FINAL BRIEF

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 19, 2004

No. 04-1021

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

_____

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 26,

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 American Federation of State, County & Municipal Employees, Council 26 (AFSCME) and the United States Department of Transportation, Federal Aviation Administration (FAA). AFSCME is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of Transportation, Federal Aviation Administration and American Federation of State, County & Municipal Employees, Council 26,* Case No. WA-CA-01-0386, decision issued on December 11, 2003, reported at 59 F.L.R.A. (No. 82) 491.

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).

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GLOSSARY

AFSCME, union, or petitioner	American Federation of State, County & Municipal Employees, Council 26
Authority	Federal Labor Relations Authority
DHHS	*Department of Health and Human Services, Philadelphia Regional Office, Region III,* 12 F.L.R.A. 167
FAA or union	United States Department of Transportation, Federal Aviation Administration
Judge or ALJ	Administrative Law Judge
OMB	Office of Management and Budget
Pet. Br.	Petitioner's brief
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Thomas	*Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000)
ULP	unfair labor practice

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on December 11, 2003. The Authority's decision is published at 59 F.L.R.A. (No. 82) 491. 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 ISSUE

Whether the Authority correctly determined that no unfair labor practice occurred where the union acquiesced in a requirement that the parties' tentative collective bargaining agreement be submitted to OMB for approval and where, lacking such approval, the agency refused to execute the tentative agreement.

STATEMENT OF THE CASE

This case arises out of an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint based on a charge filed by the American Federation of State, County & Municipal Employees, Council 26 ("AFSCME," "union," or "petitioner"). The charge alleged that the United States Department of Transportation, Federal Aviation Administration ("FAA" or "agency") violated § 7116(a)(1), (5), and (8) of the Statute by refusing to execute a collective bargaining agreement. Adopting the recommended decision and order of its Administrative Law Judge ("Judge," or "ALJ"), the Authority held that no unfair labor practice had occurred. AFSCME now seeks review in this Court under § 7123(a) of the Statute.

[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

STATEMENT OF THE FACTS

A. Background

AFSCME, Council 26, is the exclusive representative of four bargaining units of FAA employees in Washington, D.C. ALJD 7.[2] In April of 2000, immediately following AFSCME's recognition as exclusive representative of the four units, the union contacted the FAA and began making preparations to negotiate a collective bargaining agreement. ALJD 8, Tr. 171.

1. Negotiations between AFSCME and the FAA

Prior to beginning negotiations, the FAA's two chief negotiators, Anthony Herman, a partner with the firm of Covington and Burling, and Ray Thoman, the FAA's Deputy Assistant Administrator for Labor Relations, both understood that the Office of Management and Budget (OMB) would have to approve of any tentative agreement reached between the union and the FAA before the agreement could become final. Tr. 464, 557. "[T]he OMB took the position that, before any collective bargaining agreement could become final, they had to be consulted after a tentative agreement was reached and approve it." Tr. 461. *See also* Tr. 462, 464.

At the first meeting between union and FAA negotiators, the parties discussed ground rules for the coming negotiations. Steve Kreisberg, the union's

[2] Because the parties have agreed to utilize a Deferred Appendix, references to the record are to individual documents. For the Court's convenience, this brief will follow the citation form set forth in Petitioner's Brief (Pet. Br.) at 2 n. 1.

chief negotiator, established, first, that any tentative agreement would not be implemented until the union membership had ratified it and, second, that no individual article could be finalized until the entire agreement was finalized. Tr. 459. Herman, in turn, explained that

> just as the union had to ratify its agreement before it could be final, there were certain steps that [the FAA] had to take before any agreement could be final, and those steps [included] that the agreement had to be approved by . . . the Office of Management and Budget . . . .

Tr. 459. *See also* Tr. 557 (Thoman confirming Herman's recollection; "[Herman] reminded or stated that . . . whatever we came up with was subject to review by the Office of Management and Budget.").

The OMB approval requirement was discussed numerous times during bargaining. The union never – at the ground rules session or any other time – objected to OMB review. As Herman testified,

> A: I repeatedly, both across the bargaining table, in formal meetings with Mr. Kreisberg, in formal meetings with Mr. McEntee, and in formal meetings with [both] Mr. Kreisberg and Mr. McEntee, said to them in unmistak[ably] clear terms that any agreement that we reached had to be approved by the OMB.
> Q: What was Mr. Kreisberg's response when you would make this statement?
> A: Mr. Kreisberg generally said nothing or said, "I understand."

Tr. 465. *See also* Tr. 466, Herman testifying "I can tell you that in the very first meeting that [AFSCME International President Gerald] McEntee and Mr. Kreisberg and I had, I talked about OMB approval. In fact, it even – it became so

much a topic of conversation, particularly between Mr. McEntee and me, that we both referred to it as the 'OMB problem.' It was shorthand for the need to get approval and my concern whether we could get it." Tr. 466.

OMB approval had become standard procedure on FAA contracts involving pay.[3] Tr. 461, 502-503. The FAA's witnesses testified that OMB approval was routinely acquiesced to by the FAA's other constituent unions: "[W]e signed off on individual agreements with NATCA, just as we signed on individual agreements with AFSCME and with PASS, on an article-by-article basis, all the while understanding that the agreement as a whole was subject to approval by OMB . . ." Tr. 541, 539-41, 586. Furthermore, as the Judge noted, "I find it difficult to believe that AFSCME would not be familiar with the negotiations of other bargaining units involving similar units within the FAA, particularly since the negotiations included pay issues unique to FAA." ALJD 28. Indeed, the union's witnesses repeatedly demonstrated a familiarity with the content and process of other bargaining units' negotiations. Tr. 109, 172, 174, 187, 276; *see also* Tr. 480.

Far from indicating that the union objected to OMB approval, the record shows that the union accepted, and offered to assist with, the process. In a meeting, "early on," between Herman and McEntee, McEntee reassured Herman "'[i]f you're telling me OMB is a problem, let me know when the right time is and

[3] Unlike most federal employees, FAA employees may bargain over compensation issues pursuant to 49 U.S.C. § 40122.

I'll call OMB myself, or I'll call the President and fix the problem.'" Tr. 469. Herman testified that in another meeting, "I believe it was a December meeting," that included FAA Administrator Garvey and President McEntee, Garvey "talked about . . . getting OMB approval." Tr. 481, 482. As the meeting concluded, "Mr. McEntee [said], 'All right, I have to go to the White House. We'll have to go see the President,' or something along those lines." Tr. 482. McEntee was not the only union official to give express consent to OMB approval: Under cross-examination, Thoman was asked if Kreisberg had ever agreed to OMB approval. He responded, "Yes . . . various times he said, 'You do whatever you need to do.'" Tr. 582.

The closest the union ever came to rejecting OMB approval was in a meeting when Kreisberg challenged Herman's authority to bargain in light of the FAA's insistence on OMB approval. Herman recalled, "[o]ne time I recall at a meeting he expressed frustration at my reminder that any agreement was subject to OMB approval, and he said, 'Well, why don't you bring OMB here?'" Tr. 465. As Kreisberg himself testified, however, his reaction was primarily a bargaining ploy and not a genuine insistence that OMB representatives be at the bargaining table; in fact, negotiations continued immediately after the exchange. Tr. 95-97.

Negotiations proceeded as the January 2001 change in administrations approached, reaching an apex in a January 19, 2001, meeting between AFSCME

President McEntee, Secretary of Transportation Slater, Deputy Secretary of Transportation Downey, FAA Administrator Garvey, and the parties' chief negotiators. Tr. 470-71. At the meeting, the parties reached tentative agreement on several critical pay and pay-related articles. GCX 8. At this meeting, too, Herman reminded the parties that OMB would need to approve the tentative agreement. "I think Mr. McEntee's response was, 'I understand,' something along those lines. It wasn't a point of controversy." Tr. 476. Kreisberg reacted similarly. Tr. 477. In fact, in his testimony, Kreisberg expressed relief that the January 19 terms might be acceptable to OMB: "I remember thinking to myself, well, that's a good thing, that means that we're not going to have problems." Tr. 117.

The January 19 meeting was followed by one final bargaining session, on January 24, 2001, when the final articles were tentatively agreed upon. At this final meeting, OMB approval was discussed again.

> Mr. Thoman and I said, "We're very worried about OMB approval. We're very worried that we're not going to get OMB approval. It's a new Administration. It's a new time. We don't know what this OMB is going to say. . . ." And Mr. Kreisberg said, "I understand."

Tr. 486-488. In response to Herman and Thoman's concerns about OMB, the union negotiators agreed to "a significantly more robust . . . cost-cutting" and furlough arrangement. Tr. 489, 527, 560-61; *see also* Tr. 562-63.

The union presented the agreement to its members, who voted to ratify the agreement on February 21, 2001. Tr. 573. The FAA, consistent with its earlier statements, reminded the union that the agreement would not be final until OMB had reviewed and approved it. At this point, the union did object, emailing Herman, "[a]lthough I understand that the agency would like OMB approval of the tentative agreement, I do not concede that the finality of our agreement is contingent upon OMB approval." GSX 13; *see also* GCX 14. Herman testified about his reaction to the union's late objection: "I thought it was absurd . . . I called up Steve [Kreisberg] and I said, 'You know, I understand what you're doing here. I understand the record you're trying to make, but you know it's not true.' . . . I don't think he had much of a response, but I don't recall it." Tr. 492. Thoman also testified that this was the first time the union had objected to OMB review. Tr. 566.

Subsequently, the FAA presented the agreement to OMB. Tr. 497. On or about March 8, 2001, OMB General Counsel Jay Lefkowitz disapproved the tentative agreement, citing provisions in the FAA/AFSCME agreement that would pay FAA employees substantially more than non-FAA employees for the same work. Tr. 493, 500, 516, 591. Herman promptly relayed the disapproval to the union. Tr. 501, GCX 16, 17. When learning of the disapproval, President McEntee did not object, simply saying "'I understand.' That's all he said. I think

he might have said, 'That's all I wanted to know.'" Tr. 496. Because OMB had disapproved of the tentative agreement, the agreement never became final, and the FAA refused to execute it, instead offering to reopen negotiations.

2. The Unfair Labor Practice Charge

Shortly thereafter, on March 20, 2001, AFSCME filed a ULP charge with the Authority's Regional Office. The union claimed that "[t]he FAA's failure to execute the agreement violates Sections 7114(b)(5) and 7116(a)(1) and (5) of the Statute." Union's ULP charge, GCX 1(a). The Regional Office investigated and issued a formal complaint, alleging that the FAA had committed a ULP by refusing to execute the parties' agreement.

B. The ALJ's Decision

The Judge held that the FAA did not commit a ULP. She reasoned that the Statute only requires agencies to execute *final* agreements, and the parties' tentative agreement never became final for two reasons. First, under the rules proposed by the FAA and acquiesced to by the union, the tentative agreement would not become final unless OMB gave its approval. Second, in light of the OMB review requirement, Herman and Thoman did not have sufficient authority to enter into a final agreement.

The Judge determined, as a finding of fact, that the union was aware of the OMB approval requirement and had acquiesced to that review. The Judge noted that witness testimony on this issue was contradictory:

> Both Respondent and the [u]nion rely solely on witness testimony to establish this necessary element of the case. . . . According to the [u]nion witnesses, the issue of OMB approval was only related to pre-approval of pay proposals [brought] to the bargaining table. . . . Respondent's witnesses assert that it was clear from the beginning of the negotiations that OMB would have final approval of the agreement.

ALJD 28. In crediting the agency witnesses' testimony, the Judge considered not only her "observation of the witnesses and their demeanor," ALJD 2, but also

- That the FAA had submitted tentative agreements with other bargaining units to OMB for review, and the union was familiar with those other agreements, ALJD 28;
- That the union had not contradicted Herman's testimony that, early in negotiations, Herman had told the union's International President, Gerald McEntee, about OMB review, and that President McEntee had offered his assistance in obtaining OMB approval, ALJD 29;[4]
- That "the testimony of Respondent's witnesses regarding the need for OMB approval of the tentative agreement were consistent and logical within the time frame of the extended negotiations," *id*.; and

[4] The union elected not to call Mr. McEntee to testify at the hearing, though he was designated as a rebuttal witness.

- That union bargaining concessions, agreeing to limit pay raises, were made in consideration of obtaining OMB approval. *Id*.

Because the Judge credited the agency's witnesses, she concluded that "the Respondent had clearly given the [u]nion notice that OMB would have to approve the tentative agreement before it could be final, and the [u]nion acquiesced in this condition . . . ." ALJD 29. Furthermore, because the agreement never became final, the FAA was not obligated to execute it and refusing to do so was not a ULP.[5] *Id*.

In sum, the Judge found that no ULP had occurred because the FAA had not refused to execute a *final* collective bargaining agreement. The General Counsel and the union filed exceptions. *See* Dec. at 4-5.

C. The Authority's Decision

On review, the Authority affirmed the Judge, adopting her conclusions of law and findings of fact. Specifically, the Authority held that "[t]he evidence in the record supports the Judge's finding that the [u]nion acquiesced in the

[5] Responding to arguments first raised in the parties' post-hearing briefs, the Judge also held that the agreement was not final because, in light of the OMB approval requirement, the FAA's representatives were not authorized to enter final agreements. ALJD 27. Although the FAA had not been charged with a ULP for failing to send fully authorized representatives to the table, the Judge went on to hold that the union had waived its right to demand fully authorized agency representatives. *Id*. As discussed below, the Authority did not reach these points, finding that the lack of OMB approval was sufficient to render the agreement non-final, and the FAA's failure to provide sufficiently authorized representatives was not a part of the General Counsel's complaint.

requirement for OMB approval." Dec. at 6. Because the union had acquiesced to OMB review, and OMB approval had not been given, "the agreement was not final and . . . absent such finality, the [FAA] was under no obligation to execute the agreement." Dec. at 6-7.

The Authority explicitly rejected the union's argument that the Judge had failed to consider relevant evidence. "We find no merit in the [u]nion's contention[.] The Judge considered, but specifically did not credit, testimony to the effect that the Respondent had not notified the [u]nion concerning its intent to submit any agreement reached to OMB for approval." Dec. at 6. In addition, the Authority was not persuaded by the union's suggestion that OMB had not actually disapproved the agreement. "[T]here is substantial evidence in the record supporting the Judge's finding that OMB disapproved the agreement." Dec. at 6.

The Authority also rejected the union's exception to the Judge's waiver analysis. As the Authority noted, "the Respondent is not charged with refusing to send authorized representatives to the bargaining table," and so there could be no ULP found on this new and uncharged theory. Dec. at 7, n. 4.

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 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.

Review of the Authority's factual determinations is narrow. "We are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.'" *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted); *see also* 5 U.S.C. § 7123(c) ("[t]he 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"). A petitioner's burden is particularly high when challenging an ALJ's credibility determinations: The court "must accept the ALJ's credibility determinations . . . as adopted by the Board,

unless they are patently unsupportable." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001).

SUMMARY OF ARGUMENT

The Authority correctly held that the FAA did not commit an unfair labor practice by refusing to execute a tentative collective bargaining agreement. An agency is only required to execute a final agreement. In this case, the tentative agreement was not final because an agreed-upon precondition, OMB approval, had not occurred.

Based upon the testimony in the record and the Judge's credibility determinations, the Authority concluded that the union had acquiesced in the requirement that OMB approve any agreement that the parties negotiated before the contract would become final. This determination is supported by substantial evidence, including unrebutted testimony that the union's International President agreed to, and offered to help obtain, OMB approval of the parties' agreement.

Substantial evidence also supports the Authority and Judge's finding that OMB did not, in fact, approve the tentative agreement. Among other things, credible evidence in the record establishes that one of the agency's chief negotiators took part in face-to-face meetings with OMB and was a participant in the conference call during which OMB gave its disapproval.

Finally, the union's argument that the Authority erred by not addressing the Judge's waiver analysis is mistaken. The union claims that the Authority should have examined whether the union waived its right to negotiate with fully authorized representatives. However, as the Authority properly observed, the FAA was never charged with failing to provide sufficiently authorized representatives. Moreover, acquiescence in the OMB approval requirement in this case does not involve the waiver of a right under § 7114(b)(2).

Accordingly, the petition for review should be denied.

ARGUMENT

THE AUTHORITY CORRECTLY DETERMINED THAT NO UNFAIR LABOR PRACTICE OCCURRED WHERE THE UNION ACQUIESCED IN A REQUIREMENT THAT THE PARTIES' TENTATIVE COLLECTIVE BARGAINING AGREEMENT BE SUBMITTED TO OMB FOR APPROVAL AND WHERE, LACKING SUCH APPROVAL, THE AGENCY REFUSED TO EXECUTE THE TENTATIVE AGREEMENT.

A. The Authority's Determinations are Supported by Substantial Evidence

The union challenges, incorrectly, two of the Authority's findings as unsupported by substantial evidence: first, that the union acquiesced to OMB approval, Pet. Br. 14 and, second, that OMB disapproved of the tentative agreement. Pet Br. 19. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thomas v. NLRB*, 213 F.3d 651, 657 (D.C. Cir 2000) (*Thomas*). It is "something less than the

weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm.*, 383 U.S. 607, 620 (1966).

"This Court will uphold the [Authority's] decision upon substantial evidence even if we would reach a different result upon de novo review. . . . The posture of the instant case calls for singular deference, as petitioners must show that there was a lack of substantial evidence to support the [Authority's] finding[.]" *Thomas*, 213 F.3d at 657 (internal quotations and citations omitted).

1. Substantial evidence supports the Authority's determination that the union acquiesced to OMB review of the tentative agreement

Substantial evidence supports the Authority's conclusion that the union was aware of, and acquiesced in, OMB approval of the parties' tentative agreement. As illustrated above, pp. 3-8, supra, the record contains "such relevant evidence as a reasonable mind might accept as adequate" to support the conclusion that the union acquiesced to OMB review. Thomas, 213 F.3d at 657.

The Authority noted that "[t]he Judge credited the testimony of Respondent's witnesses," Dec. at 6, about, first, notifying the union of the OMB approval requirement and, second, the union acquiescing to the requirement. As cited above, the standard for overturning a Judge's credibility determination is high: The court "must accept the ALJ's credibility determinations . . . as adopted

by the Board, unless they are patently unsupportable." *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001). Here, the union has not made such a showing. Petitioner's brief illustrates only that the Judge heard contradictory evidence on these issues, but does not even attempt to demonstrate that the Judge's credibility determinations were "patently unsupportable." *Id*.

As an initial matter, the union's Statement of Facts, Pet. Br. 3-11, misrepresents the Judge's decision. The union incorrectly claims, "[n]one of the facts set forth in this section is contested. They are based almost entirely on the facts as found by the [Authority] and/or by the [Judge]." *Id*. at 3, n. 2.

However, at several points, the Petitioner treats the Judge's *presentation of union testimony* as if it was the Judge's *own finding of fact*. For instance, Petitioner claims that "[the Judge] also found that OMB was never mentioned during the ground rule discussions. ALJD 9; Tr. 82." Pet. Br. 4. Actually, the Judge found that "no other ground rules were submitted *in writing* by either party . . . *[a]ccording to [a union witness]*, during the ground rules discussions, there was no mention of discussion about the . . . OMB[.] ALJD 9 (emphasis added).

In another misstatment, the union claims that the Judge found "[n]either Herman nor Thoman portrayed OMB's involvement as an after the fact approval of the party's [sic] agreement, and the [union] never agreed to such a condition." Pet. Br. 5, citing ALJD 12-13. However, the cited text omits the Judge's introductory sentence, "[a]ccording to the [u]nion witnesses . . . ." ALJD 11. Indeed,

throughout the Judge's Statement of Facts, the Judge presents both parties' testimony without making final factual findings. The judge's ultimate legal conclusions and factual findings are found in her "Analysis and Conclusion," ALJD 26-30. In the Judge's conclusion, she explicitly credits the FAA's witnesses: "I find the record evidence shows that the [FAA] did clearly set forth its position on OMB approval during the negotiations," ALJD 28, and "I therefore credit the testimony of Herman and Thoman with regard to this issue." ALJD 29. The union's Statement of Facts, then, is neither authoritative nor reflective of the Judge and the Authority's findings.[6]

The union's reliance, Pet. Br. *passim*, on testimony from union witnesses that contradicts the Judge and Authority's ultimate conclusions is misplaced. As noted, the Supreme Court has held that evidence need not be uncontradicted in order to be substantial.

[6] The union's misrepresentation is not confined to its Statement of Facts. At Pet. Br. 14, the union claims: "Indeed, the ALJ expressly found that '[t]he union never agreed that OMB approval of the agreement would be all right . . . .' ALJD 12." The quoted text is in the heart of a section of the Judge's Decision where she is stating the parties' positions, and the union's misrepresentation is obvious when one compares the quoted text to the Judge's finding of fact: "[T]he Respondent had clearly given the [u]nion notice that OMB would have to approve the tentative agreement before it could be final, and the [u]nion acquiesced in this condition . . . ." ALJD 29.

Ultimately, the facts in the record more than satisfy a substantial evidence inquiry. To summarize, the evidence indicates

- That the FAA's chief negotiator raised the OMB approval requirement at the first session, and the union did not object, Tr. 459, 465, 557;
- That OMB approval was a standard feature in contracts between the FAA and its bargaining units, and that the union was aware of this practice, Tr. 461, 502-503, 539-41, 586 and Tr. 109, 172, 174, 187, 276, 480;
- That the union's International President was made aware of the OMB approval requirement, and he offered to assist in obtaining that approval, Tr. 466, 469, 482;
- That OMB approval was discussed on several occasions during the course of negotiations, and the union never objected, Tr. 465, 466, 476, 477, 582;
- That the union's chief negotiator expressed relief when learning that OMB would be likely to approve a particular set of terms, Tr. 117;
- That the union made bargaining concessions in an effort to obtain OMB approval, Tr. 487-89, 527, 560-63; and
- That the union did not object to OMB review and approval until after tentative agreement on all articles had been reached. Tr. 492, 566.

In light of this evidence, substantial evidence supports the Judge and Authority's conclusion that the union acquiesced to OMB review of the parties' tentative agreement.[7]

2. Substantial evidence supports the Authority's determination that the parties' tentative agreement was not approved by OMB

The union claims, incorrectly, that OMB's disapproval of the parties' tentative agreement was never established. Pet. Br. 19-20.

As an initial matter, it is important to noted that OMB's disapproval is not an issue in this case. The Judge and the Authority found that the agreement would become final contingent upon OMB *approval*, and so only the existence or absence of such approval is relevant. *See, e.g.*, Dec. at 6 ("the requirement for OMB approval"), ALJD 29 ("OMB would have to approve the tentative agreement before it could be final"). Inasmuch as the General Counsel alleged that the FAA had refused to execute a final agreement, the burden of proving OMB *approval* rested with the General Counsel, and any uncertainty in this regard supports the Authority's decision to dismiss the complaint. *See* 5 C.F.R. § 2423.32. ("The General Counsel shall present the evidence in support of the complaint and have

[7] The union suggests that "under the [Authority's] logic," it would have risked committing a ULP of its own if it had taken exception to the OMB approval requirement and not proceeded with negotiations. Pet. Br. 18. The Authority's decision does not impose such a requirement. Whatever the union's other options, in this case, as found by the Judge, the union did not even state an objection to OMB review.

the burden of proving the allegations of the complaint by a preponderance of the evidence.")

Moreover, as the Authority correctly held, substantial evidence shows that OMB disapproved the parties' tentative agreement. Dec. at 6. In addition to the evidence cited by the Authority ("undisputed testimony of Respondent's Chief Negotiator [Herman] that he was present when OMB disapproved the agreement," Dec. at 6, citing Tr. 500), there is other testimony and evidence showing that OMB disapproved of the agreement. Thoman testified, for instance, that "Jay Lefkowitz, the General Counsel of OMB" directed the FAA not to execute the agreement, Tr. 591, and Herman testified about a conversation he had with McEntee "after OMB had disapproved the contract." Tr. 492. The union's own chief negotiator was satisfied that OMB had actually disapproved the contract: "[W]hat ultimately turned out that happened [was] that OMB did not approve." Tr. 140.

In an effort to cast doubt on the uniform testimony of both parties' chief negotiators, petitioner cites testimony from OMB attorney Linda Oliver. Oliver was not party to the meetings between OMB and the FAA, and her first involvement with the agreement was responding to a congressional information request. Tr. 569. Moreover, Oliver did not learn that she would be testifying until the day before the ULP hearing, when OMB was served with a subpoena. Tr. 26-27, 514. Thus, the inconsistencies in her testimony, *see* Pet. Br. at 19 and n. 13, are unsurprising, and the Authority correctly did not fault the Judge for not

specifically commenting on her testimony. "[T]he Judge is not required to comment on every piece of evidence presented to her, particularly where, as here, there is substantial evidence in the record supporting the Judge's finding that OMB disapproved the agreement." Dec. at 6.

B. The Union's Remaining Contention is Without Merit

The union's remaining claim, that the Authority erred by not discussing the Judge's wavier analysis, Pet. Br. 20, is without merit. The union erroneously conflates the issue of whether it *acquiesced* to OMB approval with the issue of whether it *waived* its right to demand fully authorized agency negotiators. Pet. Br. 22. Specifically, the union claims that it did not waive its right to bargain with fully authorized representatives. Pet. Br. 20.

Long-standing Authority precedent indicates that parties may, through ground rules or otherwise, require satisfaction of certain conditions in order for an agreement to be final. For example, in *Department of Health and Human Services, Philadelphia Regional Office, Region III*, 12 F.L.R.A. 167 (1983) (*DHHS*), the Authority considered whether a final agreement existed between the agency and a union where

> [p]rior to commencing negotiations . . . the [agency] and [the union] agreed to ground rules which stated, in part, that the "final Negotiated Agreement is subject to the approval of the Regional Director and the President of the Local."

DHHS, 12 F.L.R.A. at 168-69. Negotiations "continued intermittently for some five years," with the parties finally initialing a "document setting forth their agreement." *Id.* at 169. The union "claim[ed] that this document was a final and binding collective bargaining agreement . . . ." *Id.* The Authority, however, disagreed, "noting particularly the parties' ground rules requirement that any final agreement must first be approved by both the [agency's] Regional Director . . . and AFGE Local 3376's President." *Id.* Just as the parties in *DHHS* required extra steps before their tentative agreement would become final, the parties in the instant case, through the union's acquiescence to OMB approval, established similar requirements.[8] The union's acquiescence to this condition requires no inquiry into whether the union waived its rights under § 7114(b)(2).

Furthermore, whether the agency violated the union's rights by fielding inadequately authorized representatives is not a part of this case. As noted above, p. 9, *supra*, neither the union's charge nor the General Counsel's ULP complaint charges the agency with anything other than failing to execute a final agreement. "[A] violation not expressly alleged in a complaint may be found if . . . the respondent knew what conduct was at issue and had a fair opportunity to present a

[8] *DHHS* is a representation case, in which NTEU was attempting to organize a representational election at the agency, and AFGE claimed it had an existing agreement with the agency. Although the context is different, the Authority's analysis – whether parties may agree to pre-finalization requirements through ground rules negotiations or otherwise – is relevant to the instant case.

defense." *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Ariz.*, 52 F.L.R.A. 421, 429 (1996). The agency had no such notice or opportunity to defend against the union's inadequate authorization claim. Even at the hearing, counsel for the General Counsel stated that the sole issue before the Judge was whether the agency had refused to execute a final agreement: "The violation that's alleged is whether or not there's a final agreement." Tr. 543.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES COUNCIL 26, Petitioner	)	
v.	)	No. 04-1021
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Final Brief for the Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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