ORAL ARGUMENT SCHEDULED FOR MAY 6, 2005

No. 04-1224

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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 951, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 2152, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioners

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF A DECISION 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 Federation of Federal Employees, Locals 951 and 2152, International Association of Machinists and Aerospace Workers (NFFE or Union) and United States Department of the Interior, Bureau of Land Management, California State Office, Sacramento, California (Agency). NFFE, Locals 951 and 2152 are the petitioners in this court proceeding; the Authority is the respondent; National Treasury Employees Union and 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 *National Federation of Federal Employees, Locals 951 and 2152, International Association of Machinists and Aerospace Workers and United States Department of the Interior, Bureau of Land Management, California*, Case No. 0-NG-2685, decision issued on May 13, 2004, reported at 59 F.L.R.A. (No. 170) 951.

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

ADDENDUM

Page

TABLE OF AUTHORITIES

CASES

Page No.

TABLE OF AUTHORITIES
(Continued)

Page No.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

TABLE OF AUTHORITIES
(Continued)

Page No.

STATUTES

TABLE OF AUTHORITIES
(Continued)

CODE OF FEDERAL REGULAITONS

Page No.

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

GLOSSARY

Agency	United States Department of the Interior, Bureau Of Land Management, California State Office, Sacramento, California
Am. Br.	Amici Brief
App.	Joint Appendix
AUO	Administratively Uncontrollable Overtime
Authority	Federal Labor Relations Authority
FSIP	Federal Service Impasses Panel
Illinois Nurses	*Illinois Nurses Association and Veterans Administration Medical Center, North Chicago, Ill.*, 27 FLRA 714 (1987)
NFFE or Union	National Federation of Federal Employees, International Association of Machinists and Aerospace Workers
PASS	*Professional, Airways Systems Specialists and United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 59 FLRA 25 (2003)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
Un. Br.	Union Brief

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FEDERAL LABOR RELATIONS AUTHORITY

Respondent

ON PETITION FOR REVIEW OF A DECISION 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) in 59 F.L.R.A. 951 (2004), a copy of which is set forth at Joint Appendix (App.) 1-16. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000 & Supp. I 2001) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority reasonably concluded that bargaining proposals having the effect of requiring an agency to remove several employees from their regularly assigned duties for several weeks, in order to provide the union with approximately 10,000 pages of sanitized documents, are nonnegotiable because the proposals affect management's right to assign work under § 7106(a)(2)(B) of the Statute.

STATEMENT OF THE CASE

This case arose as a consolidated negotiability proceeding before the Authority under § 7117(c) of the Statute. It concerns bargaining proposals

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

by two locals of the National Federation of Federal Employees, International Association of Machinists and Aerospace Workers (collectively referred to as "NFFE" or "Union"). The United States Department of the Interior, Bureau of Land Management, California State Office, Sacramento, California (Agency), which was engaged in bargaining with both NFFE locals, declared the proposals to be nonnegotiable. The Union appealed to the Authority for a negotiability determination under § 7117(c) of the Statute. The Authority determined that the proposals are nonnegotiable because they affect the Agency's statutory right to assign work under § 7106(a)(2)(B) of the Statute. Accordingly, the Authority dismissed the Union's negotiability appeals. The Union seeks review of the Authority's decision and order under § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background

The Agency notified the Union, in October 2001, that it intended to conduct an evaluation to determine if administratively uncontrollable overtime (AUO), that is, premium pay on an annual basis for overtime work, was appropriate for Law Enforcement Ranger employees of the Agency.[2] (Union

[2] The statutory and regulatory bases for AUO are 5 U.S.C. § 5545(c)(2) and 5 C.F.R. § 550.151 *et seq.* (2004), respectively. The head of an agency may approve AUO pay for an employee who occupies a position that requires

Petition for Review, Attachment 3.) As part of this evaluation process, the Agency said that it would gather information about the work done and hours worked by these employees over a 13-week period. (App. 17.) During this 13-week period, each of the approximately 70 law enforcement employees at issue was to complete, on a daily basis, a Form 9260-12 ("Administratively Uncontrollable Overtime Report") and a Form 9260-15 ("Patrol Log"). (App. 26-27.) Information entered onto these forms included witness names, arrest information, and information about particular law enforcement investigations. (App. 8.)

At the end of the 13-week period, the data provided on these forms would be compiled and analyzed, to determine if the nature of the employees' job duties comported with the established criteria for awarding AUO pay, and, if so, how much the premium pay should be. (App. 17.) The 13-week period was to begin in November 2001. (*Id.*) If it was decided based on this analysis to provide AUO pay to these employees, there would

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substantial amounts of irregular, unscheduled overtime work which cannot be controlled administratively, with the employee generally being responsible for recognizing, without supervision, circumstances that require the employee to remain on duty. 5 C.F.R. § 550.153 (2004). AUO pay is a substitute form of payment for irregular, unscheduled overtime work and is paid on an annual basis as a premium up to 25% of base pay, instead of payment for actual overtime worked on an hourly basis. *See Slugocki* v. *United States*, 816 F.2d 1572 (Fed. Cir.), *cert. denied*, 484 U.S. 976 (1987) (discussion and application of AUO provisions in denying Deputy United States Marshals AUO pay).

be a follow-up "spot check[]" of employee work hours and job duties, to assess whether the AUO determination remained appropriate. (App. 4.)

The November 2001 evaluation period was postponed to October 2002, and it was increased to 14 weeks. (Agency Statement of Position at 5-6.) In June 2002, in anticipation of the October 2002 evaluation period, the Agency and the Union engaged in collective bargaining negotiations concerning the impact and implementation of the AUO evaluation process. (*Id.* at 6.)

Among the bargaining proposals submitted by one of the Union locals, bargaining on behalf of the Law Enforcement Rangers at one of the Agency's area offices, were the following:

> Proposal 19[3]
>
> Management will provide the Union President with all the completed evaluation materials upon the conclusion of the 13 week trial period.
>
> Proposal 20
>
> Management agrees to provide the Union President all documentation collected and documented during any "Spot Checks" on any bargaining unit Rangers.

[3] The numbering of the proposals is as designated by the parties in their submissions to the Authority.

Another Union local, bargaining on behalf of Law Enforcement Rangers at another Agency area office, presented a proposal identical to Proposal 19, above. (App. 3.) The parties agreed at the bargaining table that the documents referred to in Proposal 19 include the following:

> (1) All the Form 9260-12s completed daily by the employees during the 14 week trial period, sanitized for confidential law enforcement data;
>
> (2) All the Form 9260-15s completed daily by the employees during the 14 week trial period, sanitized for confidential law enforcement data;
>
> (3) "Initial Calculation Worksheets," which are filled out by a supervisor to determine the percentage of AUO premium pay employees may be entitled to based on their work hours and duties;
>
> (4) The recommendation by the Agency's Human Resources Office to the Agency's State Director about implementation of AUO for employees; and
>
> (5) The final decision of the State Director as to whether AUO premium pay will be authorized to employees.

(App. 3-4.) The "spot check[]" documents referenced in Proposal 20 were understood to refer to the same kinds of documents covered in Proposal 19. (App. 4.) It is undisputed that the documents covered by the proposals would number approximately 10,000. This number comprises about 4,900 documents each for Forms 9260-12 and 9260-15, and about 200 pages in the other categories of data. (App. 5.)

Although the parties were able to agree on a number of other matters concerning implementation of the AUO evaluation process, the Agency declared both of the above proposals to be nonnegotiable, and refused to bargain on them. The Union then filed the negotiability petitions with the Authority that give rise to the instant case.

B. The Authority's Decision

The Authority held that the disputed proposals affect the Agency's management right to assign work under § 7106(a)(2)(B) of the Statute, and therefore dismissed the Union's petitions.[4] (App. 10.) The Authority first stated that it is well settled under its precedent that the management right to assign work includes the right to determine the particular duties to be assigned, the right to decide when work assignments will occur, and the right to decide to whom or what positions the duties will be assigned. (App. 7.) It relied in this connection on its decisions in *National Treasury Employees Union and U.S. Department of Commerce, Patent and Trademark Office*, 53 F.L.R.A. 539, 564 (1997) (holding that agreement

[4] Section 7106(a)(2)(B) provides in relevant part as follows:

> (a) [N]othing in this chapter shall affect the authority of any management official of any agency –
>
> * * * * * *
>
> (2) in accordance with applicable laws –
>
> * * * * * *
>
> (B) to assign work . . . .

provision requiring, among other things, that the personnel office of an agency select promotion panel members affected the agency's right to assign work, even though no specific employee in the office was designated in the proposal for this duty); and *Professional Airways Systems Specialists and United States Department of Transportation, Federal Aviation Administration, Washington, D.C.*, 59 F.L.R.A. 25 (2003) (*PASS*) (observing that it was undisputed that proposals requiring the agency to create a form and a data base affect the right to assign work because they would impact the agency's ability to assign work to non-bargaining unit employees, who would have to create and maintain the data base).

The Authority then went on to note that the proposals in this case would require agency management to assign the tasks of "collating, collecting and furnishing to the Union nearly 10,000 documents." (App. 7.) Of these, approximately 9,800 pages of documents (consisting of Forms 9260-12 and 9260-15) would have to be sanitized by agency personnel to redact confidential law enforcement or privacy information. (*Id.*) It was undisputed, the Authority observed (App. 8), that the Agency would have to "remove several employees from their regularly assigned duties for several weeks" to accomplish these tasks. In the Authority's view, the Agency would therefore be precluded under the proposals from assigning to those

employees their regularly assigned duties. (*Id.*) Consequently, the Authority held that the proposals affect the Agency's exercise of the right to assign work under § 7106(a)(2)(B) of the Statute.

Examining contrary considerations, the Authority next stated that it was unaware of any precedent, and the Union cited none, wherein the Authority had considered the impact upon the right to assign work of a proposal requiring the provision of this volume of documents. (App. 8.) The Union argued only that the Authority had previously held that proposals were negotiable if management retained the right to determine to whom duties will be assigned and how the work will be done. (*Id.*)

The Authority then observed that the proposals in this case are distinguishable from proposals that call on management to take more routine actions, such as implementing procedural requirements or performing duties already being performed by management. (App. 9.) The Authority acknowledged this Court's holding in *National Labor Relations Board Union, Local 6* v. *FLRA*, 842 F.2d 483, 486 (D.C. Cir. 1988), that § 7106 of the Statute does not prohibit the disclosure of any documents. However, the Authority noted, it did not view this statement by the Court as intending to insulate proposals requiring document disclosure from analysis as to whether such proposals affect management's right to assign work under § 7106. (*Id.*)

Finally, the Authority noted that the Union made no claim that its proposals were negotiable as procedures or appropriate arrangements under § 7106(b)(2) or (3) of the Statute. Accordingly, it dismissed the Union's petitions for review.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343* v. *FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if it is "arbitrary, capricious, or an abuse of discretion" and "otherwise not in accordance with law." *See* 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). With regard to a negotiability decision like the one under review in this case, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's

proposal." *NTEU* v. *FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994). The instant case involves the Authority's interpretation of its own organic statute.

SUMMARY OF ARGUMENT

The Authority reasonably held that implementing the Union's proposals would require such a substantial reallocation of the Agency's staff that, in the exceptional circumstances of this case, the proposals affect the Agency's statutory right to assign work, and are therefore nonnegotiable. The Authority was fully mindful of the principle, set out in its case law and that of this Court, that any bargaining proposal could be said in some measure to require management to assign work to employees. Thus, proposals causing management to take routine actions, such as implementing procedural requirements or performing duties already being performed by staff, will be found negotiable notwithstanding their impact on management's ability to assign work.

However, in the exceptional and unprecedented circumstances of this case, with approximately 10,000 pages of documents to be organized and redacted by Agency employees over several weeks, the Authority reasonably considered the impact of implementing the proposals on management's right to assign work. For the Authority to disregard these circumstances in

determining the proposal's negotiability would run counter to Congress's intent in enacting that management right.

The Union's arguments are based on a misunderstanding of the Authority's decision in this case and its precedent. The Union's primary claim is that under established case law, only proposals that on their face establish the "who/what/when" of work assignments can be held nonnegotiable. However, contrary to the Union's claim, the Authority did not supplant the "who/what/when" basis for determining a proposal's negotiability. Nor did the Authority hold in this case that a proposal's impact on management's right to assign work is by itself, in every case, the basis for determining a proposal's negotiability. As to its precedent, the Authority has never ruled out the possibility of considering, in an exceptional case such as this one, the impact of implementing a proposal. Thus, precedent such as *Illinois Nurses Association and Veterans Administration Medical Center, North Chicago, Ill.*, 27 F.L.R.A. 714 (1987) (*Illinois Nurses*), relied upon by the Union, is inapposite.

Moreover, the Authority has permissibly adopted a case-by-case approach to determining which proposals should be held nonnegotiable because their implementation affects management's exercise of its right to assign work. The Authority in its decision provided a sufficiently adequate

explanation of the reasons for its decision to warrant affirmance by this Court. Finally, the fact that the Union can negotiate for data disclosure that is greater than its statutory entitlement to data under § 7114(b)(4) of the Statute does not exempt such bargaining proposals from analysis under the management rights provision of the Statute.

ARGUMENT

THE AUTHORITY REASONABLY CONCLUDED THAT BARGAINING PROPOSALS HAVING THE EFFECT OF REQUIRING AN AGENCY TO REMOVE SEVERAL EMPLOYEES FROM THEIR REGULARLY ASSIGNED DUTIES FOR SEVERAL WEEKS, IN ORDER TO PROVIDE THE UNION WITH APPROXIMATELY 10,000 PAGES OF SANITIZED DOCUMENTS, ARE NONNEGOTIABLE BECAUSE THE PROPOSALS AFFECT MANAGEMENT'S RIGHT TO ASSIGN WORK UNDER § 7106(a)(2)(B) OF THE STATUTE.

The Authority's determination of nonnegotiability in this case is both reasonable and consistent with applicable precedent. The Union's and *amici*'s arguments to the contrary misapprehend applicable precedent and the basis for the Authority's decision, and are therefore without merit. Accordingly, the Authority's decision should be affirmed.

A. The Authority's Decision Is Both Reasonable and Consistent With Applicable Precedent

The plain language of § 7106(a) of the Statute states that a bargaining proposal need only "affect" the exercise of a management right to be held

nonnegotiable.[5] The Authority has consistently recognized that analysis of whether a proposal affects management's exercise of a right under § 7106(a) must be undertaken judiciously, as any proposal could in some way be said to impact on how management exercises those rights, thus effectively negating the bargaining obligation. *E.g., Am. Fed'n of Gov't Employees, Local 2761 and Dep't of the Army, Army Publ'ns Distribution Ctr., St. Louis, Mo.*, 32 F.L.R.A. 1006, 1015 (1988).[6] However, nothing in § 7106(a) specifies that the effect of a proposal on the exercise of a management right must be determined based only on the explicit language of the proposal itself, as opposed to the necessary operational effect resulting from its implementation.

Turning to the management right to assign work under § 7106(a)(2)(B) of the Statute, as the Authority recognized (App. 7), it is well established that the right protects management's ability to determine the

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[5] A proposal otherwise nonnegotiable because it affects the exercise of a management right can nevertheless be found negotiable under § 7106(b)(2) and (3) of the Statute if the proposal is a procedure for the exercise of that right, or an appropriate arrangement for employees adversely affected by the exercise of the right. *See Patent Office Prof'l Ass'n* v. *FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995). However, because the Union in this case does not allege that the proposals at issue were either procedures or appropriate arrangements, those issues are not before the Court.

[6] This Court has recognized this principle as well. *National Treasury Employees Union* v. *FLRA*, 793 F.2d 371, 374-75 (D.C. Cir. 1986).

particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter and United States Dep't of Defense, Nat'l Guard Bureau, Kansas Nat'l Guard, Topeka, Ks.*, 60 F.L.R.A. 342 (No. 73) (Oct. 22, 2004).

It is undisputed in this case that the subject proposals would require the Agency to retrieve, compile and sanitize approximately 10,000 pages of documents. Moreover, it is undisputed that accomplishing this task would require the Agency to "remove several employees from their regularly assigned duties for several weeks." (App. 8.) The Authority emphasized the unprecedented and extraordinary nature of the burdens that the Authority found the proposal would place on agency resources. (App. 8, 9.)

It was eminently reasonable for the Authority to conclude that the conceded massive and unprecedented redirection of staff resources that would necessarily result from implementing these proposals would affect the Agency's ability to determine the duties to be assigned to its personnel. Thus, whatever other duties the Agency may have intended over several weeks to assign to the staff that would carry out the requirements of the proposals, that staff would instead have to be extensively engaged in document processing. In short, it would be these bargaining proposals, and

not management's sole discretion, that would determine the use of these staff resources. This is precisely the result that Congress intended to avoid in enacting § 7106(a)(2)(B) of the Statute.

It is true, as the Union (Union Brief (Un. Br.) at 11) and the *amici* (*Amici* Brief (Am. Br.) at 10-11) contend, that the proposals at issue here do not explicitly mandate that any particular duties be performed by any particular employees at any particular time. Proposals that do so, of course, are among the most common types of bargaining proposals to be held to affect the exercise of management's right to assign work.

However, the absence of such an explicit identification on the face of a proposal by no means renders it automatically negotiable, as the Union and the *amici* seem to suggest. In fact, the Authority has held proposals nonnegotiable based on their impact on management's unfettered ability to exercise its right to assign work, as established in the record of the case before it. In this case, the Authority relied (App. 7) on its decision in *PASS*, 59 F.L.R.A. 25. In *PASS*, the union stipulated that a series of proposals requiring an agency to create and maintain certain documents, and provide copies of them to the union, interfered with, among other things, the

agency's right to assign work. The Authority went on to hold that the proposals were not negotiable as appropriate arrangements.[7]

Impact, rather than the express wording of the proposal, was pivotal in *National Federation of Federal Employees, Local 1482 and U.S. Department of Defense, Defense Mapping Agency, Louisville, Ky.*, 39 F.L.R.A. 1169 (1991), *vacated and remanded on other grounds sub nom. United States Department of Defense, Defense Mapping Agency, Louisville, Ky.* v. *FLRA*, 955 F.2d 764 (D.C. Cir. 1992) (table). In that case, the Authority held nonnegotiable the first sentence of a proposal that provided only that "the purpose of the quality control program is to ensure the acceptable quality of the map sheet being produced." The Authority concluded, "[b]ased on the record," that "the intent of the first sentence is to restrict the uses to which the results of the quality control review process can be put." Thus, under this part of the proposal, quality review results could not be used to appraise employee performance. This fact affected management's ability to assign work to employees, and therefore rendered the proposal nonnegotiable. *NFFE, Local 1482*, 39 F.L.R.A. at 1177-78.

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[7] The *amici* assert (Am. Br. 13 n.4) that it was "disingenuous" for the Authority here to rely on *PASS*, since the union there did not contest the management right issue. However, they provide no basis for concluding that the union's stipulation in *PASS* diminishes the value of this precedent.

Regarding another management right, in *National Treasury Employees Union and Internal Revenue Service*, 7 F.L.R.A. 275 (1981), the Authority held nonnegotiable a proposal that, among other things, granted union representatives access to enter all work areas. The Authority found that the effect of the proposal was to allow union representatives into work areas containing confidential taxpayer information. Thus, although the proposal itself said nothing about access to confidential taxpayer information, the Authority found the proposal would have the effect of interfering with management's right to determine its security practices regarding safeguarding such information under § 7106(a)(1) of the Statute. It was therefore held nonnegotiable. *NTEU*, 7 F.L.R.A. at 276-77.

These cases demonstrate that the Authority does not always restrict itself to examining solely the explicit language of a proposal to determine whether it affects the exercise of a management right. Nor would the Authority act consistent with congressional intent if it did so. As this Court recognized in *Department of Defense, Army-Air Force Exchange Service* v. *FLRA*, 659 F.2d 1140, 1151 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982), the focus of Congress' intent in enacting the management rights provision in § 7106(a) was on management's "nonnegotiable substantive authority." Proposals whose implementation places substantial burdens on

management's work assignment decisions must be deemed contrary to management's right to assign work. For the Authority to disregard this fact would be contrary to Congress's intent in establishing that right.

The Authority certainly must engage in such analysis prudently, as mentioned at p. 14, above. Thus, as the Authority pointed out in this case (App. 9), proposals requiring management to take routine actions, such as implementing procedural requirements or performing duties management officials are already performing, will be found negotiable notwithstanding their impact on management's ability to assign work.[8] However, proposals like the current ones, which, based on record evidence, would have an extraordinary impact on the exercise of a management right, are properly

[8] The Authority cited in this connection (App. 9) its decision in *Patent Office Professional Association and United States Department of Commerce, Patent and Trademark Office, Washington, D.C.*, 47 F.L.R.A. 954 (1993), in which it found negotiable a proposal requiring a management official to perform certain tasks which were of a nature that the official was already responsible for performing. The Authority also relied on its decisions in *National Treasury Employees Union and U.S. Nuclear Regulatory Commission, Washington, D.C.*, 43 F.L.R.A. 1279 (1992); and *American Federation of Government Employees, Local 446 and U.S. Department of the Interior, National Park Service, Blue Ridge Parkway, Asheville, N.C.*, 43 F.L.R.A. 836 (1991). In both of these cases, the Authority found negotiable proposals that required certain agency officials to create written documentation of the reasons for taking certain actions. The Authority found that these requirements were procedural in nature, and called for by existing legal requirements. As the Authority accurately noted (App. 9), none of these three cases involved the extraordinary resource demands placed on management by the proposals in the instant case.

ruled nonnegotiable. Accordingly, the Authority's determination of nonnegotiability in this case is both reasonable and consistent with applicable precedent and congressional intent.

B. The Union's and *Amici's* Arguments Are Without Merit, and Should Be Rejected.

The Union makes several arguments critical of the Authority's decision.[9] However, these arguments reflect a misunderstanding of Authority precedent and the decision in this case, and thus should be rejected.

1. The Union's first claim (Un. Br. 9-13) is that the Authority's decision inexplicably departs from precedent that assertedly holds that only proposals expressly identifying on their face the "who/what/when" of work assignments can be held nonnegotiable (Un. Br. 11). As set out at pp. 14 to 18, above, this premise is faulty. The Authority did not in this case hold that the effect of a proposal's implementation, as opposed to its language, will in all cases be considered in determining whether the proposal affects the right to assign work. Rather, the Authority's decision was clearly limited to the extraordinary circumstances of this case. (App. 8, 9.)

[9] Many of the arguments advanced in the *amici*'s brief are to the same effect as the Union's. Therefore, only those points raised solely by the *amici* will be addressed separately here.

Further in this connection, the Authority has never in its precedent ruled out the possibility, in cases presenting exceptional circumstances, of finding nonnegotiable proposals whose implementation, not their plain language, effectively causes substantial dislocations in an agency's work assignment plan. However, in cases where such exceptional circumstances are not present, and a proposal's language does not dictate the "who/what/when" of work assignments, the Authority will find the proposal negotiable.

A case of this latter type is *Illinois Nurses*, 27 F.L.R.A. 714, relied on heavily by the Union (Un. Br. 10-12.)[10] In that case, the Authority found negotiable a proposal that, among other things, allowed a union to submit salary data to the agency. The Authority rejected an agency argument that because the agency would have to identify an employee to review that data, the proposal would interfere with its right to assign work. 27 F.L.R.A. at 727-28.

The situation in the instant case is markedly different from that in *Illinois Nurses.*[11] In the instant case, the onerous demands created by the

[10] The Union did not cite this case to the Authority in the proceedings below.

[11] The *amici* also cite in this connection *National Treasury Employees Union and Department of Health and Human Services, Social Security*

proposals will of necessity require the Agency to make massive changes in the work assignment decisions it would have made in the absence of these proposals. This result in itself, even in the absence of the proposals' specifying who will accomplish the work, is sufficient to find that the proposals interfere with the Agency's exercise of its right to assign work. In *Illinois Nurses*, by contrast, there was no showing that the volume of documents involved even remotely approached the immense volume of documents at issue here. Thus, the impairment to the exercise of the right is not comparable.[12]

2. The Union next argues (Un. Br. 13-17) that the Authority's holding "effectively abolishes collective bargaining in the Federal sector" (Un. Br. 13), because it allows for finding nonnegotiable any proposal that requires

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Administration, Office of Hearings and Appeals, Falls Church, Va., 47 F.L.R.A. 705 (1993). However, the relevant proposals there were found negotiable as procedures under § 7106(b)(2) of the Statute. 47 F.L.R.A. at 706. The Union has never claimed here that the subject proposals are negotiable procedures. Also, as with *Illinois Nurses*, there was no showing there that the extraordinary volume of documents at issue in the present case was involved.

[12] The Union supports the Authority's holding when it says (Un. Br. 11) that the Agency could contract out the work of preparing the 10,000 pages of documents for disclosure to the Union. Under § 7106(a)(2)(B) of the Statute, management retains the sole discretion to make determinations regarding contracting out. Thus, if these proposals would so fundamentally alter the Agency's work assignment plans that it would have to exercise another management right to comply with them, the extent of invasion of management discretion is all the more evident.

management to take an action. Again, this argument is based on the faulty premise that the Authority's holding here will be extended to all cases involving the right to assign work. The argument ignores the extent to which the Authority took pains to make clear (App. 8, 9) that its holding was very much tied to the exceptional facts of this case. Further, the Authority emphasized (App. 9) that its precedent in cases like *Illinois Nurses* remains unchanged. That is, the Authority will continue to recognize that the mere fact that a proposal calls on an agency to take some action is insufficient by itself to hold the proposal nonnegotiable.

The Union also contends (Un. Br. 16-17) that the Authority's reliance on the particular circumstances of this case creates an unworkable rule, because the Authority did not establish with specificity how much of a burden caused by a proposal's implementation is sufficient to find the proposal nonnegotiable. Contrary to the Union's argument, the Authority did provide sufficient explanation in its decision as to the decision's basis.[13] The Authority not only pointed to the specific record facts concerning excessive workload that support its holding (App. 8, 9), but it also distinguished (App. 9) the factors in previous cases (i.e., routine actions

[13] Under 5 U.S.C. § 555(e), Authority negotiability decisions need only provide a "brief statement" of the reasons for the decision, explaining "why it chose to do what it did." *Tourus Records, Inc.* v. *DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001).

carrying out procedures and actions already being taken by management) that were not present here. This is more than sufficient decision-making by the Authority. The Authority is not obliged in this case to specify the precise "bright line" it will use to delineate negotiable and nonnegotiable proposals for all cases in the future. Leaving such elucidation for future cases is an appropriate method of decision-making. *Cf. Country Ford Trucks* v. *NLRB*, 229 F.3d 1184, 1190-91 (D.C. Cir. 2000) (it is expected that the National Labor Relations Board will make appropriate unit determinations on a case-by-case basis).

In a related vein, the Union argues (Un. Br. 18) that the Authority's decision is "slanted toward management," as it focuses on the burden the proposals place on management, and not the benefits they confer on employees. This contention reflects a misunderstanding of the nature of a negotiability proceeding. The issue in this case is solely whether the proposals at issue affect the exercise of a management right. As a result, considering the impact of the proposals on the Agency's ability to exercise its right to assign work is most appropriate. The benefits of the proposal to bargaining unit employees, however, simply have no place in this analysis.[14]

[14] The Authority does balance the extent to which a proposal affects the exercise of a management right against the benefits of the proposal to employees when it decides whether a proposal is an appropriate arrangement

This misunderstanding on the Union's part also undermines its claim (Un. Br. 19-20) that the burdens the proposals place on management should be considered in impasse proceedings before the Federal Service Impasses Panel (FSIP), rather than serving as a basis for finding the proposals to be nonnegotiable.[15] This case presented the Authority with a legal issue, that is, whether the proposals affect the exercise of a management right. That is a matter the Statute entrusts to the Authority for resolution, not the FSIP. *Am. Fed'n of Gov't Employees* v. *FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985).

3. Finally, the Union argues (Un. Br. 20-21) that the Authority's decision is contrary to the established principle that unions can bargain for document disclosure that is above and beyond what they are entitled to as a matter of law under § 7114(b)(4)(B) of the Statute.[16] The Union's argument

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under § 7106(b)(3) of the Statute. *U.S. Dep't of the Treasury, Ofc. of the Chief Counsel, Internal Revenue Serv.* v. *FLRA*, 960 F.2d 1068, 1071 (D.C. Cir. 1992). The Union does not, however, claim that the subject proposals are appropriate arrangements under § 7106(b)(3).

[15] The FSIP is empowered under § 7119 of the Statute to resolve impasses that may arise during collective bargaining. *E.g., Am. Fed'n of Gov't Employees, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641 (D.C. Cir. 1983).

[16] Section 7114(b)(4)(B) provides in relevant part that the obligation to bargain in good faith includes a requirement that an agency provide a union with data that is, among other things, "reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining."

is without merit. As the Authority noted in its decision (App. 6), it has never suggested that this statutory "floor, not a ceiling" principle was intended to allow for bargaining on data disclosure proposals without regard to whether those proposals are inconsistent with management rights. These types of proposals, just like any other, are subject to negotiability analysis under § 7106. The effect of the Union's arguments is to eliminate any ceiling at all on the negotiability of data disclosure proposals.

The *amici*, in making this same argument (Am. Br. 14-15), point to *Department of Justice* v. *FLRA*, 991 F.2d 285 (5th Cir. 1993). In that case, the Fifth Circuit reversed an Authority decision holding that an agency must, under § 7114(b)(4) of the Statute, provide a union with thousands of pages of documents that would have to be collected from around the world and then redacted before being given to the Union. The court held that, given the efforts required to provide the documents, they were not "reasonably available" within the meaning of § 7114(b)(4)(B). *Dep't of Justice*, 991 F.2d at 291-92.

It appears to be the *amici*'s argument that because a large volume of documents were held not to be required to be disclosed as a matter of statutory right, it must of necessity be a negotiable matter. This point is obviously incorrect. Data disclosure proposals must withstand negotiability

analysis, just like any other kind of proposals. This claim must therefore also be rejected.

CONCLUSION

The Union's 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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCALS 951 AND 2152, IAMAW,	)	
Petitioners	)	
v.	)	No. 04-1224
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority and Respondent's Motion For Substitution of Counsel, have been served this day, by mail, upon the following:

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