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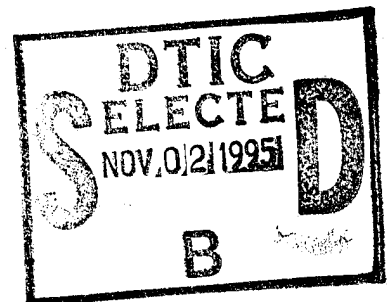
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***"The Validity and Impact of the ACT Decision
When Coupled With Executive Order 12871"***

Graduate Elective Research Paper
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LAW CENTER

A. BACKGROUND- 5 U.S.C. Section 7106(a) and 5 U.S.C. Section 7106(b)

Negotiability and the scope of bargaining in the federal sector is a rather difficult, metaphysical area of the law, one which has spawned an enormous amount of litigation. Section 7106(a) provides, as follows: Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws-

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

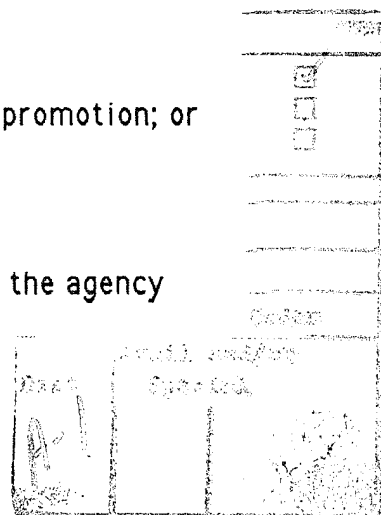
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from-

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency



mission during emergencies.

This relatively straightforward reservation of rights to management, free of the duty to bargain, is amended a bit, however, by Section 7106(b)(1), *maybe more than "a bit"* which provides ~~s~~ as follows: 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;

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

As a result, there is not much to bargain about in the federal sector. *until now* It is quite easy for the agency to say something is nonnegotiable under the broad dictates of Section 7106(a) or elect not to negotiate over matters contained in Section 7106(b)(1). All that really is left for negotiations are the procedures and appropriate arrangements discussed in Sections 7106(b)(2) and (b)(3).

All of this changed, though, on May 6, 1994, when the U.S. Court of Appeals for the District of Columbia issued a decision in Association of Civilian Technicians, Montana Chapter No. 29 v. Federal Labor Relations Authority, 22 F.3d 1150 (D.C. Cir. 1994) (hereinafter ACT).

B. The ACT decision

In ACT, the Montana National Guard agreed to bargain with the union over a dress code and subsequently entered into an agreement which was contained in the negotiated collective bargaining agreement. This agreement authorized unit employees to have the daily option of wearing either the military uniform or an agreed-upon standard civilian attire. The local agency had bargained over this matter as a "means" used to perform work within the meaning of Section 7106(b)(1). The National Guard Bureau (NGB), after conducting the "agency head" review required by 5 U.S.C. Section 7114(c), disapproved this agreement on the grounds that the provision, which authorized technicians to wear standard civilian attire rather than their military uniforms while on duty, interfered with management's ability to determine its "internal security practices" within the meaning of Section 7106(a)(1).

The union filed an unfair labor practice *complaint* with the Authority, who *which*

concluded that the provision permitting employees to wear standard civilian attire directly interfered with the management right to determine the means to achieve its internal security goals. While the Authority saw it as a 7106(b)(1) matter, it also was a 7106(a)(1) matter, and the latter trumped. National Guard Bureau, Alexandria, Virginia and the Association of Civilian Technicians, Montana Chapter No. 29, 45 FLRA 506 (1992). In addition, ^{the Authority} they rejected the union's suggestion in its brief, "which is unsupported by caselaw or any other explanation, that section 7106(b)(1) is an exception to section 7106(a)." Id. at 520.

On appeal, in ACT, the Court of Appeals for the District of Columbia held that an agency head could not reject a provision in a contract which directly interfered with an area reserved to management under Section 7106(a) where that provision is also within the scope of Section 7106(b)(1). 22 F.3d at 1155. The panel reached its conclusion through its interpretation of the prefatory language found in Section 7106(a): "Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency. . . ."

In so ruling, the Court did not quarrel with the agency's argument that the requirement to wear a uniform affected internal security.

Rather, noting that it was well-established that a uniform requirement also

was a "means" used to perform agency's work within the meaning of Section 7106(b)(1), the Court reasoned that, inasmuch as the exercise of the management decision-making authorities reserved by Sections 7106(a)(1) and (2) were "subject to subsection (b)," it followed that the exercise of such reserved rights was subject to the management waiver authorized by subsection (b)(1). More particularly, it held, in the context of a section 7114(c) agency head disapproval decision, that once an agreement pertaining to a permissible subject of negotiation is reached by local agency negotiators, this election is binding upon the agency [head]. Id. at 1160.

C. The Consequences of ACT when coupled with Executive Order 12871

What makes this decision such an important one is the issuance of Executive Order 12871, on 1 October 1993, in which President Clinton tells agencies that management may no longer refuse to "negotiate over subjects set forth in 5 U.S.C. 7106(b)(1). . . ."

But for the issuance of this Executive Order, the potential adverse impact ACT would have had on agency negotiators could have been fairly easily contained. Agencies could simply provide guidance to negotiators to be wary of the fact that

they may be binding themselves to an otherwise unlawful provision if they elect to negotiate over subjects which, while prohibited by Section 7106(a), also fall within the purview of areas of decision-making referenced in Section 7106(b)(1). Put simply, the question of the overlap or tension between the mandatory management's rights in Section 7106(a) and Section 7106(b)(1) ^{permissive} topics would not present many practical problems because management could simply exercise its option not to bargain.

However, the Executive Order ^{in effect} forbids agency managers from exercising the statutory election left to their discretion by Congress to refuse to negotiate over the permissive subjects of bargaining listed in Section 7106(b)(1). With that avenue foreclosed, ^{again} management's find themselves having to retreat to a non-negotiability posture or else negotiating over reserved management's rights.

^{Qualitative} This mandate to negotiate over Section 7106(b)(1) matters has rendered the relationship between 7106(a) and 7106(b)(1) a major policy issue with ramifications throughout the federal sector. This relationship is critical in determining the scope of bargaining.

Even if the Authority and the courts should agree that there is a ^{in the context of the EO} statutory duty to bargain over Section 7106(b)(1) subjects, that obligation would

What is the purpose of this?

be rendered meaningless in those situations where the matter or proposal also is encompassed within Section 7106(a) should Authority precedent be followed.

However, should the legal analysis of the D.C. Circuit in ACT be adopted so that section 7106(b)(1) becomes an exception to Section 7106(a), the scope of bargaining would be dramatically increased if there is a statutory duty to bargain over (b)(1) subjects.

- no duty to bargain over (b)(1) subjects

As a result, the General Counsel to the FLRA has submitted a request for a determination of a major policy question to the Authority concerning the relationship between 5 U.S.C. Section 7106(a) and 5 U.S.C. Section 7106(b)(1). The General Counsel defined the issue as follows: "Are matters and proposals which are within the bargaining subjects set forth in Section 7106(b)(1) of the Statute [Federal Service Labor Management Relations Statute (FSLMRS)] negotiable at the election of agency management at the level of exclusive recognition even though those matters may be within the subjects set forth in section 7106(a) of the Statute?"

In Advice Memorandum No. 95-3, dated February 28, 1995, the General Counsel points out that the D.C. Circuit legal analysis has become a major obstacle for those agencies which are attempting to bargain over section 7106(b)(1)

matters as mandated by the Executive Order. It has made it extremely difficult, if not impossible, he says for those agencies which have made good faith efforts to enter into improved consensual and collaborative relationships with their employees' elected representatives as envisioned by the Executive Order. "Instead of working together to design and implement comprehensive changes to reform Government and to create organizations capable of delivering the highest quality of service to the American people, the parties are engaging in legal gymnastics over the scope of bargaining, while attempting to comply with the Executive Order mandate." He goes on to say that ACT has "created uncertainty, and more significantly, a disincentive to parties to change the nature of their labor relations as contemplated by the Executive Order, and to bargain over subsection (b)(1) matters." This uncertainty, he says, is a "partnership buster."

On March 16, 1995, the Authority, in response to the General Counsel's request, published a notice in the Federal Register (Vol. 60, No. 51, at 14285) in which it solicited written comments on the question posed by the General Counsel in Advice Memorandum No. 95-3. In addition, the Authority invited comments regarding five additional questions:

- (1) What is the proper meaning to be accorded the phrase in section 7106(a)

stating that it is "subject to subsection (b)," as it relates to subsection (b)(1)?

(2) What is the proper meaning to be accorded the phrase in section 7106(b) stating that "Nothing in this section shall preclude any agency and any labor organization from negotiating--"? For example, does it operate with respect to section 7106(b)(1) as a "clarification" or a "limitation," a distinction raised by the court in American Federation of Government Employees, Local 2782 v. FLRA, 702 F.2D 1183, 1186-87 (D.C. Cir. 1983)(Dicta)?

(3) What matters or proposals, if any, within the subjects set forth in section 7106(b)(1) are not also within (i.e., do not also affect) one or more subjects set forth in section 7106(a)?

(4) Does the relationship between section 7106(a) and (b)(1) depend on the particular section 7106(a) subject which is affected?

(5) Does the relationship between section 7106(a) and (b)(1) depend on whether parties are bargaining over proposals for an agreement or whether an agency head is exercising authority under section 7114(c) of the Statute to review an agreement already reached?

While the focus of this paper will be on the original question posed by the General Counsel when he referred a major policy issue to the Authority in Advice Memorandum No. 95-3, in analyzing and answering that question I will also answer the first two additional questions posed by the Authority. As for the final three questions, they will not be addressed.

D. ACT was correctly decided- Management decisions which Congress barred from negotiations under Section 7106(a)(1) are rendered negotiable if they also implicate the decisions reserved to management under Section 7106(b)(1) and an agency elects to negotiate the matter.

1. Statutory interpretation

A statute must, if possible, be construed in such a fashion that every word has some operative effect. Vesser v. OPM, 29 F.3d 600, 605 (Fed. Cir. 1994).

A statute should not be construed in a way that renders a provision superfluous. Board of Trustees of Trucking Employees v. Centra, 983 F.2d 495, 504 (3d Cir. 1992).

Management might argue that the ACT panel's reading of the relationship

between Sections 7106(a) and (b), carried to its logical ending, violates these principles in that it clearly serves to render part, if not all of, Section 7106(a) nugatory. ^{Just 7106(a) provisions that are subject to subsection (b)} For example, it is evident that any determination to employ a particular internal security practice must take the form of subsidiary decisions that involve one or more of the "subjects" or "matters" described in Section 7106(b)(1). If this is true, though, it is not the ACT panel's interpretation of the *statute* that makes part, if not all of, Section 7106(a) nugatory. Rather, it is the Executive Order itself and its impact on the statute that causes such a result. Without the Executive Order, management could choose not to negotiate over "subjects" or "matters" that affect internal security practices, and Section 7106(a) most certainly would not be rendered nugatory. And even with the Executive Order, there are matters under 7106(a) such as "mission" and "budget" which would not always be affected by any of the subjects listed in section 7106(b)(1). The point, though, is that ACT's reading of the statute gives both 7106(a) and 7106(b)(1) operative effect. What may take away some of 7106(a)'s operative effect is the Executive Order, ^{the will of} not the court's construction of the statute.

In ACT, the issue involved the negotiation of a dress code. The agency and the Authority had found that while a dress code could be negotiated under (b)(1) as a "methods and means of performing work," such rules also affected the "internal

security practices of the agency” and thus constituted a prohibited subject under (a). ACT, at 1150-1152. This case highlights the tenuous existence of (b)(1) as a meaningful subsection of section 7106. Hypothetically, under the Authority’s approach, agencies and labor organizations could negotiate over staffing needs on the expansion of a federal works project under (b)(1) only to be denied the benefit of any agreement because of a conflict with (a) which prohibits negotiation over hiring, assigning, and determining the personnel by which agency operations shall be conducted. There is an infinite number of bargaining proposals that could arguably fall under both (b)(1) and (a). Thus, unless the reasoning of the D.C. Circuit in ACT is followed, Section 7106(b)(1) will be stripped of all meaning and the parties will waste countless hours on bargaining over (b)(1) subjects that are subsequently determined subjects under (a). This absurd result cannot be what Congress intended. - *Apple*

Looking at the sections more closely, you realize that it is impossible to negotiate the substance of a 7106(b)(1) subject that does not in some way impact⁺ the subjects in subsection (a). Numbers, types and grades of employees and technology, methods, means of performing work can always be determined to have an impact on budget, at a minimum. *had look at 7106(1) when was said person's budget would not be affected* Therefore, to interpret the law to mean that any effect on subsection (a) makes a subsection (b)(1) proposal non-negotiable

equates to saying that the subsections in 7106 are contradictory. This would eliminate all the discretionary subjects and, in effect, eliminate (b)(1) altogether. Permissive subjects of (b)(1) are selected parts of subsection (a) that the law has given management the discretion to negotiate.

When construing federal statutes, the established rules of statutory construction prevail. Bardes v. First National Bank, 178 U.S. 524, 20 S.Ct. 1000 (1900).

A general rule of statutory construction requires that words be given their usual, or common, meaning. National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, 101 S.Ct. 27879 (1981).

One need look no further than the language of Section 7106 itself to verify that matters covered by Section 7106(b)(1) may be negotiated even though those matters are also covered by Section 7106(a). It is clearly stated in the introductory phrase of subsection (a) that the management rights set forth in subsection (a) are "subject to subsection (b) of this section." This introductory language makes clear that subsection (a) does not stand alone and indeed may be affected by subsection (b). In turn, subsection (b) begins by stating that "nothing

in this section" [7106] "shall preclude any agency and any labor organization from negotiating" the matters covered in subsection (b). This clause can only be interpreted as reserving for agencies and labor organizations the right to negotiate over permissive subjects without regard to subsection (a).

The language of Section 7106 thus seems to establish a hierarchy, in which the terms of subsection (b) hold priority over those of subsection (a). Department of Defense, Army and Air Force Exchange Service v. FLRA, 659 F.2d 1140,1153 (D.C. Cir. 1981), , AFGE v. FLRA, 455 U.S. 945 (1982). In AFGE Local 1923 v. FLRA, 819 F.2d 306, 308 (D.C. Cir. 1987), the D.C. Circuit similarly noted that while, standing alone, subsection (a) "would relieve an employer from any duty to bargain over union proposals whose incorporation in a collective bargaining agreement would affect the enumerated managerial rights, subsection (b) . . . Lists certain kinds of proposals that would affect these managerial rights, yet remain proper subjects of collective bargaining."

The language of Section 7106 thus clearly indicates that, as long as a matter may be negotiated under subsection (b)(1), the fact that the matter is also covered under subsection (a) cannot serve to invalidate the negotiated provision. As noted by the court in ACT, "this relationship between subsections (a) and (b) of

[Section] 7106 could not have been expressed more clearly in the language of the [Statute].” 22 F.3d at 1155.

To read the statute any other way would write Section 7106(b)(1) out of the Statute, as this example from ACT illustrates:

Subsection (b)(1), for example, permits bargaining about “the numbers . . . of employees . . . Assigned to any organizational subdivision, work project, or tour of duty,” while subsection (a) enumerates management rights as including the right “to determine the . . . Number of employees . . . [And] to assign work.” According to the FLRA’s interpretation, the number of employees and their assignment would fall beyond the permissible scope of bargaining, despite the explicit authority to bargain set out in subsection (b)(1). The Agency and the FLRA have not presented any reason to accept a logic which would effectively expunge significant passages from subsection (b)(1) of the [Statute]. See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (applying principle of statutory construction “to give effect, if possible, to every clause and word of a statute” {internal quotes and citation omitted}). Therefore, we must reject outright the extraordinary twist on simple words proposed by the FLRA’s reading of the [Statute]. 22 F.3d at 1155.

Since effect must be given every provision of the statute, matters covered by Section 7106(b)(1) MAY be negotiated, IF THE AGENCY ELECTS TO DO SO, even though those matters are also covered by Section 7106(a). It is clear that Congress intended to give the agencies the power in subsection (b)(1) to choose to negotiate over otherwise prohibited subjects of bargaining. If an agency chooses NOT TO ELECT to negotiate over a (b)(1) subject, the subject remains prohibited and non-negotiable.

2. Legislative history

However, it is also important to remember that when interpreting a statute, the intent of Congress is all-important. United States v. N.E. Rosenblum Truck Lines, 319 U.S. 50, 625 S.Ct. 445 (1942).

As a result, it has been found appropriate to resort to the legislative history of a statute no matter how clear the words appear upon initial examination. Harrison v. Northern Trust Co., 317 U.S. 675, 59 S.Ct. 356 (1943)

Where plain language of a statute appears to resolve a question, resort to the legislative history should be limited to ascertaining whether that resolution is consistent with any clearly expressed legislative intention that would cause the tribunal interpreting the statute to question the general presumption that the Congress expresses itself through the language it chooses. Immigration & Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 107 S.Ct. 1207 (1987).

The obvious confusion with the proper interpretation of the relationship between Sections 7106(a) and 7106(b)(1) provides even greater

reason to resort to the clear expression of the Congressional intent which underlies the enactment of the two sections in order to properly define their relationship.

All interpretations and decisions involving the FSLMRS are to be made with an effective and efficient government as a primary concern. 5 U.S.C. Section 7101(b). Thus, the language of the FSLMRS must be construed in light of the paramount right of the public to as effective and efficient a government as possible. Conf. Rep. No. 95-1717, Page 153/154 (October 5, 1978).

It would require legislative history of exceptional clarity to induce anyone to adopt an interpretation which, as described above, would deprive subsection (b)(1) of virtually all effect. Here, most of the legislative history consists of the "usual conflicting generalities, providing assurance, if they are all to be taken at face value, that the proposed bill offers the best of both worlds, fully preserving the prerogatives of federal managers (statements upon which the Authority justly relies) while yet fully promoting collective bargaining on all significant issues (statements which the Authority undrestandably tends to ignore). " AFGE Local 2782 v. FLRA, 702 F.2d 1183, 1187 (D.C. Cir. 1983). The portions of legislative history most precisely directed to the point at issue here

support the interpretation I have adopted.

“I want to assure my colleagues that Title VII takes a middle ground-- retaining management rights which are necessary to function with flexibility and effectiveness.” Comments of Bill Sponsor Clay, see 124 Cong. Rec. H 8466 (August 11, 1978).

It is clear that the members of the Congress that passed the FSLMRS intended that bargaining over the areas expressly reserved to the management of the agencies was prohibited, unless the area also was included as part as Section 7106(b)(1) and the agency elected to negotiate over the matter.

Comments of Congressman Udall that his amendment strengthens the reserved management rights to be enumerated in the statute while emphasizing that the reserved rights should be treated narrowly as an exception to the general obligation to bargain over conditions of employment. He goes on to explain that his amendment adds a new subsection (b)(1) under Section 7106 of the bill, and explains that subsection (b)(1) is intended to “. . . Provide that nothing in the management’s rights section shall preclude any agency and any labor organization from negotiating, AT THE ELECTION OF THE AGENCY (emphasis added), on the numbers, types, and grades of employees assigned to any organizational

subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. 124 Cong. Rec. H 9634 (September 13, 1978).

Comments of Congressman Udall where he makes it clear that matters which affect the retained rights in the management's rights section are excepted from the obligation to bargain. That is, that they are properly seen as barred from bargaining. He stated that one purpose of the management's rights provision was to "preserve the ultimate exercise of the management functions listed. As such, the management rights clause operates as an exception to the general obligation to bargain in good faith over conditions of employment." 124 Cong. Rec. H 9648-49 (September 13, 1978). Again, though, while this ultimate exercise of management functions is preserved and reserved to management, they CAN elect to bargain over 7106(b)(1) matters if they so choose.

Congressman Derwinski went even further, making it clear that not only was the right to make decisions over the areas expressly reserved in Section 7106(a) exclusively that of management, but that the right to make decisions about the areas referred in Section 7106(b)(1) was also reserved exclusively to management. In advocating Senator Udall's substitute amendment, which was eventually enacted with only minor changes, Congressman Derwinski

stated that "under this substitute, an agency's mission, budget, organization and internal security practices would remain beyond the scope of collective bargaining, as would the wages, fringe benefits and numbers of employees in an agency; the numbers, types and grades of positions or employees assigned to an organizational unit, work project or tour of duty; or the technology of performing the work of such projects." 124 Cong. Rec. H 9639 (September 13, 1978).

These rights under Sections 7106(a) and 7106(b)(1) are reserved exclusively to management, and they exclusively can decide whether or not to bargain over a permissive subject under Section 7106(b)(1).

Udall was not entirely correct. Section 12(b)(1) of EO 11491 was drafted by the NLRB - 7106(b)(1).

In an exchange between Congressmen Ford, Edwards, and Udall regarding the meaning and effect of section 7106(b)(1), Congressman Edwards asked why the provision regarding the obligation to bargain over numbers, types and grades, and methods and means was separated from the basic reservation of management rights, Congressman Ford responded, "I should say that the splitting of the two parts has no substantive effect on the status quo. . . . Not only are they under no obligation to bargain. . . . An agency can begin to bargain, change it's mind and remove the subject from further bargaining." Mr. Udall accepted these comments. 124 Cong. Rec. H 9646 (September 13, 1978). Once again, the

agency is under no obligation to bargain 7106(b)(1) matters, but it can if it so chooses. And under the dictates of the new Executive Order, they have opted to negotiate over all 7106(b)(1) matters.

*- Why make this decision?
Has nothing to do with
regulatory decisions.*

It is clear that Congress intended that there be no bargaining over decisions affecting the areas referenced in Section 7106(a), unless the decision also concerned an area referenced in Section 7106(b)(1) and the agency elected to bargain about it. Thus, if Section 7106(b)(1) is read to permit bargaining (where the agency elects to bargain) over proposals which also directly affect the exercise of reserved rights under Section 7106(a), it would be consistent with the clear expression of Congressional intent. Congress intended to give agencies discretion as to whether or not they would bargain over 7106(b)(1) matters. The agency has this discretion, and has decided to bargain over all 7106(b)(1) matters.

*What
does that mean?
What a queer
thing
to say*

The framers intentionally added the phrase, "at the election of the agency," to subsection 7106(b)(1). This phrase was added to give management the flexibility to bargain over matters which would otherwise be deemed nonnegotiable as a management right. Therefore, based on the addition of this language, Congress viewed the subsection (b)(1) subjects as an exception to management rights, but only when management elected to bargain over those

matters.

The statute suggests that the obligation to undertake bargaining over these (b)(1) topics is left solely within the discretion of management because they are so closely related to the actual exercise of management rights. Thus, should management elect to voluntarily negotiate (b)(1) matters, those matters, based on that election, are an exception to the subsection (a) prohibition on bargaining. Before exercising its option to negotiate over a (b)(1) proposal, an agency determines whether or not the negotiations are in its best interests. By making this a permissive topic, Congress ensured that management rights could be protected as felt necessary without causing the negotiations process to suffer from slavish adherence to 7106(a).

what test?
The test and legislative history of the statute are sufficiently clear to overcome the deference we would normally accord an agency's interpretation of its organic statute. *FLRF I assume you mean*
Process Gas Consumers Group v. United States Department of Agriculture, 694 F.2d 778, 791-92 (D.C. Cir. 1982) (en banc).

3. ACT is consistent with prior caselaw.

This position is also consistent with the courts' and the Authority's

treatment of matters negotiable under Section 7106(b)(3) and 7106(b)(2). In AFGE Local 2782, Judge Scalia found that bargaining proposals which address matters listed in Section 7106(a) may still be negotiable as "appropriate arrangements" within the meaning of Section 7106(b)(3). The Authority adopted the rationale of the court in AFGE Local 2782 as its own in NAGE Local R14-87 and Kansas Army National Guard, 21 FLRA 24, 26 (1986), and has steadfastly held to this position ever since. AFGE Local 3258 and U.S. Dep't of HUD, Boston Regional Office, 48 FLRA 232, 234-37 (1993) (proposal requiring fair and equitable redistribution of additional work resulting from a new mail metering system interfered with agency's Section 7106(a)(2)(B) right to assign work but held negotiable as an appropriate arrangement); AFGE Local 3172 and U.S. Dep't of HHS, SSA, San Jose District, San Jose, Cal., 46 FLRA 322, 329-32 (1992) (provision allowing reassigned employee a first right of refusal for vacancy in former office interfered with agency's Section 7106(a)(2)(C) right to fill vacancies but held negotiable as an appropriate arrangement); AFGE Local 4041 and U.S. Dep't of HHS, SSA, Albuquerque Teleservice Center, Albuquerque, N.M., 45 FLRA 3, 5-10 (1992) (provision requiring training for incumbent of new position interfered with agency's Section 7106(a)(2)(B) right to assign work but held negotiable as an appropriate arrangement).

These cases recognize that any management right in Section 7106(a) is subordinate under the introductory language in both Section 7106(a) and (b) to the union's right in Section 7106(b)(3) to negotiate appropriate arrangements for adversely affected employees. This analysis is equally compelling for matters covered by Section 7106 (a) when those matters may be negotiated under Section 7106(b)(1).

Even though they may stay the exercise of a management right, matters have also been found negotiable as procedures within the meaning of Section 7106(b)(2) IFPTE Local 1 and U.S. Dep't of the Navy, Norfolk Naval Shipyard, Portsmouth, Va., 49 FLRA 225, 271-75 (1994); AFGE Dep't of Education Council of Locals and U.S. Dep't of Education, 36 FLRA 130, 131-134 (1990); and AFGE Local 1999 and AAFES, Dix-McGuire Exchange, Fort Dix, N.J., 2 FLRA 153, 153-58 (1979), Department of Defense, Army and Air Force Exchange Service, supra [all holding that stays of disciplinary actions pending completion of grievance and/or appellate procedures are negotiable as "procedures" even though the proposals would serve to delay exercise of management's right to discipline under Section 7106(a)(2)(A)]. By recognizing that procedures may be negotiated that restrict exercise of management rights under Section 7106(a), the Authority similarly indicated that

Section 7106(a) management rights are subordinate to the provisions of Section 7106(b).

Subsection (b)(1) differs from subsections (b)(2) and (b)(3) in that subsection (b)(1) subjects remain off limits to the parties as prohibited subjects ***unless the agency wishes to bargain over them.*** It is up to the agency to decide whether or not a (b)(1) subject sufficiently interferes with the rights reserved in Section 7106(a). If there is sufficient interference, they should opt not to bargain. But once they decide to bargain, they cannot suddenly say, down the road, "Whoops, sorry, this matter interferes with our reserved rights in Section 7106(a)." As the D.C. Circuit in ACT found, subsection (b) "indisputably" operates as an exception to Section 7106(a). ACT at 1155.

As mentioned earlier, the Authority asked what is the proper meaning to be accorded the phrase in section 7106(b) stating that "Nothing in this section shall preclude any agency and any labor organization from negotiating--"? For example, they ask, is it a "clarification" or a "limitation," a distinction raised by the court in AFGE, Local 2782 v. FLRA, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983).

In that case, then Judge Scalia explained the distinction:

The Authority has perhaps been misled by a confusing duplicity in

and reach agreement at the level of recognition of no agreement required for any form of subject to permanent

subsection (b). Statutory or contractual provisions that begin "Nothing in this section shall preclude. . ." serves two distinct purposes, which are often difficult to distinguish. Sometimes they are intended merely to *clarify* rather than *limit* the prior provisions. For example, a provision saying that "red is included" may be followed by a statement that "nothing in this section shall apply to dark pink." When this clarifying usage is employed, something which comes within the proviso cannot simultaneously come within the principal provision. The two categories are mutually exclusive-- the color is *either* red *or* dark pink. In other instances, however, the proviso is used genuinely to alter what precedes: "Nothing in this section shall apply to red tint No. 43." Under this usage, the excepted item is included *both* within the principal provision *and* (in order to accept it) within the proviso--red tint No. 43 *is* red. In our view, paragraph (b)(2) --as permissibly interpreted by the Authority--is a proviso of the former sort; it requires a conventional dichotomy between substance {governed by subsection (a)} and procedure {governed by paragraph (b)(2)}. Paragraph (b)(3), however, does not lend itself to such interpretation. There is no way to regard "appropriate arrangements for employees adversely affected" as a *clarification* of the scope of management prerogatives. "Appropriate arrangements" (unlike "procedures") is a meaningless clarification--and one that would not have to be limited to "employees adversely affected" as opposed to *all* employees. The conclusion is unavoidable that what was intended was an *exception* to the otherwise governing management prerogative requirements of subsection (a). This is in accord with standard labor-management provisions in the private sector, which curtail normal management hiring prerogatives with regard to employees who have been demoted. . . . It also explains the broad limiting word "appropriate, which . . . Permits the Authority to place needful limitations upon the sweep of the exception. The Authority is incorrect, therefore, in its conclusion that proof of coverage by subsection (a) is automatically proof of nonexemption under subsection (b). *Id.* At 1186-87.

Judge Scalia held that Section 7106(b)(2) could be "permissibly interpreted" by the Authority to be a "clarification" of Section 7106(a) because of

“a conventional dichotomy between substance {governed by subsection (a)} and procedure {governed by paragraph (b)(2)}.” Id. In other words, the term “procedure” can be given a meaning that is “mutually exclusive” from “substance.”

Judge Scalia, because the matters set forth in Section 7106(a) are substantive, found that the introductory phrase to subsection (b) is a “clarification” of Section 7106 (a) as that introductory phrase applies to subsection (b)(2). By contrast, he found that to treat “appropriate arrangements” in Section 7106(b)(3) as a “clarification” would be “meaningless” and that the conclusion is unavoidable that what was intended in Section 7106(b)(3) was an exception to the otherwise governing management prerogative requirements of subsection (a).” As an illustration of what was intended in Section 7106(b)(3), he analogized the meaning of Section 7106(b)(3) to the standard practice in the private sector of curtailing normal management hiring prerogatives with regard to employees who have been demoted.

Thus, the language of Section 7106(b)(3) was found to be a “limitation” on management prerogatives in Section 7106(a) because “arrangements” is a substantive term that cannot be deemed “mutually exclusive” from the

"substance" provisions in Section 7106(a). The court's holding that Section 7106(b)(2) was "permissibly interpreted" as a "clarification" of Section 7106(a) rather than a "limitation" upon Section 7106(a) was not because of the introductory language to Section 7106(b) as such, but because the word "procedures" in subsection (b)(2) can be "permissibly interpreted" as being "mutually exclusive" from the "substance" provisions of Section 7106(a).

The matters set forth in Section 7106(b)(1), as with the matters set forth in Section 7106(b)(3), are matters of substance that cannot be deemed to be "mutually exclusive" of the matters set forth in Section 7106(a). For example, the D.C. Circuit in ACT noted that subsection (b)(1) permits bargaining about "the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" while Section 7106(a), "subject to subsection (b)," enumerates, as management rights, the right to determine the "number of employees" [subsection (a)(1)] and to "assign work" [subsection (a)(2)(B)]. ACT at 1155. The overlap in the language in these subsections on the number of employees assigned to work projects, such as the number of mechanics assigned to repair an aircraft or the number of custodial workers assigned to mop the floors of a hospital ward, could not be clearer. Since the terms are not "mutually exclusive," Section 7106(b)(1) cannot be a "clarification" as that term

is used in AFGE Local 2782. Section 7106(b)(1) can only operate as a "limitation" on the reach of Section 7106(a). AFGE Council of Locals No. 214 v. FLRA, 798 F.2d 1525, 1531, n. 8 (D.C. Cir. 1986) ("Section 7106(b)(1) serves only to *limit* the reach of Section 7106(a)").

In ACT, even the Authority recognized that the provisions of subsections (a) and (b)(1) are not mutually exclusive. In National Guard Bureau, Alexandria, Va., 45 FLRA 506 (1992), the Authority held that language permitting national guard technicians to wear civilian uniforms in lieu of a military uniform was an infringement on management's Section 7106(a)(1) right to determine its internal security practices. 45 FLRA at 516-519. At the same time, the FLRA also recognized that a requirement to wear the military uniform is a "methods and means of performing work" within the meaning of Section 7106(b)(1). 45 FLRA at 520. Thus, as to the wearing of the military uniform, the FLRA has already found that the language of Section 7106(a) and of Section 7106(b)(1) is not "mutually exclusive." This is even further demonstration of the fact that Section 7106(b)(1) must operate as a "limitation" on the scope of Section 7106(a) instead of a "clarification" as those terms were used by Judge Scalia.

Thus, applying Judge Scalia's analysis to subsection (b)(1), one would have

to conclude that because (b)(1) confers substantive rights, (b)(1) must be a limitation on (a), which also confers substantive rights. The Court's consideration of (b)(3) as a substantive right and thus a limitation on the sweep of (a) only helps confirm that (b)(1) also serves as a limitation on (a) as opposed to a clarification. Clearly, subsection (b)(1) is more substantive than subsection (b)(3) and thus must be considered a limitation on (a).

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E. CONCLUSION

In summary, it is not the ACT decision which has created uncertainty, and more significantly, a disincentive to parties to change the nature of their labor relations... and to bargain over subsection (b)(1) matters," as stated by the General Counsel. Rather, it is the Executive Order itself, and the lack of foresight in its drafting and publication, that has created this mess.

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discretion? - 1/27/11*

It is clear from the wording of the statute, legislative history, and caselaw that management decisions which Congress barred from negotiations under Section 7106(a)(1) **are** rendered negotiable if they also implicate the decisions reserved to management under Section 7106(b)(1) AND an agency elects to negotiate the matter.

z

It is up to the agency to decide whether or not a (b)(1) subject sufficiently interfered with the rights reserved in Section 7106(a). It is their right to do so and is discretionary power vested in the agency by Congress. If there is sufficient interference, they should opt not to bargain. This statute gives management the flexibility to function with control and effectiveness.

Section 7106(b)(1) is an exception to 7106(a) if, and only if, an agency wishes to make it so. And with this Executive Order, President Clinton, whether he intended to do so or not, has made a choice, and the only possible consequence of that choice is that section 7106(b)(1) will always be an exception to 7106(a) when the two overlap, at least for as long as the Executive Order is in effect. So while Congress probably never expected the agency to give away its discretion in (b)(1), the agency did, and it is consistent with the flexibility Congress wished to vest in management. Congress gave management the right to waive its management rights by enacting subsection (b)(1). This right cannot be vindicated unless subsection (b)(1) is viewed as an exception to subsection (a).

F. Recommendation

We could save the Executive Order and, through some sort of tortured reasoning, find that during negotiation of a 7106(b)(1) proposal, if the proposal

also directly or excessively interferes with a 7106(a) right, the agency should be seen as operating within its statutory rights if it declines to negotiate over the proposal because of the 7106(a) impact. We could do something to preserve the management rights in 7106(a), which the Executive Order has unintentionally given away. It certainly is true that Congress would not have wanted the management rights outlined in 7106(a) to be as totally eroded as they are by the impact of the Executive Order on the statute.

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if the proviso that "nothing shall preclude bargaining on (b)(1) proposals" is interpreted to be a "limiting" proviso, as argued earlier in this paper, then subsection (b)(1) subjects, like arrangements under subsection (b)(3), would be viewed as something different and apart from the actual exercise of a management right. Thus, one option recommended by the General Counsel in his 17 April 1995 memorandum is to apply current precedent in interpreting subsection (b)(3) to subsection (b)(1), to apply the "excessive interference" test to subsection (b)(1) matters when they also are encompassed under subsection (a).

"The framers intentionally added the phrase, "at the election of the agency," to subsection 7106(b)(1). As noted above in the discussion of the legislative history, the phrase was added to give management the flexibility to bargain over matters which would otherwise be deemed non-negotiable as a management right. Therefore, based on the addition of this language, it

could be argued that Congress viewed the subsection (b)(1) subjects as an exception to management rights, analogous to arrangements, but only when management elected to bargain over those matters. The Statute suggests that the obligation to undertake bargaining over these (b)(1) topics is left solely within the discretion of management because they are so closely related to the actual exercise of management rights. Therefore, it could be argued that should management elect to voluntarily negotiate (b)(1) matters, those matters, based on that election, are an exception to the subsection (a) prohibition on bargaining, similar to negotiating over (b)(3) arrangements.

In sum, the Authority, using the D.C. Circuit approach and consistent with its own precedent, may treat subsection (b)(1) matters in the same manner as it treats either subsection (b)(2) or (3) subjects of bargaining. Thus, the Statute could be read that if an agency elects to bargain over a subsection (b)(1) matter which also is encompassed under subsection (a), the agency may do so if the bargaining does not either directly interfere with the exercise of the subsection (a) right {the (b)(2) analogy} or excessively interfere {the (b)(3) analogy}. " p. 14-15.

what good?
The Court should not do that, though. Since the adjective "appropriate" is omitted from subsection (b)(1), the subsection (b)(3) "excessive interference" test is not applicable. The statute is clear- if any agency elects to do so, it can bargain over (b)(1) matters. The agency does not **have to** if it does not want to. The agency should analyze the proposal, and if it directly interferes or excessively interferes with the management rights outlined in 7106(a), they should not opt to bargain.

The matters in (b)(2) and (b)(3) are matters the agency **has** to bargain over,

unlike (b)(1). So it makes sense that the courts had to step in and protect management a bit with the respective "direct" and "excessive" interference tests. Under (b)(1), though, management is under no obligation to bargain, and if they make a mistake and opt to bargain on a proposal that interferes with the management rights outlined in 7106(a), they cannot come running to the courts begging for protection. We should not interpret and apply a statute incorrectly to curb the effects of an ill-advised Executive Order.

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The solution is simple. Either rescind the Executive Order, or revise it. The federal government created this problem, and only they can rid us of it. And until they do, this unfortunate situation will remain as is. The revision should make the language advisory, rather than mandatory. Rather than stating that management may no longer refuse to negotiate over matters set forth in Section 7106(b)(1), it should state in advisory terms that management should attempt to negotiate over the subjects set forth in Section 7106(b)(1) unless they excessively interfere with the rights set out in Section 7106(a).

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This would leave intact the statutory discretion Congress intended management to have, and at the same time would be a proclamation by management that they sincerely desire to enter into improved consensual and

Recommendation...

collaborative relationships with their employees' elected representatives. It will at least be a start, and if a certain local agency decides to not adhere to the spirit and advice of the Executive Order and hide behind (b)(1)'s discretionary protection when not bargaining over a (b)(1) matters that does not interfere with any (a) rights, well, that is a choice Congress intended to give management, and such a situation would be the federal government's problem, and noone else's.

Specimens

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