ORAL ARGUMENT NOT YET SCHEDULED
Nos. 20-1396 (lead), 20-1397, 20-1404

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, et al.,
Petitioners,
v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

These consolidated Petitions for Review arise from a joint request by the U.S. Department of Education and U.S. Department of Agriculture (the "Agencies") pursuant to 5 C.F.R. § 2427.2(a) for a general statement of policy or guidance from the Federal Labor Relations Authority (the "Authority" or "FLRA"). In response, the Authority issued its decision in *U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (2020) (Member DuBester dissenting). The American Federation of Government Employees, National Treasury Employees Union, and American Federation of State, County and Municipal Employees (collectively, the "Unions"), who were not parties below, have filed these Petitions for Review of that decision. In this Court proceeding, the Unions are the petitioners and the Authority is the respondent.

B. Ruling Under Review

The Unions seek review of the Authority's decision in *U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (2020) (Member DuBester dissenting).

C. Related Cases

This case was not previously before this Court or any other court, nor is the Authority aware of any related cases currently pending before this Court or any other court.

/s/ Noah Peters
Noah Peters
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Federal Labor Relations Authority

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GLOSSARY

Agencies	U.S. Department of Education and U.S. Department of Agriculture
ALJ	Administrative Law Judge
Authority	The Federal Labor Relations Authority
Br.	Petitioners' opening brief
EO 11491	Executive Order 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969)
FLRA	The Federal Labor Relations Authority
JA	The Joint Appendix
NLRA	The National Labor Relations Act
NLRB	The National Labor Relations Board
Policy Statement	*U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (2020) (Member DuBester dissenting).
Request	The Agencies' Request for a General Statement of Policy or Guidance
Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Unions	Petitioners, American Federation of Government Employees, National Treasury Employees Union, and American Federation of State, County and Municipal Employees

STATEMENT OF JURISDICTION

In the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2018) (the "Statute"), Congress charged the Authority with not only adjudicating disputes, but also "provid[ing] leadership in establishing policies and guidance" under the Statute. 5 U.S.C. § 7105(a)(1). Part 2427 of the Authority's regulations implements Congress's command by setting forth procedures by which parties may request general statements of policy or guidance. Those regulations allow the head of any federal agency, union, or lawful association to "ask the Authority for" a policy statement. 5 C.F.R. § 2427.2(a).

In assessing such requests, the Authority considers several factors, including "whether an Authority statement would prevent the proliferation of cases involving the same or similar question." *id.* § 2427.5(b), "[w]hether the resolution of the question presented would have general applicability under" the Statute, *id.* § 2427.5(c), and whether issuing a policy statement would promote the purposes of the Statute, *id.* § 2427.5(f). Before issuing a policy statement, the Authority will, "as it deems appropriate," give "interested parties" an opportunity

to comment. *Id.* § 2427.4. The Authority thus had subject matter jurisdiction to issue *U.S. Department of Education and U.S. Department of Agriculture*, 71 FLRA 968 (2020) (Member DuBester dissenting) (the "Policy Statement") under 5 U.S.C. § 7105(a)(1) and part 2427 of the Authority's regulations.

The Policy Statement is a "final order of the Authority" reviewable in circuit court under 5 U.S.C. § 7123(a). *See Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 750 F.2d 143, 144-145 (D.C. Cir. 1984) ("*AFGE 1984*"). The Authority's Policy Statement "marks the consummation of the agency's decisionmaking process" and "is not of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citation omitted). Further, it is an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (internal quotation marks omitted).

As in *AFGE 1984*, the Policy Statement contains the Authority's "final word on the subject" of whether a substantial impact standard should apply in determining whether a management-initiated change requires bargaining, and "[n]othing further needs to be done by the

FLRA" to implement it. *AFGE 1984*, 750 F.2d at 144. The Authority was clear on this point, as it overruled a previous case (*Department of Health and Human Services, SSA Region V, Chi., Ill.*, 19 FLRA 827, 829-30 (1985) ("*SSA Reg. V*") and said that "[t]o the extent Authority decisions since *SSA Reg. V* have applied a different standard or test [than 'substantial impact'], they will no longer be followed." (JA 18, 20.) As in *AFGE 1984*, the Authority has since applied the Policy Statement in subsequent adjudications. *See U.S. Dep't of Homeland Sec. U.S. Customs & Border Prot. El Paso, Tex.*, 72 FLRA 7, 11 & n.47 (2021) (citing *Policy Statement*, 71 FLRA at 971); *compare AFGE 1984*, 750 F.2d at 145.

STATEMENT OF THE ISSUES PRESENTED

1. Has Congress spoken directly to the precise question of whether agencies must bargain over changes that have no substantial impact on employees' conditions of employment?

2. Given that Congress used similar language in defining the collective bargaining obligation under the Statute (*see* 5 U.S.C. §§ 7102(2), 7103(a)(12)) as it used in the National Labor Relations Act ("NLRA") (*see* 29 U.S.C. §158(d)), and given that both this Court and

the Authority have consistently looked to National Labor Relations Board ("NLRB") precedent in determining the scope of bargaining under the Statute, *see*, *e.g.*, *Library of Congress v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983) ("*Library*"), was it reasonable for the Authority to apply the same "substantial impact" standard that the NLRB has used for over 50 years to determine what level of impact a change must have before the employer is required to bargain over it?

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. (Add. 1.)

STATEMENT OF THE CASE

By letter dated October 31, 2019, the Agencies jointly asked the Authority to issue a general statement of policy or guidance holding that, in determining whether a management-initiated change[1] requires

[1] The "management-initiated" qualifier serves to distinguish cases where a change in a condition of employment arises from changes not attributable to management, such as workload fluctuations. In such cases, no bargaining is required. *See, e.g.*, *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customs & Border Patrol, Tucson Sector Tucson, Ariz.*, 60 FLRA 169, 173 (2004); *U.S. Dep't of Veterans Affairs Med. Ctr. Sheridan, Wyo.*, 59 FLRA 93, 94 (2003).

"impact and implementation" bargaining,[2] a substantial impact standard should apply. (JA 1.) The Agencies noted that the Statute does not specify what level of impact a change must have before bargaining is required. (JA 2.) They observed that the Statute, in defining the "conditions of employment" over which parties must bargain as "policies, practices, and matters . . . affecting working conditions," suggests that the duty to bargain is triggered only where a change has an appreciable effect on employees. (*Id.*) (quoting 5 U.S.C. § 7103(a)(14).)

Initially, the Authority had interpreted the Statute, and the Executive Order which preceded it, as requiring bargaining only where a change had a substantial impact on conditions of employment. (JA 3

[2] "Impact and implementation bargaining" refers to bargaining under 5 U.S.C. § 7106(b)(2) & (3) over the procedures management will observe in exercising management rights and "appropriate arrangements for employees adversely affected by the exercise of any" management right. The Authority uses the same standard to determine whether a change requires bargaining in the impact-and-implementation context as in any other context. (JA 17 (citing *Soc. Sec. Admin., Off. of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 653-54 (2004), *pet. den. sub nom. Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir 2005)).) Thus, the Authority did not limit its discussion in the Policy Statement to impact-and-implementation bargaining, and the Unions do not challenge that aspect of the Policy Statement before this Court.

(collecting cases); *see also* Executive Order 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969) ("EO 11491").) But, in the mid-1980s, the Authority switched from a substantial impact test to a "more than de minimis" standard. (JA 3.) The "more than de minimis" standard requires bargaining over "any change that causes an impact to a condition of employment that is more than trivial, or insignificant." (JA 2.)

The inevitable result of such a standard, the Agencies urged, "is either the negotiation of every proposed management change that is other than insignificant, or litigation over whether the proposed change is no more than insignificant." (*Id.*) The Agencies observed that the "more than de minimis" standard "has resulted in vast differences of opinion among judges, arbitrators, and the Authority regarding what constitutes a de minimis change." (JA 3.) "This resulting lack of clarity has negatively impacted labor-management relations and has increased the potential for harmful and duplicative litigation and associated costs." (*Id.*) The Agencies urged that the Authority return to the substantial impact standard, which "would provide a meaningful, workable and realistic standard that could significantly reduce

ambiguity and thereby prevent, or at least significantly reduce, continued litigation." (JA 5.)

The Authority granted the Agencies' request and issued a thorough and well-reasoned Policy Statement restoring the substantial impact test. (JA 17–20.) The Authority noted that at its inception, it applied a substantial impact standard in determining whether a management-initiated change triggered the duty to bargain. (JA 17.) Then, in the mid-1980s, the Authority abandoned the "substantial impact" standard in favor of a "more than de minimis" standard. In the ensuing years, the "more than de minimis" test yielded inconsistent results, making its application unpredictable. (*See* JA 18 n.14 (describing contradictory holdings applying the "more than de minimis" test).) The Authority further observed that it was "incongruous to impose a statutory duty to bargain on matters that are barely more than trivial" and which have "no substantial impact on conditions of employment." (JA 20.)

In looking for a "meaningful and determinative" standard, the Authority noted that, both before and after the Statute was promulgated, the NLRB has required bargaining only when a purported

change has a "material or substantial impact" on bargaining-unit employees. (JA 19.) And the Authority further found that it had never provided any reason for departing from the substantial impact test. (JA 20.) The Authority thus determined that substantial impact is the appropriate test for deciding whether a change to a condition of employment is significant enough to trigger a duty to bargain. (*Id.*)

Shortly after the Authority issued its Policy Statement, the Unions filed these Petitions for Review.

STATEMENT OF THE FACTS

I. Congress Closely Patterns the Statute's Definition of the Duty to Bargain After Analogous Provisions of the NLRA

The Statute "was modeled on the [NLRA]," and "its provisions were crafted either by analogy or by contrast" to that earlier-enacted law. *Am. Fed'n of Gov't Emps., Local 32, AFL-CIO v. FLRA*, 853 F.2d 986, 992 (D.C. Cir. 1988) ("*AFGE 1988*") (internal quotation marks omitted). In particular, Congress patterned the duty to bargain in the Statute on the NLRA's definition of that same duty. The Statute gives employees the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." 5 U.S.C. § 7102(2). It defines "collective

bargaining" as "the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" *Id.* § 7103(a)(12); *see also id.* § 7114(b)(2) ("The duty . . . to negotiate in good faith . . . shall include the obligation . . . to discuss and negotiate on any condition of employment[.]").

The NLRA similarly defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). The NLRB has read the word "confer" to require employers to negotiate and bargain over conditions of employment, not simply discuss them. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *NLRB v. Irvington Motors, Inc.*, 343 F.2d 759, 760 (3d Cir. 1965); *Call, Burnup, & Sims, Inc.*, 159 NLRB 1661, 1678 (1966); *Betra Mfg. Co.*, 233 NLRB 1126, 1135 (1977). Thus, the duty to bargain under the Statute was crafted "by analogy . . . to the

NLRA." *FLRA v. Soc. Sec. Admin.*, 846 F.2d 1475, 1478 (D.C. Cir. 1988). The basic obligation, in both cases, is "to meet at reasonable times" and "consult and bargain" or "confer" "with respect to . . . conditions of employment." 5 U.S.C. § 7103(a)(12); 29 U.S.C. § 158(d).[3]

Unlike the NLRA, however, the Statute emphasizes that the duty to bargain is limited to "conditions of employment *affecting such employees*[.]" 5 U.S.C. § 7103(a)(12) (emphasis added). The Statute reinforces that the duty to bargain is premised on a substantial impact on employees by defining "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting* working conditions[.]" *Id.* § 7103(a)(14) (emphasis added). Similarly, § 7106(b)(3) of the Statute requires bargaining over "appropriate arrangements for employees adversely *affected* by the exercise" of any management right. *Id.* § 7106(b)(3) (emphasis added). "Congress thus . . . predicated the duty to bargain under § 7106(b)(3) and under § 7102(2) upon the same notion, namely

[3] "Wages and hours" are excluded from the Statute's definition of "collective bargaining" because "[t]he wages and fringe benefits of the overwhelming majority of Executive Branch employees are fixed by law, in accordance with the General Schedules of the Civil Service Act." *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 649 (1990) (citing 5 U.S.C. § 5332).

an *effect* upon employees[.]" *Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 963 (D.C. Cir. 2005) (emphasis in original) ("*AALJ*"). That is, the Statute emphasizes that "some level of impact—that is, effect— is a sine qua non of a union's right to engage in bargaining[.]" *Id.* (internal formatting omitted).

II. In Addition, Congress Defines the Duty to Bargain Under the Statute in Terms Virtually Identical to EO 11491

The Statute also defines the duty to bargain in a manner "virtually identical" to EO 11491, which governed federal-sector labor relations immediately before the Statute. *Fed. Aviation Admin.*, 55 FLRA 254, 259 (1999) ("*FAA*"). Similar to § 7103(a)(12) and § 7114(b)(2) of the Statute, § 11(a) of EO 11491, titled "Negotiation of agreements," provided that "[a]n agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions[.]" 34 Fed. Reg. at 17610. Similar to § 7103(b)(3) of the Statute, § 11(b) of EO 11491 listed several non-negotiable management rights, but included an exception allowing negotiation of "appropriate

arrangements for employees adversely affected by the impact of realignment of work forces or technological change." *Id.*

III. Like the NLRB and the Assistant Secretary for Labor-Management Relations, the Authority Initially Applies a "Substantial Impact" Standard in Determining What Changes Require Bargaining

For well over 50 years, both before and after the Statute was enacted, the NLRB has applied a threshold standard in determining when an employer-initiated change to conditions of employment requires bargaining. Under the NLRB's precedent, "not every unilateral change in" conditions of employment "constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one[.]" *Peerless Food Products, Inc.*, 236 NLRB 161, 161 (1978) (quoting *Rust Craft Broad. of N.Y., Inc.*, 225 NLRB 327, 327 (1976).)

So too with respect to § 11(a) of EO 11491, which required agencies and unions to "meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions[.]" The Statute uses almost identical language in obligating agencies and unions "to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement

with respect to the conditions of employment affecting such employees," and defining "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions[.]" 5 U.S.C. § 7103(a)(12), (14).

The Assistant Secretary for Labor-Management Relations held that the bargaining obligation created by § 11(a) of EO 11491 was "not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees." *Dep't of Def., Air Nat'l Guard, Tex. Air Nat'l Guard, Camp Mabry, Austin, Tex.*, No. 738, 6 A/SLMR 591, 592 (Nov. 4, 1976) ("*Camp Mabry*"). "Rather, Section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions." *Id.*

The Authority initially interpreted the Statute to require a "substantial impact" standard. In *Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 5 FLRA 333, 336–37 (1981), the Authority adopted the findings and conclusions of an Administrative Law Judge ("ALJ"), including the ALJ's application of the substantial impact standard from *Camp Mabry*.

In so doing, the Authority approved the ALJ's holding that "there should be no doubt that management should not be compelled to negotiate where the exercise of its rights results in an insubstantial impact on bargaining unit employees." *Off. of Program Operations, Soc. Sec. Admin.*, 5 FLRA at 337.

IV. Then, Without Explanation, the Authority Switches to the "More Than De Minimis" Standard, Which Yields Wildly Inconsistent Results

In the mid-1980s, however, without explanation, the Authority modified the "substantial impact" standard first to an "impact" standard, *U.S. Government Printing Office*, 13 FLRA 203, 204–05 (1983), and then a "more than de minimis" standard, *Department of Health & Human Services, Social Security Administration Chicago Region*, 15 FLRA 922, 924 (1984). The Authority first attempted to give content to the "more than de minimis" standard in *SSA Reg. V*, issued when the Authority had only two members. Those two members wrote separate opinions that expressed differing views on what the "more than de minimis" standard was supposed to mean. (JA 18.)

Acting Chairman Frazier issued an opinion listing five factors (the nature of the change, its duration and frequency, the number of

employees affected, the size of the bargaining unit, and whether the parties had bargained over similar changes in the past) that should be considered in determining whether a change was "more than de minimis." *SSA Reg. V*, 19 FLRA at 830 (opinion of Acting Chairman Frazier). All five could equally be applied to measure whether the change had a substantial impact, although he avoided using that phrase.

In his opinion, Member McGinnis said that he defined a "de minimis change" as "a change which does not have a substantive adverse effect upon unit employees." *SSA Reg. V,* 19 FLRA at 834 (concurring opinion of Member McGinnis). He emphasized that the "more than de minimis" test must take into account "the needs of agency management to make changes in employee working conditions in order to carry out the day-to-day operations in the Government[.]" *Id*. And, noting that § 7101(b) of the Statute says its provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government," Member McGinnis observed:

> It follows that section 7106(b)(2) and (3) must be construed so as to permit management to conduct its business generally without unreasonable impediments. Such an objective cannot be reached if management must be required

> to bargain over every decision it makes, regardless of the impact on unit employees. Decisions are made daily by every level of management, and if bargaining were required on each and every decision, Government would grind to a halt.

Id.

From this muddled beginning, the "more than de minimis" standard yielded wildly inconsistent results. Applying that test, the Authority held that rearranging the seating location within a single office was more than de minimis, but moving an employee to an entirely different work location was not more than de minimis. *Compare U.S. Dep't of Health & Hum. Serv., Soc. Sec. Admin., Balt., Md.*, 36 FLRA 655, 688 (1990), *with Gen. Serv. Admin., Region 9, S.F., Cal.*, 52 FLRA 1107, 1111-12 (1997). It held that requiring an employee to give up a "second" office, while keeping his primary office, was "more than de minimis," but moving an employee permanently to a vacant office was not more than de minimis. *Compare U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173–74 (2009), *with Nat'l Treasury Emps. Union, Chapter 26*, 66 FLRA 650, 653 (2012). Increasing "supervisory" duties for "lead" guards already performing supervisory duties was more than de minimis, the Authority

determined, but reassigning and giving a new position description and responsibilities to an employee was not more than de minimis. *Compare U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002), *with U.S. Dep't of Labor*, 70 FLRA 27, 30–31 (2016). And the Authority found that changes to a single employee's duties triggered a duty to bargain (without considering the size of the bargaining unit), while finding that changes to two employees' duties did not trigger a duty to bargain (based in part on the sizes of the affected bargaining units). *Compare U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89–90 (2009), *with Dep't of Hous. & Urb. Dev., Columbia Area Off., Columbia, S.C.*, 20 FLRA 233, 235–36 (1985).

V. The Authority Restores the "Substantial Impact" Standard

By letter dated October 31, 2019, the Agencies jointly asked the Authority to issue a policy statement holding that, in determining whether a management-initiated change requires "impact and implementation" bargaining under the Statute, a substantial impact standard should apply. (JA 1.) The Agencies noted that the Statute is not clear what level of impact a change must have on conditions of

employment before bargaining is required. (JA 2.) Initially, the Agencies noted, the Authority had interpreted the Statute and EO 11491 as requiring bargaining only where a change had a substantial impact on conditions of employment. (JA 3 (collecting cases).) But, in the mid-1980s, without explanation, the Authority switched from a substantial impact test to a "more than de minimis" standard. (*Id.*) The Agencies observed that the "more than de minimis" standard "has resulted in vast differences of opinion among judges, arbitrators, and the Authority regarding what constitutes a de minimis change." (JA 3.) They urged the Authority to return to the substantial impact standard. (JA 5.)

The Authority granted the Agencies' request and issued a Policy Statement restoring the "substantial impact" test and rejecting the "more than de minimis" standard. (JA 17–20.) The Authority noted that at its inception, it applied a substantial impact test. (JA 17.) However, in the mid-1980s, the Authority abandoned the "substantial impact" test in favor of a "more than de minimis" standard. In doing so, however, the Authority failed to explain why the substantial impact standard was inadequate. (JA 17–18).

In addition, the Authority found that the "more than de minimis" test had yielded wildly inconsistent results, making its application unpredictable. (JA 18 n. 14 (collecting contradictory holdings applying the "more than de minimis" test).) Thus, the Authority agreed with the Agencies that the "more than de minimis" test had proved unworkable and had negatively affected federal-sector labor relations. (*Id.*) Moreover, the Authority observed that "[b]y definition, 'de minimis' signals triviality" and it was "incongruous to impose a statutory duty to bargain on matters that are barely more than trivial" and which have "no substantial impact on conditions of employment." (JA 20.)

In looking for a "meaningful and determinative" standard, the Authority noted that, both before and after the Statute's enactment, the NLRB has required bargaining only when a change has a "material or substantial impact" on bargaining-unit employees. (JA 19.) Moreover, the Authority itself had never provided any reason for departing from the "substantial impact" test. (JA 20.) The Authority thus found that the substantial-impact test is the appropriate means for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain. (*Id.*)

Shortly after the Authority issued its Policy Statement, the Unions filed these Petitions for Review.

SUMMARY OF ARGUMENT

The Unions contend that the "plain text of the Statute" forecloses the use of a substantial impact standard. (Br. 15–19.) But the reverse is true: Congress invited use of the substantial impact test by defining the duty to bargain under the Statute in terms that were nearly word-for-word identical to the definition of that duty in the NLRA and EO 11491, both of which had long been interpreted to require use of a substantial impact test.

This Court has "repeatedly observed that [the Statute] was modeled on the [NLRA], and that its provisions were crafted either by analogy or by contrast." *AFGE 1988*, 853 F.2d at 992 (internal quotation marks omitted). Here, Congress patterned the duty to bargain in the Statute on the NLRA's definition of that same duty. *Compare* 5 U.S.C. §§ 7102(2), 7103(a)(12), *with* 29 U.S.C. §158(d). Both before and after the Statute was enacted, the NLRB has applied a threshold substantial impact test in determining when an employer-initiated change to conditions of employment requires bargaining.

Peerless Food Products, Inc., 236 NLRB at 161. Indeed, the Statute indicates even more strongly than the NLRA that a threshold substantial impact test should apply. *See, e.g.*, *AALJ*, 397 F.3d at 963 (noting that the Statute's provisions state repeatedly that bargaining is predicated upon an "effect" on employees); 5 U.S.C. § 7101(b) (stating that the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government").

In addition, the Statute defines the duty to bargain in a manner "virtually identical" to EO 11491, which governed federal-sector labor relations immediately before the Statute. *FAA*, 55 FLRA at 259. As with the NLRA, the settled administrative interpretation of EO 11491 was that a management-initiated change must have a substantial impact on employees before bargaining was required. *Soc. Sec. Admin., Bureau of Hearings & Appeals*, 2 FLRA 237, 239, 243 (1979).

The Unions contend that the use of a substantial impact test is contrary to the Statute's text because, in their view, the Statute requires bargaining over any change that "affects" employees—regardless of the level of that effect. (Br. 15–19.) But this interpretation would equally doom the "more than de minimis" test,

because it too requires that only changes that meet a threshold level of impact may trigger a bargaining duty. *AALJ*, 397 F.3d at 961–63 (rejecting a similar "plain text" argument). Seeking to avoid this conclusion, the Unions point to dictionary definitions of "substantial" as meaning "important, essential" and "significantly great." (Br. 17.) But they fail to cite the dictionary definition of "de minimis," which is "lacking significance or importance: so minor as to merit disregard." *De Minimis*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/de%20minimis. There is little difference between insisting that a change must be "significant" or "important" and insisting that it must be "substantial." And, in its Policy Statement, the Authority explained that its "substantial impact" standard would serve the same function as the "more than de minimis" standard: to "determin[e] whether a change to a condition of employment is significant enough to trigger a duty to bargain." (JA 20; *see also AALJ*, 397 F.3d at 962 (the Statute does not require bargaining over "truly insignificant conditions of employment.").)

The Unions insist that the use of a "substantial impact" standard is inconsistent with Congress's intent to promote collective bargaining.

(Br. 22–23.) This argument rests on an overly simplistic view of Congress's purpose in enacting the Statute, which was to "strike[] a balance between the need to strengthen employees' bargaining rights, and the need not to unduly interfere with government operations." *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 852 (D.C. Cir. 1985) ("*AFGE 1985*"). Using the same substantial impact standard that prevailed in the private sector under the NLRA and in the federal sector under EO 11491 at the time of the Statute's enactment fits comfortably with that purpose.

Moving to *Chevron* step two, the Unions fail to show that the Authority's Policy Statement is arbitrary or capricious. The Unions contend that the Authority "misstated its precedent" in saying that it had "never provided any 'explanation or rationale' for adoption of the de minimis standard." (Br. 24 (quoting JA 19).) The Unions' argument for why the Authority "misstated its precedent," however, rests on a mischaracterization of what the Authority said. (JA 19 & n. 24.) And the Unions' argument is not even correct on its own terms. The passage the Unions emphasize provides no explanation whatsoever for why a "more than de minimis" test would better serve "to distinguish between

changes which require bargaining and those which do not" than a "substantial impact" test. *Dep't of Health & Hum. Servs. Soc. Sec. Admin.*, 24 FLRA 403 (1986) ("*HHS, SSA*").

Next, the Unions contend that the Authority's Policy Statement is contrary to *AALJ* and *AFGE v. FLRA*, 446 F.3d 162 (D.C. Cir. 2006) ("*AFGE 2006*"). But "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("*Brand X*"). Here, neither *AALJ* nor *AFGE 2006* held that the "more than de minimis" standard "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.*

The Unions make the startling contention that it was unreasonable for the Authority to look to NLRB precedent in determining the scope of bargaining under the Statute. (Br. 31–33.) But this Court has said repeatedly that the Authority acts arbitrarily when it *ignores* NLRB precedent in determining the scope of bargaining

under the Statute. *See, e.g.*, *AFGE 1988*, 853 F.2d at 992. It has insisted that "when the Authority departs from a familiar principle rooted in private sector precedent, it should either identify practical distinctions between private and governmental needs that justify the departure, or offer some evidence in the language, history, or structure of the statute suggesting that Congress intended a different result." *Id.* The substantial impact test, which the NLRB has applied for over 50 years to measure the scope of bargaining under the NLRA, certainly counts as a "familiar principle rooted in private sector precedent[.]" *Id.*

In its Policy Statement, the Authority contrasted the results of eight different cases applying the "more than de minimis" standard to show that it has yielded unpredictable and unworkable results. (JA 18 & n. 14.) The Unions contend this was not enough to justify discarding the "more than de minimis" standard. (Br. 34–36.) But the Unions do not bother discussing any of the cases the Authority cited. (*Id.*) Nor do they make any effort to explain how their results were consistent with one another. (*Id.*) Instead, they urge that "the inherently fact dependent nature of the de minimis exception" means that cases applying that test will always turn on their particular facts. (Br. 34.)

But the Unions' contention that it can never be known *ex ante* whether a management-initiated change in conditions of employment will be considered "de minimis" amply supports the Authority's decision to discard that test. In sum, the Unions offer no justification for disturbing the Authority's predictive judgment that the substantial impact test would "draw a line that is meaningful and determinative" (JA 19), where the "more than de minimis" test had failed to do so.

STANDARD OF REVIEW

Congress gave the Authority responsibility for interpreting and administering the Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("*BATF*"); *Ass'n of Civilian Technicians., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). In particular, "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*, 699 F.2d at 1289; *see also* 5 U.S.C. § 7105(a)(2)(E).

"Because the 'Congress has clearly delegated to the Authority the responsibility in the first instance to construe the [Statute],'" this Court "reviews the Authority's interpretation of the [Statute] under the two-step framework announced in *Chevron*[.]" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*") (alteration in original) (quoting *Library*, 699 F.2d at 1284). At *Chevron* step one, "the Court must determine whether the statute is ambiguous with respect 'to the precise question at issue[.]'" *Id.* at 1042 (quoting *Chevron*, 467 U.S. at 842-43.) In doing so, the Court applies "traditional tools of statutory construction." *NTEU 2014*, 754 F.3d at 1042 (internal quotation marks omitted). If the statute is silent or ambiguous, the Court moves to step two. *Id.*

At *Chevron* step two, "'the question for the [C]ourt is whether the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose.'" *Id.* (quoting *Am. Fed'n Gov't Emps., AFL-CIO v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)). The Court will "defer to an agency's interpretation of a statute so long as it is reasonable." *Id.* (citing *Chevron*, 467 U.S. at 844; *Loving v. IRS*, 742 F.3d 1013, 1016 (D.C. Cir. 2014)).

The *Chevron* step two analysis "overlaps with" the Administrative Procedure Act's arbitrary and capricious standard. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 96 (D.C. Cir. 2005) (quoting *Chamber of Com. v. Fed. Election Comm'n*, 76 F.3d 1234, 1235 (D.C. Cir. 1996)). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the [Authority] failed to consider relevant factors or made a clear error in judgment[.]" *Cellco P'ship v. Fed. Com. Comm'n*, 357 F.3d 88, 93–94 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

The Authority, like other agencies, "is free to alter its past rulings and practices even in an adjudicatory setting" so long as it provides a "reasoned explanation" for doing so. *Local 32, Am. Fed'n of Gov't Emps. v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]" *Id.* (internal quotation marks omitted). The reason for such flexibility is that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . *must* consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S.

at 863–64 (emphasis added). Indeed, in *Chevron* itself, the Supreme Court deferred to an agency interpretation that was a recent reversal of agency policy. *Id*. at 857–58.

ARGUMENT

I. The Policy Statement Satisfies *Chevron* Step One

The Unions contend that the Authority's Policy Statement fails at *Chevron* step one because Congress has spoken "to the precise question" of the scope of bargaining under the Statute and ruled out a "substantial impact" standard. (Br. 14.) That argument is meritless. Congress intentionally chose to define the Statute's bargaining obligation in terms that carried a settled administrative interpretation, one which held that a management-initiated change must have a "substantial impact" on employees before bargaining was required. Thus, to the extent Congress precisely spoke to this question, it spoke in favor of using the substantial impact test.

In addition, *AALJ* rejected an argument similar to that made by the Unions here: "that, because the Statute enumerates several exceptions to the duty to bargain but nowhere mentions a de minimis exception, the court should infer that the Congress did not intend that

there be a de minimis exception[.]" *AALJ*, 397 F.3d at 961. *AALJ* held that the use of such a threshold standard did not contravene he Statute's text. 397 F.3d at 961-63. And *AALJ* did not "insist[] . . . that the only acceptable way to express that a change lacked the significance necessary to trigger an agency's duty to bargain was to call it 'de minimis.'" (JA 20.)

Finally, the Unions are incorrect in asserting that the "substantial impact" standard is at odds with Congress's intent to promote collective bargaining. (Br. 19–23.) With the Statute, Congress sought to "strike a balance between the need to strengthen employees' bargaining rights, and the need not to unduly interfere with government operations." *AFGE 1985,* 778 F.2d at 852. Using the same threshold "substantial impact" standard that applied in the private sector under the NLRA and the federal sector under EO 11491 at the time the Statute was enacted fits comfortably with these purposes.

A. Congress Deliberately Framed the Statute's Bargaining Obligation Using Language That Had Consistently Been Interpreted as Incorporating a Threshold "Substantial Impact" Requirement

The Unions contend that the "plain text of the Statute" forecloses the use of a substantial impact standard. (Br. 15–19.) But the reverse

is true: Congress invited use of the substantial impact test by defining the duty to bargain under the Statute in terms that were nearly word-for-word identical to the definition of that duty under the NLRA and EO 11491, both of which had long been interpreted to require a threshold substantial impact standard. To the extent that Congress used different text in the Statute than in the NLRA and EO 11491, those differences underscore the permissibility of using a substantial impact standard.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *accord Lorillard v. Pons*, 434 U.S. 575, 580–581 (1978) (when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law" and to have "adopte[d] that interpretation"); *Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (a substantial similarity between the two provisions is "a strong

indication" that the two statutes should be interpreted similarly); *Gordon v. U.S. Capitol Police*, 778 F.3d 158, 164–65 (D.C. Cir. 2015).

This Court has repeatedly emphasized that this principle applies to the Statute and the NLRA. In enacting the Statute, "Congress was fully aware of the analogy between the [Statute] and the [NLRA][.]" *AFGE 1988*, 853 F.2d at 992. This Court has "repeatedly observed that [the Statute] was modeled on the [NLRA], and that its provisions were crafted either by analogy or by contrast." *Id.* (internal quotation marks omitted.) Thus, "when the Authority departs from a familiar principle rooted in private sector precedent, it should either identify practical distinctions between private and governmental needs that justify the departure, or offer some evidence in the language, history, or structure of the statute suggesting that Congress intended a different result." *Id.*

Here, Congress patterned the duty to bargain in the Statute on the definition of that same duty contained in the NLRA. Indeed, the two provisions are virtually identical. The Statute gives employees the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter." 5 U.S.C. § 7102(2). It defines "collective bargaining" as "the

performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees[.]" *Id.* § 7103(a)(12); *see also id.*, § 7114(b)(2) ("The duty . . . to negotiate in good faith . . . shall include the obligation . . . to discuss and negotiate on any condition of employment[.]").

The NLRA similarly defines "to bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment[.]" 29 U.S.C. § 158(d).[4]

The duty to bargain under the Statute, then, was crafted "by analogy . . . to the NLRA," not by contrast. *Soc. Sec. Admin.*, 846 F.2d at 1478. The basic obligation, in both cases, is "to meet at reasonable

[4] As noted *supra*, the NLRB has consistently read the word "confer" to require employers to negotiate and bargain over conditions of employment, not simply discuss them. *See, e.g.*, *Call, Burnup, & Sims, Inc.*, 159 NLRB at 1678; *Betra Mfg. Co.*, 233 NLRB at 1135. Thus, the Unions' suggestion that the NLRA's use of the term "confer" instead of "bargain" represents a material difference between the two statutes (Br. 32) is meritless.

times" and "consult and bargain" or "confer" "with respect to . . . conditions of employment[.]" 5 U.S.C. § 7103(a)(12), 29 U.S.C. § 158(d).

For well over 50 years, both before and after the Statute was enacted, the NLRB has applied a threshold standard in determining when an employer-initiated change to conditions of employment requires bargaining. Under settled NLRB precedent, "not every unilateral change in" conditions of employment "constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one[.]" *Peerless Food Products, Inc.*, 236 NLRB at 161 (quoting *Rust Craft Broad. of N.Y., Inc.*, 225 NLRB at 327); *accord NLRB v. Katz,* 369 U.S. 736, 746–47 (1962), *YP Adver. & Publ'g LLC*, 366 NLRB No. 89 (2018); *Flambeau Airmold Corp*, 334 NLRB 165, 166 (2001), *Millard Processing Serv. Inc.*, 310 NLRB 421, 425 (1993); *Taino Paper Co.*, 290 NLRB 975, 978 (1988); *United Techs. Corp.*, 278 NLRB 306, 308 (1986); *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970).

Indeed, the Statute indicates even more strongly than the NLRA that a threshold "substantial impact" test should apply. Unlike the NLRA, the Statute emphasizes that the duty to bargain is limited to

"conditions of employment *affecting such employees*[.]" 5 U.S.C. § 7103(a)(12) (emphasis added). The Statute reinforces that the duty to bargain is predicated on a substantial impact on employees by defining "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting* working conditions[.]" *Id.* § 7103(a)(14) (emphasis added). Similarly, § 7106(b)(3) of the Statute requires bargaining over "appropriate arrangements for employees adversely *affected* by the exercise" of any management right. *Id.* § 7106(b)(3) (emphasis added).

"Congress thus . . . predicated the duty to bargain under § 7106(b)(3) and under § 7102(2) upon the same notion, namely an *effect* upon employees[.]" *AALJ*, 397 F.3d at 963 (emphasis in original). That is, the Statute emphasizes that "some level of impact—that is, effect—is a sine qua non of a union's right to engage in bargaining[.]" *Id.* (internal formatting omitted). In so doing, the text of the Statute lends itself to a "substantial impact" standard more readily than that of the NLRA, which does not contain any similar references to "effects" upon employees.

There is another salient difference between the NLRA and the Statute—one that also strongly weighs in favor of applying a threshold "substantial impact" test. In the Statute, Congress "took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government'—that clearly invites the Authority to exercise its judgment[.]" *Id.* at 962 (quoting 5 U.S.C. § 7101(b)). The NLRA does not prescribe any similar rule of construction.

In addition, the Statute defines the duty to bargain in a manner "virtually identical" to EO 11491, which governed federal-sector labor relations immediately before the Statute. *FAA*, 55 FLRA at 259. Similar to § 7103(a)(12) and § 7114(b)(2) of the Statute, § 11(a) of EO 11491 provided that "[a]n agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting

working conditions[.]" 34 Fed. Reg. 17605.[5] The Statute uses almost identical language in obligating agencies and unions "to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees," and defining "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions[.]" 5 U.S.C. §§ 7103(a)(12), (14). *See FAA*, 55 FLRA at 259 ("the stated duty to bargain under the Executive Order and the Statute is virtually identical.") And similar to § 7103(b)(3) of the Statute, § 11(b) of EO 11491 listed several management rights, but included an exception allowing negotiation of "appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." 34 Fed. Reg. 17605.

As with the NLRA, the settled administrative interpretation of EO 11491 at the time of the Statute's enactment was that a management-

[5] The term "confer" in § 11(a) of EO 11941 was interpreted as creating an "obligation to bargain." *Am. Fed'n of Gov't Emps. Local 1940*, No. 71A-11, 1 FLRC 101, 102 (Jul. 9, 1971); *see also Local 1106, Nat'l Fed'n of Fed. Emps. v. Laird,* 318 F. Supp. 153, 155 (D.D.C. 1970); *Army and Air Force Exchange Serv. Keesler Consolidated Exchange*, No. 144, 2 A/SLMR 170, 175 (Mar. 28, 1972); *Am. Fed'n of Gov't Emps., Local 2578*, No. 965, 8 A/SLMR 61, 63 (Jan. 11, 1978).

initiated change must have a substantial impact on employees before bargaining was required. In 1976, the Assistant Secretary for Labor-Management Relations held that the bargaining obligation created by § 11(a) of EO 11491 was "not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees." *Camp Mabry*, 6 A/SLMR 591, No. 738, at 592. "Rather, Section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions." *Id.*; *see also Soc. Sec. Admin., Bureau of Hearings & Appeals*, 2 FLRA at 239, 242.

Section 7135(b) of the Statute states that "[p]olicies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 . . . shall remain in full force and effect . . . unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter." 5 U.S.C. § 7135(b). With this provision, "Congress indicated that it expected continuity of administration from the Executive Order to the Statute[.]" *FAA*, 55 FLRA at 259. Thus, where a part of EO 11491 was carried over "in virtually unchanged form" in the Statute—as with the duty to bargain

in § 11(a)—the Authority is required to "treat the administrative precedent with the same deference as it would treat its own prior FLRA decisions." *Nat'l Treasury Emps. Union v. FLRA*, 774 F.2d 1181, 1192 (D.C. Cir. 1985) ("*NTEU 1985*"). Such administrative precedent includes decisions of the Federal Labor Relations Council and the Assistant Secretary for Labor-Management Relations interpreting EO 11491. *Id.* at 1192-93.

In sum, at the time of the Statute's enactment in 1978, settled administrative precedent under both EO 11491 and the NLRA required a threshold "substantial impact" standard to be satisfied before a management-initiated change gave rise to a duty to bargain. Both the Authority and this Court have noted repeatedly that Congress was aware of comparable provisions under the Executive Order and the NLRA and how they had been interpreted. *See AFGE 1988*, 853 F.2d at 992; *Library*, 699 F.2d at 1287; *Am. Fed'n of Gov't Emps., Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1279 (1998). Congress specifically directed that the Authority carry over administrative interpretations of parts of EO 11491—such as the bargaining obligation in § 11(a)—that were incorporated into the Statute "in virtually unchanged form."

NTEU 1985, 774 F.2d at 1192; *see also FAA*, 55 FLRA at 259 ("the stated duty to bargain under the Executive Order and the Statute is virtually identical."); 5 U.S.C. § 7135(b). Thus, Congress did not "foreclose" the use of a substantial impact test in the Statute—it specifically invited it by using language that had always been interpreted as creating such a test.

B. The Unions' "Plain Language" Argument Was Effectively Rejected by *AALJ* and Is Not Supported by Dictionary Definitions

The Unions contend that the use of a substantial impact test is contrary to the Statute's text because, in their view, the Statute requires bargaining over any change that "affects" employees—regardless of what degree of effect it may have. (Br. 15-19.) But, if true, that would mean the "more than de minimis" test is also contrary to the Statute.

Indeed, in *AALJ*, the Court rejected an argument similar to that made by the Unions here: "that, because the Statute enumerates several exceptions to the duty to bargain but nowhere mentions a de minimis exception, the court should infer that the Congress did not intend that there be a de minimis exception[.]" *AALJ*, 397 F.3d at 961.

In doing so, *AALJ* underscored that, under the Statute, "*some level of impact*—that is, effect— is a sine qua non of a union's right to engage in bargaining[.]" *Id.* at 963 (emphasis added; internal formatting omitted). And, *AALJ* emphasized that, in the Statute, "Congress took the unusual step of prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government,'—that clearly invites the Authority to exercise its judgment[.]" *Id.* at 962 (quoting 5 U.S.C. § 7101(b)). *AALJ* noted that "[e]ffectiveness and efficiency in government can hardly be thought to require bargaining over truly insignificant conditions of employment." *Id.* And *AALJ* held that "[i]t is, of course, for the Authority, rather than for this court," to formulate an appropriate threshold standard. *Id.* at 963.

Seeking to avoid this conclusion, the Unions point to dictionary definitions of "substantial" as meaning "important, essential" and "significantly great." (Br. 17–18.) But they fail to cite the dictionary definition of "de minimis," which is "lacking significance or importance: so minor as to merit disregard." *De Minimis*, Merriam-Webster Online Dictionary, https://www.merriam-

webster.com/dictionary/de%20minimis. There is little textual difference between insisting that a change must be "significant" or "important" and insisting that it must be "substantial."

In its Policy Statement, the Authority explained that the "substantial impact" standard would serve the same function as the "more than de minimis" standard: to "determin[e] whether a change to a condition of employment is significant enough to trigger a duty to bargain." (JA 20.) *AALJ* held that the use of such a threshold test was consistent with the Statute's text. *AALJ*, 397 F.3d at 961-63. Moreover, *AALJ* did not "insist[] . . . that the only acceptable way to express that a change lacked the significance necessary to trigger an agency's duty to bargain was to call it 'de minimis.'" (JA 20.) Indeed, *AALJ* underscored that the Statute does not require "bargaining over truly *insignificant* conditions of employment" and it characterized a de minimis change as one that "ha[d] no *appreciable* effect on working conditions." *AALJ*, 397 F.3d at 962 (emphases added). And, as the Authority noted, "a common synonym for 'appreciable' is 'substantial.'" (JA 20.)

In addition, the Unions' argument relies on cherrypicked definitions of "substantial." The top two definitions of "substantial" are "consisting or relating to substance" and "not imaginary or illusory." *Substantial*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/substantial. The most pertinent definition of "substance" is "practical importance: meaning, usefulness." *Substance*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/substance.

It was in this sense that the Authority (and the NLRB) mean "substantial"—as a way of forestalling a requirement to bargain over "matters . . . of too little importance to merit the law's notice." (JA 20.) The Authority in its Policy Statement said that it meant the substantial impact test to filter out cases where "a change lack[s] the significance necessary to trigger an agency's duty to bargain." (JA 20 & n.33.) The NLRB has similarly characterized the substantial impact test as turning on "whether the change is of legitimate concern to the union as the representative of employees, such that the union would be entitled to bargain about the matter on behalf of the employees." *Northside Ctr. for Child Dev.*, 310 NLRB 105, 105 (1993). The word "significant" is

defined similarly to "substantial": "having meaning" and "having or likely to have influence or effect." *Significant*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/significant.

Thus, contrary to the Unions' contention (Br. 17–18), the dictionary definitions of "de minimis," "substantial" and "significant," along with NLRB precedent, undermine any notion that using a "substantial impact" standard would drastically limit the scope of bargaining. Instead, the "substantial impact" test would more effectively serve the supposed purpose of the "more than de minimis" test—ensuring that parties are not forced to bargain over insignificant or unimportant matters. (JA 18-20 & n. 14.)

C. The Unions' "Plain Text" Argument Is Also Inconsistent with *Environmental Defense Fund*

In addition to being inconsistent with *AALJ*, the Unions' plain text argument is at odds with *Environmental Defense Fund, Inc. v. EPA*, 82 F.3d 451 (D.C. Cir. 1996) ("*EDF*"). At issue in *EDF* was a statutory provision providing that "[n]o department, agency, or instrumentality of the Federal Government shall engage in . . . any activity" that does not "conform" to an EPA implementation plan. *EDF*, 82 F.3d at 465. According to the plaintiff in *EDF*, this language showed

that "Congress intended the general conformity requirement to apply to every activity of the federal government, however minor a source of emissions it may be." *Id.* That argument is similar to that made by the Unions here: that the Statute requires bargaining any time a federal agency makes a change in conditions of employment that has any effect, no matter how slight, on employees. (Br. 19–21.)

This Court, however, rejected the argument. It held that such language was not "so rigid" that it must apply to all federal government activity, finding that, despite the sweeping language, "nothing in the statute [ ] preclude[d]" the EPA from categorically exempting certain federal government activities that produced de minimis emissions from conforming to the EPA's implementation plan. *EDF*, 82 F.3d at 466–67. Rather, this Court said that "it seems eminently reasonable for the EPA to interpret this provision to refer to 'any activity' that is likely to interfere with the attainment goals" in the statute rather than any activity undertaken by the federal government. *Id.*

Here, the Statute's text is far less rigid than the statutory text in *EDF*. Recall that the Statute requires agencies and unions "to meet at reasonable times and to consult and bargain in a good-faith effort to

reach agreement with respect to the conditions of employment affecting such employees," and defines "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions[.]" 5 U.S.C. § 7103(a)(12), (14). That is a far cry from a requirement that "no department, agency, or instrumentality of the Federal Government covered by the Statute shall make any change in working conditions without first bargaining"—and, in *EDF*, this Court found analogous language did *not* inflexibly require conformity where the federal action would not lead to a "regionally significant level of emissions." *EDF*, 82 F.3d at 466. Moreover, the statute in *EDF*, unlike the Statute here, did not contain a provision requiring that its terms "be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b). Thus, the Unions' "plain text" argument is at odds with *EDF*.

D. The Policy Statement Is Consistent with the Statute's Purpose

The Unions insist that the use of a "substantial impact" standard is inconsistent with Congress's intent to promote collective bargaining. (Br. 22–23.) But this wrongly assumes that the purpose of the "substantial impact" test is to drastically limit the scope of bargaining,

and ignores the reasons the Authority actually gave for requiring that test: to provide a "meaningful and determinative" standard for determining "whether a change is significant enough to warrant bargaining." (JA 18–19 & n.10.) Indeed, the Authority agreed that the Statute is meant to encourage collective bargaining, but explained that a substantial impact standard would better promote meaningful bilateral negotiations than the "more than de minimis" test. (JA 18-20.) And this Court has itself found that the Statute's broad pro-bargaining purpose is consistent with the use of a threshold standard to weed out matters too insignificant to require bargaining. *AALJ*, 397 F.3d at 962.

In addition, the Unions' argument rests on an overly simplistic view of Congress's purpose in enacting the Statute. With the Statute, Congress sought to "strike a balance between the need to strengthen employees' bargaining rights, and the need not to unduly interfere with government operations." *AFGE 1985*, 778 F.2d at 852. It was meant to "represent a fair package of balanced authority for management, balanced with a fair protection for at least the existing rights the employees have." *Dep't of Def. v. FLRA*, 659 F.2d 1140, 1145 (D.C. Cir.

1981) (quoting 124 Cong. Rec. H9647 (daily ed. Sept. 13, 1978) (statement of Rep. Ford)).

The substantial impact test is also meant to strike a balance between the right of employees to bargain and the public interest in government efficiency, thus furthering the Statute's most basic purposes. Indeed, Congress must have envisioned that the same threshold "substantial impact" standard that applied in the private sector under the NLRA and the federal government under EO 11491 would also apply under the Statute, given that 1) Congress closely patterned the Statute's duty to bargain after the definition of that duty in the NLRA and EO 11491 and 2) expressly required that prior administrative interpretations of EO 11491 carry over where it used similar language in the Statute. *See* 5 U.S.C. § 7135(b).

Library only strengthens this conclusion. *Library* said that the Statute "may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Library*, 699 F.2d at 1285. Citing this language, the Unions urge that the Authority has improperly created a non-express statutory exemption with the "substantial impact" test.

(Br. 19–20.) But a similar argument was rejected by *AALJ*, which noted that the "more than de minimis" test was not "a new management right" but rather an interpretation of the statutory phrase "affecting working conditions" and a way of "implementing the legislative design." *AALJ*, 397 F.3d at 961–62 (quoting *EDF*, 82 F.3d at 466); *see also* 5 U.S.C. § 7103(a)(14).

So too, the "substantial impact" test, which serves the same function as the "more than de minimis" test (JA 17–20), is faithful to the Statute's text and purpose. As *AALJ* noted, in "predicat[ing] the duty to bargain under § 7106(b)(3) and under § 7102(2) upon the same notion, namely an *effect* upon employees," Congress emphasized that "some level of impact—that is, effect— is a sine qua non of a union's right to engage in bargaining." *AALJ*, 397 F.3d at 963 (emphasis in original). And in "prescribing a practical and flexible rule of construction—to wit, the Statute 'should be interpreted in a manner consistent with the requirement of an effective and efficient Government,'" Congress "clearly invite[d] the Authority to exercise its judgment" regarding the appropriate threshold standard before bargaining is required. *Id*. at 962 (quoting 5 U.S.C. § 7101(b)). *Library*,

indeed, emphasized the same point: "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*, 699 F.2d at 1289.

But even more fundamentally, *Library* undermines the Unions' argument by underscoring that "the structure, role, and functions of the Authority were closely patterned after those of the NLRB," and "relevant precedent developed under the NLRA is therefore due serious consideration." *Id.* at 1287. Indeed, in *Library* itself, the Court looked to NLRA precedent in determining the scope of "conditions of employment" subject to bargaining under the Statute. *Id.* at 1286. Here, the Authority similarly determined that looking to NLRA precedent was appropriate in measuring the scope of "conditions of employment" subject to bargaining under the Statute. (JA 19 & nn.28–30.) In so doing, it was faithful to *Library*.

II. The Policy Statement Satisfies *Chevron* Step Two

Moving to *Chevron* step two, the Unions fail to show that the Authority's Policy Statement is arbitrary or capricious. The Authority

correctly noted that it had never explained why the "substantial impact" test was incorrect or flawed. (JA 19 & n.24.) Its Policy Statement was consistent with *AALJ* and *AFGE 2006*. The Authority's decision to look to NLRB precedent in measuring the scope of bargaining under the Statute was plainly reasonable—indeed, this Court has repeatedly held that it is arbitrary and capricious for the Authority *not* to look to such precedent. And the Authority properly found that the "more than de minimis" standard yielded unpredictable results, and that the "substantial impact" standard would "draw a line that is meaningful and determinative." (JA 19.) The Unions make no serious effort to challenge the Authority's conclusions on those points.

A. The Authority Correctly Noted That It Had Never Given a Reasoned Explanation for Rejecting the "Substantial Impact" Test

The Unions contend that the Authority "misstated its precedent" in saying that it had "never provided any 'explanation or rationale' for adoption of the de minimis standard." (Br. 24 (quoting JA 19).) But what the Authority said was entirely accurate: "[n]either *SSA Reg. V* nor *Department of HHS, SSA* gave any explanation or rationale to support the change" from a "substantial impact" standard to a "more

than de minimis" standard. (JA 19 (citing *SSA Reg. V*, 19 FLRA 827 (1985) and *HHS, SSA.*, 24 FLRA 403 (1986)).) The Authority further explained that, in rejecting the substantial impact standard, it had "not provide[d] any rationale as *to why the substantial impact standard was incorrect*." (*Id.* n.24 (emphasis added).)

The Unions' argument for why the Authority "misstated its precedent," then, rests entirely on mischaracterizing what the Authority said—even in the face of the Authority's own clarification. The Unions do not contest that *SSA Reg. V* and *HHS, SSA* failed to explain why the substantial impact standard was incorrect or why a change from that standard was required—and that was all that the Authority said.

But the Unions' argument is not even correct on its own terms. The passage the Unions cite appears in a section of *HHS, SSA* entitled "The use of a standard to identify changes which require bargaining and those which do not." *HHS, SSA*, 24 FLRA at 406. That section explained that "[t]he use of a standard to distinguish between changes which require bargaining and those which do not is fully supported by the Statute and its purposes and policies." *Id.* *HHS, SSA* continued:

> [T]he Authority must take care that its adjudicative processes not be unnecessarily burdened with cases that do not serve to bring meaning and purpose to the Federal labor-management relations program. While we seek to ensure that the rights of agencies, unions, and employees under the Statute are protected in situations involving changes in conditions of employment, we must also seek to discharge our responsibilities in a fashion that promotes meaningful bilateral negotiations. **Interpreting the Statute to require bargaining over every single management action, no matter how slight the impact of that action, does not serve those aims**. The limited scope of Federal sector bargaining caused by external laws, rules, and regulations also demands that the Authority not impose further limitations unless they are based on clear statutory authority and are buttressed by sound policy considerations.

Id. at 406-407 (emphasis added).

Thus, the reasoning that the Unions point to in support of the "more than de minimis" standard equally supports use of the "substantial impact" standard. The substantial impact test is equally "a standard to distinguish between changes which require bargaining and those which do not" which "is fully supported by the Statute and its purposes and policies." *Id.* at 406. As the Authority explained at length in its Policy Statement, the substantial impact test is meant to ensure that the Authority is not "unnecessarily burdened with cases that do not serve to bring meaning and purpose to the Federal labor-management relations program," "promote[] meaningful bilateral

negotiations," and prevent the Statute from "requir[ing] bargaining over every single management action, no matter how slight the impact of that action." (JA 18–20; *compare HHS, SSA*, 24 FLRA at 406.)

What the Authority never explained in *HHS, SSA* or *SSA Reg. V* is why those purposes are better advanced by the "more than de minimis" test rather than the "substantial impact" test. Thus, the Unions' citation to *HHS, SSA* only underscores the truth of what the Authority said: that its "prior rejection of the substantial impact standard [wa]s specious and did not provide any rationale as to why the substantial impact standard was incorrect." (*Id.* n.24.) *HHS, SSA*'s cryptic reference to "[t]he limited scope of Federal sector bargaining caused by external laws, rules, and regulations" can hardly be considered a reasoned explanation for why the "more than de minimis" test is superior to the "substantial impact" test, especially when read in context. *HHS, SSA*, 24 FLRA at 406.

B. The Policy Statement Is Consistent with *AALJ* and *AFGE v. FLRA*

The Unions contend that the Authority's Policy Statement is contrary to *AALJ* and *AFGE 2006*. (Br. 25–31.) These arguments too are without merit. "A court's prior judicial construction of a statute

trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. "This principle," *Brand X* explained, "follows from *Chevron* itself." *Id.* That is because "*Chevron* established a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Id.*

Here, neither *AALJ* nor *AFGE 2006* held that the "more than de minimis" standard "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 982. Indeed, *AALJ* emphasized the *precise opposite*. *AALJ*, 397 F.3d at 962–63. Thus, as the Authority rightly noted, *AALJ* did not "insist[] . . . that the only acceptable way to express that a change lacked the significance necessary to trigger an agency's duty to bargain was to call it 'de minimis.'" (JA 20.)

This conclusion is strengthened, not undermined, by *AALJ*'s observations that "[a] de minimis change is not a proper subject of bargaining not because management has a 'right' to make it but because it has no appreciable effect upon working conditions" and that permitting a "de minimis" exception is "not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design." (Br. 27 (quoting *AALJ*, 397 F.3d at 962).) As the Authority explained in its Policy Statement, the "substantial impact" test serves the same function as the "more than de minimis" test: to "determin[e] whether a change to a condition of employment is significant enough to trigger a duty to bargain." (JA 20.) The Authority found that the substantial impact test provides a "meaningful and determinative" standard for determining "whether a change is significant enough to warrant bargaining"—unlike the "more than de minimis" standard, which "ha[d] been drained of any determinative meaning" and effectively required what it was supposed to forbid: bargaining over trivia. (JA 18–20 & n.14.) *AALJ* held that the use of such a threshold test was consistent with the Statute's text and purpose. *AALJ*, 397 F.3d at 961–63.

At this point, the Unions again fall back on their cherrypicked definition of "substantial" as "significantly great" and argue, on that basis, that it has a different meaning than "appreciable." (Br. 29–30.) But, properly defined, the two terms mean the same thing. As explained above, the top two definitions of "substantial" are "consisting or relating to substance" and "not imaginary or illusory." *Substantial*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/substantial. In this context, "substance" means "practical importance: meaning, usefulness." *Substance*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/substance. "Appreciable" means "capable of being perceived or measured." *Appreciable*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/appreciable. Thus, as the Authority rightly concluded, the two words are synonyms. (JA 20.) More to the point, by using terms like "appreciable," "insignificant," or "de minimis" *AALJ* clearly did not mean to preclude the Authority from formulating the threshold test using different words.

Nor did *AALJ* do so by its passing reference to the "the narrow limits of the de minimis doctrine[.]" *AALJ*, 397 F.3d at 963. The full

context of that quote responded to the unions' concern in that case that the de minimis exception would "upset the balance at the bargaining table" and "seriously damage the union's collective bargaining efforts." *Id.* The Court found that concern was "misplaced in view of the narrow limits of the de minimis doctrine, for the Authority will bear the burden before this court of showing that any particular application of the de minimis exception is reasonable." *Id.* at 963. So too here, the Authority will bear the burden in future cases of showing that any particular application of the substantial impact test is reasonable and consistent with the Statute.

Like *AALJ*, *AFGE 2006* did not hold that the "more than de minimis" standard "follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Brand X*, 545 U.S. at 982. Instead, *AFGE 2006* took pains to underscore that it only "address[ed] the reasonableness of the FLRA's application of the de minimis exception" to the facts of that particular case, involving an agency's revision to its firearms policy. *AFGE 2006*, 446 F.3d at 165. Because the Court found that the change at issue was "massive," it

concluded that the Authority "unreasonably applied the de minimis exception." *Id.* at 167.

* * * * *

A primary purpose of the *Brand X* rule that agency constructions of ambiguous statutes receive *Chevron* deference, notwithstanding prior judicial interpretations, is to prevent "the ossification of large portions of our statutory law[.]" *Brand X*, 545 U.S. at 983. Here, the Authority confronted a test ("more than de minimis") that it found had "been drained of any determinative meaning" and effectively been extended to require "that a matter triggers an agency's duty to bargain whenever management has made any decision, no matter how small or trivial," in spite of its original purpose to *prevent* bargaining over such matters. (JA 18.) The Authority traced the problem back to the de minimis test's command to bargain over matters that have no substantial impact on a condition of employment. (JA 20.) Further, the Authority observed that it had initially applied a substantial impact test, before switching to the "more than de minimis" standard at some point in the 1980s without explaining why. (JA 17–18.) And, it noted that the NLRB has consistently applied a substantial impact test both now and before the

Statute was enacted. (JA 19.) *AALJ* did not preclude the Authority from correcting its misguided precedent and replacing the unworkable de minimis standard with the substantial impact test.

C. The Authority Reasonably Relied Upon Relevant NLRB Precedent

Next, the Unions argue that it was not just incorrect but *unreasonable* for the Authority to look to NLRB precedent concerning the duty to bargain under the NLRA. (Br. 31–33.) This argument is startling in light of this Court's repeated pronouncements holding the precise opposite—that it is reversible error for the Authority *not* to look to NLRB precedent in determining the scope of bargaining under the Statute. *U.S. Dep't of Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1436–37, 1439-41 (D.C. Cir. 1992); *AFGE 1988*, 853 F.2d at 992; *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 503–04 (D.C. Cir. 1985); *cf. U.S. Dep't of Treasury, I.R.S. v. FLRA*, 996 F.2d 1246, 1252 (D.C. Cir. 1993) ("[i]n interpreting the [Statute] we look to generally accepted principles of labor law developed under the [NLRA] to inform our understanding of the language Congress uses"); *Library*, 699 F.2d at 1286–88 (looking to NLRB

precedent in determining the meaning of "conditions of employment" under the Statute).

This Court has insisted that "when the Authority departs from a familiar principle rooted in private sector precedent, it should either identify practical distinctions between private and governmental needs that justify the departure, or offer some evidence in the language, history, or structure of the statute suggesting that Congress intended a different result." *AFGE 1988*, 853 F.2d at 992. The substantial impact test, which the NLRB has applied for over 50 years to measure the scope of bargaining under the NLRA, is certainly a "familiar principle rooted in private sector precedent." *Id*. And, as the Authority correctly found, there is no reason to depart from it. (JA 19 & nn.28–30). As noted *supra*, there is no meaningful difference between the text of the Statute and the NLRA in defining the duty to bargain that would suggest that the "substantial impact" test should not apply.

D. The Court Should Defer to the Authority's Well-Supported Finding That the "More Than De Minimis" Test Yielded Inconsistent Results

In its Policy Statement, the Authority contrasted the results of eight different cases applying the "more than de minimis" test to show

that it has yielded unpredictable and unworkable results. (JA 18 & n.14.) The Unions contend this was not enough to justify abandoning the "more than de minimis" test. (Br. 34–36.) But the Unions do not bother discussing any of the cases the Authority cited or make any effort to explain how their results were consistent with one another. (*Id.*) Instead, they contend that "the inherently fact dependent nature of the de minimis exception" means that cases applying the de minimis test will always turn on their particular facts. (Br. 34.)

The implications of this view are astounding. Under the Unions' way of thinking, it is perfectly fine—indeed, *required* —for the Authority to use a test that is so fact-dependent that its outcome can never be predicted in advance. The Unions' contention that it can never be known *ex ante* whether a management-initiated change will be considered "de minimis" amply supports the Authority's decision to discard that test. The practical result of such unpredictability is exactly why the Authority changed the standard: agencies being required to bargain "whenever management has made any decision, no matter how small or trivial." (JA 18.)

The Unions fatalistically contend that "[t]he same result will obtain with the substantial impact standard" because, supposedly, any fact-dependent test will yield unpredictable results. (Br. 34–35.) But the Authority's determination that the "substantial impact" test would "draw a line that is meaningful and determinative," (JA 19,) is precisely the sort of predictive judgment to which this Court accords heightened deference. *BNSF Ry. Co. v. Surface Transp. Bd.*, 526 F.3d 770, 781 (D.C. Cir. 2008) ("It is well established that an agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, so long as they are reasonable.") (quoting *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 260 (D.C.Cir.2007)).

In addition, the Authority gave at least two reasons to believe that the substantial impact test would succeed in yielding predictable results where the "more than de minimis" test had failed, and the Unions do not respond to either. *First*, there is a body of over 50 years of NLRB case law from which to draw in deciding whether a management-initiated change requires bargaining under the substantial impact test. (JA 18 & nn.28–30.) The Unions do not argue

that private-sector precedent is unworkable or yields unpredictable results, nor could they.

Second, the Authority observed that "[b]y definition, 'de minimis' signals triviality," and that it was "incongruous to impose a statutory duty to bargain on matters that are barely more than trivial" and which have "no substantial impact on conditions of employment." (JA 20.) By contrast, a substantial impact test focuses not on the supposed need for the agencies and unions to bargain over matters that are barely more than trivial, but on the requirement that a change must impact working conditions in a substantial and meaningful way before bargaining is required. Saying that a change must have a substantial impact on employees is a perfectly clear and natural way of expressing that common-sense idea. *See Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 52 (D.C. Cir. 2004) (Henderson, J., concurring) ("To engage in bargaining over such minutiae, which . . . has nothing to do with any substantive condition of employment, is a waste of everyone's time[.]").

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court deny the Petitions for Review.

Respectfully submitted,

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March 19, 2021

FED. R. APP. P. RULE 32(A) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 12,663 words excluding exempt material.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statues and Regulations

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5 U.S.C. § 5332

The General Schedule

(a)(1) The General Schedule, the symbol for which is "GS", is the basic pay schedule for positions to which this subchapter applies. Each employee to whom this subchapter applies is entitled to basic pay in accordance with the General Schedule.

(2) The General Schedule is a schedule of annual rates of basic pay, consisting of 15 grades, designated "GS-1" through "GS-15", consecutively, with 10 rates of pay for each such grade. The rates of pay of the General Schedule are adjusted in accordance with section 5303.

(b) When payment is made on the basis of an hourly, daily, weekly, or biweekly rate, the rate is computed from the appropriate annual rate of basic pay named by subsection (a) of this section in accordance with the rules prescribed by section 5504(b) of this title.

5 U.S.C. § 7101(b)

Findings and purpose

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7102(2)

Employees rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the

exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

> **(2)** to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7103(a)

Definitions; application

(a) For the purpose of this chapter--

> **(1)** "person" means an individual, labor organization, or agency;
>
> **(2)** "employee" means an individual--
>
> > **(A)** employed in an agency; or
> > **(B)** whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;
>
> but does not include--
>
> > **(i)** an alien or noncitizen of the United States who occupies a position outside the United States;
> > **(ii)** a member of the uniformed services;
> > **(iii)** a supervisor or a management official;
> > **(iv)** an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or
> > **(v)** any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution1 but does not include--

(A) the Government Accountability Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority;
(G) the Federal Service Impasses Panel; or
(H) the United States Secret Service and the United States Secret Service Uniformed Division.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;
(B) an organization which advocates the overthrow of the constitutional form of government of the United States;
(C) an organization sponsored by an agency; or
(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;
(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint--

> **(A)** by any employee concerning any matter relating to the employment of the employee;
> **(B)** by any labor organization concerning any matter relating to the employment of any employee; or
> **(C)** by any employee, labor organization, or agency concerning--
>
> > **(i)** the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or
> > **(ii)** any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

> **(A)** relating to political activities prohibited under subchapter III of chapter 73 of this title;
> **(B)** relating to the classification of any position; or
> **(C)** to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means--

> **(A)** an employee engaged in the performance of work--
>
> (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a

prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);
(ii) requiring the consistent exercise of discretion and judgment in its performance;
(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and
(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which--

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or
(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit--

(i) on the basis of an election, or
(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

5 U.S.C. § 7105(a)

Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

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

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

> **(D)** prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;
>
> **(E)** resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;
>
> **(F)** prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;
>
> **(G)** conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;
>
> **(H)** resolve exceptions to arbitrator's awards under section 7122 of this title; and
>
> **(I)** take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 7106(b)

Management Rights

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

> **(1)** at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
>
> **(2)** procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7114(b)

Representation Rights and Duties

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;
(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed

terms, and to take such steps as are necessary to implement such agreement.

5 U.S.C. § 7123(a)

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.

5 U.S.C. § 7135(b)

Continuation of existing laws, recognitions, agreements, and procedures

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

29 U.S.C. § 158(d)

Unfair Labor Practices

(d) Obligation to bargain collectively
For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

> **(1)** serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
> **(2)** offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
> **(3)** notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
> **(4)** continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a

> period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

> **(A)** The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.
> **(B)** Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.
> **(C)** After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

5 C.F.R. § 2427.2

Requests for general statements of policy or guidance.

(a) The head of an agency (or designee), the national president of a labor organization (or designee), or the president of a labor organization not affiliated with a national organization (or designee) may separately or jointly ask the Authority for a general statement of policy or guidance. The head of any lawful association not qualified as a labor organization may also ask the Authority for such a statement provided the request is not in conflict with the provisions of chapter 71 of title 5 of the United States Code or other law.

(b) The Authority ordinarily will not consider a request related to any matter pending before the Authority, General Counsel, Panel or Assistant Secretary.

5 C.F.R. § 2427.4

Submissions from Interested Parties

Prior to issuance of a general statement of policy or guidance the Authority, as it deems appropriate, will afford an opportunity to interested parties to express their views orally or in writing.

5 C.F.R. § 2427.5

Standards governing issuance of general statements of policy or guidance.

In deciding whether to issue a general statement of policy or guidance, the Authority shall consider:

(a) Whether the question presented can more appropriately be resolved by other means;

(b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question;

(c) Whether the resolution of the question presented would have general applicability under the Federal Service Labor–Management Relations Statute;

(d) Whether the question currently confronts parties in the context of a labor-management relationship;

(e) Whether the question is presented jointly by the parties involved; and

(f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the Federal Service Labor–Management Relations Statute.

ADDENDUM OF ADMINISTRATIVE PRECEDENT UNDER EXECUTIVE ORDER 11491

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UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

AFGE Local 1940

and

FLRC No. 71A-11

Plum Island Animal Disease
Laboratory, Dept. of Agriculture,
Greenport, N. Y.

DECISION ON NEGOTIABILITY ISSUE

Background of Case

During negotiations on a supplement to the agreement between the union and Plum Island Animal Disease Laboratory (PIADL), a dispute arose over the establishment of tours of duty by the agency. The circumstances surrounding this dispute are briefly as follows:

PIADL is a facility located on an island a short distance off the coast of the United States, and engaged in research on exotic diseases of animals. Its major operations are conducted in two laboratory buildings, a decontamination plant and a power plant. To provide for round-the-clock operation and maintenance of its buildings and equipment, PIADL currently employs four crews of 11 men each (including a foreman), who work on three rotating, weekly shifts, and who supplement the regular 8-hour, 5 days per week, maintenance employees.

Management has now decided that, by reason of improvements in equipment and operating procedures, its work can be more effectively and efficiently accomplished by eliminating the third shift in one laboratory, and establishing two new fixed shifts, working on a regular five day basis. No reductions in force or in grades are anticipated, although premium pay would be reduced. Improved staffing of the first and second shifts would be effected by the agency action.

The union claims that such changes in tours of duty, and particularly the establishment of new tours, are negotiable, and submitted the following proposal on tours of duty, during bargaining on the supplemental agreement:

Both parties recognize that management has the right to fix and to assign the number, type and grades of personnel to any segment in its organization, to any location and to an approved scheduled tour of duty. Changes in personnel from one scheduled shift to another, or from one existing five-day period to another, are assignments or scheduling of personnel and not changes in tours of duty.

Should management in exercising the above-cited rights determine that a change in scheduled tours of duty is necessary to maintain the efficiency of the Government operations entrusted to them, such determination will be presented to the Local representatives with a recommended revised schedule tour of duty for consideration, together with a recommended effective date, not less than two pay periods dating from the date it is presented to the Local.

During the above period, consultations will be undertaken to arrive at a mutually acceptable schedule. If consultation does not result in a mutually acceptable tour of duty and if requested by the Local, negotiations of a formal schedule will be initiated; these negotiations shall be conducted in good faith to assure no undue delay in establishing an effective date for a revised schedule.

Tours of duty now in existence will remain the same unless changed in accordance with the provisions of this article.

PIADL asserted that the union's proposal is non-negotiable and, upon referral, the Department of Agriculture upheld such position, on the ground that the proposal conflicts with management's rights under the Order. The union appealed to the Council from Agriculture's determination, and the Council accepted the petition for review under section 11(c)(4) of the Order.

Opinion

The essential question is whether changes in tours of duty, including the establishment of new tours, must be negotiated under section 11(a) of the Order, or whether such changes are excepted from the obligation to bargain, particularly under section 11(b) of the Order.

Section 11(a) provides that an agency and the exclusive representative of its employees shall negotiate "with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under . . . this Order." Section 11(b), however, excludes from the obligation to bargain "matters with respect to . . . the numbers, types, and grades of positions or employees assigned to an

organizational unit, work project or tour of duty." Section 11(b) further provides: "This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change."

The intent of the foregoing provisions in section 11(b) is explained in the Report accompanying E.O. 11491 (Labor-Management Relations in the Federal Service (1969)), as follows (pp. 38-39):

> We believe there is need to clarify the present language in section 6(b) of [E.O. 10988, which preceded E.O. 11491 and which excluded from the obligation to bargain an agency's "assignment of its personnel"]. The words 'assignment of its personnel' apparently have been interpreted by some as excluding from the scope of negotiations the policies or procedures management will apply in taking such actions as the assignment of employees to particular shifts or the assignment of overtime. This clearly is not the intent of the language. This language should be considered as applying to an agency's right to establish staffing patterns for its organization and the accomplishment of its work -- the number of employees in the agency and the number, type and grades of positions or employees assigned in the various segments of its organization and to work projects and tours of duty.
>
> To remove any possible future misinterpretation of the intent of the phrase 'assignment of its personnel,' we recommend that there be substituted in a new order the phrase 'the number of employees, and the numbers, types and grades of positions, or employees assigned to an organizational unit, work project or tour of duty.' As further clarification, a sentence should be added to this section providing that agencies and labor organizations shall not be precluded from negotiating agreements providing for appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change. (Emphasis supplied)

It is plain from the foregoing that the establishment or change of tours of duty was intended to be excluded from the obligation to bargain under section 11(b). As stated in the Report, the agency has the right to determine the "staffing patterns" for its organization and for accomplishing its mission. Clearly, the number of its work shifts or tours of duty, and the duration of the shifts, comprise an essential and integral part of the "staffing patterns" necessary to perform the work of the agency. Further, the specific right of an agency to determine the "numbers, types, and grades of positions or employees" assigned to a shift or tour of duty, as provided in section 11(b), obviously

subsumes the agency's right to fix or change the number and duration of those shifts or tours. To hold otherwise, i.e. to interpret section 11(b) as sanctioning the right of the agency to determine the composition of the shift or tour and not the framework upon which that composition depends, would render the provisions of section 11(b) virtually meaningless.

While the obligation to bargain does not therefore extend to the establishment or change of tours of duty under section 11(b), negotiations may be required on the impact of such actions on the employees involved. For example, as indicated in the Report, bargaining may be required on the criteria for the assignment of individual employees to particular shifts; on appropriate arrangements for employees who are adversely affected by the realignment of the work force; and the like. Indeed, the agency stated in the instant case, "There is no disagreement that matters such as procedures for determining how qualified individuals will be assigned to a particular shift or tour and advance notice of such changes before they are made are negotiable and agreement has, in fact, been reached on those matters."

Turning now to the union's proposal in the present case, this proposal would, among other things, require bargaining on changes of tours of duty if so requested by the union, and would proscribe any such changes by the agency unless agreed upon by the union. As already indicated, the obligation of an agency to bargain does not extend to the establishment or changes of tours of duty under section 11(b). PIADL was consequently free from the obligation to bargain on this proposal by the union.

Accordingly, pursuant to section 2411.18(d) of the Council's rules of procedure, we hold that the determination by the Department of Agriculture that negotiations were not required on the union's proposal here involved was proper and must be sustained.

By the Council.

W. V. Gill
Executive Director

Issued: July 9, 1971

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2578, AFL-CIO, AND NATIONAL ARCHIVES AND RECORDS SERVICE
A/SLMR No. 965

This proceeding involved two unfair labor practices complaints. The first complaint, filed by the National Archives and Records Service (NARS), alleged that the American Federation of Government Employees, Local 2578, AFL-CIO (AFGE) violated Section 19(b)(6) of the Order by failing to negotiate a new agreement during September 1975. The second complaint, filed by the AFGE, alleged that the NARS violated Section 19(a)(1) and (6) of the Order by failing to negotiate in good faith, to meet at reasonable times, and to give its negotiators the authority to negotiate an agreement.

The Administrative Law Judge found that the NARS violated Section 19(a)(6) of the Order by, in effect, engaging in a calculated strategy of delay which resulted in the exhaustion of official time for the AFGE negotiating team and discouraged the AFGE from proceeding with negotiations for a new agreement. Thus, he found that the NARS offered proposals "demeaning and unacceptable to the Union, which had the Union on the defensive attempting to hold on to what it had instead of moving for improvement on the existing contract." In this regard, he took particular note of proposals relating to three contract provisions, which, in his view, evidenced an intention on the part of the Activity negotiators to discourage the AFGE from proceeding with contract negotiations. With respect to the complaint against the AFGE, the Administrative Law Judge found that, under the circumstances, the AFGE was justified in breaking off contract negotiations and, therefore, its conduct was not violative of Section 19(b)(6) of the Order.

The Assistant Secretary disagreed with the Administrative Law Judge's finding of a Section 19(a)(6) violation against the NARS. He noted that the duty to bargain in "good faith" requires that parties to negotiations approach the bargaining table with an open mind and a sincere desire to reach agreement. This duty does not require either party to agree to a proposal or make concessions and no inference of bad faith bargaining can be drawn solely from a party's failure to retreat from its initial proposals. In addition to approaching bargaining with an open mind and a sincere desire to reach agreement, the duty to bargain in good faith requires that the parties make an earnest effort to reach agreement through the collective bargaining process. In determining whether a party has bargained in good faith the Assistant Secretary will not substitute his judgment with respect to the merits of contract proposals. Thus, even if a proposal or proposals appear onerous or burdensome to the outside observer, they will not be deemed to constitute bad faith bargaining unless the totality of the evidence will support the conclusion that such proposal or proposals were advanced with the clear intent of evading or frustrating the bargaining responsibility.

The Assistant Secretary found that although Activity negotiators engaged in "hard bargaining" with the AFGE, the totality of its conduct did not reflect a closed mind and the absence of a desire to reach agreement. In this connection, he noted, among other things, that the NARS had made no take it or leave it demands but, rather, continued to make proposals and counter-proposals throughout the course of negotiations and displayed a willingness to consider alternative proposals.

With respect to the unfair labor practice complaint filed by the NARS alleging that the AFGE's absence from four negotiating sessions constituted a violation of Section 19(b)(6) of the Order, the Assistant Secretary, concluded, in agreement with the Administrative Law Judge, that the AFGE had not violated the Order. In this regard, he noted, among other things, that while the AFGE team did not appear at the September negotiating sessions, its Chief Negotiator continued to communicate with his NARS counterpart in an attempt to gain a favorable arrangement in regard to his team's exhausted official time.

Accordingly, the Assistant Secretary ordered that the complaints be dismissed.

A/SLMR No. 965

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2578, AFL-CIO

Respondent

and Case No. 22-6621(CO)

NATIONAL ARCHIVES AND RECORDS SERVICE

Complainant

NATIONAL ARCHIVES AND RECORDS SERVICE

Respondent

and Case No. 22-6648(CA)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2578, AFL-CIO

Complainant

DECISION AND ORDER

On June 15, 1977, Administrative Law Judge George A. Fath issued his Recommended Decision and Order in the above-entitled consolidated proceeding, finding in Case No. 22-6621(CO) that the Respondent labor organization, American Federation of Government Employees, Local 2578, AFL-CIO, hereinafter called AFGE or Union, had not engaged in conduct which was violative of the Order. In Case No. 22-6648(CA), the Administrative Law Judge found that the Respondent Activity, National Archives and Records Service, hereinafter called NARS or Activity, had engaged in certain unfair labor practices and recommended that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the NARS filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decison and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject cases, 1/ including the NARS' exceptions and supporting brief, I hereby adopt the Administrative Law Judge's findings, conclusions and recommendations, only to the extent consistent herewith.

The evidence establishes that in October 1974, the Chief Negotiators for the NARS and the AFGE signed ground rules drafted to govern the negotiations for a new agreement. The ground rules specified the composition of the bargaining teams; the days and times of bargaining sessions; a limit of 40 hours of official time for negotiations during duty hours for each member of the AFGE negotiating team; and a procedure for the Chief Negotiators to "initial off" individual contract clauses to indicate tentative agreement pending full and final agreement.

Negotiating sessions started on November 25, 1974, and continued until February 1975, when they were suspended by mutual agreement because of questions concerning the effect of the impending amendments to Executive Order 11491 and because of lack of progress. The record indicates that negotiations resumed on May 22, 1975, and continued until July 1975, at which time most of the AFGE negotiators had exhausted their 40 hours of official time. After a series of informal discussions between the Chief Negotiators in August 1975, the AFGE negotiators did not appear for further meetings or respond to the NARS' request for bargaining sessions in September. The NARS subsequently filed the complaint in Case No. 22-6621(CO) alleging that the Union violated Section 19(b)(6) of the Order by failing to negotiate a new agreement during September 1975. Shortly thereafter, the AFGE filed its complaint in Case No. 22-6648(CA) alleging that the NARS violated Section 19(a)(1) and (6) of the Order by failing to negotiate in good faith, to meet at reasonable times, and to give its negotiators the authority to negotiate an agreement. 2/

In case No. 22-6648(CA), the Administrative Law Judge found that the NARS violated Section 19(a)(6) of the Order by, in effect, engaging in a calculated strategy of delay which resulted in the exhaustion of

1/ The Administrative Law Judge did not introduce the formal documents into the record. However, inasmuch as the record in the instant case transferred to the Assistant Secretary included the formal documents, they are deemed to be properly included in the record within the meaning of Section 203.23(b) of the Assistant Secretary's Regulations. See Local R1-57, National Association of Government Employees (NAGE), A/SLMR No. 896 (1977); Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Region V-A, A/SLMR No. 832 (1977); Puget Sound Naval Shipyard, U.S. Department of the Navy, A/SLMR No. 829 (1977); and Charleston Naval Shipyard, 1 A/SLMR 27, A SLMR No. 1 (1970).

2/ The Regional Administrator dismissed the complaint in Case No. 22-6648(CA) insofar as it alleged that the Activity had refused to meet at reasonable times and had failed to invest its negotiators with appropriate authority. This dismissal action was not appealed.

official time for the Union negotiating team and which discouraged the Union from proceeding with negotiations for a new agreement. Thus, the Administrative Law Judge found that the NARS offered proposals "demeaning and unacceptable to the Union, which had the Union on the defensive attempting to hold on to what it had instead of moving for improvement on the existing contract." In this regard, he took particular note of proposals relating to three contract provisions, the preamble, the grievance procedure, and the proposal on union representatives, which, in his view, evidenced an intention on the part of the Activity negotiators to discourage the AFGE from proceeding with contract negotiations. With respect to the preamble, the Administrative Law Judge noted that the amendment to the preamble was not "initialed off" until May 1975, some seven months after negotiations commenced, and that the only change from the existing preamble was the deletion of the concluding paragraph. In connection with the grievance procedure, the Administrative Law Judge found the Activity's proposals to be a "complicated maze of steps, stages, qualifications, time limits, and permission slips." And, in regard to management's proposal on union representatives, he noted that the NARS' negotiators proposed that a steward be appointed for each unit in each branch and division of the NARS, a proposal which would require 45 stewards, and that employee violations of smoking and drinking prohibitions would result in disciplinary action taken against the steward in the branch or division in which the violating employee involved was a staff member.

The Administrative Law Judge also found evidence of collateral matters which he felt had a bearing on the issue of good faith bargaining. 3/ He concluded that the course of conduct pursued by the NARS was tantamount to a refusal to consult, confer, or negotiate with the AFGE and, therefore, violated Section 19(a)(6) of the Order.

I disagree with the foregoing conclusion of the Administrative Law Judge. In my view, the record does not establish that the NARS engaged in a course of conduct which was violative of the Order. The duty to bargain in "good faith" set forth in Section 11(a) of the Order requires that parties to negotiations approach the bargaining table with an open mind and a sincere desire to reach agreement. This duty does not necessarily require either party to agree to a proposal or to make a concession. Thus, in my view, no inference of bad faith bargaining can be drawn solely from a party's failure to retreat from its initial proposals. In addition to approaching bargaining with an open mind and a sincere desire to reach agreement, the duty to bargain in good faith also requires that the parties make an earnest effort to reach agreement through the collective bargaining process. In determining whether a party has bargained in good faith the Assistant Secretary will not substitute his judgment with respect to the merits of contract proposals. Thus, even if a proposal or proposals appear onerous or burdensome to the outside observer, they will not be deemed to constitute bad faith bargaining unless the totality of the evidence supports the conclusion that such proposal or proposals were advanced with the clear intent of evading or frustrating the bargaining responsibility. In my view, the record herein does not establish that the NARS violated its duty to bargain in good faith.

Although the Activity negotiators engaged in "hard bargaining" with the AFGE, the totality of their conduct, did not, in my opinion, reflect a closed mind and the absence of a desire to reach agreement. In this connection, the record reflects that the parties had reached tentative agreement on some eleven articles by the end of July 1975, and that the Activity, at no time, made any take it or leave it demands. Rather, it continued to make proposals and counter-proposals throughout the course of negotiations and it displayed a willingness to consider alternative proposals in order to reach agreement. 4/ With respect to the specific Activity proposals on the grievance procedure and on union representatives and disciplinary actions alluded to by the Administrative Law Judge, in my opinion, they were not so inherently onerous or burdensome that, standing alone, they would evidence an intent not to reach agreement on the part of the Activity negotiators. Further, with respect to these items, the Activity did not refuse to consider proposals from the Union, and its original proposals were modified in the course of negotiations. In regard to the bargaining over the preamble, the record discloses that the parties came to agreement on the proposed deletion the first and only time they negotiated over the matter. Further, the record reveals that the single paragraph deleted from the original preamble was essentially duplicative of one already contained in Article II of the negotiated agreement.

Nor, in my view, did the Activity's contention that certain proposals made by the Union were non-negotiable, constitute bad faith bargaining under the circumstances of this case. Thus, the Union never chose to contest the Activity's contention by other than a broad assertion that the latter was wrong and, with respect to those items deemed non-negotiable by the Activity's Chief Negotiators, the AFGE was informed that the Union could request a determination by the agency head regarding the negotiability of any Union proposal, and that it could avail itself of the procedures set forth in Section 11(c) of the Order to determine the negotiability of any management proposal. The record shows that the AFGE never sought such determinations of negotiability.

3/ The collateral matters which the Administrative Law Judge noted were the alleged harrassment by the Activity of Union officers by eavesdropping on a Union business call and bad performance ratings; management's exclusion of additional employees from the exclusively represented unit and failure to give the AFGE a copy of its certification; and the expressions of management that it was not obligated to formulate training programs policy with the Union.

4/ With respect to the Administrative Law Judge's conclusion that the Respondent pursued a strategy of delay to cause the Complainant's negotiators to exhaust off duty-time, it is noted that the Regional Administrator dismissed the AFGE's allegation that the Activity had refused to meet at reasonable times and that the parties' ground rules were consistent with Section 20 of the Order. Moreover, the record reflects that the Activity's negotiators were willing to negotiate at adjustable times and, in a spirit of compromise, indicated that they would be willing to meet "half-on and half-off" the clock in an attempt to get the negotiations resumed.

With respect to the collateral issues which the Administrative Law Judge referred to in his Recommended Decision and Order, the record reflects that the alleged harrassment, eavesdropping, and bad performance evaluations substantially pre-dated the commencement of the negotiations herein, and that no unfair labor practice complaints or grievances were filed in connection with these allegations. As to the allegations of bad performance evaluations, while a witness, in a self-serving statement, testified that his evaluations "could not be justified," there is no record evidence as to when the evaluations were made, what the evaluations were, or whether they were related in any way to his union activities.

In connection with the Activity's contention in an unrelated proceeding that certain employees should be excluded from the existing unit, in my view, such contention, standing alone, is consistent with its rights under the Order and, absent any other evidence of improper motivation, cannot be deemed either violative of the Order or indicative of management's attitude with respect to the negotiation of an agreement. Thus, the Order permits management to question an employee's eligibility for inclusion within a unit, and it also permits an exclusive representative to contest management's position through the filing of a petition for clarification of unit. Finally, the AFGE had the opportunity to seek a negotiability determination in regard to management's unilateral formulation of some training programs and failed to do so.

Accordingly, under all of these circumstances, I find, contrary to the Administrative Law Judge, that the NARS' conduct was not violative of Section 19(a)(6) of the Order.

With respect to Case No. 22-6621(CO), the record indicates that in September 1975, the AFGE negotiators failed to appear for four negotiating sessions which had been proposed by the NARS negotiating team. The NARS contended that the AFGE's absence from these negotiating sessions constitute a violation of Section 19(b)(6) of the Order. The Administrative Law Judge found that the Union was justified in breaking off contract negotiations and, therefore, there was no violation of the Order. I agree with his conclusion. Thus, the evidence indicates that while the AFGE team did not appear at the September negotiating sessions, its Chief Negotiator continued to communicate with his NARS counterpart in an attempt to gain a favorable arrangement in regard to his team's exhausted official time. Moreover, in the context of the totality of the bargaining which took place between the parties, the AFGE's absence from the four sessions, standing alone, was not considered to constitute bad faith bargaining. Accordingly, I find that the AFGE's conduct was not violative of Section 19(b)(6) of the Order.

ORDER

IT IS HEREBY ORDERED that the complaints in Case Nos. 22-6621(CO) and 22-6648(CA) be, and they hereby are, dismissed.

Dated, Washington, D.C.
January 11, 1978

Francis X. Burkhardt

Francis X. Burkhardt, Assistant Secretary of Labor for Labor-Management Relations

favored the AFGE over the NFFE by granting it privileges not accorded the NFFE. Therefore, I conclude that the announcement to its employees by the Activity in its December 23, 1970 memorandum of availability to the AFGE of Activity facilities, not announced to its employees in the October 5, 1970 memorandum as available to the NFFE, further interfered with the free choice of its employees to select an exclusive representative, and that the portion of Objection No. 5 going to this matter be sustained.

RECOMMENDATIONS

In view of my conclusions above that Objections Nos. 1 and 2 and a portion of Objection No. 5 are meritorious, it is recommended that the Assistant Secretary sustain these objections. Further, it is recommended that the Assistant Secretary set aside the election conducted on January 27, 1971, and that he direct that a second election be conducted under the terms of Executive Order 11491, and in accordance with the applicable Regulations.

Henry L. Segal
HENRY L. SEGAL
HEARING EXAMINER

Dated at Washington, D. C.
DECEMBER 6, 1971

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE
A/SLMR No. 144

This proceeding arose upon the filing of two unfair labor practice complaints. The first was initiated by Local 2670, American Federation of Government Employees, AFL-CIO (Union), in which a Section 19(a)(6) violation of Executive Order 11491 was alleged based on the Exchange's (1) dilatory tactics in delaying the start of negotiations; (2) failure to empower its principal negotiator with authority to conclude an agreement; (3) failure to offer meaningful proposals on certain subjects of negotiation; (4) unilateral change in conditions of employment; (5) reliance on certain "unlawful" Army and Air Force Exchange Service (AAFES) personnel regulations; and (6) "closed mind" at the bargaining table as evidenced by its overall method of negotiating. The second complaint, initiated by the Exchange, alleged violation of Sections 19(b)(1) and (6) because of the Union's (1) failure to empower its principal negotiator and negotiating committee with authority to conclude an agreement; and (2) attitude of hostile contempt for the Executive Order and pertinent AAFES directives and regulations.

Following a consolidated hearing, the Hearing Examiner issued a Report and Recommendations dismissing both complaints in their entirety.

Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including exceptions filed by the Exchange, the Assistant Secretary adopted the dismissal recommendations of the Hearing Examiner with certain modifications.

With respect to the action brought by the Union against the Exchange, the Assistant Secretary concluded that:

(1) The Exchange-caused delay of four months in the start of negotiations, standing alone, ordinarily would constitute a refusal to consult, confer, or negotiate within the meaning of Section 19(a)(6) of the Order. However, noting particularly that prior to January 1971, the Union did not press for immediate negotiations and once negotiations began they were transacted with sufficient diligence, no violation on this aspect of the complaint was found.

(2) The Exchange's negotiating method of considering the Union's proposed collective-bargaining agreement article by article, rather than submitting its own counterproposals in advance, was a legitimate bargaining approach.

(3) Although the Exchange's principal negotiator indicated, at various times during bargaining sessions, that certain Union agreement proposals could not be approved because they were contrary to AAFES regulations and the Order, and, in addition, refused Union requests to seek changes in the pertinent regulations from higher authorities, in the circumstances of this case, such conduct did not violate the Order either in terms of the Exchange negotiator's authority to bargain, or in terms of overall good faith bargaining.

(4) Finally, as to the Exchange's refusal to discuss, in whole or in part, specific agreement proposals relating to hours of work, promotion, and dues checkoff, no Section 19(a)(6) violation was found at this time because of the Union's failure to pursue procedures designated in Section 11(c) of the Executive Order. Additionally, the Assistant Secretary found that the Exchange's bargaining pertaining to the Union's arbitration proposal was in good faith.

The decision included a discussion of the implications of Section 11(c) procedures, and the respective roles of the Federal Labor Relations Council and the Assistant Secretary of Labor for Labor-Management Relations flowing therefrom.

With respect to the action brought by the Exchange against the Union, the Assistant Secretary concluded that the Hearing Examiner was correct in finding that the Union did not violate its duty to bargain under Section 19(b)(6) because the evidence did not support the contentions that the Union denied proper authority to its chief negotiator and negotiation committee members for consummating a collective-bargaining agreement. The evidence also failed to show that the Union negotiators' expressions of displeasure with certain aspects of the Executive Order and with various Exchange policies and regulations constituted Section 19(b)(6) violation.

In conclusion, the Assistant Secretary found no independent evidence of Union interference with, restraint, or coercion of employees in the exercise of rights assured by the Order.

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE 1/

Respondent

and Case No. 41-1905 (CA)

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO 2/

Complainant

LOCAL 2670, AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO

Respondent

and Case No. 41-2130 (CB)

ARMY AND AIR FORCE EXCHANGE SERVICE,
KEESLER CONSOLIDATED EXCHANGE

Complainant

DECISION AND ORDER

On June 9, 1971, Hearing Examiner Henry L. Segal issued his Report and Recommendations in the above-entitled proceeding, finding that the Respondents had not engaged in the unfair labor practices alleged in the complaints, and recommending that the complaints be dismissed in their entirety. Thereafter, the Army and Air Force Exchange Service, Keesler Consolidated Exchange 3/ filed exceptions with respect to the conclusions and

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1/ The name of the Respondent appears as amended at the hearing.

2/ The name of the Complainant appears as amended at the hearing.

3/ Herein referred to as the Exchange.

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recommendations relative to Case No. 41-2130 (CB) contained in the Hearing Examiner's Report and Recommendations. 4/

The Assistant Secretary has reviewed the rulings of the Hearing Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Hearing Examiner's Report and Recommendations and the entire record in the subject cases, including the exceptions, I hereby adopt the findings, conclusions, and recommendations of the Hearing Examiner as modified below. 5/

The complaint in Case No. 41-1905 (CA), filed by the Union against the Exchange, alleged violation of Section 19(a)(6) of Executive Order 11491 based on the Exchange's (1) dilatory tactics in delaying the start of negotiations; (2) failure to empower its principal negotiator with authority to conclude an agreement; (3) failure to offer meaningful proposals on certain subjects of negotiation; (4) unilateral change in conditions of employment; (5) reliance on certain "unlawful" Army and Air Force Exchange Service personnel regulations; and (6) "closed mind" at the bargaining table as evidenced by its overall method of negotiating. The complaint in Case No. 41-2130 (CB), filed by the Exchange against the Union, alleged violation of Sections 19(b)(1) and (6) of Executive Order 11491 based on the Union's (1) failure to empower its principal negotiator and negotiating committee with authority to conclude an agreement; and (2) attitude of hostile contempt for the Executive Order, and pertinent Army and Air Force Exchange directives and regulations. Because these allegations raise important issues as to the bargaining obligations of agencies and labor organizations under Executive Order 11491, I feel it necessary to present, at the outset, a detailed review of the pertinent facts.

4/ Local 2670, American Federation of Government Employees, AFL-CIO, herein referred to as the Union, filed no exceptions to the Hearing Examiner's Report and Recommendations.

5/ During the course of the proceeding in these cases, a new Executive Order, No. 11616, was issued on August 26, 1971, effective November 24, 1971, amending portions of Executive Order 11491. Notwithstanding that the instant cases are governed by Executive Order 11491, it should be noted that Executive Order 11491, as amended, contains no relevant revisions of any Executive Order sections applicable herein. Therefore, the following discussion and conclusions may be regarded in terms of future applicability under Executive Order 11491, as amended.

Course of Negotiations

It is undisputed that the Union was granted formal recognition by the Exchange on July 12, 1968, under Executive Order 10988. Subsequently, the Union won a representation election held on June 20, 1969, and by letter dated July 3, 1969, was granted exclusive recognition for a unit of regular full-time and part-time hourly paid civilian employees at the Exchange, with various categories of personnel excluded. 6/ In October 1969, the Union submitted a proposed agreement to the Exchange. The Exchange indicated that it would meet with the Union for negotiations in November 1969, but this did not occur allegedly because of the necessity of transmitting the Union's proposals to the Army and Air Force Exchange Service headquarters in Dallas, Texas. 7/ Thereafter, on two other occasions, the Exchange scheduled and postponed the start of negotiations. In this connection, a December 1969, date was abandoned by the Exchange based on the "busy holiday season" and a January 1970, date was cancelled due to the Exchange's annual inventory. With an indication by the Union that it would have to do something about these delays, negotiations ultimately commenced on February 10, 1970.

This first session was devoted to the establishment of ground rules which included, among other things, a procedure for handling disputes and impasses, one part of which called for submission of disputed and impassed issues to the Federal Mediation and Conciliation Service and to the Federal Service Impasses Panel; and a procedure for reaching a completed agreement, with the Exchange and Union agreeing to each proposed article separately as discussed but withholding their final approval pending completion of the total agreement. 8/ The chief negotiator for the Exchange was an assistant general counsel for labor relations from the AAFES and the Union was represented principally by the Local's president.

6/ In agreement with the Hearing Examiner, I find that the Exchange cannot now raise as a defense in this unfair labor practice proceeding the contention that the unit involved herein is inappropriate because it excludes military personnel employed during off duty hours.

7/ Herein referred to as the AAFES.

8/ While I note the nature of these "ground rules," the Hearing Examiner is correct in his comment that I am not required under the Order, nor do I think it would effectuate the policies of the Order, to interpret or police such side agreements absent evidence that they constitute independent violations of the Order. Cf., Report on a Decision of the Assistant Secretary, Report No. 20.

The parties next met on February 11, 12, 13, 16, 17, and 18; and on March 16, 17, 18, and 19. The Union's October proposals formed the basis for discussion and the Exchange offered proposals only when it found a Union version to be unsatisfactory. The Exchange's counterproposals generally were submitted at the meeting in which the subject involved was considered, rather than in advance. As a result of this negotiating process, both sides agreed to approximately 17 agreement items. However, three items remained open: arbitration, hours of work, and promotion. With respect to these subjects, a Federal mediator was requested by the Union to conduct a meeting on April 23, 1970. After conferring with each side separately, he apparently suggested that the Exchange might try to come up with new counterproposals on these subjects. But at a session held the following day, April 24, the Exchange merely presented a slightly reworded clause concerning hours of work.

Thereafter, in a letter dated June 20, 1970, the Union charged the Exchange with violating Section 19(a)(6) of the Order by sending a principal negotiator to the bargaining table who was strictly governed by orders from the AAFES, thereby lacking authority to conclude an agreement. It alleged also that the Exchange's negotiator refused to bargain on the issues of arbitration, hours of work, and promotion. The Exchange did not reply to the charge until August 21, and during the interim the Union filed its complaint herein on August 12, 1970. At the Exchange's request, a second Federal mediator was scheduled to attend, what turned out to be, a final negotiation meeting on October 2, 1970.

At the October 2 meeting, the Exchange submitted new or rewritten counterproposals on arbitration, hours of work, and promotion (a discussion of the substance of each is presented below), and the Exchange also raised, for the first time, an entirely new issue - dues checkoff. The record reveals that previously dues checkoff had not been a subject of bargaining because, as a result of the Union's formal recognition under Executive Order 10988, a written agreement providing for the withholding of union dues was executed between the parties on July 11, 1968. 9/

9/ This "Memorandum of Understanding" made eligible for checkoff authorization, "all employees of /the Exchange/, except any unit whereby exclusive recognition has been granted," and it called for termination of an allotment under various circumstances affecting the individual authorizing employee and also "at the beginning of the first pay period after the Commander, Keesler AFB, Mississippi, determines that the Lodge is no longer eligible for formal recognition." Despite the fact that, by its terms, this checkoff arrangement could have been ended when the Union gained exclusive recognition on July 3, 1969, it was not, and authorized dues withholding has continued without interruption from 1968, to the present date. Thus, as of the start of negotiations in February 1970, and until about October 2, it appears the Union assumed dues checkoff was covered by the separate Memorandum of Understanding and would not be included in any negotiated agreement.

The issue with respect to dues checkoff developed as a result of the issuance by the AAFES on May 29, 1970, of an Exchange Service Bulletin No. 58, entitled "Voluntary Deduction of Labor Organization Dues," which was applicable to all of its exchange service components. The bulletin stated that its purpose was "to provide guidance to exchanges for the voluntary deduction of labor organization dues from the pay of AAFES employees who are members of organizations which have been granted formal or exclusive recognition." It stated further that: "Where a labor organization holds or obtains exclusive recognition, the dues withholding procedures, if any, will be part of the collective bargaining agreement and will terminate concurrently therewith. All agreements are subject to and become effective on the approval of the Chief, AAFES. They may not exceed two years in duration."

On October 2, the Exchange announced at the bargaining session that, in line with the new policy, existing checkoff procedures under the side agreement would have to be discontinued and any new arrangement would have to be included in the parties' negotiated agreement. A checkoff proposal consistent with the AAFES bulletin was presented, and this proposal, along with the Exchange's counterproposals on the three open items, was submitted to the Union as a "package deal," the Union being asked to accept all as written, or reject them. Strenuously objecting to this procedure and to the introduction of a checkoff issue into the negotiations, in light of the parties' existing side agreement, the Union rejected the four "packaged" contract clauses. In so doing, the Union's chief negotiator stated it would be necessary to contact the Union's national headquarters regarding the AAFES's new dues withholding policy before the Union could consent to a different kind of checkoff arrangement.

Subsequent to October 2, 1970, the Union made no further reply to the Exchange's "package deal," nor did it request any further negotiation meetings. On or about January 20, 1971, the Exchange filed its complaint against the Union alleging violation of Sections 19(b)(1) and (6) of the Order.

Disputed Agreement Proposals

Arbitration. Early in the negotiations, the parties agreed to all but the last step of a grievance procedure. In this regard, the Union sought a provision for arbitration handled by an outside arbitrator, with costs equally divided between the parties. The Exchange, rejecting this, countered with a method whereby a hearing officer would be selected by the parties from a list of military or civilian personnel under the jurisdiction of the Installation Commander, but not Exchange employees, who would render an advisory opinion subject to final decision by the Commander. In support of its

counterproposal, the Exchange contended that (a) the Exchange had no budget provision for paying outside arbitrators, (b) Exchange profits were designated specifically for the Central Servicemen's Relief Fund, and (c) an outside arbitrator would not be as familiar with Exchange operations and regulations as would a person connected with the Air Force Base.

Because the Union rejected the Exchange's suggestion, this issue remained at impasse until the Exchange submitted its "package deal" on October 2. Included in that offer was the Union's arbitration proposal.

Hours of work. The record reveals that the Exchange currently schedules a majority of its employees to work six days a week for a total of 40 hours. Overtime is calculated on the basis of hours worked beyond the 40-hour regular workweek. The Union proposed that overtime be paid for all time exceeding 40 hours per week or eight hours per day. But, with respect to overtime, the Exchange noted that an AAFES regulation that, "Only time worked in excess of 40 hours during the administrative workweek is considered overtime work," would not permit institution of the Union's proposal. No further discussion of overtime was entertained during negotiations.

As noted above, the normal administrative workweek for a majority of the Exchange's employees is six days a week for a total of 40 hours. However, the Union contended that all Exchange employees could and should be assigned to a 5-day schedule, with two consecutive days off. 10/ This also was dismissed by the Exchange on the basis of the following AAFES regulation: "The regular scheduled workweek will not exceed 40 hours. Except where inconsistent with operational needs, the hours scheduled will not exceed 8 hours per workday and will not be scheduled for more than 5 days in an administrative workweek. The regular scheduled workweek will not include hours on more than 6 days or include more than 10 hours on any one workday, except during an annual or other directed inventory." The Exchange contended its "operational needs" demand that its facilities be open at least six and, in some cases, seven days a week, thereby rendering the 5-day workweek virtually impossible with its present employee complement. With continued Union insistence to the contrary, the Exchange, in connection with a feasibility survey, asked facility managers to write out tentative 5-day schedules for their employees. 11/ Overall, the Exchange's survey apparently

10/ The evidence reveals that for many years a few employees assigned to one Exchange outlet, the "Quick Shop," had a 40-hour, 5-day workweek.

11/ The "Quick Shop" manager apparently misunderstood that this was to be on paper only, and, in fact, instituted the new workweek for all "Quick Shop" employees. The Exchange reported this change to the Union at the next negotiation session and offered to reinstate the prior "Quick Shop" schedule. The Union, while objecting to the unilateral action, conceded it would be unnecessary to return to the prior schedule.

indicated that a 5-day workweek would require more regular part-time employees and, hence, some current full-time employees would have to work on a regular part-time basis. Because this would result in a loss of pay to the affected employees, the Union rejected this Exchange solution.

The parties thereafter remained deadlocked on both aspects of hours of work, with the Exchange alleging ultimately that the subjects of overtime and workweek scheduling were nonnegotiable under Section 11(b) of the Executive Order.

Promotion. Various aspects of promotion policy were discussed during negotiations and agreement was obtained on some matters, such as job posting. However, impasse was reached on two issues - promotional criteria and their procedural use. First, the Union sought to implement criteria for promotion through the assignment of a specific numerical weight to each. Second, the Union objected to the use of "veteran status" as a criterion because it discriminates against women. Both of these subjects are referred to in an AAFES regulation which provides that: "Employees are selected for promotion on the basis of performance, potential, length of AAFES service and veteran status, in that order of importance." In this connection, the Exchange objected to bargaining about either of the foregoing subjects, contending that the cited regulation was controlling and unalterable, and that, moreover, these aspects of promotion policy are not negotiable because of Sections 11(a), and 12(a) and (b)(2) of the Executive Order.

Notwithstanding the Exchange's position in this regard, at the parties' October 2 meeting it offered, as part of the "package," an agreement provision which stated that, "Employees are selected for promotion on the basis of performance, potential, length of service and veteran status in that order of importance. Where performance, potential and length of AAFES service are equal, veteran status will be used only to break a tie. Performance evaluations will be made by Branch Managers." When this particular concession as to "veteran status" was made, the Exchange's chief negotiator allegedly remarked that in doing this he might be exceeding his authority.

With regard to all disputed agreement proposals, the record indicates that whenever the parties' difficulties centered on a particular AAFES regulation, the Union frequently asked the Exchange to seek rulings and/or changes in the regulations through its headquarters. The Exchange refused, pointing out that it was the Union's obligation to challenge regulations by approaching the AAFES, and then by appeal to the Federal Labor Relations Council 12/ pursuant to Sections 4(c)(2), and 11(c)(2), (3) and (4)(i) and (ii) of the Executive Order.

12/ Herein referred to as the Council.

Discussion and Findings

1. Overall, I agree with the Hearing Examiner's conclusion in Case No. 41-1905 (CA) that the Exchange fulfilled its duty to negotiate with the Union within the meaning of Section 19(a)(6) of the Order.

However, I disagree insofar as the Hearing Examiner's findings can be read to imply that, standing alone, dilatory conduct by a party would not constitute a violation of Section 19(a)(6). In my view, Section 19(a)(6) must be construed in connection with Section 11(a) of the Order, 13/ which specifies that there is a bargaining obligation on the part of both agencies and labor organizations to "meet at reasonable times" and to "confer in good faith." I do not consider that the Exchange's excuses for delaying the negotiations in this matter, such as the busy holiday season and annual inventory, adequately meet the Executive Order's collective-bargaining requirements. Moreover, in this regard, it appears that the Exchange's chief negotiation spokesman was not connected with the Exchange's day-to-day activities and, thus, he would not be involved in its seasonal rush or inventory. Clearly, the purposes of the Executive Order are not served best where, as here, a labor organization achieves exclusive recognition in July, submits a complete collective-bargaining agreement proposal to the Activity the first part of October, and then waits until the middle of February, ostensibly, for the Activity to decide that it is now "convenient" to negotiate. Labor organizations having exclusive representative status have a right under the Order to prompt consideration of their bargaining request. Absent evidence of more plausible reasons for this kind of delay, such conduct by the Exchange ordinarily would amount to a refusal to meet at reasonable times with the employees' duly recognized exclusive bargaining representative, and would result in a finding of violation of Section 19(a)(6) of the Order.

However, in the circumstances of this case, and noting particularly that prior to January 1971, the Union did not press for immediate negotiations, and once negotiations began they were transacted with sufficient diligence, I do not find a violation of Section 19(a)(6). Although the Union further contends that the Exchange's negotiating method of considering the Union's proposed collective-bargaining agreement article by article and not submitting its own counterproposals in advance amounts to a refusal to confer in good faith, in my opinion, this is a legitimate bargaining approach. In addition, the record reveals that when difficulties did arise as to the substance of a particular Union-proposed contract provision, the Exchange never failed to provide, at a reasonable time, a substitute provision when such was considered possible. During the course of negotiations, then, all of the Union's bargaining agreement provisions were either accepted or rejected by the Exchange, or a substitute presented.

The Union argues that the instant negotiations were meaningless in that the Exchange's principal negotiator, an AAFES attorney, was not equipped with sufficient authority to conclude an agreement. This contention stems primarily from the fact that, at various points during the course of bargaining, the Exchange's spokesman indicated certain proposed agreement provisions could not be approved because they were contrary to AAFES regulations. On numerous occasions, he apparently stated that he was bound by these regulations in terms of what he could accede to at the bargaining table. Moreover, when the Union asked him to request possible changes in AAFES regulations from higher authorities, he refused to do so. Because some of the specific agreement provisions and regulations in dispute between the parties actually raise issues of the negotiability of the subject matter itself, and because discussion and concessions actually did take place as to other provisions, I reject the Union's contention that this conduct of the Exchange's principal negotiator violated the Order either in terms of his authority to bargain, or in terms of overall "good faith" bargaining.

As noted above, during the course of negotiations, the Exchange's spokesman took the position that the subject matter of certain Union proposals was contrary to AAFES regulations or the Order and, therefore, not negotiable. In my view, Section 11(c) of the Order 14/ provides the

13/ Section 11(a) provides, in pertinent part, that: "An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and this Order."

14/ Section 11(c) provides that: "If, in connection with negotiations, an issue develops as to whether a proposal is contrary to law, regulation, controlling agreement, or this Order and therefore not negotiable, it shall be resolved as follows: (1) An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the procedures of the controlling agreement, or, if none, under agency regulations; (2) An issue other than as described in subparagraph (1) of this paragraph which arises at a local level may be referred by either party to the head of the agency for determination; (3) An agency head's determination as to the interpretation of the agency's regulations with respect to a proposal is final; (4) A labor organization may appeal to the Council for a decision when--(i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order.

exclusive method for resolving such a dispute. 15/ Thus, issues other than those involving the interpretation of a controlling agreement at a higher agency level, may bring immediately into play the processes of the Council as outlined in Section 4(c)(2), 16/ and Section 11(c)(4)(i) and (ii) of the Order. Under these latter provisions, negotiability disputes in connection with agreement negotiations are segregated into two categories: (4)(i) - disagreement with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order; and (4)(ii) - belief, by a labor organization, that an agency's regulation, as interpreted by the agency head, violates applicable law, regulation of appropriate authority outside the agency, or this Order.

Under these Section 11(c) procedures, the extent to which a particular agreement proposal or agreement subject may or may not have to be bargained about would be decided at the outset by the Council. Thereafter, under the Order's procedures, the Assistant Secretary may be required to determine whether the parties' bargaining in this regard has, in any way, violated Section 19 of the Order. The Report and Recommendations of the Study Committee, which preceded the Executive Order, sets out the policy and procedure as follows: "A labor organization should be permitted to file an unfair labor practice complaint when it believes that a management official has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the processes described in /Section 11(c)/." The Report and Recommendations concluded that the Section 11(c) procedures are recommended in the hope that they will "give exclusively recognized organizations a way of resolving, during negotiations, questions as to whether a matter proposed for negotiation is in conflict with law, applicable regulations or a controlling agreement."

In these circumstances, I find as follows as to the four disputed subjects in the instant proceeding:

Arbitration. The record reveals that the parties fully discussed various arbitration procedures, but failed to reach agreement in the negotiation sessions prior to the October 2 meeting. At that time, the Exchange acceded to the Union's arbitration demand, although its agreement in this respect was then tied to the Exchange's "package deal" as to dues checkoff.

15/ See Report on a Decision of the Assistant Secretary, Report No. 26, in which I found that the intent of Section 19(a)(6) of the Order is to provide a labor organization an opportunity to file a complaint when it believes that management has been arbitrary or in error in excluding a matter from negotiation which has already been determined to be negotiable through the procedures set forth in Section 11(c) of the Order.

16/ Section 4(c)(2) provides: "The Council may consider, subject to its regulations-- (2) appeals on negotiability issues as provided in Section 11(c) of this Order."

Under these circumstances, in agreement with the Hearing Examiner, I conclude that the Exchange's bargaining on arbitration was not violative of Section 19(a)(6) of the Order. 17/

Hours of work. As noted above, the disputed hours of work issue involved two aspects. First, the Exchange refused to discuss, outright, the Union's proposal to change the basis for calculating overtime pay because of a conflicting AAFES regulation.

In accord with the Exchange's position in this respect, i.e., that the basis for calculating overtime is nonnegotiable because this subject is controlled by an existing AAFES regulation, I find that the Section 11(c)(2) procedure is applicable. Failing a satisfactory answer from the agency head the Union has available an appeal to the Council under Section 11(c)(4)(i) or (ii), as may be appropriate. This follows from the fact that the Exchange's refusal to bargain about the subject of overtime was based on a belief that, under the Order, the Exchange's overtime regulation could properly be used to eliminate any negotiations on the subject. Because this is a negotiability question which has not been decided by the Council prior to the filing of the unfair labor practice complaint herein, I conclude that this aspect of the instant complaint should be dismissed.

The second part of the hours of work issue involved the Exchange's refusal to agree to the Union's proposal to change the regularly scheduled workweek. Despite the fact that the Exchange contended that this subject was nonnegotiable under Section 11(b) of the Order, it not only discussed the Union's proposal, but also even went so far as to check into the practical application of such a change when applied to its current employee complement. Because the results of this scheduling survey called for more regular part-time employees and a reduction in the number of regular full-time employees, and hence, was unacceptable to the Union, an impasse resulted.

Notwithstanding the Exchange's willingness to bargain about some elements of workweek scheduling, I do not view this as a waiver of its fundamental position that the subject itself is nonnegotiable because it is governed by an existing AAFES regulation. Therefore, as in the overtime

17/ Nor does it appear that the Union could pursue Section 11(c) procedures on the subject of arbitration for there is no evidence of an Exchange contention that Union proposals concerning arbitration were nonnegotiable because they were contrary to law, regulation, controlling agreement, or the Order.

situation discussed above, the "Section 11(c)(2) - 11(c)(4) procedures" should have been followed. Accordingly, as this is a negotiability question which has not been decided by the Council prior to the filing of the unfair labor practice complaint herein, I conclude that this aspect of the instant complaint should be dismissed. 18/

Promotion. The Exchange's ultimate position as to the Union's promotion proposal was that promotion is a nonnegotiable subject under the Executive Order, citing, in particular, Section 12(a) and (b)(2). It contended also that an AAFES regulation governed promotion. The Exchange, however, did discuss the Union's promotion proposal and, as in the case of arbitration, it granted a portion of the Union's demand after the unfair labor practice charge in this proceeding was filed.

Again, notwithstanding this limited discussion and concession, because the subject of promotion herein also raises an issue of negotiability based on an existing agency regulation, it is a matter to be processed under the "Section 11(c)(2) - 11(c)(4) procedures." Accordingly, for reasons discussed above, the unfair labor practice complaint in this respect must be dismissed.

Dues checkoff. This subject was not raised until the final negotiation session when it was brought to the bargaining table by the Exchange in the form of an announcement of a new AAFES checkoff policy that any checkoff arrangement must be included in the negotiated agreement. Included in the wording of that policy is a statement which also, in effect, limits the duration of any agreed-to bargaining agreement to two years. Both of these topics, as interpreted and treated by the Exchange to dispense with any discussion of checkoff, quite obviously involve issues of negotiability, and their proper resolution is through the "Section 11(c)(2) - 11(c)(4) procedures" discussed above.

Accordingly, in agreement with the Hearing Examiner, no unfair labor practice complaint on these matters may be entertained by the Assistant Secretary at this time.

18/ The record clearly shows that the change in the workweek for all "Quick Shop" employees resulted from an apparent misunderstanding between the Exchange and the "Quick Shop" manager. In view of the Exchange's immediate notification of this fact to the Union and its offer to restore the prior workweek schedule, all coupled with the Union's concession that this was unnecessary, I conclude that further proceedings on this matter are unwarranted.

2. The Hearing Examiner concluded in Case No. 41-2130 (CB), that the Union did not refuse to negotiate in violation of Section 19(b)(6) as the evidence did not support the contentions that the Union denied proper authority to its chief negotiator and negotiation committee members for consummating a collective-bargaining agreement. He found also that the Union did not violate Section 19(b)(6) based on the expressions of its negotiators' displeasure with certain aspects of the Executive Order and with various Exchange policies and regulations. I agree.

The evidence is clear that all members of the Union's negotiation committee possessed the requisite power to agree to a final negotiated agreement and that any expressions by them of a need to refer a matter, such as dues checkoff, to some higher union authority merely reflected their desire for guidance in terms of the labor organization's national policy. Such conduct was comparable to that of the Exchange negotiation committee members who also expressed the need to keep their bargaining table agreements in conformity with AAFES policies and regulations. In neither instance is this, standing alone, a basis for concluding there was a lack of bargaining authority at the installation level. The evidence also is clear that Union committee members, although vocally expressive of their lack of sympathy with portions of the Executive Order, as well as with certain Exchange policies and regulations, were merely expressing their own point-of-view, and were not, thereby, refusing to negotiate within the meaning of Section 19(b)(6).

Therefore, I adopt the Hearing Examiner's recommendation in Case No. 41-2130 (CB) that the Section 19(b)(6) allegation in the complaint be dismissed.

Although the Hearing Examiner made no specific reference to the Section 19(b)(1) allegation in the complaint herein, simply recommending dismissal of Case No. 41-2130 (CB) in its entirety, I find no independent evidence of Union interference with, restraint, or coercion of employees in the exercise of rights assured by this Order.

Accordingly, I conclude that the Section 19(b)(1) allegation in Case No. 41-2130 (CB) also should be dismissed.

ORDER

Pursuant to Section 6(a)(4) of Executive Order 11491 and Section 203.25(b) of the Regulations, the Assistant Secretary of Labor for Labor-Management Relations hereby orders that the complaints in Case Nos. 41-1905 (CA) and 41-2130 (CB) be, and they hereby are, dismissed.

Dated, Washington, D. C.
March 28, 1972

W. J. Usery, Jr., Assistant Secretary of Labor for Labor-Management Relations

November 4, 1976

UNITED STATES DEPARTMENT OF LABOR
ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS
SUMMARY OF DECISION AND ORDER OF THE ASSISTANT SECRETARY
PURSUANT TO SECTION 6 OF EXECUTIVE ORDER 11491, AS AMENDED

DEPARTMENT OF DEFENSE,
AIR NATIONAL GUARD,
TEXAS AIR NATIONAL GUARD,
CAMP MABRY, AUSTIN, TEXAS
A/SLMR No. 738

This case involved an unfair labor practice complaint filed by the Texas Air National Guard AFGE Council of Locals (AFGE), alleging essentially that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing a memorandum prohibiting the consumption of alcoholic beverages on "Air Guard" facilities without first meeting and conferring with the AFGE, the exclusive representative of the civilian air technicians.

The Administrative Law Judge stated that "...a matter affecting working conditions within the meaning of Section 11(a) of the Order encompasses those perquisites, practices or privileges enjoyed by virtue of the employment relationship" and found that the use of alcoholic beverages at parties by the employees on "Air Guard" facilities was such an incident of employment constituting a working condition within the meaning of Section 11(a) which could not be changed unilaterally without proper notice to the exclusive representative and without affording it an opportunity to bargain on the subject.

Contrary to the Administrative Law Judge, the Assistant Secretary concluded that agency management's control of the consumption of alcoholic beverages on government facilities does not fall within the ambit of Section 11(a) of the Order. In this regard, he found that Section 11(a) describes limited areas of negotiation but does not embrace every issue of interest to agencies and exclusive representatives which indirectly may affect employees. Rather, Section 11(a) encompasses matters which materially affect, and have a substantial impact on, personnel policies, practices and general working conditions. The Assistant Secretary stated that, in his view, a restriction on the consumption of alcohol on a government facility did not reach such a level of importance.

Accordingly, the Assistant Secretary ordered that the complaint be dismissed in its entirety.

A/SLMR No. 738

UNITED STATES DEPARTMENT OF LABOR

BEFORE THE ASSISTANT SECRETARY FOR LABOR-MANAGEMENT RELATIONS

DEPARTMENT OF DEFENSE, AIR NATIONAL GUARD,
TEXAS AIR NATIONAL GUARD, CAMP MABRY,
AUSTIN, TEXAS

Respondent

and Case No. 63-5604(CA)

TEXAS AIR NATIONAL GUARD AFGE COUNCIL
OF LOCALS

Complainant

DECISION AND ORDER

On April 9, 1976, Administrative Law Judge Salvatore J. Arrigo issued his Recommended Decision and Order in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions and a supporting brief with respect to the Administrative Law Judge's Recommended Decision and Order.

The Assistant Secretary has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order and the entire record in the subject case, including the Respondent's exceptions and supporting brief, I hereby adopt the findings, conclusions and recommendations of the Administrative Law Judge, only to the extent consistent herewith.

The complaint in the instant case alleges, in effect, that the Respondent violated Section 19(a)(1) and (6) of the Order by issuing a memorandum prohibiting the consumption of alcoholic beverages on "Air Guard" facilities without first meeting and conferring with the Complainant, which is the exclusive representative of all civilian air technicians of the Texas Air National Guard. In his Recommended Decision and Order, the Administrative Law Judge stated that "...a matter affecting working conditions within the meaning of Section 11(a) of the Order encompasses those perquisites, practices or privileges enjoyed by

virtue of the employment relationship. The use of alcoholic beverages at parties by unit employees at Hensley Field was such an incident of employment." Finding that the use of alcoholic beverages at parties held at the Respondent's facility constituted a working condition within the meaning of Section 11(a) of the Order which could not be changed unilaterally without proper notice to the exclusive representative affording it the opportunity to bargain on the change, the Administrative Law Judge concluded that the directive issued on August 30, 1974, 1/ by the Respondent without notice to the Complainant and without affording it the opportunity to negotiate was violative of Section 19(a)(1) and (6) of the Order.

Under the particular circumstances of this case, I do not agree with the findings of the Administrative Law Judge. In my view, agency management's control of the consumption of alcoholic beverages at government facilities does not fall within the ambit of those personnel policies and practices and matters affecting working conditions which are contemplated by Section 11(a) of the Order. Section 11(a) describes the limited areas which are subject to the bargaining obligation on the part of agencies and exclusive representatives. In my view, it is not intended to embrace every issue which is of interest to agencies and exclusive representatives and which indirectly may affect employees. Rather, Section 11(a) encompasses those matters which materially affect, and have a substantial impact on, personnel policies, practices, and general working conditions. I do not consider a restriction on the consumption of alcohol on a government facility to reach such a level of importance. 2/

1/ This directive reads as follows:

SUBJECT: Alcoholic Beverages
TO: Each Division

The verbal policy of the Adjutant General's Department is furnished for compliance by all Air Guard personnel at this station: ALCOHOLIC BEVERAGES WILL NOT BE SERVED OR CONSUMED BY AIR GUARD PERSONNEL ON AIR GUARD FACILITIES

Signed:
FOR THE COMMANDER
Newton T. Williams, Major, TexANG
Administrative Officer

2/ It is noted that the agency memorandum herein did not prohibit or otherwise affect the practice of holding parties at Air Guard facilities for promotions, retirements, or other reasons.

Accordingly, in view of the foregoing, I conclude that the Respondent owed no obligation under Section 11(a) of the Order to notify, and, upon request, to meet and confer with the Complainant prior to the issuance of its memorandum concerning the consumption of alcohol, and that, therefore, its conduct herein was not in derogation of the parties' exclusive bargaining relationship. Hence, I shall order that the instant complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 63-5604(CA) be, and it hereby is, dismissed.

Dated, Washington, D. C.
November 4, 1976

Bernard E. DeLury, Assistant Secretary of Labor for Labor-Management Relations