ORAL ARGUMENT SCHEDULED FOR APRIL 13, 2004

No. 03-1277

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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, FD-1, IAMAW, LOCAL 1442,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Federation of Federal Employees, Local 1442 (NFFE) and United States Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania (Dep't of Army). NFFE is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of the Army, Letterkenny Army Depot, Chambersburg, Pennsylvania and National Federation of Federal Employees, Local 1442,* Case No. BN-CA-01-0670, decision issued on July 14, 2003, reported at 58 F.L.R.A. 685.

C. Related Cases

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

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GLOSSARY

Add.	Addendum
BRAC	base realignment and closure
Corps of Engineers	*United States Army Corps of Engineers, Memphis Dist., Memphis, Tenn.*, 53 F.L.R.A. 79 (1997)
Depot or agency	United States Department of the Army, Letterkenny Army Depot
JA	Joint Appendix
Judge	Administrative Law Judge
LMPC	Labor Management Partnership Council
Pet. Br.	Petitioner's brief
SAS	School Age Services
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	unfair labor practice
union, NFFE, petitioner	National Federation of Federal Employees, FD-1, IAMAW, Local 1442

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on July 14, 2003. The Authority's decision is published at 58 F.L.R.A. (No. 166) 685. A copy of the decision is included in the Joint Appendix (JA) at JA 1-7. The Authority exercised jurisdiction over the case pursuant

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

STATEMENT OF THE ISSUES

Whether the Authority reasonably determined that no unfair labor practice was committed where the agency, a military installation bound by the Defense Base Closure and Realignment Commission's decisions, closed a program without bargaining after giving the union adequate notice that the program would be closing, and the union failed to request bargaining in accordance with the parties' collective bargaining agreement.

STATEMENT OF THE CASE

This case arises as an unfair labor practice (ULP) case. The National Federation of Federal Employees, FD-1, IAMAW, Local 1442 ("union," "NFFE," or "petitioner") filed a ULP charge against the United States Department of the Army, Letterkenny Army Depot ("Depot" or "agency"). The Authority's General Counsel issued a complaint, alleging that the Depot committed a ULP when it closed the Depot's School Age Services program.

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

This complaint was heard by an Administrative Law Judge (Judge), pursuant to § 7118(a)(6). The Judge held that no ULP had been committed. The General Counsel filed exceptions with the Authority. The Authority affirmed and adopted the Judge's ruling. Neither NFFE nor the General Counsel filed a motion for reconsideration; the union now seeks review in this Court under § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background

The Letterkenny Army Depot, located in Chambersburg, Pennsylvania, is tasked with the service and maintenance of Army missile and artillery systems. There are a number of civilian employees at the Depot, organized into appropriate bargaining units. NFFE represents one such bargaining unit of non-professional employees.

In 1990, responding to "the end of the Cold War, combined with the growing urgency to reduce the Federal budget deficit," Congress passed the Defense Base Closure and Realignment Act of 1990 (Public Law 101-510, 104 Stat. 1808).[2] The Act created the Defense Base Closure and Realignment Commission (DBCRC), which was charged with "provid[ing] a fair process that will result in the timely closure and

[2] *See* July 1, 1995 "Report to the President" by the Defense Base Closure and Realignment Commission, p. ix. DBCRC's Report to the President may be found at http://www.defenselink.mil/brac/docs/1995com.pdf.

realignment of military installations inside the United States." *Id*. The Letterkenny Depot was among the installations selected for major realignment. *Id*. at pp. 1-31 to 1-33.

As a result of a base realignment and closure (BRAC) action, the Depot was directed to divest itself of all non-mission critical land and buildings as well as the programs supported by those properties. JA 127-129. Among these non-mission critical programs were the Depot's Child Development Center and School Age Services (SAS) programs. This case concerns the SAS program; BRAC required the Depot to surrender, to the local school district, the land and buildings used to run SAS. JA 110. On April 16, 1997, the Depot informed NFFE by memorandum that a number of child care programs would be closed as a direct result of BRAC.

> In consonance with all the other BRAC 95 stuff going on, these are the Projected Timelines for the "[Letterkenny Army Depot] Close-Out" of [Morale, Welfare, Recreation] entities. . . . Will keep you posted as we move thru [sic] this.

JA 157. A list of programs to be closed, including SAS, was attached to the memorandum. JA 158. The Depot's notice identified the scope and nature of the closings, and gave the union a "best guess" date of September 1998/March 1999 for when the property transfer would actually be completed. *Id*.

The notice was sufficient to allow NFFE to fully understand the impact of SAS's closing. As the local president testified, "employees . . . would be affected because essentially, if they closed, their position would be cancelled. The second effect was the [e]ffect on the rest of the bargaining units and the employees that utilized those services would no longer have child care . . . ." JA 41.

Article 5, Section 4 of the parties' collective bargaining agreement establishes a ten-day window in which the union may request bargaining over the proposed changes.

> Section 4.
> . . .
> a. The Employer will provide the Union with written notification of the proposed change(s) or implementation and request the Union's views.
> b. The Union will, within 10 calendar days, either inform the Employer in writing of the Union's views on the proposed change(s) or implementation or the Union will request negotiations. . . . Failure of the Union to request negotiations or respond in writing within 10 calendar days will be considered acceptance of the proposed change(s) or implementation.
> c. The parties agree that *if the Union either exercises its option to consult* (responds in writing without requesting negotiations) or does not respond at all as provided in Section 4(b) above, *negotiations are waived on the specific change(s) or implementation.*

JA 177 (emphasis added).

As reflected in the language of Article 5, Section 1, the agreement provides for both formal negotiation and a separate, parallel "consultation" procedure whereby the parties share views.

> Section 1.
> . . .
> a. Consult – The Employer will inform the Union of what it proposes to do and will solicit the Union's views and consider the Union's views in reaching a final decision on actions to be taken. . . .
> b. Negotiate – One or both parties provide the other with written proposal(s). The other party(ies) may make counterproposals. The parties then meet and bargain in a good faith effort to reach a mutual agreement. Negotiations will be conducted in accordance with the Agreement to Negotiate . . . (Note: For purposes of this Agreement, the terms "meet and confer" and "negotiate" are synonymous and have the same meaning.)

JA 176. It is undisputed that the union did not request negotiations. Instead, in keeping with Article 5's "consultation" provisions, on April 30, 1997 – fourteen days after the Depot gave notice – the union referred the matter to the Depot's Labor Management Partnership Council (LMPC). JA 211-212. LMPC consisted of representatives from management and each of the Depot's several bargaining units. LMPC allowed the parties to exchange information and have discussions separate and apart from the formal bargaining process. JA 42-43.

Through LMPC, the Depot and the union worked together to ameliorate the closings' effects on bargaining unit members. The Depot also shared information, as available, about the anticipated exact date of program closure.[3] The Depot made

[3] In July 1999, the union abandoned the LMPC program. However, the union never withdrew the SAS matter from the LMPC, nor did it request that any outstanding concerns to be addressed in any other forum. JA 111-112.

efforts to keep SAS running for as long as possible. *See, e.g.,* JA 98-99. These efforts were successful; the Depot was initially able to extend SAS through August 1999, JA 229, and then again until its closing in August 2001. At all times, though, the parties understood that BRAC closings were inevitable and outside the control of Depot management. JA 96-98, 133-135.

On January 23, 2001, the Depot informed the union that the SAS program would close on August 31, 2001. JA 249. For the first time, the union requested negotiations, JA 166, and the Depot initially agreed. *See, e.g.,* JA 145. After bargaining sessions and mediation, however, the Depot realized that the union had waived its bargaining rights by not requesting negotiations pursuant to Article 5, Section 4, within ten days of the April 16, 1997, notice.[4] JA 252. On August 1, 2001, the Depot withdrew from negotiations with the union. *Id.* SAS was closed as scheduled on August 31, 2001.

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[4] In reaching this conclusion, the Depot relied upon a General Counsel determination in an identical case concerning the Child Development Center. In that case, the Regional Office declined to issue a ULP complaint, noting that "[a]lthough you pursued the issue [in 1997] through partnership, no evidence was presented that the Union made a request to bargain within ten days of receiving the April 1997 notice as required under the collective bargaining agreement." JA 172. *See* JA 170-173, August 6, 1999, letter from FLRA Regional Director Davidson to union President Deborah Witherspoon.

B. The Unfair Labor Practice Charges

The union subsequently filed a ULP charge, and the General Counsel issued a complaint, alleging that the Depot had committed ULPs. JA 182-183. Specifically, the General Counsel claimed that

> 12. On August 12 [sic], 2001, after negotiations had begun and while negotiable proposals were on the bargaining table, the Respondent informed the Charging Party that it would no longer engage in negotiations over its decision to end its SAS child care program, and on August 31, 2001, the SAS program was ended.
> 13. The Respondent implemented its decision to end its SAS program without providing the Union an opportunity to negotiate to the extent required by the Statute.
> 14. By the conduct described in paragraphs 12 and 13, the Respondent committed unfair labor practices in violation of 5 U.S.C. § 7116(a)(1) and (5).

JA 183.

Significantly, the complaint made no allegation of bad-faith bargaining; the language of paragraphs 12 and 13, above, refers only to terminating negotiations, not negotiating in bad faith. As such, and as discussed below (at pp. 24-25), the union's arguments on these points are out of place.

C. The Administrative Law Judge's Decision

The Depot denied the allegations, and the parties proceeded to a hearing before an Administrative Law Judge. The Judge determined that no ULP had been committed.

The Judge held that the Depot did not fail to meet its bargaining obligations for

several reasons. First, the April 16, 1997 memorandum "provided adequate notice that the facility would be closed," thereby triggering "the ten-day time limit contained in the collective bargaining agreement." JA 6. The union had not requested bargaining. Instead,

> the Union commenced what amounted to consultation through the LMPC. The submission of the issue to the LMPC was an understandable, and even commendable, attempt to explore alternatives to the closure. However, Article 5 of the collective bargaining agreement recognizes a clear distinction between consultation and negotiation and the Union is bound by that distinction.

Id. The Judge held that the union waived its right to bargain over the SAS closure. Accordingly, in the Judge's view, the Depot was not obligated to honor the union's untimely 2001 bargaining request. As a result, the Judge concluded that the Depot "had no duty to bargain and, therefore, no duty to bargain to conclusion." JA 7.

D. The Authority's Decision

The General Counsel excepted to the Judge's decision, and the Depot filed an Opposition to the General Counsel's exceptions. Upon review, the Authority affirmed the Judge's ruling.[5]

Echoing the Judge, the Authority held that the 1997 notice was sufficient to trigger the ten-day window to request bargaining. Furthermore, nothing in the delay

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[5] Member Pope's dissenting opinion is found at JA 2-3.

between notice and actual closure served to invalidate the 1997 notice or otherwise renew the union's bargaining rights: "[N]either the delay in closure nor the exploration of alternatives to closure could reasonably be construed as a recission of the decision to terminate the SAS program, especially as the [Depot] was under order from higher authority to effect the closure." JA 1. The Authority also opined that "[i]f delaying an adverse event for employees gave rise to new bargaining obligations by virtue of the passage of time, an employer would be deterred from attempting to reduce the impact of an adverse event through delayed implementation." *Id*.

In sum, the Authority determined that (a) the 1997 notice was sufficiently clear, (b) the union waived its right to bargain over the closure, and (c) the passage of time did not create a new bargaining obligation. Therefore, the Authority held that no ULP was committed, adopting the Judge's findings, conclusions, and recommended order. JA 2.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); s*ee also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

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

Review of the Authority's factual determinations is similarly narrow. "We are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.'" *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted).

SUMMARY OF ARGUMENT

The Authority correctly held that the Letterkenny Army Depot did not commit an unfair labor practice by closing its School Age Services program on August 31, 2001, as the union had waived its rights to bargain over the closure.

The Depot's April 16, 1997, notice to the union of the SAS program's closure was legally sufficient to trigger the union's bargaining obligations. Consistent with Authority precedent, that notice set forth the scope and nature of the change, as well as an estimated closure date. Because the union did not request negotiations within 10 days of receiving the notice, as required under the parties' collective bargaining agreement, the union waived its right to bargain over the closure. The union's decision, 14 days after receiving notice, to "consult" on the matter in a "partnership" environment, merely confirmed the union's waiver of its bargaining rights under the collective bargaining agreement.

Furthermore, the Authority properly held that the Depot's efforts to delay the SAS closure did not create a new bargaining obligation. The case's record and sound policy considerations support the Authority's determination that neither the delay of the closure date nor the "consultations" over alternatives to the closure could reasonably be construed as a rescission of the decision to close the SAS program. To the contrary, because the closing of the SAS program in 2001 resulted in exactly the same

impact on the bargaining unit that the union had anticipated when it was notified of the closure in 1997, no new bargaining obligation arose on the part of the Depot.

Finally, the union's bad faith bargaining claim and assertion of a right to engage in midterm bargaining over tuition assistance lack merit. Neither was alleged in the ULP complaint filed against the Depot, and thus neither was part of the case before the Authority. In addition, the union's tuition assistance claim was not raised before the Authority, and thus its consideration by this Court is barred by § 7123(c) of the Statute.

ARGUMENT

A. The Authority Correctly Held that the Union Waived its Right to Demand Bargaining Over the SAS Closure

The Authority correctly held that the union waived its right to demand bargaining over the SAS BRAC closure. As discussed below, the union had ten days from receiving the April 16, 1997, memorandum to request bargaining. By failing to do so, the union waived its bargaining rights. Furthermore, referring the SAS closure to LMPC did not preserve the union's bargaining rights. Finally, the union's argument that the delay in implementation and/or the January 2001 memorandum created a new bargaining window has no foundation in the Statute or case law, and should accordingly be rejected.

1. The April 1997 BRAC memorandum gave the union adequate notice of the SAS closure

As an initial matter, the Depot's April 16, 1997, memorandum to the union gave adequate notice of the SAS closure. Because the notice was adequate under Authority case law, NFFE waived its bargaining rights by failing to request negotiations.

> Adequate notice of a proposed change in conditions of employment triggers the exclusive representative's responsibility to request bargaining over the change . . . [f]ailure to request bargaining in response to adequate notice . . . may be construed as a waiver of the exclusive representative's right to bargain.

United States Army Corps of Engineers, Memphis Dist., Memphis, Tenn., 53 F.L.R.A. 79, 82 (1997) (*Corps of Engineers*) (internal citations omitted). Here, the Authority, in agreement with the Judge, reasonably determined that the April 16, 1997, memorandum constituted adequate notice to the union.

The Authority has explained the elements that a notice must contain in order to be considered "adequate." A notice is adequate if it is

> sufficiently specific and definitive to adequately provide the exclusive representative with a reasonable opportunity to request bargaining . . . . For example, the notice must apprise the exclusive representative of the scope and nature of the proposed change in conditions of employment, the certainty of the change, and the planned timing of the change.

Id.; *see also United States Dep't of the Treasury, United States Customs Serv., Port of New York and Newark*, 57 F.L.R.A. 718, 720 (2002), *petition for review denied*,

No. 02-1153 (D.C. Cir. Apr. 25, 2003) (unpublished decision) (citing the *Corps of Engineers* test).

Applying this test, the Authority reasonably determined that the April 16, 1997, notice gave the union a reasonable opportunity to request bargaining. The notice, by its own terms, informed NFFE of the scope and nature of the proposed change: closure of the SAS program. By attributing the closure to BRAC and labeling it a "closure," the memorandum also identifies the certainty of the change. Finally, the notice provided the planned timing of the change: September 1998/March 1999. Although the Depot was able to keep the program running until 2001, *Corps of Engineers* requires only that the union be informed of the *planned timing* of the closure.

Moreover, at the time it was issued, the union found the notice adequate. As the Judge pointed out, the union "tacitly acknowledged the adequacy of the notice by its memorandum . . . stat[ing] that, 'We have just recently been *officially notified* that'" SAS was to be closed. JA 6; *see also* JA 211 (emphasis added).

The union now argues, erroneously, that the 1997 notice was inadequate. Petitioner's Brief (Pet. Br.) 17. The union misreads *Corps of Engineers*. Although NFFE is correct that the Depot made "undisputed efforts to keep the [SAS] program open," *id.*, it errs in suggesting that the adequacy of a notice is determined by

subsequent events rather than the terms of the notice. Focusing on post-notice events, NFFE argues that the 1997 notice was deficient because "the certainty of the change eroded over time" as a result of the Depot's efforts to assist its bargaining unit members. Pet. Br. 17.

However, notices must be evaluated at the time they are issued. When a union receives a notice, the union must be able to determine whether the notice is sufficient to trigger a time line for requesting negotiations. Under NFFE's contrary reasoning, unions would never know if an otherwise adequate notice might become retroactively inadequate by, as asserted in this case, an agency's efforts to postpone a closing. There is nothing in Authority case law or the language of the Statute that would support the creation of such an unworkable rule, and the union cites no authority to the contrary.

2. The union did not request negotiations within the contractual time frame

Because the 1997 BRAC memorandum gave adequate notice of SAS's closure, the union had ten days under the parties' agreement to request bargaining. As discussed below, the union did not request negotiations, and its referral of the issue to LMPC is not equivalent to requesting negotiations.

Under the terms of Article 5, Section 4 of the parties' collective bargaining

agreement, the union had ten days from April 16, 1997, to request negotiations over the SAS closure. JA 177; *see also Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 F.L.R.A. 1532, 1536 (1996) (recognizing validity of contractual time limits on the exercise of statutory rights). The Authority and the Judge held, reasonably and consistent with the record, that the union did not request to negotiate over the closure. JA 1, 6-7. Instead, as the union admitted at the hearing, it referred the matter to LMPC.

> Q: And we're also in agreement that after the April, 1997 letter from Mr. Izzi giving you the projected dates of the closure of the [child care] facilities, that you did not request bargaining at that time?
> A: Well, we were trying to do everything in partnership at that time, and there were a lot of issues that we didn't request bargaining over, traditional bargaining over. We tried to address them through the Partnership.
> . . .
> Q: But you chose not to take traditional bargaining as provided for within your contract, is that correct?
> A: That's correct.

JA 78-79, testimony of NFFE, Local 1442 President Witherspoon.[6]

The Judge correctly ruled that referring an issue to LMPC constituted "consulting," rather than "negotiating," under the contract. "The submission of the

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[6] The referral to LMPC was also outside of the contract's ten day time limit for requesting negotiations, as it occurred on April 30, 1997, and the notice was issued on April 16, 1997. JA 211.

issue to the LMPC was an understandable, and even commendable, attempt to explore alternatives to the closure. However, Article 5 of the collective bargaining agreement recognizes a clear distinction between consultation and negotiation and the [u]nion is bound by that distinction." JA 6.

Thus, the agreement provides for two separate processes: consultation and negotiation. In consultation, the parties share and consider each other's views, *but the union waives its right to demand negotiations. See* Section 4(c) of the parties' agreement, JA 177 (set forth *supra* at 8). Negotiation, on the other hand, is a traditional bargaining process including the exchange of written proposals. Applying this contractual distinction, both the Judge and the Authority reasonably determined that referring the SAS closure to LMPC was not the legal equivalent of requesting negotiations under Article 5. JA 1, 6.

The union mistakenly relies on Authority cases in which parties have attempted to resolve disputes through similar alternative dispute resolution techniques. Specifically, as authority for the proposition that the LMPC is tantamount to formal bargaining, the union argues that "[t]he fact that the sessions were conducted in a partnership atmosphere, as opposed to 'traditional' collective bargaining, does not preclude a conclusion that the sessions constituted collective bargaining within the

meaning of the Statute." Pet. Br. 21, citing *United States Dep't of Transportation, Fed. Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 F.L.R.A. 312, 318 (1997).

The union's argument is flawed in several respects. First, even taken in isolation, the language cited by the union only suggests that partnership may be one form of collective bargaining. It does *not* suggest that partnership is synonymous with formal negotiation.

Second, the union overlooks a number of Authority cases holding that partnership is not interchangeable with formal negotiation. "[P]artnerships are intended to be an additional tool for the resolution of workplace issues, not a replacement for collective bargaining." *United States Dep't of the Interior, Washington, D.C.*, 56 F.L.R.A. 45, 51 n.10 (2000). Even the *Department of Transportation* case, cited by the union, reminds parties that, "[a]s our conclusion is based on the totality of the circumstances in this case, it is not intended, and should not be construed, as a general pronouncement that all discussions of the sort in this case constitute collective bargaining within the meaning of the Statute." *United States Dep't of Transportation, Fed. Aviation Admin., Standiford Air Traffic Control Tower, Louisville, Ky.*, 53 F.L.R.A. at 320 n.8.

Finally, as noted above, the union's reliance on broad, non-specific language ignores the clear and specific terms of the parties' own agreement. Article 5 of the agreement defines consultation and negotiation as separate, complementary processes. The union in this case selected consultation. Although, as the Judge noted, this may have been a reasonable and commendable choice, it was not a timely bargaining request: the parties' agreement explicitly provides that referring a matter to consultation waives bargaining rights. As a result, the Authority and the Judge were correct in holding that the union waived its rights to demand negotiations over the SAS closure.

3. The Authority properly held that the Depot's efforts to delay the SAS closure did not create a new bargaining obligation

The union also incorrectly claims that the delay in implementing the SAS closure, combined with the January 2001 memorandum, gave rise to a new bargaining obligation. Pet. Br. 17-18. This argument is without merit.

The Authority and the Judge correctly determined that nothing occurring after the 1997 official notice was issued served to create a new bargaining obligation for the Depot.

> Neither the delay of the closure date nor the exploration of alternatives to the closure could reasonably have been construed as a recission of the decision to terminate the SAS program. Indeed, it was made clear to the [u]nion that the closure of the SAS program was the result of a directive from an authority to which the [Depot] was subordinate.

JA 6. These findings are supported by substantial evidence. *See, e.g.*, JA 40, 43, 86-88, 94, 96-99, 120-122, 126.

The Authority's decision is also consistent with sound policy considerations. As the Authority noted, "[t]he benefit provided employees through delay in the inevitable closure of an SAS should not result in a new bargaining obligation for the [a]gency. Otherwise, agencies will implement as soon as the right to bargain is satisfied or waived even when delay of the event is possible and beneficial to employees." JA 1-2.

The Authority has previously considered the question of when modifications to a proposed change in conditions of employment gives rise to a new bargaining obligation. In *Department of the Treasury, Internal Revenue Serv. and ITS, Cleveland, Ohio Dist. Office*, 20 F.L.R.A. 403 (1985), the agency had proposed changes to the office layout in 1981, and the union waived bargaining. In implementing the changes in 1983, the agency deviated from the original proposal. *Id.* at 403-406. The Authority held that no new bargaining obligation was created, as

> the nature and degree of the impact of the change in 1983 did not differ from the impact that was foreseeable when Respondent developed its plan in 1981. In order for there to be a 1983 bargaining obligation, the nature of management's action in 1983 must have resulted in *new impact* or reasonably foreseeable impact, which is more than *de minimis*, *beyond*

> *that which was already foreseeable* as a result of the Respondent's announced 1981 decision . . . .

Id. at 406 (emphasis added).

Applying this reasoning to the instant case supports the Authority's conclusion. The 2001 SAS closing resulted in exactly the same impact that NFFE had anticipated as a consequence of the 1997 official notice: loss of SAS services for parents and loss of SAS employment for employees. *See* p. 4, *supra*. Rather than punish the Depot for keeping SAS running for its bargaining unit members, the Authority properly determined that neither the delay in closing the program nor the 2001 memorandum gave rise to a new bargaining obligation.[7]

In summary, because the 1997 memorandum was adequate notice, the union was bound to request negotiations within ten days in order to preserve its bargaining rights. It failed to do so, instead referring the matter to consultation before the LMPC. As a result, the union waived its bargaining rights. Even though final closure was postponed, the impact of the 2001 closure was identical to the impact described in the 1997 notice.

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[7] The union incorrectly claims that a 1999 law allowing appropriated funds to be used for reimbursing child care tuition gave rise to a new bargaining obligation for the Depot. *See, e.g.*, Pet. Br. 24-26. As indicated above, mere changes in external circumstances, without a related change in impact, do not resuscitate waived bargaining rights. Here, the impacts – loss of jobs and loss of child care – that the union sought to address in its untimely 2001 proposals were identical to the impacts that the union could have addressed with timely proposals in 1997.

Therefore, no new bargaining obligation was created, and the Depot was entirely within its rights to terminate negotiations.

B. The Union's Remaining Objections to the Authority's Decision Lack Merit

The union raises two other contentions in its brief. As discussed below, neither of these arguments has merit, and thus do not warrant granting the union's petition for review.

1. The Authority properly disposed of the union's bad faith bargaining claim

In its brief, the union argues that the Authority should have found a separate ULP of bad-faith bargaining based on the Depot's conduct in the 2001 negotiations. Pet. Br. 26-28. Specifically, the union takes issue with the Depot's withdrawal from those negotiations and argues that this suggests bad faith on the Depot's part throughout the entire 2001 bargaining process. *See id.*

The union's fallacious contention overlooks the fact that the union did not charge, and the General Counsel's complaint did not allege, that the Depot bargained in bad faith. As the Authority explained in its decision, the Depot was charged with failing to negotiate, not bargaining in bad faith: "[T]he complaint does not allege that the Respondent's actions constitute an independent violation of the Statute." JA 2 n.2.

Indeed, neither the union's charge (JA 155-156) nor the General Counsel's complaint (JA 182-184) can be fairly read to encompass an allegation of bad-faith bargaining. Because the Depot was never expressly alleged to have violated the Statute by bargaining in bad faith, the Authority properly affirmed the Judge's refusal to rule on bad-faith claims that were never part of the case. JA 2 n.2.

The Authority's decision in this respect is entirely consistent with Authority precedent. "[A] violation not expressly alleged in a complaint may be found if . . . the respondent knew what conduct was at issue and had a fair opportunity to present a defense." *Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Phoenix, Ariz.*, 52 F.L.R.A. 421, 429 (1996). Here, nothing in either the union's charge or the General Counsel's complaint notified the Depot that the charge against it was for anything other than failing to bargain. Because the bad-faith claim was not properly pled, the Depot did not have fair notice of the allegation, and the Judge and Authority properly declined to find a ULP on this theory.

Additionally, there can be no finding of bad-faith where, as here, an agency had no obligation to bargain in the first place. The Statute provides that "it shall be an unfair labor practice for an agency . . . to refuse to consult or negotiate in good faith with a labor organization *as required by this chapter* . . . ." 5 U.S.C. §§ 7116(a),

7116(a)(5). Because the Depot was not under a bargaining obligation, there can be no finding that it bargained in bad faith.

2. The union's argument asserting a separate right to engage in midterm bargaining over tuition assistance programs is barred by § 7123(c) of the Statute

Because the union's claim (Pet. Br. 24-26) that it has a separate right to bargain over tuition assistance programs was not raised to the Authority, § 7123(c) of the Statute bars the Court from considering it.

Section 7123 of the Statute provides that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986). Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision, are not within the Court's jurisdiction to consider. *See, e.g., United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 244-245 (D.C. Cir. 1993).

The union failed to raise its tuition assistance claim before the Authority, and did not file a motion for reconsideration. Instead, it raises the midterm bargaining argument for the first time on appeal.[8] This union's new claim, then, falls completely within the ambit of § 7123(c), and the Court is without jurisdiction to consider this portion of the union's petition.

In addition to being barred by § 7123(c), the claim was never part of the case against the Depot. The General Counsel's complaint (p. 8, *infra*) alleges only that the Depot closed SAS without completing its bargaining obligations. The union acknowledges that its tuition assistance claim is not about the SAS closure, but is instead a midterm bargaining issue. *See* Pet. Br. 26. As such, the tuition assistance claim was not only never raised to the Authority, but was never a part of this case at all.

[8] Although the dissenting opinion discusses tuition assistance programs, it is in the context of a change in circumstances between the 1997 notice and the 2001 closing. *See, e.g.*, JA 3. Therefore, it would not be accurate to claim that the Authority has considered the union's argument on this point.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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January 2004

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

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, FD-1, IAMAW, LOCAL 4036 Petitioner	)	
v.	)	No. 03-1277
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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February 4, 2004

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§ 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—

* * * * * * *

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

* * * * * * *

§ 7116. Unfair labor practices

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

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

* * * * * * *

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

* * * * * * *

§ 7118. Prevention of unfair labor practices

* * * * * * *

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

* * * * * * *

§ 7123. Judicial review; enforcement

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

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

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

* * * * * * *

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

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

* * * * * * *