ORAL ARGUMENT SCHEDULED FOR FEBRUARY 6, 2004

No. 03-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-136,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Association of Government Employees, Local R5-136, SEIU, AFL-CIO (NAGE) and the Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina. NAGE is the petitioner in this court proceeding; the Authority is the respondent; and the National Treasury Employees Union is the amicus.

1. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina and National Association of Government Employees, Local R5-136, SEIU, AFL-CIO*, Case Nos. AT-CA-00101 and AT-CA-00198, decision issued on April 1, 2003, reported at 58 F.L.R.A. 432.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS
(Continued)

Page No.

TABLE OF CONTENTS
(Continued)

Page No.

ADDENDUM

Page

TABLE OF AUTHORITIES

CASES

Page

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

STATUTES

Page

CODE OF FEDERAL REGULATIONS

*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

AFGE	*American Federation of Government Employees, AFL-CIO, Local 3399*, 9 F.L.R.A. 1022 (1982)
Amicus Br.	Amicus' Brief
Commerce	*United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993)
JA	Joint Appendix
Judge	Administrative Law Judge
Medical Center or agency	Department of Veterans Affairs, Ralph H. Johnson Medical Center
Pet. Br.	Petitioner's brief
SJA	Supplemental Joint Appendix
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
union, NAGE or petitioner	National Association of Government Employees, Local R5-136 SEIU, AFL-CIO
ULP	unfair labor practice

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on April 1, 2003. The Authority's decision is published at 58 F.L.R.A. (No. 104) 432. A copy of the decision is included in

the Joint Appendix (JA) at JA 1-19. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

1. Whether the Authority reasonably held that no unfair labor practice was committed where the Medical Center adopted the union's status quo proposal without bargaining but refused to bargain over untimely proposals.

2. Whether the Authority reasonably held that no unfair labor practice was committed where the Medical Center, a Department of Veterans Affairs hospital, modified patient parking in such a way that the impact on employees was *de minimis*, without first notifying the union or engaging in bargaining.

STATEMENT OF THE CASE

This case arises as an unfair labor practice (ULP) case. It consolidates two complaints in proceedings initiated by the National Association of Government

[1] Pertinent statutory provisions are set forth in the attached Addendum (Add.) to this brief.

Employees, Local R5-136, SEIU, AFL-CIO ("union," "NAGE," or "petitioner") against the Department of Veterans Affairs, Ralph H. Johnson Medical Center ("Medical Center" or "agency").[2] Both complaints relate to parking at the Medical Center. In one case, No. AT-CA-00101, the union challenged the agency's refusal to consider its untimely proposals concerning proposed changes to employee parking policies. In the other case, No. AT-CA-00198, the union objected to the Medical Center's decision to allow patients to park in empty parking spaces in a parking lot ordinarily used by employees.

The complaints were heard by an Administrative Law Judge (Judge), pursuant to § 7118(a)(6). The Judge held that ULPs had occurred in both cases and ordered negotiations and a return to the status quo ante. The Medical Center filed exceptions with the Authority. Neither NAGE nor the General Counsel filed exceptions or oppositions to the Medical Center's exceptions. The Authority overturned the Judge's ruling, finding that no ULPs had been committed. NAGE now seeks review in this Court under § 7123(a) of the Statute.

[2] At several points in its brief, NAGE erroneously describes the proceedings involved as arbitration proceedings. *See* Pet. Br. at 2, 3. There were no arbitration proceedings below, since the cases were brought as ULPs rather than grievances.

STATEMENT OF THE FACTS

A. Background

The Ralph H. Johnson Medical Center is a Department of Veterans Affairs hospital located in Charleston, South Carolina. NAGE Local R5-136 is the exclusive representative of roughly 650 professional and non-professional employees who work at the Medical Center. JA 83.

The Medical Center provides parking for its patients and employees in a number of lots on and near Medical Center property. Two lots are particularly relevant to this case: the "Zone 7," or "employee" lot, and the "Elks lot," a set of 60-70 parking spaces that the Medical Center leased and used for overflow patient parking.

1. The employee parking policies case

The Medical Center regulates employee use of the lots made available for employee parking. On August 24, 1999, the union received a memorandum from the Medical Center entitled "Proposed Changes in Parking Lot Area/Bravo Street." JA 71, 226. The memorandum did not reference patient parking, but concerned only changes to employee parking policies such as prohibiting vehicles from

parking under a canopy in front of the Medical Center and revising the parking gate card fee schedule. JA 157, 227.

Under the terms of the "Master Agreement between the National Association of Government Employees and the Department of Veterans Affairs" (agreement), the union had fifteen days to request bargaining and submit proposals. Article 11, Section 2 of the Agreement provides that

> **Section 2 - Procedure for Bargaining**
> This procedure is applicable to Mid-Term and Impact and Implementation Bargaining as defined in Section 1 above.
> A. The Employer shall notify the Union prior to the planned implementation of a proposed change to conditions of employment. The notice shall advise the Union of the reason for the change and the proposed effective date.
> B. The Union shall have fifteen (15) calendar days from the date of notification to request bargaining and to forward written proposals to the Employer except in emergency situations where a 15 day notice would not be practicable.
> C. If the Union does not request bargaining within the time limit, the Employer may implement the proposed change(s).
> D. Upon timely request by the Union, bargaining will normally commence within ten (10) calendar days, unless otherwise agreed upon by the parties.

JA 258-259. Seven days later, on August 31, the union acknowledged receiving the Medical Center's memorandum, and replied by requesting bargaining and proposing "at this time that all conditions of employment remain status quo" for the duration of the bargaining period. JA 191. The union also submitted a multifaceted

and "voluminous" request for information, and indicated that it would submit additional proposals once it received the information. JA 118, 192.

These were the union's only communications during the contract's fifteen-day period for submitting proposals. After the fifteen days had expired, the parties continued to discuss the union's information request, which led to an exchange of information on October 27, 1999. JA 195.

On November 17, 1999, nearly three months after the Medical Center notified the union of its proposed changes, the union followed its timely submitted status quo proposal with additional proposals, which the Medical Center declared untimely under the agreement. JA 197, JA 200. In its response to the untimely proposals, the Medical Center explained that since no timely substantive proposals had been submitted during the period specified in the parties' agreement, the Medical Center intended to move forward with the changes outlined in its August 24th memorandum.

It is undisputed that the Medical Center maintained the status quo in the lot for much longer than the bargaining period set forth in the agreement. The union acknowledges that the Medical Center did not begin to enforce the new parking policies at any time during this exchange of memoranda. JA 75-76.

b. The patient parking case

Because of heavy use of the Medical Center by veterans, patient parking was a significant issue for the agency. Patient parking problems intensified when the Medical Center lost its lease on the Elks lot in the spring of 1999.[3] The loss of this overflow lot did not significantly affect employees, but it had a "terrible" effect on patients' ability to find parking at the Medical Center. JA 107, 93. William Hendley, then a Lieutenant Supervisory Police Officer at the Medical Center, testified "it would be nothing uncommon in the morning to have twenty, thirty, forty vehicles . . . driving in circles trying to look for open parking spaces." JA 107. This was particularly true on days when the Medical Center scheduled clinics, which increased the number of patients looking for parking. JA 95.

Lt. Hendley testified that, in an effort to ensure patient access to the Medical Center's services, the agency's police force "made a decision to start parking patients in the [Zone 7] lot, in the back of the lot. And the reason is because the back of the lot was primarily empty." JA 108. Patients were guided to park in the

[3] Although the facts in the patient parking case preceded the facts in the employee parking policies case, the Judge and Authority treated the employee parking policies case first. This brief follows that sequence.

employee lot during peak hours, when patient parking was tightest, "basically after 9:00" in the morning. JA 95.

The timing of this patient parking is significant because, as Stanley Nelson, an Operations Officer at the Medical Center, testified, "[m]ost of the employees are parked after, I'd say about a quarter to nine, 9:00, the majority of them." JA 97. Lt. Hendley echoed this testimony: "The employees generally start work between 8:00 and 8:30 in the morning. We never started parking patients into the employee parking lot until between 9:00 and 9:30, and at that time there were ample spaces available in the back because the employees generally all parked in the front." JA 115.

There was no adverse impact on employees; they continued to have first choice of the more than adequate number of spaces in the Zone 7 lot. As a representative sample, on the morning in July 2000 when the General Counsel's representative visited the Medical Center, there were 25 parking spaces left open in the lot even after all patients had been parked. JA 129. Furthermore, employees did not complain - or, apparently, even notice - that patients were parking in the back of the lot. Lt. Hendley testified, "[a]t no time did we have any employee come to us and complain about them not being able to find a space." JA 115, 130.

B. The Unfair Labor Practice Charges

In response to the events described above, the union filed two ULP charges against the Medical Center. Upon review, the Authority's General Counsel issued two narrowly and carefully worded complaints against the Medical Center.[4]

1. The employee parking policies case

The union, displeased with the Medical Center's unwillingness to accept the untimely November proposals, filed a ULP charge complaining that the Medical Center had improperly failed to bargain. This charge gave rise to Case No. AT-CA-00101, in which the General Counsel's complaint alleged specifically that

> 14. Since August 31, 1999, Respondent, by Wilson, refused to bargain in good faith by declaring the Union's proposals to be untimely; declaring that no further action was required on the Union's proposals; and declaring that Respondent intended to proceed with implementation of the changes in parking without negotiation.
> 15. By the conduct described in paragraph 14, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116 (a)(1) and (5).

SJA 2. Contrary to assertions in petitioner's brief (Pet. Br.) (29-34, 22), the General Counsel did not charge the Medical Center with improperly failing to

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[4] The complaints, Case Nos. AT-CA-00101 and AT-CA-00198, are included at Supplemental Joint Appendix (SJA) 1-6. At the hearing, they were General Counsel's Exhibits 1(c) and 1(h), respectively.

convey its refusal to bargain or with breaching the parties' collective bargaining agreement. Consequently, those issues are not part of the case against the Medical Center.

2. The patient parking case

In November 1999, while discussing employee parking with Medical Center police officers, the local union president was told that patients had been parking in empty spaces in the Zone 7 lot. JA 85-86. The union argued that it had the right to bargain over any such change in patient parking arrangements, and filed a ULP charge with the General Counsel. The complaint in Case No. AT-CA-00198 alleged that

> 13. On or about November 15, 1999, Local R5-136, by Truesdell, discovered that patients were being allowed to park in the employees' parking lot.
> 14. Respondent implemented the change described in paragraph 13 without notifying the Union and giving it an opportunity to negotiate as required by the Statute.
> 15. By the conduct described in paragraph 14, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

SJA 5. These two complaints were consolidated for hearing before an Administrative Law Judge (Judge).

C. The Administrative Law Judge's Decision

The Judge held that the Medical Center had committed ULPs in both cases.

1. The employee parking policies case

In Case No. AT-CA-00101, the Judge held that the Medical Center committed a ULP "by refusing to negotiate over the union's timely submitted proposals . . . ." JA 25. In the Judge's opinion, all of the union's proposals – including those submitted nearly three months after the Medical Center notified the union of its revised policy – were timely. JA 27. Although NAGE maintains otherwise (Pet. Brief at 11-12), the Judge did not base his ULP finding on the Medical Center's "failure to convey" its refusal to bargain or on any grounds other than the refusal to negotiate alleged in the complaint. *See* JA 29.

2. The patient parking case

The Judge also held that the Medical Center committed a ULP in Case No. AT-CA-00198 "by unilaterally permitting patients to park in the employee parking lot." JA 29. The Judge based his decision on Authority decisions that have held employee parking to be a condition of employment.

D. The Authority's Decision

The Medical Center filed exceptions to the Judge's rulings. Neither the General Counsel nor the union filed exceptions or a response to the Medical Center's exceptions. Upon review, a majority of the Authority overturned the Judge's rulings in both cases.[5]

1. The employee parking policies case

In Case No. AT-CA-00101, the Authority began by citing the principle that collective bargaining agreements must be interpreted based on their "express terms." JA 7. Under the express terms of the agreement, the union had until September 8, 1999, to submit written proposals. Going beyond the agreement's express terms, the Judge had interpreted the agreement to, in effect, allow for a second fifteen-day period following the Medical Center's response to the union's information request. The Medical Center argued, and the Authority found, that "there is no assertion or evidence that the parties agreed to an extension of time to allow the Union to submit proposals after the contractual 15-day period." JA 8. Accordingly, the Authority, relying on the agreement's express terms, concluded that only the initial status quo proposal was timely and negotiable. JA 8.

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[5] Member Pope's dissenting opinion is found at JA 13.

Furthermore, although the parties never formally negotiated over the status quo proposal, the Authority determined that this did not constitute a ULP. First, the Authority found that the Medical Center had complied with the status quo proposal well past the end of the contractually mandated bargaining period. JA 8. Second, the Authority found that the status quo proposal contemplated that there would be subsequent bargaining over proposals submitted later in the fifteen-day period. JA 8. In the Authority's view, because the status quo proposal pertained only to the status quo during negotiations, and because no additional timely proposals were submitted during the prescribed bargaining period, there was nothing more over which to negotiate. JA 8.

2. The patient parking case

The Authority also reversed the Judge in Case No. AT-CA-00198, the patient parking case. Importantly, the Authority noted the Medical Center's mission-based arguments, and stated:

> In addressing the Respondent's mission necessity argument, the Judge states that this case "is not about Respondent's duty to its patients," and that such an argument "entirely misses the point." . . . We respectfully disagree with the Judge. We believe that the point of this case is *precisely* the Respondent's duties to its patients.

JA 9-10, n.5 (emphasis in original, internal citations omitted).

The Authority thus determined that Case No. AT-CA-00198 revolves not around employee parking, a condition of employment, but instead around patient parking, a means of performing work under Authority precedent. JA 10 (citing *AFGE, AFL-CIO, Local 3399*, 9 F.L.R.A. 1022 (1982)). As such, the Authority held that the Medical Center had no substantive bargaining obligations over the subject of patient parking, and was required to bargain only over its impact and implementation. Moreover, the Medical Center's impact and implementation bargaining obligations existed only if the change had more than a *de minimis* effect on employees. JA 10.

Consistent with the testimony summarized above, the Authority held that the General Counsel had not shown by a preponderance of the evidence that employees had suffered any adverse effect. JA 10-11. Since there was no adverse effect, the impact on employees was *de minimis*. Accordingly, the Authority concluded that the Medical Center had no obligation to bargain over patient parking in the Zone 7 lot, and that no ULP had been committed. JA 11.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

This Court has also noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Co. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp.*, 967 F.2d at 665. So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal. *Fed. Deposit Ins. Co.*, 977 F.2d at 1496. The Authority is also accorded deference when interpreting the meaning of a union's proposal. *Nat'l Treasury Employees Union v. FLRA*, 848 F.2d 1273, 1278 (D.C. Cir. 1988).

Review of the Authority's factual determinations is similarly narrow. "We are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.' . . . The same scope of review applies when the FLRA reaches a conclusion different from that of its administrative law judge." *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted).

SUMMARY OF ARGUMENT

The Authority acted reasonably and correctly when it held in these cases that the Department of Veterans Affairs Medical Center here involved fulfilled its bargaining obligations, and did not commit any ULPs when it changed employee parking policies, and increased patient parking opportunities. In the employee parking policies case (No. AT-CA-00101), the Authority construed the parties' collective bargaining agreement consistent with its plain language, and correctly held that the agreement required that bargaining proposals be submitted within fifteen days of the agency's notice to the union of proposed changes in conditions of employment. Because the union's substantive proposals in this case were concededly submitted more than fifteen days after the Medical Center's notice of its proposed changes, those union proposals did not give rise to any bargaining obligation on the Medical Center's part. Therefore, the Medical Center did not commit ULPs when it declared the proposals untimely and declined to bargain over them.

In addition, the Authority properly concluded that the Medical Center did not fail to fulfill its bargaining obligations regarding the union's status quo proposal. Consistent with the proposal, which was intended to prevent changes in employee

parking policies only for the duration of the bargaining period, the Medical Center did not make any changes to employee parking policies during the time that the Medical Center had a bargaining obligation. Moreover, the lack of subsequent timely, substantive proposals left the parties with nothing to bargain over, and released the Medical Center from any further bargaining obligations on the subject.

The Authority also correctly decided that the Medical Center did not commit ULPs in the patient parking case (No. AT-CA-00198). Relying on arguments that were properly presented by the Medical Center, the Authority correctly determined that allocating patient parking at the Veterans Affairs hospital was a means by which the agency performed its work. Accordingly, under established precedent, the Medical Center did not have an obligation to bargain over the substance of its patient parking decision.

Furthermore, the Authority correctly concluded that the Medical Center did not have any obligation to bargain over the impact and implementation of its patient parking decision. In this regard, it is well established that impact and implementation bargaining is not required where the effect on employees of a change in conditions of employment is *de minimis*. In this case, substantial evidence supports the Authority's determination that there was no adverse effect

on employees at all. Because the effect on employees was thus clearly *de minimis*, the Medical Center had no bargaining obligation over its patient parking decision.

The objections of petitioner and *amicus* NTEU lack merit. Contrary to the unions' assertions, the Authority decided the cases on grounds properly presented by the Medical Center. Other arguments by the unions, including the argument that the Authority violated its own regulations, should be rejected either because they are newly raised and therefore not within the Court's jurisdiction to consider, or because they are erroneous.

ARGUMENT

A. The Authority Reasonably Held That No Unfair Labor Practice Was Committed Where the Medical Center Adopted the Union's Status Quo Proposal Without Bargaining but Refused to Bargain Over Untimely Proposals

The Authority correctly decided Case No. AT-CA-00101, regarding proposed changes in employee parking policies at the Medical Center. As discussed below, the agreement's express terms require proposals to be submitted within fifteen days of notice of a proposed change. Therefore, the union's November proposals were untimely, and did not give rise to any bargaining obligations.

Further, and as also discussed below, the union's one timely proposal called only for the Medical Center to maintain the status quo during the period that a bargaining obligation existed. The Medical Center did not fail to fulfill its bargaining obligations over the status quo proposal for two reasons. First, the union was granted exactly what it had asked for, the maintenance of the status quo through the entire bargaining period. Second, the lack of subsequent, substantive, proposals left the parties with nothing to bargain over and released the Medical Center from its obligations to maintain the status quo.

3. The Authority correctly interpreted the plain language of the parties' collective bargaining agreement and properly held that the Medical Center had no duty to bargain over the union's untimely November proposals

To determine whether the Medical Center committed a ULP in this case, it is first necessary to interpret the parties' collective bargaining agreement and decide which proposals were timely submitted. This issue is fundamental because agencies do not commit ULPs by refusing to negotiate over untimely proposals. *See, e.g., United States Dep't of the Air Force, Air Force Material Command*, 55 F.L.R.A. 10 (1998); *see also Internal Revenue Serv. (Dist., Region, Nat'l Office Unit)*, 14 F.L.R.A. 698, 700 (1984) ("NTEU's bargaining request . . . was not timely made. Under these circumstances, the Respondent had no obligation to

bargain and its failure to do so cannot be found to have violated the Statute."). In this case, there was a question as to whether the union's November proposals were timely, since they were submitted nearly three months after the Medical Center notified the union of its proposed changes.

It is well established in Authority case law that parties' agreements are interpreted based on their express terms. *See, e.g., United States Dep't of Justice, INS, Wash., D.C.*, 52 F.L.R.A. 256, 261 (1996); *Internal Revenue Serv., Wash., D.C.*, 47 F.L.R.A. 1091, 1110 (1993); *see also Washington Metropolitan Area Transit Auth. v. Mergentime Corp.*, 626 F.2d 959, 961 (D.C. Cir. 1980) (holding that "[u]nder general contract law, the plain and unambiguous meaning of an instrument is controlling . . . the Court should construe the contract as a whole so as to give meaning to all of the express terms.") (internal citations omitted). As noted above, the agreement expressly allowed the union, as pertinent here, "fifteen (15) calendar days from the date of notification to request bargaining and to forward written proposals to the Employer . . . ." JA 258, 259. There is no "tolling period" or provision that allows for timely submitted proposals to be supplemented later by untimely proposals.

The contract's plain language supports the Authority's determination "that the proposals submitted by the Union outside of the contractual 15-day period were untimely filed under that negotiated provision." JA 8. Furthermore, there was no evidence offered by either party that even suggested that "the parties agreed to an extension of time to allow the Union to submit proposals after the contractual 15-day period . . . ." *Id.* Because the express terms of the agreement did not allow the November proposals, and there was no exception or extension of time agreed to by the parties, the record supports the Authority's conclusion that the November proposals were untimely. Consequently, the Medical Center was not required to bargain over them.

4. The Authority properly held that the Medical Center did not violate its duty to bargain over the union's status quo proposal

Although the parties never engaged in formal bargaining over the union's timely status quo proposal, the Authority correctly held that the Medical Center did not violate its duty to bargain with respect to that proposal, either.[6]

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[6] Petitioner's brief misstates the Authority's ruling, suggesting in several instances (*see, e.g.*, Pet. Brief at 27) that the Authority found the status quo proposal nonnegotiable. The Authority found the status quo proposal negotiable, but held that the Medical Center had not violated its duty to bargain.

a. The Medical Center did not improperly change conditions of employment without bargaining because it complied with the union's status quo proposal and refrained from making any changes to employee parking policies during the period it had a bargaining obligation

The union concedes that its status quo proposal sought to prevent changes in employee parking policies only for the duration of the bargaining period. *See, e.g.*, Pet. Br. at 18 (characterizing its proposal as "requesting that conditions remain *status quo until the completion of bargaining . . .*") (emphasis added), 24. Consistent with this interpretation, it is clear that the Medical Center did not improperly change employee parking policies. To the contrary, "the Respondent, in fact, complied with the proposal because it maintained the status quo well beyond the contractual period authorizing bargaining." JA 8. Substantial – and uncontroverted – evidence supports the Authority's finding. *See, e.g.*, JA 75-76. No party has alleged, at any time, that the Medical Center did not maintain the status quo until after the untimely November proposals were received.

b. Because the status quo proposal contemplates future timely proposals, the lack of such proposals released the Medical Center from any obligation to maintain the status quo

The Authority also correctly held that the lack of timely substantive proposals terminated the Medical Center's obligation to maintain the status quo. In this regard, the record supports the Authority's finding that the union's status quo proposal contemplated future bargaining. For example, in its August 31 submission, the union indicated its intent to submit future, substantive, proposals. JA 236. The Authority reasonably concluded that, without additional timely proposals, "there was nothing further to bargain and the Respondent had no obligation to maintain the status quo until a non-existent bargaining obligation was concluded." JA 8.

In summary regarding this aspect of the case, the Authority reasonably and correctly interpreted the parties' agreement and the union's status quo proposal. Based on these interpretations, the Authority properly concluded that the Medical Center had no obligation to bargain over the union's untimely November proposals, or over whether to maintain the status quo respecting employee parking policies after the time permitted under the parties' agreement for the submission of

substantive proposals. These determinations of the Authority are entitled to deference and should be upheld.

B. The Authority Reasonably Held That No Unfair Labor Practice Was Committed Where the Medical Center, a Department of Veterans Affairs Hospital, Modified Patient Parking in Such a Way That the Impact on Employees Was *De Minimis*, Without First Notifying the Union or Engaging in Bargaining

The Authority also correctly decided Case No. AT-CA-00198, concerning patient parking at the Medical Center. Under longstanding precedent, allocating patient parking at Veterans Affairs hospitals is a means of performing work and thus not a mandatory subject of negotiation. Furthermore, because the Medical Center's decision to allow patients to park in the Zone 7 lot had no adverse effect on employees and consequently was clearly *de minimis*, no impact and implementation bargaining was required. As a result, the Medical Center did not commit a ULP by allowing patients to park in the Zone 7 lot without negotiating with the union.

1. Patient parking at Veterans Affairs hospitals is a means of performing work under § 7106(b)(1), and thus not a mandatory subject of negotiation

The Authority correctly held that patient parking at Veterans Affairs hospitals is a means of performing work under § 7106(b)(1) of the Statute. A "means of

performing work" is "any instrumentality . . . used by an agency for the accomplishing or furthering of the performance of its work." *Nat'l Treasury Employees Union*, *Chapter 83*, 35 F.L.R.A. 398, 407 (1990). Because the Medical Center uses its parking lots to enable patients to avail themselves of the hospital's services, the Authority correctly held that patient parking at Veterans Affairs hospitals is a means of performing work.

This holding is consistent with longstanding Authority precedent. In *American Federation of Government Employees, AFL-CIO, Local 3399*, 9 F.L.R.A. 1022 (1982) (*AFGE*), the agency, also a Veterans Affairs hospital, sought to reapportion its parking so that the lots formerly used for employee parking would be designated for patient parking, and the lots formerly used for patient parking would be made available to employees. *AFGE* at 1022-23. Just as in this case, the hospital had proposed changes "in order to accommodate its clientele most effectively . . . ." *AFGE* at 1023 (internal quotations omitted). The union in *AFGE* submitted proposals, seeking to bargain over the substance of the changes.

The Authority held that the agency was not required to bargain over the substance of its decision, stating:

> [The proposal] would require bargaining over management's decision as to which of the Agency's parking facilities will be used to accommodate its clientele. It would require "exclusive" use by employees of those facilities which management has designated for use by hospital clientele in order to accommodate them most effectively. The Authority concludes that such a designation by the Agency concerning the use of its parking facility is a determination with respect to the "means of performing work" within the meaning of section 7106(b)(1) of the Statute. . . . [and] not within the duty to bargain[.]

Id. at 1023-1024. Instead, the hospital was only obligated to bargain over impact and implementation matters. *Id.* at 1024.

In the instant case, the Medical Center, like the Veterans Affairs hospital in *AFGE*, designated the Zone 7 lot for use by hospital clientele in order to accommodate them most effectively. *Id.* Accordingly, the Medical Center's decision to allow patients to park in the Zone 7 lot was a determination with respect to a means of performing work, over which the Medical Center had no substantive duty to bargain. JA 10.

The union's reliance on cases holding as a general matter that employee parking is a bargainable condition of employment is misplaced. None of the cases cited by the union purports to rule on the status of patient parking at Veterans Affairs facilities. Because these cases do not deal with the "client service" element that distinguishes the instant case, they are inapposite.

For these reasons, the Court should uphold the Authority's ruling that the Medical Center was not obligated to bargain over its decision regarding patient parking.

2. Impact and implementation bargaining was not required because the change did not have any adverse effect on employees, and was consequently *de minimis*

Even where a matter, such as the patient parking here involved, is not substantively bargainable, there may still be an obligation to bargain over impact and implementation. Such bargaining is required where an agency's nonnegotiable changes have more than a *de minimis* effect on employees. *See, e.g., Dep't of Health and Human Servs., Social Security Admin.*, 24 F.L.R.A. 403, 407-408 (1986); *Fed. Bureau of Prisons, Fed. Correctional Inst., Bastrop, Tex.*, 55 F.L.R.A. 848, 852 (1999). As these cases hold, impact and implementation bargaining is not required, however, where the changes' effect on employees is *de minimis*.

In this case, substantial evidence supports the conclusion that the Medical Center was not required to engage in impact and implementation bargaining. This record evidence establishes that employees suffered no adverse effect as a result of the Medical Center's patient parking decisions, and that consequently the effect

was *de minimis*. JA 11-12. There is a wealth of support in the record for this determination. For example, witnesses testified that patients were not parked until after morning shift employees had already begun work, and would depart before the afternoon shift arrived. *See supra,* 4-6. Only one employee, out of 650-700 in the bargaining unit, had complained about parking contemporaneously with the changes, and "it is unclear whether the employee . . . was unable to find a parking space at all, or simply could not find a space to his liking." JA 12. Testimony indicated that even on the busiest days, twenty to thirty spaces remained in the Zone 7 lot after all patients and employees had been parked. *Supra, id.*

In short, the Authority's decision in the patient parking aspect of this case is consistent with longstanding Authority precedent and supported by substantial evidence in the record. It should therefore be upheld.

C. The Unions' Remaining Objections to the Authority's Decision Lack Merit

In addition to the arguments refuted above, the unions present several objections that this Court should also reject.

1. Contrary to the unions' assertions, the authority did not raise issues *sua sponte*, and if it did, no error was committed

Both petitioner and *amicus* (NTEU) claim that the Authority erred by deciding one or both cases on grounds not raised by the Medical Center. *See, e.g.*, Pet. Br. at 39-40, Amicus Br. at 12-15. These arguments reflect a misunderstanding of the record below, the Authority's waiver regulations, and the Authority's inherent powers as an administrative tribunal.

a. The Authority based its decision on arguments that were properly presented by the Medical Center

Contrary to the unions' assertions, the Medical Center's pleadings did indeed set forth the arguments on which the Authority based its decision. Regarding the employee parking policies case, the union claims that the Authority ignored the Medical Center's "only argument," that the proposal was "not viable." Pet. Brief at 23.

This union argument overlooks the fact that the Medical Center also argued, and the Authority agreed, that "nothing in [the agreement] authorizes the Union to have additional time – beyond 15 days – to submit proposals." JA 7. This timeliness argument, that underpins the Authority's holding, is reiterated throughout

the Medical Center's pleadings and testimony before the Judge. *See, e.g.*, JA 119, 121, 122, 123.

In the patient parking case, the unions have similar complaints. NAGE asserts that the Authority "created the argument" that determining patient parking is a means of performing work. Pet. Brief at 40. Echoing NAGE, NTEU contends that "the Agency had not invoked management rights . . . ." Amicus Br. at 10.

The unions are mistaken. As the Authority noted, "[a]lthough the Respondent did not expressly cite [*AFGE*], the arguments that it made, both before the Judge and the Authority, were more than sufficient to invoke a claim under § 7106(b)(1) of the Statute." JA 10. In its exceptions to the Judge's ruling, for instance, the Medical Center argued that

> this unfair labor practice charge should be dismissed for "mission necessity" reasons. . . . [P]arking patients is essential to the mission of the agency. . . . [P]arking availability for patients at the VA is directly linked to quality of patient care and its mission.

JA 51d. In addition, the Judge took note (JA 25-26) of the Medical Center's argument in its post-hearing brief that

> [The Medical Center] has a duty to its patients to park them if they cannot find a space. Respondent cannot have patients continually circling the parking lot, looking for a space to park when they have scheduled medical appointments. . . . Customer service is number one today – having convenient parking for patients is a business

> necessity and a priority. Respondent's raison [d'etre] is to treat patients, not park employees.

Agency's Post-Hearing Brief, SJA 10. Moreover, consistent with its reliance on its management rights contentions, the Medical Center argued that the change's effect on employees was *de minimis*. *Id.* Thus, the Court should reject the unions' claims that the Authority decided the cases on bases not raised by the Medical Center.

b. In any event, the Authority may properly raise issues *sua sponte*

(1) Even if the Authority did, in fact, rely on arguments not raised below, this does not provide a basis upon which to overturn the Authority's decision. "[I]t is well settled that the Authority may raise *sua sponte* such questions as it finds relevant and necessary in any case before it." *United States Dep't of Justice*, 52 F.L.R.A. 1093, 1098 (1997); *see also Nat'l Treasury Employees Union*, 55 F.L.R.A. 1174, 1186 (1999) (commenting that "the Union is correct that 'the Authority could have reviewed the subsection *sua sponte* . . ..'"); *Headquarters, Nat'l Aeronautics and Space Admin., Wash., D.C.*, 50 F.L.R.A. 601, 623 n.18 (1995) ("[T]he Authority has previously addressed, *sua sponte*, matters that were not excepted to by the parties."). Furthermore, this Court has considered cases

where the Authority raised issues *sua sponte*. *See, e.g., Patent Office Professional Ass'n v. FLRA*, 26 F.3d 1148 (D.C. Cir. 1994); *United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993) (*Commerce*).

The Authority's practice in this area is consistent with principles of judicial decision-making. Article III courts may raise certain issues *sua sponte* "if doing so furthers 'the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice[],'" *United States v. Allen*, 16 F.3d 377, 378-379 (10th Cir. 1994), or to "expedit[e] litigation," *Butcher v. Gerber Prod. Co.*, 88 F. Supp.2d 788, 798 (W.D. Mich. 2000).

(2) Furthermore, nothing in the Authority's regulations precludes the Authority from raising issues *sua sponte*. NAGE and NTEU raise the novel, but meritless argument that two of the Authority's own regulations, 5 C.F.R. §§ 2423.40 and 2429.5, barred it from "relying on management rights and other legal grounds not argued by [the] Agency." Pet. Br. at 39-40, Amicus Br. at 12. The unions' argument reflects a fundamental misunderstanding of the The administrative process. The plain language of these regulations restricts *parties* from raising

arguments waived or not raised below.[7] They were not intended, as the unions suggest, to act as bars to the Authority's creation and maintenance of a reasonable and consistent body of case law. Thus, NTEU concedes, the "fundamental principle [is to] assure[] that parties have the opportunity to address *their opponents' arguments* . . . ." Amicus Br. at 13 (emphasis added). The Authority, however, is neither a party nor a party's opponent. It is a quasi-judicial body, acting as neutral arbiter. Consequently, it is not subject to the cited waiver regulations. Accordingly, even if the Authority raised certain issues *sua sponte*, this would not constitute a reason for overturning the Authority's decision.

Cases cited by NTEU (Amicus Br. 13) construing § 2429.5 are inapposite. Rather than standing for the proposition that the Authority is precluded from raising issues *sua sponte*, these cases are limited to the holding that the Authority will not consider a party's submission raising issues not raised below. For example, in such circumstances, the Authority held that a party's "exception is barred from consideration by the Authority." *Office and Prof. Employees Int'l Union, Local*

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[7] 5 C.F.R. § 2423.40(d), for example, states that "[a]ny exception not specifically argued" in a party's exceptions "shall be deemed to have been waived." 5 C.F.R. § 2429.5 provides that the Authority will not consider evidence or issues "offered by a party" which were not presented in proceedings below. These regulations are included at Add. A-7 and A-8.

268, 54 F.L.R.A. 1154, 1158 (1998).[8] Because the unions' contentions ignore this important difference between barring consideration of an *issue* and barring consideration of *a party's submission*, those contentions should be rejected.

2. The unions raise a number of new arguments which are not properly before this Court

Section 7123 of the Statute provides that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986). Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision, are not within the Court's jurisdiction to consider. *See, e.g.*, *Commerce* at 244-45.

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[8] *Accord Dep't of Transportation, FAA, Fort Worth, Tex.*, 55 F.L.R.A. 951, 956 (1999) (holding that "it is well established that exceptions based on evidence or issues . . . [not raised below] will not be considered by the Authority"); *United States Dept. of the Interior, Nat'l Park Serv.*, 55 F.L.R.A. 193, 195 (1999) (holding that "we deny this exception because we are barred from considering it by section 2429.5").

Section 7123(c)'s requirements are no less applicable where, as here, parties claim that the Authority acted *sua sponte.* Interpreting an identical provision in the National Labor Relations Act, the Supreme Court held that "when the NLRB raises and resolves an issue *sua sponte,* a party seeking judicial review of that issue must first file a motion for reconsideration . . . ." *Woelke & Romero Framing, Inc. v. Nat'l Labor Relations Bd., et al.*, 456 U.S. 645, 665 (1982); *see also Commerce* at 245.

Despite § 7123(c)'s restrictions, NAGE and NTEU seek to introduce arguments before this Court that were not presented to the Authority. In this regard, both NAGE and NTEU seek reversal on the grounds that the Authority violated its own regulations in deciding the instant cases. *See, e.g.*, Pet. Br. 34-35, Amicus Br. 12-15. However, this contention was never raised before the Authority.

NTEU also breaks new ground in attacking the Authority's employee parking policies decision as a flawed waiver analysis. *See, e.g.*, Amicus Br. 15-18. In making this new argument, NTEU also faults the Authority for "unlawfully revers[ing] the burden of proof" in determining that the union had waived its bargaining rights. Not only are these misrepresentations of the Authority's

decision, but they are also arguments raised for the first time before this Court. Consequently, pursuant to § 7123(c), the Court lacks jurisdiction to consider them.

In sum, as demonstrated above, the unions' remaining arguments are flawed. In both cases, the Authority based its decision on the record before it. Even if the Authority did act *sua sponte*, this would not provide any basis for challenging its decision. In addition, a number of the unions' arguments were raised for the first time on appeal, leaving the Court without jurisdiction to consider their merits under § 7123(c).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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October 2003

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 28

Pursuant to Federal Rule of Appellate Procedure 32 and Circuit Rule 28, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 7242 words.

_____
William R. Tobey

October 24, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-136, Petitioner	)	
v.	)	No. 03-1127
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority; Motion For Leave To File Supplemental Appendix For The Respondent Federal Labor Relations Authority; and Supplemental Appendix, have been served this day, by mail, upon the following:

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October 24, 2003

TABLE OF CONTENTS

Page

§ 7105. Powers and duties of the Authority

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(a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

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(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

* * * * * * *

§ 7106. Management rights

* * * * * * *

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

* * * * * * *

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * * * *

§ 7118. Prevention of unfair labor practices

* * * * * * *

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

* * * * * * *

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * * * * * *

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on

the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting side of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * *