ORAL ARGUMENT SCHEDULED FOR DECEMBER 9, 2004

No. 04-1129

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

_____

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO,

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 Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO (IFPTE) and Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina. IFPTE is the petitioner in this court proceeding; the Authority is the respondent; and the National Treasury Employees Union and the American Federation of Government Employees are the amici.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *Social Security Administration, Office Of Hearings And Appeals, Charleston, South Carolina and Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO*, Case No. AT-CA-01-0093, decision issued on February 19, 2004, reported at 59 F.L.R.A. (No. 118) 646.

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

GLOSSARY

ALJs	Administrative Law Judges
Authority or FLRA	Federal Labor Relations Authority
Chevron	*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)
Dep't of the Interior	*NFFE and FLRA v. Dep't of the Interior*, 526 U.S. 86 (1999)
DOD, Tex. Air Nat'l Guard	*Dep't of Defense, Air Nat'l Guard, Tex. Air Nat'l Guard, Camp Mabry, Austin, Tex.*, 6 A/SLMR 591, A/SLMR No. 738 (1976)
Fort Stewart Schools	*Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990)
IFPTE	Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
Office of Program Operations, SSA	*Office of Program Operations, Field Operations, Soc. Sec. Admin., San Francisco Region*, 5 F.L.R.A. 333 (1981)
OHA Charleston or agency	Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina
Peerless Food	*Peerless Food Products, Inc.*, 236 N.L.R.B. 161 (1978)

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Robins AFB	*Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 F.L.R.A. 1664 (1998)
SSA	*Dep't of Health and Human Servs., SSA*, 24 F.L.R.A. 403 (1986)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	unfair labor practice
U.S. Army Reserve	*United States Army Reserve Components Personnel and Admin. Ctr., St. Louis, Mo.*, 19 F.L.R.A. 290 (1985)

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

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" or "FLRA") on February 19, 2004. The Authority's decision is published at 59 F.L.R.A. (No. 118) 646. 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 reasonably determined that, under the Statute, an agency employer incurs a bargaining obligation when it changes substantively negotiable conditions of employment of unit employees *only* where the impact of the change is more than *de minimis*.

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 Association of Administrative Law Judges, International Federation of Professional and Technical Engineers, AFL-CIO ("IFPTE"). The charge alleged that the Social Security Administration, Office of Hearings and Appeals, Charleston, South Carolina ("OHA Charleston" or "agency") violated § 7116(a)(1) and (5) of the Statute by implementing a change in parking policy applicable to bargaining unit employees without providing IFPTE with an opportunity to bargain over the change. The Authority held that no ULP

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

had occurred and dismissed the complaint. IFPTE now seeks review in this Court under § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background[2]

IFPTE is the exclusive representative of a nationwide unit of administrative law judges (ALJs) in the Office of Hearings and Appeals (OHA) of the Social Security Administration, including those working at OHA Charleston. Beginning in October 1999, OHA Charleston provided each of its ALJs with a reserved parking space. On October 25, 2000, OHA Charleston notified IFPTE that it intended to reduce the number of parking spaces reserved for the ALJs. On October 26, IFPTE requested to negotiate over the change. The change in parking policy was implemented on November 15, 2000, and was never negotiated with IFPTE. JA 54-55.

Based on a charge filed by IFPTE, the Authority's General Counsel issued an ULP complaint alleging that OHA Charleston had violated § 7116(a)(1) and (5) of the Statute by implementing the change without affording IFPTE an opportunity to bargain. Subsequently a hearing was held before an FLRA Judge. JA 22-23.

[2] What follows is a summary of the facts sufficient to set the legal question at issue here in context. For more detail, *see* JA 23-30 and JA 54-56.

B. The FLRA Judge's Decision

As relevant here, the FLRA Judge found that OHA Charleston changed conditions of employment of unit employees when it reduced the number of parking spaces reserved for the ALJs. Although the FLRA Judge opined that the change had only a *de minimis* impact on the ALJs, he concluded, nonetheless, that OHA Charleston was required to bargain over the change. In so concluding, the FLRA Judge noted that parking for unit employees is a substantively negotiable matter, and that under existing Authority precedent, agencies are required to bargain over changes in substantively negotiable matters, irrespective of the impact of the change.[3] JA 56-57

Finding that OHA Charleston refused to bargain over the change in parking policy, the FLRA Judge held that OHA violated the Statute by implementing the change unilaterally. The FLRA Judge recommended that a *status quo ante* remedy be effected. JA 57.

[3] Under the Statute, some conditions of employment, namely those that affect the exercise of the reserved management rights enumerated in § 7106(a), are not substantively negotiable. Agency employers are nonetheless obligated to bargain over the "impact and implementation" of the exercise of the § 7106 rights, if the impact is more than *de minimis*. See e.g. *Dep't of Health and Human Servs., SSA*, 24 F.L.R.A. 403, 407-08 (1986) (*SSA*).

C. The Authority's Decision

1. The Federal Register Notice

OHA Charleston filed exceptions to the FLRA Judge's decision with the Authority. On exceptions, OHA Charleston asked that the Authority reconsider its precedent and argued that an agency should be required to bargain over changes in substantively negotiable conditions of employment *only* where the impact of such changes is more than *de minimis*. Determining that the issue raised by OHA Charleston was likely to be of concern to the federal sector labor-management community in general, the Authority published a notice in the Federal Register providing interested parties the opportunity to file amicus briefs. Parties were asked to file briefs on the following:

> What standard should the Authority apply in determining an agency's statutory obligation to bargain when an agency institutes changes in conditions of employment that are substantively negotiable? Why? Should the Authority eliminate the distinction between substantively negotiable changes, where the *de minimis* standard has not been applied, and changes that are not substantively negotiable, where the *de minimis* standard has been applied? Why?

68 Fed. Reg. 35,888, 35,889 (June 17, 2003). JA 44-52. Timely briefs were received from the parties to the case, as well as from 3 other labor organizations and 2 other agencies. JA 58-60.

2. The Authority's Decision

Noting that it was undisputed that OHA Charleston unilaterally reduced the number of parking spaces reserved for bargaining unit employees represented by the union, the Authority stated that the sole question before it was whether OHA Charleston had an obligation to bargain with the union in these circumstances.[4] JA 60. In that regard, the Authority held (Member Pope dissenting) that, under the Statute, an agency employer incurs a bargaining obligation when it changes substantively negotiable conditions of employment of unit employees only where the impact of such changes is more than *de minimis*. Applying that standard to the instant case, the Authority found, agreeing on this point with the FLRA Judge, that the change in parking procedures had no more than a *de minimis* impact and, therefore, OHA Charleston had no obligation to bargain with IFPTE. Consistent with this conclusion, the Authority dismissed the ULP complaint. JA 75-76.

The Authority began its analysis by restating the established legal principles. The Authority first noted that when an agency employer changes unit employees' conditions of employment by exercising a right reserved to management under § 7106(a) of the Statute, the substance of the decision is not itself subject to negotiation (citing *SSA*, 24 F.L.R.A. at 407-08). Citing *SSA* again, the Authority

[4] The Authority rejected the union's contention that the case had become moot because the OHA Charleston office had relocated. JA 60-61. The Authority's determination in this regard is not before the Court.

reiterated that in such circumstances an agency nevertheless has an obligation to bargain over the impact and implementation of such a change, if the change has more than a *de minimis* effect on conditions of employment. JA 63.

The Authority contrasted this situation with the situation of an agency that changes unit employees' conditions of employment by making a decision that does not involve the exercise of a reserved management right. In those circumstances, the Authority has historically applied a different standard. As the Authority noted, under this case law, such a change itself is viewed as substantively negotiable, and the agency has an obligation to bargain over the change, no matter how trivial the effect of the change (citing *Air Force Logistics Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 53 F.L.R.A. 1664 (1998) (*Robins AFB*)). JA 63.

The Authority then reexamined the bases for the application of different standards in these two bargaining situations. First, the Authority observed that under the Executive Order that governed the federal sector labor relations program prior to the enactment of the Statute,[5] an agency was obligated to bargain over

[5] The Statute was enacted as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10,988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos.

changes in conditions of employment only where such changes had a "substantial impact" on unit employees, regardless of whether the change involved reserved management rights (citing *Dep't of Defense, Air Nat'l Guard, Tex. Air Nat'l Guard, Camp Mabry, Austin, Tex.*, 6 A/SLMR 591, A/SLMR No. 738 (1976) (*DOD, Tex. Air Nat'l Guard*). JA 64-66.

Next, the Authority looked to precedent developed under the National Labor Relations Act (NLRA) by the National Labor Relations Board (NLRB). In this regard, the Authority noted that the NLRB has consistently adhered to the principle that unilateral changes in conditions of employment that are mandatory subjects of bargaining do not constitute a breach of the bargaining obligation unless the unilateral change "amount[s] to a material, substantial, and a significant one" (quoting *Peerless Food Products, Inc.*, 236 N.L.R.B. 161, 161 (1978) (*Peerless Food*)). The Authority concluded that at the time of the enactment of the Statute in 1978, the precedent under both the Executive Order and the NLRA mandated the use of a threshold standard that had to be met before a change in substantively negotiable matters gave rise to a duty to bargain over the change. According to the Authority, it would be appropriate to conclude that Congress was aware of this precedent and intended that it continue to apply under the Statute. JA 66-67.

11,616, 11,636, and 11,838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.), *reprinted in* 5 U.S.C. ' 7101 note at 1028-1033 (2000).

The Authority noted, however, that precedent under the Statute developed differently. With regard to management-initiated changes involving an agency employer's § 7106(a) rights, the Authority initially employed a "substantial impact" requirement. *See, e.g., Office of Program Operations, Field Operations, Soc. Sec. Admin., San Francisco Region*, 5 F.L.R.A. 333, 336-37 (1981) (*Office of Program Operations, SSA*). Subsequently, in other cases involving the exercise of a reserved management right, the Authority modified the "substantial impact" standard to an "impact" standard and then to a "more than *'de minimis'*" standard. *See SSA*, 24 F.L.R.A. at 407. The "*de minimis*" standard set forth in *SSA* continues to be the standard applied by the Authority in cases involving the exercise of a reserved management right under § 7106 of the Statute. JA 68-69.

With respect to changes not involving the exercise of management rights, *i.e.*, changes in substantively negotiable conditions of employment, the Authority had, without explanation, taken a different approach. Under Authority precedent, an agency was obligated to bargain over such changes irrespective of the impact of the change. *See, e.g., United States Army Reserve Components Personnel and Admin. Ctr., St. Louis, Mo.*, 19 F.L.R.A. 290, 292-93 (1985) (*U.S. Army Reserve*). JA 69-71.

The Authority observed that in *U.S. Army Reserve*, no explanation had been provided for the proposition that where the decision to make a change was itself

substantively negotiable, the extent of the change's impact on unit employees was irrelevant. Specifically, as the Authority discussed, the Authority had not provided any rationale for departing from the threshold standard applied under the Executive Orders or the NLRA. The Authority noted that in subsequent cases the Authority had continued to adhere to the *U.S. Army Reserve* standard, but never explained why the extent of the impact of the change on unit employees was not irrrelevant in determining whether the agency has an obligation to bargain (citing *Robins AFB,* 53 F.L.R.A. at 1669)). JA 71-72.

In this case, the Authority reconsidered this precedent. First, the Authority concluded that there was no compelling reason to depart from the threshold standard set forth both under the Executive Order and by the NLRB in cases involving a change by management in substantively negotiable matters. Second, the Authority found that the rationale for adopting the *de minimis* standard in cases where management rights affect the obligation to bargain is equally applicable in cases involving substantively negotiable matters. Specifically, the Authority stated its view that requiring bargaining only where the impact of a change is more than *de minimis* will further meaningful bilateral negotiations and that such an interpretation is consistent with Congress's intent in § 7101(b) that the provisions of the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." Accordingly, the Authority held that the

appropriate threshold standard to apply in both circumstances is the *de minimis* standard that the Authority has developed and applied over the years. According to the Authority, this standard provides ample guidance to the parties to determine when a bargaining obligation is incurred and ensures that bargaining takes place in a manner that furthers the purposes set forth in § 7101 of the Statute. JA 72-75.

Applying the *de minimis* standard to the instant case, the Authority found that reduction in reserved parking places had only a *de minimis* impact on unit employees.[6] Specifically, the Authority found that both before and after the reduction in reserved spaces, the ALJs had access to free parking and that there was never any difficulty in finding convenient parking places. The Authority concluded that OHA Charleston had no obligation to bargain over the change and dismissed the ULP complaint. JA 75-76.

STANDARD OF REVIEW

The standard of review of Authority decisions is Anarrow.@ *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988).

[6] It is not contested before this Court that the impact of OHA Charleston's decision to reduce the number of reserved parking spaces had no more than a *de minimis* impact on OHA Charleston ALJs.

Where, as here, the Authority is interpreting the statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart Schools*); *see also* 5 U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart Schools*, 495 U.S. at 645 (quoting *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the Statute." *Id.*

Deference to the Authority is "especially appropriate" where, as here, the Authority is required to fill in statutory gaps. *Department of Health and Human Servs. v. FLRA*, 976 F.2d 1409, 1413 (D.C. Cir. 1992) (citing *Chevron*, 467 U.S. at 843-44). Under the Statute, the obligation to bargain is provided only in general terms, leaving it to the Authority to define the precise contours of that obligation. *See NFFE and FLRA v. Dep't of the Interior*, 526 U.S. 86, 98-99 (1999) (*Dep't of the Interior*) ("Congress delegated to the Authority the power to determine . . . whether, when, where, and what sort of midterm bargaining is required"). As the Supreme Court has stated, the Authority is entitled to Aconsiderable deference@ when it exercises its Aspecial function of applying the general provisions of the

[Statute] to the complexities of federal labor relations.@ *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (the NLRB must have the authority to fill the interstices of the broad statutory provisions) (*Curtin Matheson*).

Accordingly, the Court must uphold the Authority's decision in the instant case if it is based on a reasonable interpretation of the Statute. In that regard, the Court's task is not to determine whether the Authority's interpretation of the Statute is the best or *most reasonable* one, but only whether it is a permissible one. *AFGE v. FLRA*, 778 F.2d 850, 861 (1985). Further, the Authority's reasonably adopted position at issue here is entitled to deference even though the Authority formerly held a different one. *See Curtin Matheson*, 494 U.S. at 787; *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) ("To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making.").

SUMMARY OF ARGUMENT

Exercising the power delegated by Congress to determine the precise contours of the Statute's general obligation to bargain, the Authority properly determined that an agency employer is not obligated to bargain over changes concerning substantively negotiable conditions of employment where the impact of

those changes is no more than *de minimis*. The Authority's determination in this regard was a reasonable extension of the rule previously applied only in cases where proposed changes in conditions of employment involved the exercise of management rights.

1. The Authority's decision is consistent with the language and purpose of the Statute. Like the analogous provisions of the NLRA, the Statute sets out the obligation to bargain in general terms. Following Congress's command to balance the rights of employees to bargain collectively and the need to maintain an effective and efficient government, the Authority reasonably held that although employer agencies are generally obligated to bargain over changes in conditions of employment, no such obligation exists where the effect of such a change is trivial at best. The Authority's holding is consistent with both the more restrictive Executive order program that previously governed federal sector labor relations, and the more expansive private sector regime governed by the NLRA.

2. The unions erroneously argue that the Authority's decision is contrary to the plain language of the Statute. However, nothing in the plain language of the Statute addresses an agency's obligation to bargain over matters only having a *de minimis* effect on employees' conditions of employment. Further, nothing in the Statute's structure compels the conclusion that agencies are required to provide unions with an opportunity to bargain prior to making *de minimis* changes to

employees' conditions of employment. Although the Statute delineates the *subject matters* that are appropriate for bargaining principally by identifying certain exceptions from the Statute's scope of bargaining, the Statute is silent with respect to the specific circumstances under which an obligation to bargain arises.

3. Congress left the determination as to the circumstances under which an agency's obligation to bargain arises to the Authority and the Authority's decision should be upheld because it is a reasonable interpretation of the Statute. In that regard, the unions mistakenly contend that the Authority's application of the *de minimis* standard in the instant case is contrary to clear congressional intent as evidenced by the Statute's legislative history. However, the snippets of legislative history upon which the unions rely do not concern the *de minimis* standard, but rather address the application of the Statute's management rights clause.

Further, the Authority adequately explained its departure from prior precedent. The Authority's decision specifically noted that its prior decisions gave insufficient consideration to the practices under the Executive Order and in the private sector. The Authority also stated that the statutory policies furthered by the use of the *de minimis* standard in cases involving the exercise of management rights would also be furthered in cases involving substantively negotiable matters.

Finally, the unions' policy arguments for setting aside the Authority's decision are without merit. The Authority's decision does not deprive employees

of their right to bargain collectively. The only cases affected by the Authority's decision are those were the impact of agency action is concededly *de minimis*. The obligation to bargain remains effective in all other circumstances. In addition, the union's claims that by abandoning a bright-line rule, the Authority is inviting confusion and increased litigation are unfounded. The Authority's decision only applies a well-established and well-understood principle in a new context. Contentions about increased litigation are speculative.

In sum, the Authority reasonably balanced the rights of employees and unions with the need to maintain an effective and efficient government when it determined that employer agencies must bargain over changes in conditions of employment only where the impact of such changes is more than *de minimis*.

ARGUMENT

THE AUTHORITY REASONABLY DETERMINED THAT, UNDER THE STATUTE, AN AGENCY EMPLOYER INCURS A BARGAINING OBLIGATION WHEN IT CHANGES SUBSTANTIVELY NEGOTIABLE CONDITIONS OF EMPLOYMENT OF UNIT EMPLOYEES *ONLY* WHERE THE IMPACT OF THE CHANGE IS MORE THAN *DE MINIMIS*

De minimis non curat lex ("The law does not concern itself with trifles"). Black's Law Dictionary 443 (7th ed. 1999). There is no reason to exempt labor law from this venerable axiom. Although the *de minimis* doctrine was developed as a means of preventing trivial items from draining the resources of the judiciary, the doctrine also has "sound application to administration by the Government of its

regulatory programs." *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979). The *de minimis* doctrine is not an excuse to depart from a statute, but rather is a tool to be used in implementing congressional intent. *Id.*

Consistent with this principle of general applicability, and considering both the Statute's language and its purposes, the Authority reasonably determined that an agency employer's obligation to bargain over changes in employees' conditions of employment does not extend to situations where the effect of the change on employees is *de minimis*. As discussed below, neither IFPTE, nor the amici,[7] provide any reason for this Court to disturb the Authority's holding.

A. The Authority's Decision is Consistent with the Language and Purposes of the Statute

Like the NLRA, the Statute sets out the obligation to bargain in general terms. *See* 5 U.S.C. §§ 7114, 7102(2); 29 U.S.C. 158(d). The Statute does not expressly provide the circumstances under which the obligation to bargain might arise. As discussed above, it is reasonable to infer that Congress delegated to the Authority the power to determine the precise contours of the obligation to bargain. *See Dep't of the Interior*, 526 U.S. at 98-99; *see also BATF*, 464 U.S. at 97 (holding that it is the Authority's function to apply the general provisions of the Statute to the complexities of federal labor relations). Further, the Supreme Court

[7] The National Treasury Employees Union and the American Federation of Government Employees have filed, with the Court's permission, a joint brief as amici curiae. IFPTE and the amici will be referred to collectively as "the unions."

has observed that such a delegation is consistent with the Authority's broad statutory powers under § 7105(a)(1) of the Statute to provide "leadership in establishing policies and guidance relating to matters under [the Statute]." *Id.* at 99.

As the Authority noted in the decisions below, there is no reason to burden the Authority's adjudicative processes with cases that do not serve to bring meaning and purpose to the federal sector labor-management relations program. As the Authority discussed, interpreting the Statute to require bargaining over every single management action, no matter how slight the impact of that action, does not serve those aims (citing *SSA*, 24 F.L.R.A. at 406). JA 73.

The Authority is surely correct in that assessment. This Court has recognized that in enacting the Statute, Congress sought to balance employee rights, including the right to bargain through labor organizations of their own choosing, with the need of the government to maintain the efficiency of its operations. *See NTEU v. FLRA*, 691 F.2d 553, 561-62 (D.C. Cir. 1982); *see also Library of Congress v. FLRA*, 699 F.2d 1280, 1283 (D.C. Cir. 1983) (noting that the Statute has twin purposes of protecting the right of federal employees to organize and bargain collectively while simultaneously strengthening the authority of federal agencies in the interest of a more effective public service).

Requiring an agency to bargain when it effects meaningful changes in employee working conditions, but not when it effects changes having no real effect, is a reasonable way to strike the balance Congress intended. In that regard, § 7101 of the Statute protects the rights of employees to organize, bargain collectively, and participate through labor organizations of their own choosing *in decisions which affect them*, but also provides that a purpose of the Statute is to establish procedures which are designed to meet the special requirements of the government. Section 7101 also emphasizes that the provisions of the Statute should be interpreted in a manner consistent with the requirement of an effective and efficient government. A reasonable way to reconcile these goals is to hold, as the Authority has in the instant case, that employees may participate in all workplace decisions that have a "meaningful" effect on their conditions of employment.

Further, the Authority's construction of the Statute is consistent with the practices under both the more restrictive labor relations program that governed the federal sector before the Statute and the more expansive private sector regime governed by the NLRA. In that regard, under the Executive Order, agencies were obligated to bargain only where changes to employees' conditions of employment had a "substantial impact on personnel policies, practices or general working conditions," regardless of whether the change involved a management right. *See*

Soc. Sec. Admin., Bureau of Hearings and Appeals, 2 F.L.R.A. 238, 239 (1979). As this Court has noted, although the Authority is not bound by precedent developed under the Executive Orders, Executive Order practice not explicitly eliminated in the Statute constitutes "guidance" with respect to congressional intent. *NLRBU v. FLRA*, 834 F.2d 191, 201 (D.C. Cir. 1987); *see also NTEU v. FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985) (where interpreting provisions of the Statute that are similar to those in the Executive Order, precedent developed under the Executive Order is to be considered).[8]

By the same token, this Court has recognized that precedent developed under the NLRA is instructive, though not strictly binding, in interpreting the Statute. *See, e.g. NTEU v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987). Under both the Statute and the NLRA, an employer is generally obligated to negotiate with respect to conditions of employment. *See* 5 U.S.C. § 7114(b); 29 U.S.C. § 158(d). It is well established and undisputed that the NLRB has not interpreted § 158(d) to

[8] The general obligation to bargain under the Statute is substantially identical to that under the Executive Orders. Under the Statute, the duty to bargain requires agencies and labor organizations to meet at reasonable times, and consult and bargain in a good faith effort to reach agreement with respect to conditions of employment. 5 U.S.C. § 7103(a)(12). "[C]onditions of employment" are defined as "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. 7103(a)(14). Section 11 of Executive Order 11491 required agencies and labor organizations to "meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions." Exec. Order 11,491, as amended, 3 C.F.R. 861. The general obligation to bargain under the Statute is substantially identical to that under the Executive Orders.

compel employers to bargain over insignificant changes in conditions of employment. Rather, under the NLRA, employers are obligated to bargain over changes in conditions of employment only where such changes are "material, substantial and significant." *See, e.g., Peerless Food*, 236 N.L.R.B. at 161; *see also Microimage Display Div. of Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991) (recognizing the NLRB's doctrine). This Court has held that the NLRB has the latitude not to burden itself with "infinitesimally small abstract grievances," and that it is up to the NLRB to draw the line where matters are too trivial in their impact to require bargaining. *Truck Drivers, Oil Drivers, Filling Station and Platform Workers Local 705 v. NLRB*, 509 F.2d 425, 428 (D.C. Cir 1974). Similar latitude is due the Authority.

B. The Unions' Arguments are Without Merit

Not disputing the *de minimis* effect of the changes at issue in the underlying case, the unions contend that the Authority's decision should be overturned by this Court. According to the unions, the Authority's position is directly contrary to the text and structure of the Statute and thus entitled to no deference under *Chevron*. Alternatively, the unions argue that even if the Statute does not directly settle the question, the Authority's position is based on an unreasonable and impermissible construction of the Statute. As demonstrated below, the union's contentions are without merit.

1. The Authority's Decision is not Contrary to the Plain Language of the Statute

According to the unions, the Statute's language compels a conclusion that Congress intended to require agency employers to bargain over any change in fully negotiable conditions of employment, even where it is demonstrated that the change has only a *de minimis* impact. To the contrary and as noted above, the Statute itself provides and expressly sets forth only a highly generalized obligation to bargain and does not, by its terms, compel the construction favored by the unions. Neither the specific statutory provisions nor the judicial precedent cited by the unions support the positions the unions press in this litigation.[9]

According to the unions (IFPTE Brief (Br.) 9), the "key statutory provision" is § 7102(2) of the Statute, which provides employees the right to "engage in collective bargaining with respect to conditions of employment through [their chosen] representatives." However, standing by itself, this section does not conclusively indicate congressional intent to impose on agencies a bargaining obligation over trivial matters. First, § 7102(2) is similar in its generality to

[9] IFPTE twice cites *Federal Deposit Insurance Corporation v. FLRA*, 977 F.2d 1493, 1497 (D.C. Cir. 1992) (Br. 11, 30) suggesting that this Court had approved the Authority's previously held view that the *de minimis* test should not be applied where a change in conditions of employment involved only substantively negotiable matters. To the contrary, the Court was merely noting the current Authority precedent. The applicability of the *de minimis* test was not an issue before the Court.

§ 158(d) of the NLRA and the unions concede that employers subject to the NLRA are not obligated to bargain over trivial changes.

IFPTE argues, however, that the analogy between the Statute and the NLRA should be rejected because the Statute, but not the NLRA, expressly excepts certain matters from the scope of bargaining. Citing, among other cases, *Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983), IFPTE contends that the Statute *requires* that agencies bargain over any and all conditions of employment unless expressly excused by the Statute. Noting that there is no *de minimis* exception in the Statute, IFPTE asserts that the Statute, by its terms, requires negotiations prior to any change in conditions of employment, no matter how limited the effect of the change might be. IFPTE reads too much into *Library of Congress* and related cases.

At issue in *Library of Congress*, and the other cases cited by IFPTE, were the particular subject matters that may be bargained in the federal sector -- not the circumstances under which a bargaining obligation might arise. Peculiar to the federal sector, certain *subjects* are expressly exempted from the obligation to bargain. These exceptions include matters specifically provided for by statute, *see* 5 U.S.C. § 7103(a)(14), and the specific rights reserved to management, *see* 5 U.S.C. § 7106(a). *Library of Congress*, 699 F.2d at 1284 and n. 16. At issue in the instant case is a different matter, namely, under what circumstances a

bargaining obligation arises. As the Supreme Court recognized, the Statute is silent as to the circumstances when a bargaining obligation arises. *See Dep't of the Interior*, 526 U.S. at 91-92. The Authority reasonably answered that question in this case when it held that there is no bargaining obligation regarding *de minimis* matters.

IFPTE also stresses (Br. 11) the Statute's express goal of permitting employees to participate, through their unions, in workplace decisions. However, such a general admonition cannot be construed to compel the adoption of a particular delineation of an agency's bargaining obligation. Further, and as noted above, in interpreting the Statute, the Authority must consider not only the Statute's goal of furthering collective bargaining, but also the special needs of the government and the requirement to interpret the Statute in a manner consistent with an effective and efficient government.

2. The Authority's Decision is a Reasonable Interpretation of the Statute and is Entitled to Deference

Alternatively, the unions argue that even if the Statute's plain language does not compel the conclusion that agencies are required to bargain over trivial changes in conditions of employment, the Authority's *de minimis* test is an impermissible interpretation of the Statute. In that regard, the unions contend that: 1) based on the Statute's legislative history, the *de minimis* test is contrary to clear

congressional intent; 2) the Authority has not adequately explained its departure from precedent; and 3) the test is contrary to important purposes of the Statute. The unions are mistaken on all counts.

a. The D*e Minimis* test is not Inconsistent with Congressional Intent

In contending that the *de minimis* test is inconsistent with "clear" congressional intent, the unions rely on bits and pieces from the legislative history indicating that Congress intended that the "exceptions" to the obligation to bargain are to "be narrowly construed." IFPTE Br. 14. In the first place, and as this Court has stated, "snippets of legislative history do not a law make." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1088 (D.C. Cir 2002).

Secondly, and in any event, the snippets the unions rely upon are inapposite. As the IFPTE concedes (Br. 14), the topic that dominated the legislative history was the management rights provisions of § 7106 of the Statute. The legislative comments cited by IFPTE (Br. 14-16) all concerned § 7106, and expressed Congress's intent that the Authority would interpret the *management rights* provision of the Statute more narrowly than the analogous provisions of the Executive Order. Nothing cited by IFPTE indicates that Congress intended bargaining to be triggered by *de minimis* changes in conditions of employment.

On the other hand, to the extent the legislative history address an agency's obligation to bargain prior to implementing changes in conditions of employment,

it can be read to support the Authority's interpretation of the Statute. A reference to that obligation is found in the report accompanying the Senate version of what was to become the Statute. There, the Committee on Governmental Affairs stated that agencies would be required to provide notice and an opportunity to bargain over proposed changes in conditions of employment. S. Rep. No. 95-969 at 104 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* at 764 (Comm. Print No. 96-7) (*Legis. Hist*.). Because the Senate version reflected an interest in carrying forward certain practices from the Executive Order, this legislative history may be construed as tacit approval of the determination under the Executive Order not to require bargaining over trivial matters. As the Senate Report stated, "[t]he basic, well tested provisions, policies and approaches of Executive Order 11491, as amended have provided a sound and balanced basis for [federal sector labor relations]." *Id.* at 12, *reprinted in Legis. Hist.* at 749. As discussed above, the Authority's *de minimis* test is consistent with the practice under the Executive Order. The unions have cited to nothing in the legislative history to indicate Congress's disapproval of this aspect of Executive Order practice.

Accordingly, the unions have not demonstrated that the Authority's application of the *de minimis* test is "contrary to Congress's clear intent" (IFPTE Br. 14).

b. The Authority Adequately Explained its Departure from Precedent

It is well established that an administrative agencies may deviate from precedent as long as the agency justifies the change with a reasonable explanation. *See, e.g., Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1076-77 (D.C. Circuit 2002). An agency's explanation is adequate if a reviewing court can reasonably discern the path the agency took in coming to its decision. *Fed. Election Comm'n v. Rose*, 806 F.2d 1081, 1088 and n.14 (D.C. Cir. 1986) (*Rose*).

Contrary to the unions' contentions (IFPTE Br. 18), the Authority's explanation is more than adequate. In the decision below, the Authority noted that in previously determining that an agency was obligated to bargain over changes in substantively negotiable conditions of employment irrespective of the impact of the change, no consideration had been given to private sector practice and precedent under the Executive Order (citing *U.S. Army Reserve*). JA 69-72. After a thorough review of this private sector and Executive Order precedent, the Authority concluded that the policies that led to that precedent are applicable under the Statute as well. JA 72-73. Further, the Authority noted that in applying a *de minimis* test to cases involving the exercise of management rights, the Authority

had relied on private sector precedent, citing *SSA*. JA 73. In discussing the *SSA* case, the Authority found that the policies furthered by the use of the *de minimis* standard in cases involving management rights would also be furthered in cases involving only substantively negotiable matters. Additionally, noting that the Statute must be interpreted in a manner consistent with an effective and efficient government, the Authority found that requiring bargaining over every management action, no matter how slight the impact, would tend to burden the Authority's adjudicative process with matters that do not promote "meaningful" collective bargaining.

IFPTE's objections concerning the "adequacy" of the Authority's explanation are essentially the same as those proffered concerning the merits of the Authority's decision; specifically, that Executive Order and private sector precedent are irrelevant. *See Rose*, 806 F.2d at 1088 and n.14 (evaluation concerning "adequacy" of agency explanation is not a determination about the decision itself.) As noted above, the unions' argument stresses the difference in the "scope of bargaining," *i.e.*, what subjects may be bargained, between the Executive Order program and the private sector. However, nothing in the unions' briefs provides a basis for questioning the adequacy of the Authority's explanation.

c. The Authority's Decision is not Inconsistent with Important Purposes of the Statute

The unions erroneously contend that the Authority's decision should be set aside because it deprives employees of the right to engage in collective bargaining and upsets the balance between labor and management that Congress intended. The unions' claim should be rejected.

As an initial matter, it cannot be disputed that the Authority's decision will reduce the circumstances under which unions will be able to engage in collective bargaining. That, however, is an insufficient basis for the unions' sweeping contention that the Authority's decision deprives employees of the right to bargain collectively.

In making this claim, the unions rely on the Statute's purpose of strengthening collective bargaining, but ignore the Congress's demand for an effective and efficient government. As this Court has recognized, interpreting the Statute requires striking a balance between these two important policies. *See EEOC v. FLRA*, 744 F.2d 842, 845 (D.C. Cir. 1984). Relieving agencies of an obligation to engage in collective bargaining over matters that have no significant effect on employees, but enforcing an obligation to bargain with respect to all other matters, strikes a reasonable balance.[10]

[10] IFPTE implies that the Authority's decision is more sweeping than it actually is by suggesting (IFPTE Br. 26 n. 12) that the Authority has held that changes in

The unions also claim that the Authority's *de minimis* standard deprives employees of the opportunity to determine for themselves what workplace changes are sufficiently important to warrant bargaining. The unions contend in this regard that employees are in the best position to determine what is the actual impact of workplace changes.

Contrary to the unions' position, the Authority's *de minimis* rule does not deprive employees of a meaningful voice in workplace decisions. Any time an agency proposes to change conditions of employment, a union may request bargaining. If an agency refuses to bargain contending the change is *de minimis* and the union disagrees, the union has options. Initially, the union may attempt to convince the agency that the change is more than *de minimis*. Further, should the agency continue to refuse to bargain, the union may contest the agency's decision in an appropriate forum, either by filing a ULP charge with the Authority or by filing a grievance under the parties' collective bargaining agreement. An agency that implements a change in conditions of employment without bargaining does so at its peril. *See e.g., Pension Benefit Guaranty Corp.*, 59 F.L.R.A. 48, 59 (2003).

The unions also mistakenly contend that by abandoning a bright-line rule, the Authority is inviting confusion and increased litigation. Although a bright-line

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parking policy are necessarily *de minimis*. IFPTE has misconstrued the Authority's decision. The Authority found the specific change in this case *de minimis* because the reduction in reserved parking spaces for the ALJs did not affect ALJ access to free parking. JA 75-76.

rule has the advantage of ease of application, the Authority has determined that such a rule in cases such as this would require agencies to bargain in instances that would not further the goals of the Statute. Such a determination, whether the purposes of the Statute would be better served by a bright-line rule or a more nuanced analytical approach, is within the Authority's discretion to make, so long as the Authority acts reasonably. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (choice to proceed by general rule or case-by-case adjudication lies primarily in the informed discretion of the administrative agency). In that regard, the Authority noted that it had been employing the *de minimis* test in the context of impact and implementation bargaining for years and parties to the federal sector labor relations program were familiar with the operation of the standard.

With respect to the likelihood of increased litigation, such claims are of course speculative. However, as pertinent here, the only effect of the Authority's decision is that the *de minimis* test will now be applied in a new context. Contrary to the unions' contentions (amici Br. at 22), because the parameters of the test are well established, no further litigation will necessarily be required to "flesh out" the standard.

The unions' additional suggestion (IFPTE Br. 30), that litigation will increase because employer agencies will rely on the *de minimis* test to unilaterally implement changes in conditions of employment or in other circumstances, is also

flawed. A significant increase in cases is likely only if agencies attempt to use the *de minimis* test in bad faith. The unions present no evidence to indicate that such agency misbehavior is likely.[11]

CONCLUSION

The petition for review should be denied.

[11] Amici state (amici Br. 17) that the de minimis standard in impact and implementation cases has produced an "overabundance' of litigation, citing a Lexis word search using "de minimis" and "impact and implementation." The unions' assessment is flawed. Such a search will produce a "hit" if the search words are present regardless of context. Therefore a "hit" will occur in any case in which the Authority or an ALJ has used the words regardless of whether the *de minimis* issue was actually litigated. *See, e.g., United States Patent and Trademark Office*, 57 F.L.R.A. 185, 213 (2001) (ALJ stated general principle regarding the obligation to bargain although whether the change was *de minimis* was not at issue).

Respectfully submitted,

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September 2004

CERTIFICATION PURSUANT TO FRAP 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is written in a proportionally-spaced 14-point font and contains 6775 words.

September 23, 2004

James F. Blandford
Attorney

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

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO,	)	
Petitioner	)	
v.	)	**No. 04-1129**
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

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

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