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

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The Honorable Fortney H. Stark, Jr.
House of Representatives

Dear Mr. Stark:

This is in response to your request that this Office determine whether Federal funds were improperly used by Roger E. Batzel, Director of the Lawrence Livermore Laboratory, Livermore, California, to publicize his opposition to collective bargaining at the Laboratory.

The Lawrence Livermore Laboratory is a Government-owned multiprogram laboratory operated by the University of California under a contract with the Department of Energy (DOE).

We have reviewed the copies of the two documents you provided, expressing the Director's opposition to collective bargaining. One of the documents is a Policy and Procedure Administrative Memorandum dated November 30, 1978, entitled "Collective Bargaining at the Laboratory." It is designed to inform laboratory employees of the recent enactment by the California State Legislature of the Higher Education Employer-Employee Relations Act (Berman Act). The memorandum indicates that the new law grants employees of the University of California at the Laboratory the right to participate in collective bargaining beginning on July 1, 1979. It further advised employees that procedures designed to implement the new law were being developed by the Laboratory. The memorandum concludes with the following remarks by the Director regarding collective bargaining at the Laboratory:

"Neither I, nor University of California President David Saxon, endorse collective bargaining for the University or for the Laboratory. It is my personal conviction, based on a review of collective bargaining at other institutions, that the Laboratory employees' interests as well as the Laboratory's mission will be best served by continuing to foster direct and open relationships between employees and supervisors rather than by collective bargaining.

"In the months to come, employees will have a full opportunity to hear and appraise the issues involved in collective bargaining before making

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> decisions under the Berman Act. We will make available to employees information about their alternatives under the Act. Meanwhile, questions regarding the Act should be addressed to your supervisor or to Mike Lynn, Labor Relations Manager, on Extension 29501."

The Laboratory also prepared and promulgated a brochure for all its employees entitled "About Collective Bargaining . . . Some Questions & Answers," which was designed to provide more detailed information concerning how the Berman Act would be applied at the Laboratory. The first page of the brochure contained a letter to all Laboratory employees from the Director similar to the one described above. This letter also contained a paragraph expressing the Director's views opposing collective bargaining as follows:

> "I am personally committed to a policy of continuing enhancement of our work environment such that none of us will feel the need to choose union representation. In my view, collective bargaining is not necessary at our Laboratory for productive and rewarding work relationships and may instead be harmful to their development. Further, I am convinced that most employees of our Laboratory will give careful consideration to the facts, to the issues, to the advantages and disadvantages of union representation, and will subsequently conclude that unionization is not the most favorable choice for them. However, Laboratory (and University) employees should not be singled out by being denied the opportunity to choose collective bargaining if they so wish. The Berman Act provides the right to make this choice. The same right has been granted by the Legislature to all other State employees and has long been available to employees in private universities under the National Labor Relations Act." (Emphasis in original.)

You question whether the Director of the Laboratory may properly expend Federal funds to promulgate these views.

We queried the Department of Energy concerning this matter. DOE confirmed that appropriated funds have been expended for these memoranda but denied any impropriety.

We are of the opinion that appropriated funds were properly expended for the purpose of advising laboratory employees of amendments to the California Labor code that granted them the right to engage in collective bargaining. We are unaware of any law or regulation that would prohibit the Director from expending funds to express opinions in opposition to collective bargaining at the Laboratory. DOE has advised us that publication of the Director's opinions was not prohibited by its contract with the University of California, nor by pertinent Federal procurement regulations. Accordingly, we find no improper use of appropriated funds in the situation described.

Moreover, while enforcement of these statutes is of course not within our jurisdiction, we do not believe the Director's statements violate applicable Federal or State labor legislation. DOE indicates that the Director issued the memoranda after having been advised by counsel that they would not violate the laws and regulations of the State of California or the Federal Government.

More important, DOE contends that the Berman Act explicitly authorizes managerial statements on the issue of employee representation, by adopting in substance language contained in section 8(c) of the National Labor Relations Act, as amended (29 U.S.C. § 158(c)). Specifically, the Berman Act provides as follows:

> "The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, will not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization."

Under section 8(c) of the National Labor Relations Act, which (except that it does not include the proviso) is substantially the same as the above-quoted provision of the Berman Act, an employer has a right to express his opinions and to predict unfavorable consequences which he believes may result from union representation. Such expressions by the employer will not violate the Act if they have some reasonable basis in fact and are predictions or opinions and not veiled threats of employer retaliation. In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court enumerated the standards to be used in evaluating an employer's pre-election statements as follows:

> "But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board. Thus, § 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' in violation of § 8(a)(1).
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> "Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. * * * If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. * * * [A]n employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control,' and not 'threats of economic reprisal to be taken solely on his own volition.'" (395 U.S. at 617-619.)

These standards for evaluating employers' pre-election statements under section 8(c) of the National Labor Relations Act are presumably also applicable to the similar provision of the Berman Act. Thus, we

find nothing improper about the statements of the Laboratory Director, expressing his opinions about the introduction of collective bargaining.

We trust this information will be useful to you in responding to your constituent.

Sincerely yours,

R.F.KELLER
Deputy Comptroller General
of the United States