ORAL ARGUMENT SCHEDULED NOVEMBER 21, 2003

No. 03-1083

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

ASSOCIATION OF CIVILIAN TECHNICIANS,
WICHITA AIR CAPITOL CHAPTER,

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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ORAL ARGUMENT SCHEDULED FOR NOVEMBER 21, 2003

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 Civilian Technicians, Wichita Air Capitol Chapter (ACT) and United States Department of Defense, National Guard Bureau, Kansas National Guard. ACT is the petitioner in this court proceeding; and the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *Association of Civilian Technicians, Wichita Air Capitol Chapter and United States Department of Defense, National Guard Bureau, Kansas National Guard*, Case No. 0-NG-2618, decision issued on July 24, 2002, reported at 57 F.L.R.A. 939. The Authority's order denying ACT's motion for reconsideration was issued on January 23, 2003, reported at 58 F.L.R.A. 310.

C. Related Cases

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

TABLE OF CONTENTS

Page

ADDENDUM

Page

TABLE OF AUTHORITIES

CASES

Page

TABLE OF AUTHORITIES
(Continued)

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Page

FEDERAL STATUTES

TABLE OF AUTHORITIES
(Continued)

CODE OF FEDERAL REGULATIONS

Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

ACT	Association of Civilian Technicians, Wichita Air Capitol Chapter
AFGE Local 32	*Am. Fed'n of Gov't Employees, Local 32*, 51 F.L.R.A. 491 (1995), *petition for review denied*, 110 F.3d 810 (D.C. Cir. 1997)
AFGE v. FLRA	*Am. Fed'n of Gov't Employees, Local 32 v. FLRA*, 110 F.3d 810 (D.C. Cir. 1997)
AFSCME	*AFSCME, Local 2910*, 53 F.L.R.A. 1334 (1998)
Agency	United States Department of Defense, National Guard Bureau, Kansas National Guard
Authority	Federal Labor Relations Authority
Br.	Brief
Cherry Point	*United States Department of Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434 (D.C. Cir. 1992)
FLRA	Federal Labor Relations Authority
Guard	United States Department of Defense, National Guard Bureau, Kansas National Guard
JA	Joint Appendix
Kansas National Guard	United States Department of Defense, National Guard Bureau, Kansas National Guard
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)

GLOSSARY
(Continued)

Union	Association of Civilian Technicians, Wichita Air Capitol Chapter

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on July 24, 2002. The Authority's decision is published at 57 F.L.R.A. 939. The Authority's order denying petitioner's motion for reconsideration was issued on January 23, 2003, and is published at 58 F.L.R.A. 310. Copies of these Authority determinations are included in the Joint Appendix (JA) at JA 12-18 and JA 25-31, respectively. 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) (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 determined that a collective bargaining proposal that would prescribe the forms of address agency representatives would be required to use when communicating with union officials and other unit employees engaged in labor-management relations matters was outside the agency employer's obligation to bargain.

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under section 7117(c) of the Statute. The Association of Civilian Technicians, Wichita Air Capitol Chapter ("ACT" or "union"), the exclusive representative of a unit of employees of the United States Department of Defense, National Guard Bureau, Kansas National Guard ("Kansas National Guard," "Guard," or "agency"), submitted a collective bargaining proposal that would prescribe the forms of address agency representatives would be required to use when communicating with union officials and other unit employees engaged in labor-management relations matters. The agency declared the proposal to be outside its obligation to bargain under the Statute. ACT then appealed the agency's allegations of nonnegotiability to the Authority under section 7117(c) of the Statute.

The Authority held the proposal to be outside the agency's obligation to bargain because the proposal directly determines conditions of employment of management officials. Pursuant to section 7123(a) of the Statute, ACT seeks review of the Authority's decision and order in the case.

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

STATEMENT OF THE FACTS

A. Background

The union is the exclusive representative of certain National Guard dual-status technicians employed by the Kansas National Guard. National Guard technicians are referred to as "dual status" because they are civilian employees who must – as a prerequisite to their employment – become and remain military members of the National Guard unit in which they are employed and maintain the military grade specified for their technician positions. *See* National Guard Technicians Act of 1968, as amended, 32 U.S.C.A. § 709 (2000); *Am. Fed'n of Gov't Employees, Local 2953 v. FLRA*, 730 F.2d 1534, 1537 (D.C. Cir. 1984).

In the course of collective bargaining, ACT submitted the following proposal to the Kansas National Guard:

> Terms of Address
>
> A. Written communication in connection with any matter covered by Chapter 71 of Title 5, United States Code, by the employer to a bargaining unit employee who is a labor organization representative, will not, in addressing the labor representative, refer to military status or rank; the appropriate address will be "Mr." or "Mrs." or "Ms."
>
> B. Oral communication in connection with any matter covered by Chapter 71 of Title 5, United States Code, by the employer to a bargaining unit employee who is a labor organization representative, who is on official time under 5 U.S.C. § 7131, and who is not wearing a military uniform, will not, in addressing the labor representative, refer to military status or rank; the appropriate address will be "Mr." or "Mrs." or "Ms."
>
> C. Written communication -- in connection with a grievance or arbitration under the negotiated grievance procedure; Federal Labor Relations Authority, Federal Mediation and Conciliation Service, or Federal Service Impasses Panel proceeding; adverse action; or other dispute concerning a condition of employment -- by the employer to a bargaining unit employee who is a party or witness in the matter, will not, in addressing the employee, refer to military status or rank; the appropriate address will be "Mr." or "Mrs." or "Ms."
>
> D. Oral communication -- in connection with a grievance or arbitration under the negotiated grievance procedure; Federal Labor Relations

> Authority, Federal Mediation and Conciliation Service, or Federal Service Impasses Panel proceeding; adverse action; or other dispute concerning a condition of employment -- by the employer to a bargaining unit employee who is a party or witness in the matter, who is on official time under 5 U.S.C. § 7131, and who is not wearing a military uniform, will not, in addressing the employee, refer to military status or rank; the appropriate address will be "Mr." or "Mrs." or "Ms."

JA. 13-14. The Kansas National Guard declared the proposal to be outside its obligation to bargain under the Statute and ACT petitioned the Authority for review of the agency's determination pursuant to § 7117(c)(1) of the Statute. JA 12.

B. The Authority's Decision

The Authority held that ACT's bargaining proposal was outside the Guard's obligation to bargain because it directly determines the conditions of employment of management officials. JA 18. Relying principally on this Court's decision in *United States Department of the Navy, Naval Aviation Depot, Cherry Point, N.C.*, 952 F.2d 1434, 1441-1443 (D.C. Cir. 1992) (*Cherry Point*), the Authority stated that proposals that purport to directly determine the conditions of employment of managers and supervisors are outside the duty to bargain (citing also *AFGE, Local 32*, 51 F.L.R.A. 491, 501 (1995), *petition for review denied*, 110 F.3d 810 (D.C. Cir. 1997)). The Authority noted that, in contrast, proposals that principally relate to the conditions of employment of unit employees are not removed from the mandatory scope of bargaining simply because they indirectly affect non-unit personnel, such as management officials (citing *IFPTE, Local 49*, 52 F.L.R.A. 830, 835-36 (1996)). JA 16.

The Authority stressed that the proposal at issue here expressly requires management officials to use certain terms -- and prohibits those officials from using other terms -- in addressing unit employees while conducting labor-management relations activities. Accordingly, the Authority concluded that the proposal plainly

establishes a job requirement applying only to management officials and, in this regard, the proposal's effect on managerial personnel is not "indirect" in any way. JA 17.

The Authority rejected ACT's contention that holding the proposal nonnegotiable was essentially eradicating collective bargaining over procedural matters. ACT argued that if this proposal is outside the duty to bargain because it directly determines the conditions of employment of management personnel, then all proposals establishing procedures to be observed by management would be outside the duty to bargain. Citing *AFSCME, Local 2910*, 53 F.L.R.A. 1334, 1338 (1998) (*AFSCME*), the Authority observed that "[n]early every bargaining proposal, if accepted, will have some effect on non-unit personnel," and that this fact does not automatically render a proposal outside the duty to bargain. Noting that under *Cherry Point* the precise wording of the proposal is paramount, the Authority found that ACT constructed its proposal in a manner that directly determines a working condition of management officials. Accordingly, the Authority held that ACT's broad generalization regarding the implications of finding the proposal outside the duty to bargain lacked merit and provided no basis for reaching a contrary conclusion. JA 17.

Having held that the proposal is outside the duty to bargain because it directly determines the conditions of employment of management officials, the Authority did not address other arguments made by the Kansas National Guard.[2] JA 18.

The Authority subsequently denied the union's request for reconsideration. JA 25, 31. On reconsideration, ACT argued that under *Cherry Point*, proposals are outside the duty to bargain only if they implicate the employment relationship between

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[2] The Guard had also argued that the proposal is contrary to law, addresses matters concerning the methods and means of performing work, and concerns a military condition of employment.

the agency employer and its managers and supervisors. According to ACT, *Cherry Point* is not applicable to proposals that regulate labor relations. The Authority rejected this argument, finding no basis for it in *Cherry Point* or any other authority. JA 28-30.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *Am. Fed'n of Gov't Employees, 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." 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." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

Although the Authority is not entitled to deference in the "interpretation of a decision of this court," where, as here, an agency voluntarily adopts as its own a court's interpretation of the agency's enabling act, deference remains appropriate. *See Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 817 (D.C. Cir. 2002) (deference is due where an "agency voluntarily and reasonably acquiesced in [a court's] interpretation, taking into account the existence of the judgment, and reasoning that the interpretation was a permissible or reasonable one"). *American Bioscience, Inc. v. Thompson*, 269

F.3d 1077, 1085 (D.C. Cir. 2001), cited by ACT, is inapposite. There the agency was interpreting an order of the court in the ongoing litigation. Here, the Authority decided voluntarily to adopt, as its own, a statutory interpretation of this Court. To the extent the Authority's future application of that interpretation is reasonable under the Statute, the Authority is entitled to deference.

SUMMARY OF ARGUMENT

In this negotiability case, the Authority properly held that a union bargaining proposal that prescribes the forms of address agency representatives would be required to use when communicating with union officials and other unit employees engaged in labor-management relations matters was outside the agency employer's obligation to bargain. In so holding, the Authority applied the well-established principle that proposals that directly determine the conditions of employment of managers and supervisors are outside an employer's obligation to bargain.

1. The Authority has adopted this Court's holding in *United States Department of the Navy, Naval Aviation Depot, Cherry Point, N.C.*, 952 F.2d 1434, 1441-1443 (D.C. Cir. 1992) that proposals seeking to regulate the conditions of employment of management personnel are outside an agency's obligation to bargain. As this Court further held, such proposals remain outside the obligation to bargain even if they also vitally affect the conditions of employment of bargaining unit employees. Under *Cherry Point* and its progeny, the union's intent does not determine whether a proposal impermissibly effects supervisory working conditions. Rather, the determining feature is whether the proposal, "in fact," directly and preclusively determines supervisory working conditions.

The Court's holding in *Cherry Point* is simple and straight forward. A proposal is outside an employer-agency's obligation to bargain if it directly determines the conditions of employment of managerial personnel. ACT, however, erroneously

attempts to narrow the *Cherry Point* principle by limiting its scope to proposals that regulate the terms of the relationship between the employer and managerial personnel by providing "rights against the agency" for managerial personnel. However, nothing in *Cherry Point,* or the subsequent decisions of the Authority or this Court, supports ACT's narrow view.

Nowhere in *Cherry Point,* or in any other decision, does this Court recognize or discuss the distinction drawn by ACT. Although ACT relies on isolated statements in *Cherry Point* where the Court referred to the "interests" of non-bargaining unit personnel and proposals implicating the "relationship between the employer and non-unit personnel," the Court never develops either of these concepts. Specifically, the Court never draws the conclusion that these terms somehow limit the concepts of "conditions of employment" or "working conditions" as applied to managerial personnel. ACT has created this distinction out of whole cloth.

Finally, ACT mistakenly asserts that the Authority's holding in this case will render nonnegotiable all proposals that require agencies to assign managerial personnel to implement collective bargaining proposals providing benefits to bargaining unit employees. As the Authority has repeatedly held, proposals that principally relate to conditions of employment of unit employees remain within the duty to bargain even though there is an indirect impact on non-unit members, including managerial personnel. Accordingly, even though proposals establishing entitlements for unit employees may require some action on the part of management officials, those proposals remain negotiable, unless their effect would also be to *directly* prescribe specific working conditions for managerial personnel.

2. Although the precise line between proposals having a direct effect on non-unit personnel and those having only an indirect effect may be difficult to discern, the Authority properly applied the principles of *Cherry Point* to the proposal at issue in

this case and found that the proposal directly determines conditions of employment of managerial personnel.

By its terms, the proposal scripts managerial personnel in their communication with employees by specifically prohibiting the use of certain terms and requiring the use of others by management officials in the course of their employment. Unlike negotiable proposals that merely limit an employer's options with respect to the conditions of employment of managerial personnel, this proposal imposes, without qualifications or exceptions, a highly specific job requirement. In that regard, the proposal is specifically addressed to what supervisors may or may not do, not to any benefit that may accrue to unit employees. As the Authority stated, the proposal's effect on managerial personnel is not "indirect in any way." JA 17.

In sum, the Authority properly determined that ACT's proposal would directly determine conditions of employment of managerial personnel because it would expressly prescribe specific job requirements for those personnel. Accordingly, the Authority's reasonable conclusion that the proposal is outside the Guard's obligation to bargain should be affirmed and ACT's petition for review should be denied.

ARGUMENT

THE AUTHORITY REASONABLY DETERMINED THAT A COLLECTIVE BARGAINING PROPOSAL THAT WOULD PRESCRIBE THE FORMS OF ADDRESS AGENCY REPRESENTATIVES WOULD BE REQUIRED TO USE WHEN COMMUNICATING WITH UNION OFFICIALS AND OTHER UNIT EMPLOYEES ENGAGED IN LABOR-MANAGEMENT RELATIONS MATTERS WAS OUTSIDE THE AGENCY EMPLOYER'S OBLIGATION TO BARGAIN

It is well established in both the private and federal sectors that proposals that directly determine the conditions of employment of managers and supervisors are outside an employer's obligation to bargain. *Cherry Point*, 952 F.2d at 1442; *see also*

Keystone Steel & Wire, Division of Keystone Consolidated Industries, Inc. v. NLRB, 41 F.3d 746 (D.C. Cir. 1994). As the Authority correctly found, because the union's proposal in this case expressly dictated the terms supervisors and managers could and could not employ in dealing with employees, the proposal directly determined the conditions of employment of managerial personnel. Accordingly, the Authority correctly held the proposal to be outside the Guard's obligation to bargain.

A. Bargaining Proposals That Directly Determine Conditions of Employment of Managers and Supervisors Are Outside the Agency's Obligation to Bargain

1. The Authority's adoption of this Court's decision in *Cherry Point*

As relevant here, the Authority has adopted this Court's holding in *Cherry Point* that proposals seeking to regulate the conditions of employment of management personnel are outside an agency's obligation to bargain, irrespective of whether the proposal also vitally affects the conditions of employment of bargaining unit members. *See, e.g., AFGE, Local 1923*, 44 F.L.R.A. 1405, 1421-23 (1992). In order to understand the proper application of this principle, it will be helpful to examine the context of this Court's *Cherry Point* decision.

Cherry Point concerned the Authority's application of the private sector's "vitally affects" test. Prior to *Cherry Point*, the Authority had held that the "vitally affects" test was triggered whenever a proposal concerning the conditions of employment of bargaining unit members also affected the working conditions of non-unit employees. *See, e.g., Int'l Ass'n of Machinists and Aerospace Workers, Local Lodge 2297*, 38 F.L.R.A. 1451, 1454 (1991). Under the Authority's view at that time, a proposal that affected the working conditions of non-unit personnel was, nonetheless, negotiable if it "vitally affected" the conditions of employment of bargaining unit employees. *Id.*

This Court held that the Authority misapplied the "vitally affects" test. *Cherry Point*, 952 F.2d at 1439. Noting that most bargaining demands have some extra-unit impact, the Court held that the vitally affects test is triggered only when the bargaining proposal directly implicates the conditions of employment of non-unit personnel. *Id.* at 1440-41. Proposals that are otherwise negotiable and that only indirectly affect non-unit personnel remain within the employer's obligation to bargain. *Id.* On the other hand, the vitally affects test *may* be applicable where a proposal directly affects or seeks to determine the conditions of employment of non-unit personnel. *Id.* at 1442.

However, the Court noted that there are different classes of non-unit personnel and, as relevant here, held that the vitally affects test does not apply to proposals directly determining the conditions of employment of management personnel. *Id.* That is, a proposal that directly determines the conditions of employment of management personnel is outside the employer's obligation to bargain, irrespective of the effect on unit members. *Id.*

The Authority and this Court have further developed *Cherry Point*'s principles. For example, the Authority held nonnegotiable a proposal that would preclusively determine the competitive areas for both unit members and management personnel.[3] *AFGE Local 32*, 51 F.L.R.A. 491, 513 (1995), *aff'd* 110 F.3d 810 (D.C. Cir. 1997).

In *AFGE Local 32*, the union had argued that the proposal itself did not seek to establish the competitive area for management personnel. Rather, according to the union, the proposal only determined the competitive area for managerial personnel

[3] A competitive area is a grouping of employees within an agency, according to their geographical or organizational location, who compete for job retention in a reduction in force. *See United States Office of Personnel Management v. FLRA*, 905 F.2d 430, 432 (D.C. Cir. 1990).

through the operation of a government-wide regulation.[4] *Id.* at 497. However, in finding the proposal nonnegotiable, both the Authority and this Court emphasized that it is not the union's intent that determines whether a proposal impermissibly establishes supervisory working conditions, but rather whether the proposal, "in fact," directly and preclusively determines supervisory working conditions. *Id.* at 512; *see also, AFGE, Local 32 v. FLRA*, 110 F.3d 810, 815 (D.C. Cir. 1997) (*AFGE v. FLRA*). Further, and as noted by this Court, a proposal does not have to expressly mention supervisory or managerial personnel. If a proposal has the effect of binding the agency with respect to the working conditions of managerial personnel, the proposal is outside the agency's obligation to bargain. *AFGE v. FLRA*, 110 F.3d at 815.

In sum, a bargaining proposal is outside the agency's obligation to bargain if its effect is to directly determine conditions of employment of managerial personnel. This holds true irrespective of any benefit the proposal may confer on unit employees or the union's intent in making the proposal.

2. **ACT misconstrues *Cherry Point***

ACT erroneously contends (Br. 11; 13-14) that the proposal at issue here does not "violate the *Cherry Point* rule" because the proposal only affects managers to the extent they would be assigned by the agency to implement the employee working conditions established by the proposal. According to ACT, the rule in *Cherry Point* prohibits only proposals that regulate the terms of the relationship between the employer and a third party, such as supervisors. ACT further argues that *Cherry Point* does not apply to proposals that impose job requirements on managerial personnel only as a result of those personnel being assigned to act on the agency's

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[4] Office of Personnel regulations require that a competitive area be defined by an agency's organizational units and geographical locations, and that it must include *all employees* within the competitive area so defined. 5 C.F. R. 351.402(b) (2003).

behalf in implementing contractual obligations concerning bargaining unit conditions of employment. However, nothing in *Cherry Point*, or the subsequent decisions of the Authority or this Court, support ACT's narrow view.

Cherry Point and its progeny stand only for the simple proposition that proposals that directly establish conditions of employment of managerial personnel are outside the agency's obligation to bargain. *See AFGE v. FLRA*, 110 F.3d at 814 (setting out the relevant holding of *Cherry Point*). Nowhere in *Cherry Point*, or in any other decision, does this Court recognize or discuss the distinction drawn by ACT.[5] ACT relies principally (Br. 14-15) on isolated statements in *Cherry Point* where the Court referred to the "interests" of non-unit personnel and proposals implicating the "relationship between the employer and non-unit personnel." However, the Court never develops either of these concepts. Specifically, the Court never draws the conclusion that these terms somehow limit the concepts of "conditions of employment" or "working conditions" as applied to managerial personnel. ACT has created this distinction out of whole cloth.

Further and in any event, even assuming for the sake of argument that *Cherry Point* is concerned with "interests" instead of "conditions of employment," it is not

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[5] This is true regardless of how the distinction is characterized. The Authority in its decision on reconsideration described it as between "proposals that regulate the relationship of supervisors or managers and their employer and those proposals that relate to labor relations." JA 29. ACT on the other hand, states that the distinction it is drawing is between "proposals that regulate the relationship of supervisors or managers and their employer and proposals that determine supervisors' or managers working conditions only to the extent supervisors or managers are assigned by the agency to implement the agency's obligations to comply with bargaining unit employees' negotiated conditions of employment." Br. 17 n.6. The point is the Court never drew any distinctions with respect to the type of supervisory working conditions that might be implicated by bargaining proposals alleged to be violative of the *Cherry Point* rule.

clear that a proposal establishing a specific job requirement, even if only to implement collective bargaining obligations, does not impact the "interests" of managerial personnel. The type and quantity of work assigned is certainly an "interest" of employees.

ACT appears to be arguing that only proposals that *further* the interests of managers and supervisors are outside the obligation to bargain. In that regard, ACT concludes its brief by contending that under *Cherry Point*, the only impermissible proposals are those that "seek to grant [managerial personnel] *rights* against the agency." Br. 18. However, there is no warrant in *Cherry Point* to limit the scope of conditions of employment to "rights against the agency." To the contrary, applying *Cherry Point*, the Authority has found nonnegotiable proposals seeking to impose *obligations* on supervisory personnel. *See, e.g., AFGE, Local 1923*, 44 F.L.R.A. at 1421-23 (proposal requiring that supervisors be held accountable for success of affirmative action programs regulates conditions of employment of managerial personnel and is, therefore, nonnegotiable).

As this Court has stated, to determine the negotiability of a proposal under *Cherry Point*, the Authority or the court must only ascertain whether the proposal "directly implicates" the conditions of employment of managerial personnel. If it does, the proposal is outside the obligation to bargain. *AFGE v. FLRA*, 110 F.3d at 814. Neither this Court nor the Authority has required any further inquiry into the nature of the job requirements or other conditions of employment a proposal would impose on managerial personnel. As will be discussed in section B., below, the Authority reasonably found that the proposal at issue in this case directly determines the conditions of employment of managerial personnel.

Finally, ACT asserts that the Authority's holding in this case will render nonnegotiable all proposals that require agencies to assign managerial personnel to

implement collective bargaining proposals.[6] This concern is unfounded. As the Authority has stated numerous times, proposals that principally relate to conditions of employment of unit employees remain within the duty to bargain even though there is an indirect impact on non-unit members, including managerial personnel. *See, e.g.*, *Int'l Fed'n of Prof'l and Technical Eng'rs, Local 35*, 54 F.L.R.A. 1377, 1381-82 (1998) (citing *Cherry Point*, 952 F.2d at 1440 n.6) (holding that a proposal that would locate base restaurant for the convenience of unit members was not outside the obligation to bargain because the impact on non-unit members was speculative and indirect). Accordingly, even though proposals establishing entitlements for unit employees may require some action on the part of management officials, those proposals remain negotiable, unless their effect would also be to directly prescribe specific working conditions for managerial personnel. On the other hand, proposals that simply require agencies to provide for some employee entitlement, but leave discretion as to the manner in which the proposal is implemented would not "directly determine" conditions of employment of managerial personnel.

B. The Proposal Directly Determines the Conditions of Employment of Managerial Personnel

The Authority properly held that the instant proposal directly determines conditions of employment of managerial personnel. As the Authority has noted, the precise line between proposals having an indirect effect on non-unit personnel and proposals having a direct effect may be difficult to discern. *AFSCME*, 53 F.L.R.A. at 1337. Nonetheless, as the Authority stated, this proposal's effect on conditions of employment of managerial personnel "is not 'indirect' in any way." JA 17.

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[6] Significantly, both before the Authority and the Court, ACT has couched this objection only in broad and speculative terms, providing no concrete examples of the dire consequences predicted.

By its terms, the proposal scripts managerial personnel in their communication with employees. The proposal does this by specifically prohibiting the use of certain terms and requiring the use of others by management officials in the course of their employment. In this regard, ACT never denies that such a requirement constitutes a condition of employment of managerial personnel.[7]

Unlike negotiable proposals that merely limit the employer's options with respect to the conditions of employment of managerial personnel, this proposal imposes, without qualifications or exceptions, highly specific job requirements. *Compare Nat'l Ass'n of Agric. Employees*, 49 F.L.R.A. 319, 330-31 (1994) (proposal that may limit supervisors' opportunities for overtime, but does not preclude such opportunities does not directly determine conditions of employment of supervisors) *with Nat'l Fed'n of Fed. Employees, Local 1482*, 45 F.L.R.A. 640, 643-45 (1992) (proposal that required specific training be provided to supervisors directly determines conditions of employment of supervisors) .

Finally, it is important to note in this regard that this proposal is specifically addressed to what supervisors may or may not do, not to any benefit that may accrue to unit employees. However, even to the extent that the union intended the proposal to provide benefits to bargaining unit members, that fact is irrelevant where, as here, the effect of the proposal is to directly establish the conditions of employment of managerial personnel. *See AFGE, Local 32*, 51 F.L.R.A. at 1451; *see also AFGE v. FLRA*, 110 F.3d at 815.

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[7] Even in terms of its purported distinction between proposals that regulate the relationship between the agency and its managerial personnel and those that merely require the agency to assign managerial personnel to implement collective bargaining provisions, ACT appears to concede (Br. 17 n.6) that the assignments in the latter cases are "working conditions."

As demonstrated above, the union's proposal would directly determine conditions of employment of managerial personnel because it would expressly prescribe specific job requirements for those personnel. Accordingly, the Authority reasonably held the proposal to be outside the Guard's obligation to bargain.

CONCLUSION

The union's petition for review should be denied.

Respectfully submitted,

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September 2003

IN THE UNITED STATES COURT OF APPEALS
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ASSOCIATION OF CIVILIAN TECHNICIANS, WICHITA AIR CAPITOL CHAPTER,	)	
Petitioner	)	
v.	)	No. 03-1083
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority have been served upon the following counsel:

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September 10, 2003

TABLE OF CONTENTS

Page

§ 7105. Powers and duties of the Authority

* * *

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

* * *

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

* * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

* * *

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

* * *

§ 7123. Judicial review; enforcement

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

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

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

* * *

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

designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting side of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

5 U.S.C. § 7131. Official Time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section –

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

32 U.S.C.A. § 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsections (b) and (c), persons may be employed as technicians in –

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as authorized in subsection (c), a person employed under subsection (a) must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

(c)(1) A person may be employed under subsection (a) as a non-dual status technician (as defined by section 10217 of title 10) if the technician position occupied by the person has been designated by the Secretary concerned to be filled only by a non-dual status technician.

(2) The total number of non-dual status technicians in the National Guard is specified in section 10217(c)(2) of title 10.

(d) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title to employ and administer the technicians authorized by this section.

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned –

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who –

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2),

or (3) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(5) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

(g) Sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(h) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(i) The Secretary concerned may not prescribe for purposes of eligibility for Federal recognition under section 301 of this title a qualification applicable to technicians employed under subsection (a) that is not applicable pursuant to that section to the other members of the National Guard in the same grade, branch, position, and type of unit or organization involved.

5 C.F.R. § 351.402(b). Competitive Area

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(b) A competitive area must be defined solely in terms of the agency's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an agency. The minimum competitive area is a subdivision of the agency under separate administration within the local commuting area.

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