequently, employees should consult with one of the PBGC's ethics counselors prior to engaging in any questionable conduct. An employee may not be discipline for acting in good faith reliance on the advice of an ethics counselor, provided the employee disclosed all relevant circumstances to the counselor. 5 C.F.R. § 2635.107(b). However, good faith reliance on an ethics counselor's advice is not a defense to criminal prosecution. You should also note that discussions with PBGC's ethics counselors are not protected by the attorney-client privilege. Agency ethics officials are required by statute to report criminal violations to the PBGC's Office of Inspector General. 5 C.F.R. §§ 2635.106 and 2635.107

These PBGC disciplinary actions have included reprimands, suspensions, demotions and removals. PBGC's disciplinary process -- investigations, proposals, responses, decisions and grievances -- is described in great detail in Articles 22 and 55 of the collective bargaining agreement. Ethics counselors are not involved in any aspect of discipline. Grievances or discipline involving ethics issues are a very rare occurrence. In this regard, since 1991, only four PBGC employees have been disciplined for misconduct which, *inter alia*, violated ethical standards. Of these, one occurred in 1991, three years before Jaffe became President, and was grieved but not arbitrated; another involved a nonbargaining unit employee; a third involved an employee who resigned and did not grieve the discipline; and the fourth settled prior to the filing of a grievance. A fifth employee received a proposal to suspend, but the employee resigned before contacting the union to reply to or contest the proposal and before serving the proposed suspension.

Discipline at PBGC, and specifically discipline in these cases, is done by "LMR Team" attorneys, not ethics counselors, and certainly not Jaffe. Ethics Counselors are not asked to, and do not, assist or participate in any disciplinary investigations or actions at PBGC. Moreover, no discipline of a PBGC employee has resulted from an ethics counselor reviewing an employee's financial disclosure form or

from an ethics counselor responding to an employee seeking counseling.

The undersigned finds little relevant connection between the disciplinary actions cited and the conflict of interest allegations herein.

F. Recusal policy of PBGC

As noted above, Respondent PBGC has several ethics counselors at any given time. Jaffe and Altenburg are also NTEU officers or stewards, as was Schofield; Forster also does LMR work, as did Kemps.

Many ethics assignments arise from initial contacts by employees with the counselor. If an employee calls an ethics counselor about a matter on which the counselor is already working on in their "union" or "management" capacity, the counselor will recuse and advise the caller to contact one of the other counselors. Written assignments, such as review of a financial disclosure form, come from Resnick or Hertz, often assigned based upon the counselor's areas of expertise. If the assignment involves a matter the counselor has previously encountered in their union or LMR capacity, that counselor will disqualify himself or herself and the matter will be reassigned to a different ethics counselor. Jaffe stated that she routinely clarifies whether an employee was coming to her as a counselor or as a Chapter official. This common sense approach to disqualification seems appropriate.

Similarly, Jaffe (or Altenburg or Schofield) may theoretically receive a request for representation from a unit employee in a matter she has learned of, or worked on, as an ethics counselor. Jaffe testified she would recuse and refer the employee to one of the other Chapter 211 officers or stewards. Also Forster or former Ethics Counselor Kemps, if assigned an LMR matter previously encountered as an ethics assignment, can ask Resnick to reassign the LMR work to one of the several other LMR attorneys. Since the counselors have become expert in the area of real and apparent conflicts of interest, their responsible use of the above-described recusal policy has insured that they do not work on any matter improperly, and employees are aware of this fact. Thus, it can be argued that because of the recusal policy there have been no complaints about assignments or conflicts.

In addition, because employees acting in good faith on ethics advice cannot be disciplined for those actions, it is unlikely that an employee who received ethics advice from Jaffe would later file a grievance involving that advice. It is undisputed that Jaffe has never provided ethics advice which has resulted in a grievance.

G. Labor Relations

Labor relations at PBGC are handled in PBGC's Human Resources Department (HRD). See, e.g., the signature block of the current collective bargaining agreement. LMR attorneys, supervised on LMR matters primarily by Hertz and Resnick, may be asked to assist HRD. Ethics Counselors are not involved in labor relations, negotiations with the Union, or discipline of employees at PBGC. Ethics Counselors are located within O.C., not in HRD. Within the strictures of the collective bargain-ing agreement, PBGC departments have labor-management joint committees and occasional discussions or negotiations with representatives of the Chapter. For example, within Office of the General Counsel (herein called) OGC, Hertz has negotiated or discussed with the Chapter and with Jaffe a charter and membership for a joint IRM committee, a charter for an OGC organizational study team, and the membership of the OGC training committee.

H. Office of Government Ethic's opinion

While not dispositive of the issue in this case, it appears that Resnick and Jaffe, in considering how to respond to this case sought guidance from United States Office of Government Ethics (hereafter called OGE).

The OGE "is an executive branch agency which is responsible for overseeing and providing guidance on Governmental ethics for the Executive Branch, including the ethics programs of executive departments and agencies." 5 C.F.R. § 2600.101 (emphasis added). The Ethics in Government Act "created OGE to provide overall direction for executive branch policies designed to prevent conflicts of interest and to help ensure high ethical standards on the part of agency officials and employees." (Emphasis added).

After Jaffe described her duties as an ethics counselor, her duties as Chapter President and the Regional Director's concern in this case to OGE, OGE opined that Jaffe's serving as Chapter President while also serving as an Ethics Counselor did not either (1) create an appearance problem violating 5 C.F.R. § 2635.502, or (2) constitute a conflict of interest in violation of 5 U.S.C. § 208. Jaffe's consulting with OGE was proper, since OGE is the only Federal government agency with specific authority to guide executive agencies regarding the prevention of conflicts of interest, and because of OGE's extensive experience in this area. Further, OGE has extensive experience and specific delegation to decide such questions. OGE's conclusion that Jaffe serving as both an ethics counselor and Chapter President did not present a conflict or appearance of a conflict was particularly reassuring to her. Additionally, OGE's conclusion on Jaffe's matter seemed consistent with

its prior audits of PBGC's ethics program where it had previously no conflict or apparent conflict with Jaffe serving as a union representative or officer while also serving as an ethics counselor.

Additional Findings of Fact and Conclusions

When armies are mobilized and issues joined,
***The man who is sorry over the fact will* win.**
From the Way of Lao-tzu, translated by Wing-Tsit Chan.

The General Counsel's theory of the case is that if an objective standard is applied to the matter, Jaffe's dual roles would create an apparent conflict of interest within the meaning of section 7120(e) of the Statute when viewed by a reasonable employee.

The Charging Party mistakenly sought to enlarge that theory by contending that a real conflict of interest existed and sought to present evidence in that regard. It appears that this Charging Party, upon discovering that the General Counsel did not intend to pursue its version of the case, that a real conflict of interest existed, discarded the General Counsel like a used paper plate after a company picnic and proceeded on a frolic of his own thereby, creating collateral issues, disregarding the processes of the tribunal and generally prolonging this matter. In short, when the record as a whole is reviewed, it becomes clear that the Charging Party's participation in this matter although far-reaching had no relevance.

The Authority's rules and regulations plainly do not allow a charging party to participate in a hearing to the extent this Charging Party attempted to involve himself in the prosecution of this case. First, section 2428.18 requires the General Counsel rather than the Charging Party to present evidence to support the complaint and to meet its burden of proof by a preponderance of the evidence. Second, section 2423.16 limits participation of any party in a hearing to that determined by the administrative law judge. The Charging Party declined to follow the court's instructions with regard to offers of proof and rejected exhibits, preferring it seems, to handle it his own way. I hereby find that the materials contained in the rejected exhibit file are irrelevant to this procedure and have not been reviewed by me but are available for the Authority's perusal, if it cares to examine these exhibits. Obviously, the Charging Party either was not aware of or chose to totally ignore the Authority's rules since it repeatedly and unsuccessfully sought to amend the consolidated complaint and expand the scope of the matter despite continued

admonishment that it could not do so and that it would not be allowed to try this matter on a different theory than that of the General Counsel. The General Counsel's opening statement and his theory of the case both indicate that he considered and rejected the argument that a real conflict of interest existed in this matter. Case law is quite clear that a charging party cannot seek to amend a complaint where the General Counsel has final authority over the investigation of charges and the issuance of complaints. *Kimtruss Corporation, 305 NLRB 7101 (1992); Metal Workers, International Association, Local Union 28, AFL-CIO, 306 NLRB 9816 (1992); Manor Care Center, 308 NLRB 884 (1992); Mark P. Turegon v. Federal Labor Relations Authority, 677 F.2d 937 (D.C. Cir. 1982).*

In this case, the Charging Party left no doubt that he did not agree with the General Counsel's handling of the case. His attempts to enlarge the complaint and to place extraneous matter in the record reveals that he was in pursuit of a private matter not included in this consolidated complaint, thereby rendering his participation totally irrelevant, redundant, or both. The Charging Party clearly revealed his lack of understanding of the process when he asserted, ". . . I have an obligation as an attorney and as Charging Party to try to prove exactly what the detailed or specific duties are." Without question, the Charging Party's sought to use subpoenas for discovery purposes, which is forbidden. Furthermore, Bernsen showed his disdain for the process when he was so presumptuous as to respond to the court's limiting of irrelevant questioning that, " . . . since you know what the theory of the case is and you know what evidence and proof is needed, why don't we all leave and just have you question the witness." The undersigned considers this statement as disrespectful to the tribunal and an indication of the unprofessional demeanor of Bernsen.

In addition, the Charging Party's voluminous subpoena requests totally tracked those of the General Counsel and proved to be investigatory or for irrelevant or confidential information or for information which had already been subpoenaed by the General Counsel, making them repetitious, cumulative and a waste of time for everyone concerned. Further, the Charging Party did not follow the tribunals instruction regarding offers of proof and placing matters in a rejected exhibit file. Since the undersigned rejects the offer of proof as irrelevant, it is unnecessary for me to do more than make sure that the Authority receives the rejected matter to use as it deems appropriate. Similiarily, its requests to amend the complaint and to present evidence of its own on matters not included in the complaint, which were

denied again and again, contributed to unduly prolonging what was nothing more than a single issue case. Furthermore, the Charging Party wasted more time in briefing a theory of the case which had been repeatedly rejected, confirming that it had no understanding of the rules and regulations of the Authority. Thus, we have a case which should have been heard in a fraction of the time required to finish this matter.

Finally, hard feelings between the parties were unnecessarily engendered, in my view, not only by the Charging Party's failure to understand the process, but by arrogant behavior and refusal to listen, and a "shot gun" approach in attempting to change all of the rules to suit the Charging Party's case. The efforts by the Charging Party here were nothing more than feeble attempts to compromise the prosecutorial independence of the General Counsel and as readily seen, to convert the proceeding into private litigation between itself and the Respondents.

While I recognize that Counsel for the Charging Party has little experience in labor relations matters, it is necessary to rebuke both Counsel for the Charging Party and the Charging Party that preparation for trial requires more than words and catch phrases, but involves some research and preparation on relevant matters and issues and, more importantly knowledge of the procedures of the agency or tribunal before whom they are practicing. I saw little evidence of that here. What was observed, however, was two individuals, both the Charging Party and Counsel for the Charging Party, who for reasons known only to themselves, were determined to make this their own private case. Unfortunately, the undersigned is obliged to conclude that the Charging Party's participation shed no light on the issues before me, and were no more than ineffective attempts to turn this matter into a private party litigation, thereby, severely compromising the prosecutorial independence of the General Counsel. It is found, therefore, that the Charging Party's efforts in this case were not only disruptive but, of no consequence in resolving the issues presented by the General Counsel.

All of my concern in this matter is not reserved for the Charging Party and his Counsel, for I am unable to completely ignore or to excuse the conduct of Respondents' Counsel in this matter. Thus, the participation of Respondents' Counsel cannot be said to have aided the expeditious handling of the case. Experienced counsel for both Respondents took the Charging Party's bait and helped create a circus atmosphere among the three parties, which this tribunal must have been expected to referee.

Fortunately, Counsel for the General Counsel remained on the side line during these displays. Consequently, the record is replete with pointless motions and senseless subpoena requests which were no more than a waste of the tribunal's time and therefore, irrelevant. Nor can I say that their conduct was solely the result of or prompted by the behavior of the Charging Party or his Counsel, for in that regard we are all responsible for our own behavior. In any event, it is my view, that there was nothing either sagacious or benevolent about the party's tactics or behavior and, their

personal animosity toward each other over this case, as shown on this record, was nothing less than shameful.

The General Counsel had no evidence of a real conflict of interest in this matter. Nor did it endorse the Charging Party's view that a real conflict of interest existed. After reviewing the record in this matter, the undersigned reaches the conclusion that the alleged violation of an apparent conflict of interest also has no merit. It does in fact, appear to have been created by a defeated and embarrassed office holder in reprisal for his loss of the 1994 Chapter election. The record is replete with assumptions, guesses and inaccuracies apparently seeking to embarrass, humble and defeat an adversary more than to resolve the alleged unfair labor practice. The parties stumbled through this matter simply because it was unclear what the particular violation was and what it would take to prove by a preponderance of the evidence that an actual violation of the Statute occurred.

The core of the General Counsel's case is that examination of the two institutions involved leads to the inevitable conclusion that Jaffe does serve divergent interests and, therefore, her loyalties must be divided. The record, in my opinion, discloses no duty that Jaffe now performs as an ethics counselor, that she had not performed prior to her election as President of Chapter 211 when she was also serving as an ethics counselor. Furthermore, it is uncontroverted that Bernsen, as Chapter President utilized Jaffe in high union positions and took advantage of her ethics experience to aid the Chapter despite his present claim that Jaffe's now serving in both capacities is an unfair labor practice. It was only after Jaffe defeated him in the Chapter election that he noticed any impediment to her ability to perform in both capacities. Bernsen's only argument seems to be a hyper technical and senseless one that the only Chapter officer with responsibility for managing is the Chapter President because Jaffe when elected President had already served in several responsible union positions while she was employed as an ethics counselor.

Section 7120(e) does not only prevent the management but, "does not authorize participation in the management . . ." Jaffe was a Chapter vice-president, a similar position to that held by the EEO Counselor in *Health and Human Services*, 6 *FLRA* 30 (1981) (herein called *HHS*) relied on by the Charging Party belies this theory. The administrative law judge there found that the vice presidency of the union was a major office, but found no violation after considering the reasonableness of the agency's action therein. *HHS* is discussed in greater detail, *infra,* pp. 36-37. Additionally, it is uncontroverted that Jaffe participated in other Chapter roles in Bernsen's administration without so much as a word about conflict of interest. Obviously, Bersnen did not look "at the broad picture to see if [the] employee's official position and [her] union positions are by nature adversial," as he now implores the undersigned to do, when he assigned Jaffe to work for the Chapter, taking advantage of her ethics expertise. Or when he assigned her as chief negotiator for the Chapter while she was an ethics counselor. Most certainly Jaffe could have been perceived as participating in the management of the Chapter when she served as a vice president, but that is not the issue here. In this regard, Bernsen argues that laches and clean hands do not apply and, in that regard he is correct. What does apply, however, is Bernsen's poor judgment if that was the case, in not revealing his concern before his defeat, that a conflict existed in Jaffe's dual roles. He can hardly claim a "chilling" effect when it must be assumed that the employees who voted in the election were aware of Jaffe's dual roles. In my opinion, it is too late to lock the barn door. Certainly a great deal of energy was spent on this case by the Charging Party, when he suddenly realized, after Jaffe had beaten him, that Jaffe's loyalty was somewhere other than with Bernsen. It has often been observed that no one is more zealous than a new convert and Bernsen seems to confirm such a statement by the ardor of his efforts to debunk Jaffe, seemingly because she embarrassed him by winning the election. In all the circumstances, Bernsen's claims simply reveal his inability to accept the fact that he did lose the election to Jaffe and, therefore, lacks objectivity. Specific reasons for not finding a violation herein are set out as follows:

A. Jurisdiction

Authority jurisdiction in matters involving section 7120(e) of the Statute has long been established. *Department of Labor*, 20 FLRA 296 (1985), *AFGE Local 2513 v. FLRA*, 834 F.2d 174, 126 LRRM 3217 (D.C. Cir. 1987). The Authority found that "[s]ection 7120(e) of the Statute

expressly prohibits management officials, supervisors and confidential employees both from acting as a representative of a labor organization and from participation in its management." It then held that the agency violated section 7116(a)(1) and (3) by allowing its supervisors to vote in an internal union election. Finally, it found that the voting, constituted "participation in the management" of a union and was "thereby proscribed by section 7120(e)" and, therefore, amounted to "sponsorship, control or, at the very least, assistance of the union in violation of section 7116(a)(3)." Although the D.C. Circuit reversed the Authority, holding that it "simply [and wrongly] assumed the propriety of its finding that voting is 'participation' pursuant to section 7120 and amounts to an unfair labor practice," it did not, however, disturb the Authority's holding that section 7120 (e) "expressly prohibits" supervisors from participating in the management or representation of a labor organization and that it would be an unfair labor practice for an agency to permit them to do so.

Both Respondent PBGC and Respondent NTEU assert that the Assistant Secretary of Labor has either exclusive or primary jurisdiction over the factual issues herein. Both Respondents also maintain that the allegations here are more properly presented to the Assistant Secretary of Labor in the context
of the Charging Party's challenge to the 1994 Chapter 211 internal election.

The General Counsel, on the other hand, asserts that this is precisely the type matter that the Authority should hear.

As the Court stated in rejecting similar jurisdictional arguments to those made in the case at bar:

> [w]e do not view section 7120's role so narrowly. Several sources belie the Union's position. By its own terms, subsection (e), the subsection at issue, reaches beyond section 7120 to embrace all of Title VII of the CSRA. See, 5 U.S.C. §7120(e) ("[t]his *chapter* does not authorize participation in management . . ." (emphasis added)). The Union's neglect of this language violates the canon of construction requiring that "'effect must be given, if possible, to every word, clause and sentence of a statute' so that no part will be inoperative or superfluous, void or insignificant." (citation omitted)

> Furthermore, in failing to consider subsection 7120(e)'s reach, the Union ignores Congress' general objectives in enacting the CSRA. (Citation omitted) Title VII defines the whole of labor-management and employee relations in the federal sector. See 5 U.S.C. §§ 7101-7135. Toward the end of protecting federal employees' rights and enforcing their obligations to the government, at 7101(a), (b), Congress created the FLRA. At §7105. It is clearly Congress' will that "the Authority shall provide leadership in establishing policies and guidance relating to matters under this *chapter*." at § 7105(a)(1) (emphasis added). The Authority is further charged with the duty to "take such other actions as are necessary and appropriate to effectively administer the provisions of *this chapter.*" § 7105(a)(2)(I) (emphasis added). These purposes cannot be reconciled with the Union's construction of section 7120, disallowing all FLRA administration of that section.

The Court applied principles of statutory construction in concluding that the Authority did properly exercise jurisdiction over the section 7120(e) matter. In the instant case, the Assistant Secretary although allowing that concurrent jurisdiction exists, expressly declined jurisdiction on the section 7120(e) deferred to the Authority on the unfair labor practice allegations. I am therefore, constrained to follow the Authority's direction in the matter and, accordingly, find that the Authority has jurisdiction to address the alleged unfair labor practices herein.

B. Timeliness

The claims that the instant consolidated complaint is time barred under section 7118 of the Statute is short of the mark. Section 7118(a)(4)(A) bars the issuance of a complaint where the alleged unfair labor practice occurred more than six months before the filing of the charge. Here, the alleged unfair labor practice involves an apparent conflict of interest . . . with the duties of the employee because PBGC continued to assign Jaffe the duties of an ethics counselor while she served as Chapter President performing representa-tional duties which were allegedly in conflict with her role as an ethics counselor.

Jaffe began as ethics counselor in April 1991 and there have been no substantial changes in her ethics counselors' duties since that time. She became Chapter President in October 1994. Prior to October

1994 she was a Chapter Vice President from March 1992 to October 1994, chief negotiator for a period, and a Chapter steward since late 1990. Bernsen made her chief negotiator and asked her to represent the Chapter in at least two matters because of her ethics expertise. Each of Jaffe's Chapter positions involved participation in the management of, and acting as a representative of a labor organization. The consolidated complaint addresses only the period in which Jaffe acted as both Chapter President and agency ethics counselor which period began within six months of the filing of the charges. In these circumstances, it is found that the instant matters are not time barred under section 7118 of the Statute.

C. Did Respondents violate section 7120(e) by allowing Jaffe to serve as an ethics counselor while she was also president of the Chapter

1. The applicable legal Standard is that of an objective reasonable person, with knowledge of the facts

Section 7120(e) prohibits an employee from participating in union management where participation creates an "apparent conflict of interest." This prohibition is triggered where an objectively reasonable person would view the facts as creating such a conflict. *See U.S. Dept. of Treasury, 41 FLRA 402, 414 (1991)* (conduct judged by reasonableness considering all circumstances); *Lane. v. Dept. of Army, 19 M.S.P.B. 161, 162 (1984)* (applying reasonable person standard). It is not triggered by subjective suspicion. *See United States v. Smith, 653 F.2d 126, 128 (4th Cir. 1981*) (rejecting a subjective belief standard under Code of Professional Responsibility); *accord FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1316 (5th Cir. 1995)* (rejecting "cynical person" standard under same). The objectively reasonable person is presumed to know the duties in question and related policies and procedures. For example, in *Merit Systems Protection Board v. MSPB Professional Assn.*, 12 FLRA 137, 141 n.7 (1983). The Authority stated:

> [S]uch [apparent conflict] would only occur to parties which might not understand [the duties of the position]. Any such [apparent conflict] is further dispelled by knowledge of the process by which Agency management reviews the work product of [the employee].

Therefore, mistaken impressions or subjective beliefs about the nature of the duties or governing rules and laws are irrelevant.

At best, an apparent conflict of interest is such a nebulous term as to almost defy definition. Relying on the American Heritage Dictionary, Apparent means 1. Readily seen; open to view; visible. 2. Readily understood or perceived; plain or obvious. Understandably, such an

apparent conflict was not readily seen in this case for as already noted, two different bodies reviewed the situation and both found that Jaffe's wearing both hats was not a conflict of interest.

More recently, the Authority concluded that in order to determine whether a section 7120(e) conflict or apparent conflict of interest applies in a given case, Respondents' "conduct must be judged by the reasonableness of its action in all the circumstances." *See Office of Chief Counsel, 41 FLRA 402 at 414, quoting from HHS.*

If one applies the unequivocally objective standard articulated in these cases to Jaffe's situation, there would be no apparent conflict of interest. Basically, the evidence that is offered to show an apparent conflict in this case seems to come from an intrinsic evaluation of the facts by both the General Counsel and the Charging Party. Consequently, it is my view that what the evidence in this case lacks is objectivity after knowing all the facts. Especially since Jaffe's ethical conduct, like that of all other federal employees, is governed by OGE's Standards of Ethical Conduct for Employees of the Executive Branch. 5 C.F.R § 2635.502 states that an appearance of a conflict of interest exists where:

> circumstances would cause a reasonable person with knowledge of the relevant facts to question (an employee's) impartiality in the matter. . . .

It is my view that no "reasonable person with knowledge of the reasonable facts," would conclude that Jaffe's occupying the Chapter presidency and ethics counselor at the same time would create an apparent conflict of interest. The essence of the Charging Party's case went out the window with the section 7116(3) violation that it withdrew. It is clear that the Charging Party wants the Authority to find that Jaffe's was somehow under the control of management and, therefore, could not effectively manage the Chapter. Thus, there is no evidence that Jaffe or the Chapter was dominated by PBGC management or that Jaffe acted in any fashion to create such a conflict. Moreover, the General Counsel found no reason to proceed on a theory that there was any domination or a real conflict of interest.

Two things are worthy of note. It is impossible to say that Jaffe had not have exercised management responsibilities for the Chapter for sometime before she became Chapter President. It is also not surprising that not even Bernsen contends that Jaffe was merely a figure head vice president, for the record disclosed that Jaffe did indeed exercise a great deal of responsibility as the Chapter's vice president, as its chief negotiator for example. Second, as previously discussed, ethics counselors are not involved in investigating, processing or prosecuting disciplinary actions.

Hence, the only way Jaffe could have a conflict regarding these cases is if these employees had relied on her ethics advice to their disciplinary detriment. The instant record does not show that this has ever happened. Furthermore, it does not reveal the possibility of this ever happening.

The Charging Party asserts that enforcement[10] is an essential component of the PBGC ethics program. There is no doubt that this is so, however there is no evidence that Jaffe has any enforcement responsibilities. Furthermore, Jaffe's referral of employees to the Inspector General does not endow her with enforcement powers.

Finally, Resnick testified, and OGE's government-wide regulation promises, employees will not be disciplined when they rely to their detriment on the advice of ethics counselors. Finally, the record demonstrates that ethics counselors have long exercised a practice of recusing themselves from issues which they previously worked in other capacities. Jaffe testified and it is undisputed that she never works an issue where the employee involved had initially seen Jaffe in her union capacity. In that capacity, she retains an absolute privilege of confidentiality. Nor is there any showing that she ever would act as a representative in a case where she had previously advised the employee as an ethics counselor. Instead, she would refer the employee to another steward. Jaffe added that if she is unsure whether an employee is seeking her advice as an ethics counselor or union representative, she will inquire as to the capacity sought and remain true to the ethical responsibilities of the one chosen.

Appearances often are deceiving,
Attributed to Aesop, The Wolf in Sheep's Clothing.

In my view, the General Counsel and the Charging Party are on the wrong track in this case. The evidence presented here is based on pure speculation that a possible conflict of interest might exist and does not reveal any readily apparent conflict. Thus, there is substantial conjecture as to what might happen, if a certain set of circumstances

10 While there was considerable semantic debate over whether the PBGC ethics program is involved in "enforcement" the regulations and circumstances support the finding that there is indeed an enforcement aspect here. The American Heritage Dictionary defines "enforce" as follows:

> 1. To compel observance of or obedience to: *enforce a regulation*. 2. To impose (specified action or behavior); compel . . . 3. To give force to; stress; underline; reinforce.

It appears that all the activities of the PBGC ethics program, including counseling, financial disclosure reporting, and training, have some "enforcement" aspect as discussed *infra*. For example, the financial disclosure reporting has the fundamental purpose of "compelling observance" of the Title 18 conflict of interest provisions.

exists and not that a readily seen apparent conflict exists. For example, the Charging Party speculates that employees with a grievance might not have confidence that Jaffe would handle their grievance conflict free. However, because of the agency's recusal policy as it is said to be practiced, such a situation could not occur since Jaffe would be recuse herself in such a situation. The mere fact that a remote chance exists that the Chapter President would be involved in a certain situation if a grievance were to be filed by a bargaining unit employee does not establish an apparent conflict of interest. Section 7120(e) seems to come into play where a labor organization or an agency complains that an employee's conduct either interfered or appeared to interfere with that employees' ability to perform assigned duties or created or appeared to create an impediment to that employees management of the labor organization. Furthermore, in my view 7120(e) has not been confined to the President of a labor organization for certainly there are other officers in the organization who take part its management.

It is particularly worthy of note that both the Respondent Union and Respondent Agency, each representing a different side of the coin, found that Jaffe's performance of her duties in one capacity does not create an apparent conflict of interest in the other. Each therefore decided to keep her in the position because they saw no apparent or real conflict, based on what each thought constituted a conflict or apparent conflict. Neither the General Counsel nor the Charging Party offered any evidence to show that the actions of these two Respondent's were not reasonable in all the circumstances which would, in my opinion, be necessary to establish by a preponderance of the evidence that an apparent conflict of interest exists herein.

The Supreme Court made it clear that a "common sense" approach in labor relations suggests that an employee can wear two hats without there being divided loyalty. *See Town & Country Electric., Inc., 116 S.Ct. 450 (1995)*. The essence of the arguments by the General Counsel and the Charging Party is that Jaffe has the appearance of divided loyalty, and although the undersigned does not think that the evidence supports such a theory, the Court has said that in some circumstances there is nothing wrong with wearing two hats. It is my opinion that this would be one of those circumstances. To apply the "single minded loyalty" standard suggested by the Charging Party in this matter is totally impractical in the Federal sector. Under the single minded view, it would be required that Federal unions serviced only by full-time paid union staff probably would signal the end to collective bargaining in the Federal sector where most union officers are Federal employees. A holding such as proposed by the

General Counsel and Charging Party also would prevent an inordinate number of bargaining unit employees from holding union office, if they so desired. I do not believe that Congress had this in mind when it passed section 7120(e). In *Town & Country Electric, supra,* the Court upheld the NLRB's determination that paid union organizers, sent to apply for employment with an employer, to organize that employer's employees, were still entitled to all protections under the National Labor Relations Act as employees. In rejecting the employer's claim that the paid organizers would have divided loyalties, both the Board and Court noted that the organizer-employees would owe loyalty and duties to the employer during work hours, like all other employees, but could organize at other times:

> [a] person may be the servant of two masters . . . at one time as to one act, if the service to one does not involve abandonment of the service to the other. . . . Common sense suggests that as a worker goes about his ordinary tasks during a working day . . . he or she is subject to the control of the company employer, whether or not the union also pays the worker. The company, the worker, the union all expect that to be so. And, that being so, that union and company interests or control might sometimes differ should make no difference.

Here too, Jaffe does her government work, including ethics work, on her government time, and her representational work on her "union" time. She either performs the duties of an ethics counselor or duties of a Chapter official, but never performs both roles in the same matter. Because she never acts as both, an ethics counselor and a union official on the same matter, under *Town & Country, supra,* there would be no divided loyalties' problem. The Charging Party attempts to distinguish this matter by contending that Jaffe's divided loyalty exists because she continually performs labor-relations and personnel type activity during working hours for both the agency and the Chapter. The record does not support the assertion that Jaffe performs personnel type work. Therefore, it is rejected. *Town & Country*, *supra,* seems to put to rest the arguments assuming a *per se* appearance of a conflict of interest where an employee is simply working for "two masters." In this regard, what was offered here was pure speculation which when held up to a "common sense" or "reasonable person" standard would not establish an appearance of a conflict of interest.

In addition, when Jaffe performs representational duties, the same "privilege" which is claimed to shield Bernsen from his duty to report certain matters, also shields Jaffe. Therefore, her two roles do not conflict. I agree with the Respondents that employees given even fewer facts than were disclosed in the instant hearing, would understand that the ethics counselor's role is simply to prevent

violations of the Standards of Conduct and criminal conflict of interest laws. Therefore, they would know that after a Standard or law is violated, the matter is no longer one for ethics counselors, but rather one that would be handled by an appropriate representative such as the Inspector General. Thus, because ethics counselors have no role to play in disciplinary matters, and a reasonably informed objective employee would understand that no apparent conflict of interest exists simply because Jaffe is a Chapter President as well as an ethics counselor. Finally, it cannot be convincingly argued that Jaffe as Chapter President would automatically reject a grievance or even not arbitrate a grievance because of ethics experience. Since we are speculating it could be equally unconvincing to argue that Jaffe could be more aggressive with an ethics related grievance.

This same analysis serves as a rejoinder to the Charging Party's assertion that Jaffe's dual role as an ethics counselor has the appearance of compromising and undermining her ability to negotiate vital workplace issues such as outside employment regulations. It also answers the Charging Party's concern that Respondent PBGC's main defense is based upon its contention that its ethics counselors do not have authority to make "determinations" on behalf of the program. Nothing in the record shows that Jaffe, as an employee is less responsive to her agency employer's needs or has greater latitude to make ethics related decisions than any other ethics counselor employed by PBGC. In short, the Charging Party uses conjecture to assume that a reasonable person will see Jaffe's role as one rife with conflict. I do not agree with that assessment of the matter.

With regard to whether Jaffe's Chapter President's duties are incompatible with her duties as an ethics counselor, the same analysis can be utilized. There is absolutely no showing that Jaffe is any less responsive to the needs of the labor organization or no illustrations that the management of the labor organization would suffer because of her duties as an ethics counselor.

While "incompatibility" was not specifically argued by the parties, it must be assumed that the General Counsel is seeking to establish that Jaffe's official duties are in conflict with her Chapter duties simply because of some incompatibility between those two duties. I find nothing in 7120(e) requiring an agency to delve into the internal matters of a union and make an independent determination that the participation of one of its employees is incompatible with the employee's duties. The Authority has routinely dealt with cases containing section 7120(e) issues in an unfair labor practice setting and has found that an agency may violate

the Statute by asserting that a conflict exists. *U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office*, 41 FLRA 402 (1991); *Department of Health, Education and Welfare*, 6 FLRA 628 (1981); *Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri*, 8 FLRA 42 (1982). Here the agency has never asserted that such a conflict exists even though Jaffe and other agency attorneys in the past served as ethics counselors while performing Chapter functions, as well. In fact, Jaffe served in as ethics counselor while negotiating a new collective bargaining agreement prior to the election and, also performed other high profile Chapter functions with apparent full support of the very individual who is now complaining that a conflict exists. Unless Bernsen is so egoistic that he thinks that only the Chapter President has any responsibility for managing the Chapter, I frankly see no substance to the claim that there is a conflict of interest here, particularly since Bernsen used Jaffe in positions that he is now claiming create a conflict. Accordingly, it is found that the two positions involved here are not incompatible.

2. Ethics Counselor duties create no apparent conflict of interest

The Charging Party claims that there is an expectation of confidentiality for employees with respect to Chapter 211, and insofar as Jaffe must abide by two tenets of the PBGC ethics program: (1)"that discussions with PBGC's ethics counselors are not protected by the attorney-client privilege; and (2) PBGC ethics officials, including Jaffe, are required to report criminal violations to PBGC's Office of Inspector General. Thus, the record shows that employees seeking the confidence of a Chapter 211 representative concerning ethics-related issues could reasonably infer that such confidence would not extend to an ethics related matter. Employees who are properly informed about the duties and actions of ethics counselors would know both of the recusal policy and practice, and of the reality that Jaffe, who does both duties to the best of her ability does not "wear two hats" on the same matter at any time. The Charging Party also argues that because of the adversarial relationship that exists between a labor organization and executive agencies they will inevitably clash in administering the agencies ethics program. The record shows no likelihood that such would happen.

Jaffe's ethics duties have included: (1) review of financial disclosure reports; (2) employee ethics training; and (3) giving prospective ethics advice concerning conflicts of interest, outside

employment, and Hatch Act.[11] None of these duties create an apparent conflict of interest with her participation in the management or acting as a representative of Chapter 211.

Jaffe's review of financial disclosure reports does not create an apparent conflict of interest. This work entails reviewing reports for accuracy and sufficiency and cross-checking reported interests against a list of pending agency cases. The disclosure forms are then reviewed and approved by Resnick, Hertz or Keightley. The Counselors' work is technical and requires no consistent exercise of independent judgment. Indeed, all of this review work must be approved by Resnick, Hertz or Keightley. Without some consistent exercise of independent judgment, there can be no apparent conflict of interest. *U.S. Dept. of Treasury, Office of Chief Counsel v. Natl. Treasury Employees Union, 32 FLRA 1255, 1260 (1988); MSPB, supra.* Furthermore, no discipline at PBGC has ever resulted from a Counselor's review of an employee's disclosure form.

The Charging Party argues that the Chapter is controlled by a President who has a concurrent stake in administering[12] PBGC's ethics program. The Charging Party asserts that:

> allowing an [e]thics [c]ounselor who[se] official duties take precedence over her [Chapter] responsibilities, the respondents disable the [Chapter} from fully and fairly representing employees . . .

This claim appears to be a Machiavellian attempt to wrestle the Chapter Presidency from Jaffe, by any means available. First, the record revealed no area in which Jaffe administers the ethics program for the Respondent PBGC. Additionally, there is not one strand of evidence that Jaffe's official duties take precedence over her Chapter responsibilities. The reality is that Jaffe is employed as a GS-14 attorney who does ethics assignments as part of her work. It is not even her principal work. She has no "program" responsibilities, but reviews and makes recommendations to a supervisor. The record also reveals that Jaffe's work in the ethics area is limited to reviewing facts about proposed conduct provided by employees, analyzing the facts under applicable ethics rules, and formulating a response that

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[11] Contrary to Charging Party's frequent assertions and fliers, Ethics Counselors are not the "ethics police"; they do not investigate to ferret out violators, require "corrective action" or even participate in investigations or discipline of employees.

[12] *The American Heritage Dictionary, 1976 Ed.* defines administer: 1. To have charge of; direct; manage. This is simply one example of the Charging Party's shading of words to create grey areas. Using such terminology in such a devious way certainly detracts not only from its case, but from the General Counsel's as well.

supervisors such as Resnick, Hertz, or Keightley must ultimately approve. While her insight, analytical skill, experience, and research ability may be valued, Jaffe does not make any ethics determinations or grant any waivers; only designated agency ethics official's Resnick, Hertz, or Keightley may do so. She exercises no independent judgment or effective authority over employee conduct. Clearly, her prospective ethics counseling does not constitute administering the ethics program by any stretch of the imagination and therefore, creates no apparent conflict. *Treasury*, *supra,* at 1260 (no apparent conflict absent independent judgment and effective authority over employees).

Although the above duties define Jaffe's official role as an ethics counselor, she did report a departing employee who had engaged in conduct that apparently violated ethics rules based on information received by her, as an ethics counselor from an employee seeking prospective ethics advice from her about the same type of ethical situation. After learning of the apparent violation, Jaffe reported it to Hertz, who referred the matter to the Inspector General. In my view, this is as close as Jaffe comes to being in a conflict of interest situation. Respondent PBGC denied that Jaffe's reporting this departing employee's abuse created an apparent conflict of interest since the law requires all employees of the agency to report fraud, waste, or abuse. Respondent ignores that had Jaffe not been an ethics counselor she would not have been privy to this information and therefore, not in a position to pass it on. Even if Jaffe had not been an ethics counselor, she still would have been under a duty to report the apparent violation, but the fact is that her ethics duties were indeed the reason that the information was made available to her. While there is a perception of a conflict of interest, it is my view that a reasonable person with all the facts could only conclude that Jaffe felt the duty to report this breach as an employee and that no apparent conflict would be found from this situation.

The Charging Party contends that even the training aspects of PBGC's ethics program implicate disciplinary consequences. For example, the Notice of Proposed Removal for Employee C was based in part upon an alleged violation of 5 C.F.R. § 2635.704[13] and 29 C.F.R. part 2602. In addressing these allegations PBGC specifically relied upon the fact that Employee C "had received training [on 5 C.F.R. § 2635.704] on June 24, 1993" and that Employee C had "acknowledged receiving and reading a copy of th[ese] ethics rules when [Employee C] w[as] hired by PBGC." I see no connection between training and discipline and therefore reject that argument.

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13 "**Standard.** An employee has a duty to protect and con-serve Government property and shall not use such property, or allow its use, for other than authorized purposes." 5 C.F.R. § 2635.704(a).

The Charging Party's arguments in this case are mis-leading, particularly since for the most part they rely on the perception that a conflict of interest exists. Bernsen's own use of Jaffe undermines all the Charging Party and General Counsel's arguments concerning employees' perceptions of Jaffe's dual roles. It is important to note that no one (other than Bernsen) ever complained to PBGC or NTEU of perceiving that Jaffe had an apparent conflict of interest. One is forced to wonder how Jaffe, who for sometime prior to the election served in a high level position in the Chapter, where her expertise as an ethics counselor was used more than once to benefit the Chapter can now be claimed to be in a position where a conflict of interest exists. If anything, it would appear that PBGC could be claiming that a conflict exists, but it does not. Additionally, there is no complaint by NTEU which no doubt would be equally interested in having Jaffe removed from office, if an apparent conflict existed. Thus, the only intervening event, after Bernsen took advantage of Jaffe's ethics expertise, is that she defeated him in the 1994 election. Apparently, this defeat opened Bernsen's eyes to the apparent conflict of interest, but it also gave the undersigned a better than average view of what the perception of the ordinary employee, who had not been defeated by Jaffe in an election, might be. Thus, when one uses Bernsen's old pre-defeat eyes, there must not be an apparent conflict of interest or Bernsen would not have assigned such duties to Jaffe. Furthermore, the record clearly shows that other than Bernsen and two Executive Board cronies on his "Progressive" slate, no other employees although aware of her dual roles ever complained that Jaffe's ethics duties appeared to conflict with her duties as President. Given Bernsen's obvious bias, his views cannot rise to the reasonably objective standard defined by the Authority in *Treasury, supra*. Accordingly, it is my view that these perceptions of an apparent conflict of interest were manufactured by a disgruntled and defeated office seeker and have no validity upon which to base a violation of the Statute.

In all these circumstances, it is concluded that the General Counsel has not established by a preponderance of the evidence that either Respondent NTEU or Respondent PBGC acted unreasonably in assessing the claim of an apparent conflict of interest here.

3. Discipline for violating ethical standards is irrelevant to this matter

It was argued that PBGC's disciplinary actions during the past five years shows that PBGC considers the ethical conduct of its employees to be of paramount importance to its ability to accomplish its regulatory mission. The essence of this argument being that because violations of ethical standards may be subjects for discipline, an apparent conflict is created. However, when the recusal policy is considered,

no apparent conflict is evident.[14] In the first place, such discipline of PBGC employees is very rare (four in four years, of which only two were eligible for and sought union represen-tation). Second, ethics counselors are not involved in the investigation of, or discipline proposed for violations of ethical standards and, therefore have no role in the discip-line. In part, due to this rarity, there is no apparent conflict. Lastly, where a bargaining unit employee is involved, it is uncontradicted that Jaffe would recuse herself. Finally, even where an employee actually investigated bargaining unit members on occasion, the Authority held that no apparent conflict of interest arose due to the rarity of investigations. *U.S. Office of Personnel Management, 48 FLRA 1228, 1235 (1993).* Thus, the rarity of such cases at PBGC was clearly established on the record. Other than to establish the frequency of discipline for ethics violations, the undersigned sees little connection between the discipline and how it relates to a conflict or apparent conflict of interest in this case.

The Charging Party also argues that the recusal policy does nothing to diminish the appearance of a conflict of interest. Rather, it is aimed solely at the actual conflict. According to the Charging Party, even though Jaffe might initially recuse herself in a recusal situation, based upon her referral of a case to the appropriate authorities, her continued presence as Chapter President would have a continued "chilling effect" upon employees seeking representation through the Chapter. I do not agree. Even if such a situation was not rare, it is doubtful that an apparent conflict of interest would exist. It is uncontroverted that Jaffe never works on the same matter in her union capacity and as an ethics counselor. The mere fact that the potential for a conflict might exist if PBGC did not follow its recusal policy does elevate the matter to an apparent conflict of interest. Clearly a conflict exists each time an attorney takes a retainer. That such potential exists by no means suggests that an attorney never take a case, it means only that the attorney must take reasonable steps to avoid the conflict. Obviously, the recusal policy here was designed as such a step. Deciding whether this policy works effectively is an issue that this forum need not undertake. Section 7120(e) does not speak of "potential" conflicts. Therefore, it must be found that the apparition of potential conflicts between Jaffe's dual roles is irrelevant under section 7120(e) of the Statute.

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[14] PBGC is an agency experienced in addressing recusal, conflicts of interest and apparent conflict of interest issues in other contexts. These issues do not only arise in the context of ethics counselors. They may arise in connection with PBGC attorneys assigned to cases in which their former law firms represent a party, or with outside counsel retained by PBGC in ERISA cases. PBGC employs numerous outside counsel and sees these disputes arise so frequently that it has assigned two of the counselors, again under the supervision of Resnick and Hertz, to view outside counsel conflict matters.

4. Even under HHS, Jaffe's situation is not an apparent conflict of interest requiring remedial action by the Authority

As noted previously, the Charging Party insists throughout that this case is controlled by *HHS*. I disagree. In my opinion, even if the holding in that case could be applied here, Jaffe would not be prohibited under 7120(e) from holding union office while serving as an ethics counselor or vice-versa. In fact, she would at least have a choice of retaining one position or the other if that case were to be applied here. In *HHS* no violation of section 7106(a)(1) and (2) was found where the agency terminated the appointment of an employee as EEO Counselor upon the employee's election to the position of Chapter Vice President because of its opinion that holding the two positions created a conflict of interest situation. The Authority did not find a conflict of interest or apparent conflict of interest, and did not say that the agency was required to terminate the appointment. Relying on earlier case law under Executive Order 11491, as amended, it found instead that the agency might believe the employee would no longer be perceived as impartial in EEO counselor duties, and could terminate the assignment.

Unlike that case, as already stated, the agency here examined the situation by looking at the performance of its ethics counselors for a number of years and could not help but observe that ethics counselors for some time had served in dual capacities; sought independent determinations from OGE; examined its various checks and balances such as its recusal policy, and determined that no apparent conflict of interest or loss of impartiality requiring the removal of Jaffe as an ethics counselor from that duty simply because she was involved in management of the Union. In my view, this was a reasonable action by the agency particularly in circumstances where a charging party asserts that a conflict does exist. Indeed, had it removed Jaffe for that reason it would have been subject to the identical unfair labor practice complaint that the agency in *HHS* suffered. Finally, the HHS theory of a violation was that under section 7120(e) the agency could not require that an EEO counselor refrain from engaging in the protected activity of holding a union office. Thus, HHS is a case where an employee was forced to choose between the Union and the agency[15]. Similiarily, Respondent NTEU examined Jaffes' dual roles and found no conflict of interest. Thus, the General Counsel did not show that either of the Respondent's acted unreasonably in finding that no apparent conflict of interest existed. Nor does the undersigned find any unreasonableness in their actions. Clearly neither Respondent found it necessary to force Jaffe to choose between the two positions.

15 It is noted that the administrative law judge in GSA, 8 A/SLMR 1386, cited by Judge Dowd did not find a section 19(a)(2) violation by discrimination in regard to "hiring, tenure or promotion. . . ."

5. OGE expressed no disapproval of Jaffe's duties

While the findings of another agency are not a substitute for the Authority's judgment in its particular area of expertise, it is note worthy that Jaffe sought an opinion from OGE concerning whether an "apparent conflict of interest" existed. It is uncontradicted that Jaffe disclosed both her duties as ethics counselor and as Chapter President, her ability to recuse herself and refers persons elsewhere for assistance and that OGE advised her that the situation neither (1) created an appearance of a conflict of interest that would violate 5 C.F.R. § 2635.502, nor (2) constituted a conflict of interest in violation of 5 U.S.C. 208. OGE clearly has the responsibility under 5 C.F.R. § 2638.501 to develop rules and regulations pertaining to conflicts of interest and could even instruct PBGC to cease assigning Jaffe ethics counselor duties, but it did not.

Nor did it find fault with this arrangement when it audited PBGC's ethics program. As noted, OGE is the Government agency specifically charged with "responsibility to oversee and provide guidance on Government ethics for the Executive Branch." Under the Ethics in Government Act, OGE is the Government agency vested with responsibility "to provide overall direction for Executive branch policies designed to prevent conflicts of interest and to help insure high ethical standards on the part of agency officers and employees." 5 C.F.R. § 2600.100. Given its many years of experience analyzing and advising agencies regarding conflicts of interest and apparent conflicts of interest, its view that there is no appearance of a conflict should be accorded great weight and given deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).* In sum, the fact that OGE is aware of and had no objection to Jaffe's serving both as ethics counselor and Chapter President is further evidence that her duties do not create an apparent conflict of interest within the meaning of section 7120(e) of the Statute.

Based on all of the foregoing, it is found that the record does not establish by a preponderance of the evidence that an apparent conflict of interest was created by Jaffe's serving simultaneously as an ethics counselor for the agency while she also served a Chapter President. Accordingly, it is found that section 7120(e) of the Statute has not been violated and that neither Respondent National Treasury Employees Union nor Respondent Pension Benefit Guarantee Corporation violated the Statute, as alleged. Accordingly, it is recommended that the consolidated complaint in WA-CO-50300 and WA-CA-50302 should be dismissed.

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ELI NASH, JR.
Administrative Law Judge

Dated: August 6, 1996
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case Nos. WA-CO-50300 and WA-CA-50302, were sent to the following parties in the manner indicated:

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