

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 05-5436, 05-5437

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

NATIONAL TREASURY EMPLOYEES UNION, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

MICHAEL CHERTOFF, SECRETARY,
DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNION-APPELLEES

STATEMENT OF THE ISSUES

1. Whether regulations establishing a human resources management system for the Department of Homeland Security fail to "ensure the right of employees to bargain collectively" as required by the Homeland Security Act because:

(a) as the district court held, they impermissibly authorize managers and supervisors to unilaterally abrogate collective bargaining agreements;

(b) they allow DHS to unilaterally take matters off the bargaining table by issuing rules and regulations or declaring

that such action "may be necessary" for the agency to accomplish its mission;

(c) they eliminate virtually all negotiations over daily working conditions, including related impact and implementation bargaining, restricting negotiations to employee-specific personnel matters such as hiring, firing and promotions; and

(d) they invest a management-controlled body with the authority to resolve bargaining disputes without meaningful third party review.

2. Whether DHS and OPM lack the statutory authority to amend 5 U.S.C. § 7105(a)(1), which limits the jurisdiction of the Federal Labor Relations Authority to matters arising under Chapter 71 of Title 5, by assigning the FLRA to review decisions of the Homeland Security Labor Relations Board and adjudicate certain unfair labor practices arising under the regulations.

3. Whether the district court correctly held that a regulation precluding the Merit Systems Protection Board and arbitrators from modifying unreasonable disciplinary penalties unless they are "wholly without justification" is not "designed to further the fair, efficient, and expeditious resolution" of disciplinary matters, as required by the HSA.

4. Whether the district court erred in holding that regulations assigning an intermediate appellate function to the MSPB, reviewing decisions of an internal DHS board, do not

contravene 5 U.S.C § 1204(a), a provision by which DHS remains bound.

5. Whether the district court correctly held that the particular labor relations regulations it invalidated are not severable from the remainder of the labor relations subpart.

STATUTES AND REGULATIONS

All applicable statutes and regulations are set forth as an addendum to the Opening Brief for the Appellants.

STATEMENT OF THE CASE

I. NATURE OF THE PROCEEDINGS

This case arose out of a lawsuit filed by five federal-sector labor unions ("the Unions") to challenge final regulations establishing a new human resources management system ("HR system") at the Department of Homeland Security ("DHS").¹ The regulations were promulgated by the Secretary of DHS and the Director of the Office of Personnel Management (collectively "the Agencies") pursuant to the Homeland Security Act ("HSA" or "the Act"), Pub. L. No. 107-296, 116 Stat. 2230 (2002). See 70 Fed. Reg. 5272-5347 (Feb. 1, 2005).

In a decision dated August 12, 2005 (JA 129-166), the district court (per Judge Rosemary Collyer) granted the Unions'

¹ The Unions are the National Treasury Employees Union; the American Federation of Government Employees, AFL-CIO; the National Federation of Federal Employees, FD-1, IAMAW; the National Association of Agriculture Employees; and the Metal Trades Department, AFL-CIO.

motion for summary judgment in part, holding that: (1) critical portions of the labor relations subpart of the regulations (Subpart E) were inconsistent with the HSA's requirement that the new HR system ensure employees' rights to bargain collectively; (2) the Agencies exceeded their statutory authority under the HSA by conscripting an independent agency, the Federal Labor Relations Authority ("FLRA"), to serve as an intermediate appellate panel, reviewing the decisions of the newly created Homeland Security Labor Relations Board ("HSLRB"); and (3) the penalty mitigation regulation (5 C.F.R. § 9701.706(k)(6)) violated the HSA because it was not designed to further the "fair, efficient, and expeditious" resolution of employee disciplinary cases. The court granted the government's motion to dismiss Count 4 of the Unions' complaint, which concerned regulatory provisions addressing the role of the Merit Systems Protection Board ("MSPB") under the new system.

The court enjoined the Agencies from implementing either Subpart E or the penalty mitigation standard. On October 7, 2005, it denied the government's motion to narrow the scope of the injunction with respect to Subpart E, holding that the unlawful portions of Subpart E were not severable from the whole of that part. JA 167-176.

The case is before this Court on appeal by the government and cross-appeal by the Unions.

II. STATEMENT OF FACTS

A. The Homeland Security Act

The HSA was enacted in November 2002. The Act established a new cabinet level agency (DHS), through the merger of 22 existing agencies and portions of others that had previously been spread across the federal government. JA 134.

The HSA (at 5 U.S.C. § 9701(a)) authorized the Agencies to create a new HR system for DHS, through jointly issued regulations developed in collaboration with DHS labor organizations. Congress granted the Agencies authority to fashion the HR system "notwithstanding any other provision of" 5 U.S.C. Part III.²

Congress limited the scope of the Agencies' discretion to create a new HR system in a number of important respects. For example, while the Agencies are not required to comply with 5 U.S.C. Chapter 71, which codifies the Federal Service Labor-Management Relations Statute ("FSLMRS" or "the Labor Statute"), the HSA requires that the new system contain provisions to "ensure that employees may organize, bargain collectively, and participate through representatives of their own choosing in decisions which affect them, subject to any exclusion from

² Part III of Title 5 contains the provisions that ordinarily govern performance management, pay, employee discipline, employee rights of appeal, and labor-management relations in the executive branch. See 5 U.S.C. §§ 2101-9701.

coverage or limitation on negotiability established by law." 5 U.S.C. § 9701(b)(4).

Similarly, the HSA gives the Secretary and Director the authority to create a system that departs from the employee appeals procedures of 5 U.S.C. Chapter 77. See 5 U.S.C. § 9701(a), (f). The Act declares, however, that "it is the sense of Congress that employees are entitled to fair treatment in any appeals that they bring in decisions in relation to their employment." Id. § 9701(f)(1)(A). It stipulates, therefore, that any modifications of statutory "procedures" under Chapter 77 must be designed to "further the fair, efficient, and expeditious resolution of matters involving the employees of the Department."³ 5 U.S.C. § 9701(f)(2)(C).

B. The Regulations

The Agencies promulgated their final regulations establishing the new HR system on February 1, 2005. See 70 Fed. Reg. 5272-5347. At issue in this case are regulations appearing

³ The HSA contains other important limits upon the scope of the Agencies' discretion to fashion a new system that are not directly implicated in this case. See 5 U.S.C. § 9701. It specifies that any new HR system must not waive, modify, or otherwise affect "the public employment principles of merit and fitness set forth in section 2301" (of Title 5). See 5 U.S.C. § 9701(b)(3)(A). In addition, the Agencies may not waive, modify or otherwise affect "any provision of section 2302, relating to prohibited personnel practices" (5 U.S.C. § 9701(b)(3)(B)), as well as any provision of law referred to in section 2302(b)(1), (8), and (9), or "any rule or regulation prescribed under any [such] provision[s] of law" (5 U.S.C. § 9701(b)(3)).

in Subpart E, which governs labor relations at DHS, and Subpart G, which addresses employee appeals. See 70 Fed. Reg. at 5332-5341, 5344-5347.

1. **"Collective bargaining" under the regulations**

a. The new labor relations scheme substantially reduces the scope of matters subject to collective bargaining at DHS. Meaningful bargaining is limited to "employee-specific terms affecting discipline, discharge, and promotion." JA 157. Under the sweeping "management rights" clause, all so-called "operational" decisions are made non-negotiable, thereby committing the bulk of decisions concerning conditions of employment to management's exclusive discretion. See 5 C.F.R. § 9701.511. "Operational" matters include such bread-and-butter issues as work assignments and deployments. See 70 Fed. Reg. at 5307-08. Under Chapter 71, agencies are permitted to bargain over many of these subjects; under the regulations, bargaining over the numbers, types, and grades of employees assigned to any subdivision or work project, or tours of duty, or the technology, means or methods of doing work is now prohibited. Compare 5 C.F.R. § 9701.511(a)(2) with 5 U.S.C. § 7106(b)(1).

Under Chapter 71, agencies must also bargain over "procedures" that management will observe when exercising its enumerated management rights. See 5 U.S.C. § 7106(b)(2). The regulations relieve DHS of this obligation when it is exercising

its management rights on operational matters. Thus, DHS is only required to negotiate over procedures in a narrow category of matters involving the exercise of its rights to take personnel actions against employees, and even then, DHS has no duty to provide a union with advance notice of the exercise of its rights, as is required under the FSLMRS.⁴ See 5 C.F.R. § 9701.511(d). As a result, the so-called bargaining may take place after, rather than before, management takes action.

Chapter 71 also requires agencies to bargain over "appropriate arrangements" for employees adversely affected by the exercise of a management right. See 5 U.S.C. § 7106(b)(3). The regulations substantially limit the scope of bargaining over these issues, as well. See 5 C.F.R. § 9701.511(e). Thus, for operational rights, DHS is only required to bargain over appropriate arrangements where the exercise of the management right has "a significant and substantial impact" on the bargaining unit or on those employees in the bargaining unit affected by the exercise of the right and only when the action or event is expected to exceed 60 days. See 5 C.F.R. § 9701.511(e)(2)(i). Further, appropriate arrangements proposals must be limited to such matters as personal hardships and safety

⁴ See 5 C.F.R. § 9701.511(a)(3), (b). These "personnel actions" include laying off and retaining employees; suspending, removing, and reducing the grade, band, or pay of an employee; taking other disciplinary action; and selecting candidates to fill positions. 5 C.F.R. § 9701.511(a)(3).

measures, or reimbursement of out-of-pocket expenses. They may not include such important matters as "the routine assignment to specific duties, shifts, or work on a regular or overtime basis." 5 C.F.R. § 9701.511(e)(2)(i)-(ii).

These changes have a major practical impact on employees. Current bargaining agreements at DHS include provisions governing work and overtime assignments, details, geographic relocations and similar fundamental issues. SA 0004-0005.⁵ The negotiated provisions concerning such matters provide a basis for employees to predict the likelihood of having to work overtime, to make plans for off-duty family and social activity, and to have some influence over their work lives. Under the regulations, these matters are off the table entirely.

b. The regulations also provide a number of devices that allow managers and supervisors to escape even the narrow bargaining obligations concerning "employee-specific terms affecting discipline, discharge, and promotion," described above. A manager or supervisor can declare any decision or action "necessary to carry out the Department's mission," thereby foreclosing any bargaining over the matter at issue. 5 C.F.R. § 9701.511(a)(2). In addition, DHS may issue

⁵ "SA" refers to the Supplemental Appendix filed with this brief. The SA contains a single declaration with all of its attachments. The government inadvertently omitted some of the attachments when it reproduced this same declaration in the Joint Appendix ("JA").

implementing directives, agency regulations, or policies that render any covered matters non-negotiable. Id. § 9701.518(d)(1). Further, the HSLRB (whose composition and operation is described in greater detail at 11-12, below) is authorized to issue binding Department-wide opinions that remove additional matters from the bargaining table. Id. § 9701.509(b).

c. The regulations further authorize management to unilaterally abrogate validly negotiated collective bargaining agreements. The same regulations that allow management to take a matter off the bargaining table before an agreement is reached also allow managers to void agreements they have already entered. Thus, managers and supervisors, at every level, may take whatever actions they deem "necessary to carry out the Department's mission" without regard to collective bargaining agreements. 5 C.F.R. § 9701.511(a)(2). Moreover, collective bargaining agreements that conflict with subsequently issued implementing directives, agency regulations, or policies are rendered unenforceable. See 5 C.F.R. §§ 9701.506(a); 9701.515(d)(5).

2. **The use of an internal management board to investigate unfair labor practices and adjudicate bargaining disputes under the regulations**

The regulations entrust the resolution of bargaining disputes at DHS to a management-controlled adjudicative body:

the HSLRB. See 5 C.F.R. § 9701.508. The HSLRB is to consist of at least three members appointed by the DHS Secretary. Id. § 9701.508(a)(1). No independent confirmation of these members is required. See id. The Secretary may extend members' terms or reappoint them to new terms at his discretion. Id. He may remove HSLRB members for inefficiency, neglect of duty, or malfeasance in office, at his sole discretion. Id. § 9701.508(a)(2) (incorporating standard at 5 U.S.C. § 7104(b)). In addition, the Secretary may, at any time, appoint whatever number of additional members to the HSLRB he desires. Id. § 9701.508(a)(1), (d).

The HSLRB is responsible for resolving disputes within DHS concerning the scope of bargaining and the duty to bargain in good faith. Id. § 9701.509(a)(1). The HSLRB's members are also empowered to investigate unfair labor practice complaints related to bargaining. Id. Finally, the HSLRB will also resolve exceptions to arbitration awards involving the exercise of management rights and the duty to bargain.⁶ Id. § 9701.509(a)(3).

3. The role of the FLRA

The regulations designate the FLRA, an independent agency, to review decisions of the HSLRB, under a deferential appellate

⁶ The HSLRB is also to resolve disputes concerning requests for information and negotiations impasses. Id. § 9701.509(a)(2), (4).

standard. See 5 C.F.R. §§ 9701.508(h); 9701.510(a)(5). The FLRA is required to sustain the HSLRB's decision unless it is "(i) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; (ii) Based on error in applying the HSLRB's procedures that resulted in substantial prejudice to a party affecting the outcome; or (iii) Unsupported by substantial evidence." Id. § 9701.508(h)(1). On review, the FLRA is also required to apply the deferential rule of construction found at 5 C.F.R. § 9701.106(a)(2), which provides that "each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of [DHS'] mission, as defined by the Secretary," and that "the interpretation of the regulations . . . by DHS and OPM must be accorded great deference." Id.

The regulations impose strict timetables on the FLRA's decision-making, requiring it to issue a final decision within 30 days after completion of briefing, with one 15-day extension available in extraordinary cases. Id. § 9701.508(h)(2). If the FLRA fails to issue a decision within that timeframe, it is deemed to have upheld the decision of the HSLRB. Id. § 9701.508(h)(4). Judicial review of Authority decisions is available pursuant to 5 U.S.C. § 7123. 5 C.F.R. § 9701.508(h)(4).

Under the regulations, DHS will submit to the FLRA's existing authority under Chapter 71 to adjudicate the appropriateness of DHS bargaining units, to supervise elections, and to adjudicate unfair labor practice charges and exceptions to arbitration awards that do not involve management rights or the duty to bargain. 5 C.F.R. § 9701.510(a)(1)-(4). The regulations provide, however, that the HSLRB may strip the FLRA of jurisdiction over such matters whenever, in its unreviewable judgment, homeland security is "affect[ed]." Id. § 9701.509(a)(7), (b).

4. Employee appeals

The regulations severely restrict the authority of the MSPB and arbitrators to mitigate unreasonable penalties. Under the regulations, "an arbitrator, adjudicator, or the MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification." 5 C.F.R. § 9701.706(k)(6). The preamble to the regulations acknowledges that "[t]his standard is "significantly more limited than MSPB's current mitigation authority." 70 Fed. Reg. at 5281.

The regulations also establish a set of "mandatory removal offenses" which are to be adjudicated by an internal Mandatory Removal Panel (MRP). 5 C.F.R. § 9701.707. The MSPB is directed to review MRP decisions applying the same deferential standard

that the FLRA is to apply to HSLRB decisions. Id. § 9701.707(c)(1). Judicial review of the MSPB's decision is then available through 5 U.S.C. § 7703. See 5 C.F.R. § 9701.707(c)(4).

III. DECISIONS BELOW

This case was before the district court on the Unions' motion for summary judgment and the government's motion to dismiss on both jurisdictional and substantive grounds. The court granted in part and denied in part each parties' motion.

A. Justiciability

As an initial matter, the district court rejected the government's arguments that the Unions lacked standing and/or that some of their claims were not ripe for review.⁷ JA 145-50. The court described the Unions' injuries as "real" and "immediate" because "the Regulations would erase any contract terms that are inconsistent with the Regulations, directives, or policies, now and in the future." JA 146, 147. In addition, they would allow DHS managers and supervisors to declare any part of any agreement null and void. JA 146. The Unions "[c]ertainly" have standing to complain "about these intended

⁷ The court also rejected the Agencies' contention that the procedures set forth in the Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 (1978), precluded the Unions from filing suit under the Administrative Procedure Act to challenge the regulations. the government has abandoned this argument on appeal.

and inevitable regulatory effects, prior to implementation." JA 147.

With respect to the Unions' MSPB claims, the court held that the Unions, as "regular litigants before MSPB on behalf of DHS employees," have "immediate standing" to complain of the "material change" in the penalty mitigation standard imposed by the regulations. JA 149. Further, the changes in the MSPB's jurisdiction and procedures "inevitably impact the Plaintiff Unions and their members and are legitimately subject to pre-enforcement APA review." Id. (citing OCONUS DOD Employee Rotation Action Group v. Cohen, 144 F. Supp. 2d 1, 7 (D.D.C. 2000)). The court held that the Unions' claims involved "pure questions of law that are ripe for decision now."⁸ Id.

B. Count 1 of the Unions' Complaint

The district court granted summary judgment to the Unions on count 1 of their complaint, ruling that the regulations were inconsistent with the HSA because they did not ensure that employees may bargain collectively. Specifically, the court found that the regulations fell short of statutory requirements because the bargaining they require does not lead to an enforceable contract. JA 153. It so held because the Agencies authorized DHS managers and supervisors to disregard negotiated

⁸ The court also rejected the government's justiciability arguments on the Unions' other claims, and the government does not press those arguments here.

agreements whenever they believe it "may be necessary to carry out the Department's mission," and they further provided that implementing directives, regulations, or policies would trump such agreements. Id. A system that does not provide for binding agreements, the court held, does not ensure that employees may bargain collectively. Id.

The court dismissed other aspects of count 1, which challenged the severely restricted scope of matters subject to bargaining under the regulations and the establishment of a management-controlled board (the HSLRB) to adjudicate bargaining disputes. Though noting that the "eradication of virtually all bargaining over 'operational' issues will have a dramatic effect upon the work lives of the employees the plaintiffs represent" (JA 157), the court concluded that the Agencies had acted within their statutory authority to establish "new metes and bounds for collective bargaining at DHS." Id. Similarly, it noted that Congress had previously concluded that "a collective bargaining system has more credibility when truly neutral outsiders adjudicate disputes," but concluded that the Agencies' "thin" reasoning for employing a management-controlled board instead was entitled to deference under Chevron. Id. at 42.

C. Count 2 of the Unions' Complaint

The district court granted the Unions summary judgment in part on count 2 of their complaint, concerning the role of the

FLRA. It ruled that the Agencies could modify provisions of law governing the FLRA's jurisdiction, but that they lacked statutory authority to "fundamentally transform" its functions. JA 160. It held that the regulations fundamentally changed the FLRA by setting it up as an appellate body applying a deferential standard of review to HSLRB decisions and by "substantially redefin[ing]" DHS' bargaining obligations so that the matters the FLRA would review "no longer fall 'under' or 'in' Chapter 71." Id. The court held that these regulations "work fundamental changes" to the FLRA and, therefore, are invalid. JA 160.

D. Count 3 of the Unions' Complaint

The court granted summary judgment to the Unions on count 3 of their complaint, holding that the regulations' new penalty mitigation standard did not "further the fair, efficient, and expeditious resolution of matters involving Department employees" and therefore violated 5 U.S.C. § 9701(f)(2)(C). The court noted the Agencies' admission that the regulation was intended to narrow the circumstances in which the MSPB could mitigate a penalty. JA 160 (citing 5 C.F.R. § 9701.706(k)(6)). The effect of the regulation, the court held, was to permit DHS to "discipline or discharge employees without effective recourse," in violation of the HSA. Id.

E. Count 4 of the Unions' Complaint

On the last count, the district court held that the Agencies had the statutory authority to assign an intermediate appellate role to the MSPB in cases involving mandatory removal offenses. JA 165. Though conceding that "the question is not entirely clear," the court held that the Agencies were due Chevron deference in their interpretation of the HSA to permit this result. Id.

F. Denial of the Government's Motion to Narrow the Injunction

Following the court's decision on the motions for summary judgment and to dismiss, the government filed a motion requesting that the court narrow the scope of its injunction against Subpart E to a few specific regulations. The Unions opposed the motion, contending that the invalidated portions of the labor relations scheme were not severable from Subpart E as a whole. The court agreed and reaffirmed its injunction blocking the Agencies from implementing Subpart E and 5 C.F.R. § 9701.706(k)(6). JA 167-76.

SUMMARY OF ARGUMENT

I. The district court correctly held that the new regulations at Subpart E, establishing a labor relations system at DHS, fail to "ensure that employees may bargain collectively," as the HSA requires.

A. The new regulations create a labor relations scheme that cannot fairly be characterized as one that provides for "collective bargaining." Its fundamental flaw, as the district court recognized, is that DHS managers and supervisors are authorized to abrogate collective bargaining agreements, either by declaring that doing so "may be necessary to accomplish the agency's mission" or by issuing rules and policies that invalidate the terms of negotiated agreements. These virtually unlimited (and unprecedented) managerial prerogatives are further strengthened by regulations declaring that DHS management be given "great deference" when they are exercised.

Contrary to the government's argument, DHS' reservation of the authority to abrogate agreements by management edict causes an immediate injury to the Unions, regardless of how often (or even whether) that authority is used. The district court correctly recognized that bargaining would be on "quicksand" where DHS retained the future right to absolve itself from agreements by which a union was bound. It is this fundamental alteration of the bargaining relationship that causes immediate injury to the Unions and makes the scheme inconsistent with Congress' direction that the rights of employees to bargain collectively be ensured.

B. Another fatal flaw in the regulatory scheme, which the district court's decision does not explicitly address, is the

related reservation of authority by DHS to take matters off the bargaining table by declaring that such action "may be necessary to carry out the Department's mission" or by issuing a directive, regulation, or policy. The authority to take matters off the bargaining table by fiat is, in essence, the authority not to bargain at all.

Moreover, Congress clearly did not envision that DHS would have such authority, as it created a comprehensive mechanism for adjusting the regulations (including those governing the scope of bargaining). The use of that mechanism requires OPM's collaboration with DHS unions and notification to Congress. The regulations permitting DHS to unilaterally narrow the scope of bargaining cannot be reconciled with the statutory scheme.

C. The Unions also challenged the regulations insofar as they limit the scope of bargaining to "employee-specific personnel matters" (JA 137). Indeed, the regulations eliminate all meaningful bargaining (including negotiations over procedural protections) concerning fundamental working conditions such as the assignment of work, including overtime.

The court recognized that these changes would have a "dramatic effect" upon employees' work lives. Nonetheless, it upheld the regulations on the grounds that the HSA gave the Agencies the authority to establish "new metes and bounds" for bargaining. JA 156-57. The court's conclusion was incorrect.

The drastically limited scope of bargaining under the regulations violates congressional intent that collective bargaining rights be ensured and is not, in any event, justified by the need for "flexibility" that the Agencies have articulated, even under a deferential standard of review.

D. Finally, the use of an internal management board (the HSLRB) to investigate, adjudicate, and resolve bargaining disputes is irreconcilable with the requirement that the Agencies create a system that will "ensure" that employees may bargain collectively. Although the district court rejected this contention below, it agreed that the Agencies had presented only a "thin" justification for their decision to employ an arm of management to decide bargaining disputes. In fact, every collective bargaining system ever devised by Congress has used a neutral arbiter to resolve bargaining disputes. Further, Congress has already determined that a management-controlled board cannot credibly oversee a system of collective bargaining in the federal sector. In 1978, when it enacted the FSLMRS, Congress created an independent agency (the FLRA) to replace a management-controlled board (the Federal Labor Relations Council), which had adjudicated labor disputes under the earlier non-statutory labor relations regime. By commissioning an arm of management to decide bargaining disputes under the new regulations, the Agencies have violated the statutory command

that they "ensure" employees rights to bargain collectively at DHS.

II. The district court correctly struck down the regulations assigning the FLRA the responsibility for reviewing HSLRB decisions, and its ruling on that point should be affirmed. The court reasoned that the Agencies had the statutory authority to "modify" the provisions of Chapter 71 that limited the FLRA's jurisdiction to matters arising under that Chapter. It found, however, that the Agencies had done more than "modify" Chapter 71: they had "fundamentally transformed" the FLRA's role from that of investigator and decision-maker of first resort in bargaining disputes to an intermediate appellate authority applying a deferential standard of review.

The court's conclusion was clearly correct, even assuming that the Agencies had the authority to "modify" Chapter 71 by regulation. As a proper reading of the statutory language reveals, however, the HSA did not give the Agencies the power to "modify" or amend Chapter 71 or any other statutory provision. Indeed, the executive branch cannot constitutionally enact, repeal, or amend legislation. See Clinton v. City of New York, 524 U.S. 417, 477 (1998). Because the HSA must be read in a manner that avoids constitutional questions, this Court should affirm the district court's decision insofar as it struck down

the regulations assigning the FLRA to review the decisions of the HSLRB. For the same reasons, however, it should reverse the district court's decision upholding the regulations that enlist the FLRA to decide unfair labor practices arising purely under the new regulations and outside of Chapter 71.

III. The district court correctly ruled unlawful the new regulation prohibiting the MSPB and arbitrators from mitigating even unreasonable penalties imposed by DHS unless the penalty is "wholly without justification." As the court observed, the existing mitigation standard is already favorable to management. The Agencies' new standard was, by their own admission, designed to restrict even further that existing authority. The new standard would serve to effectively insulate DHS-imposed penalties from outside review. The district court properly concluded that this result could not be reconciled with the statutory language requiring that any departures from existing procedures be designed to ensure the fair, efficient, and expeditious resolution of employee disciplinary matters.

IV. The Agencies acted in excess of their statutory authority when they assigned a new function to the MSPB in cases involving so-called "mandatory removal offenses." The role assigned--that of an intermediate appellate body directed to review decisions of an internal DHS panel--is contrary to the role the MSPB is authorized to perform by 5 U.S.C. § 1204(a)

(outlining the Board's "powers and functions"). The MSPB lacks the authority to review the decisions of other administrative adjudicators under 5 U.S.C. § 1204; its responsibility is to take "final action" on behalf of the government, which is then subject to judicial review in the court of appeals. Because Chapter 12 of Title 5 remains applicable to DHS, the Agencies lacked the statutory authority to assign the MSPB a function that collides with its organic statute.

V. Finally, applying well-established principles that govern severability, the district court properly denied the government motion to narrow its injunction against Subpart E, to allow it to implement many aspects of its new labor relations scheme. There is, at a minimum, "substantial doubt" that the Agencies would have promulgated unchanged the portions of the regulations the district court did not invalidate, absent the provisions it did invalidate. The administrative record makes clear that having FLRA review of HSLRB decisions was critical to the entire bargaining dispute resolution mechanism. It also makes clear that the power to abrogate agreements was essential to the overall labor relations scheme and that there is substantial doubt that--absent this authority--the Agencies would have promulgated the remainder of the regulations, without modification.

ARGUMENT

I. THE DISTRICT COURT'S DECISION HOLDING THAT THE REGULATIONS ARE INCONSISTENT WITH THE HSA BECAUSE THEY DO NOT ENSURE EMPLOYEES' RIGHT TO BARGAIN COLLECTIVELY WAS CORRECT AND SHOULD BE AFFIRMED BY THIS COURT

A. The Regulations Allowing Management To Unilaterally Abrogate Valid Collective Bargaining Agreements Violate the Statutory Command that Employees' Rights To Bargain Collectively Be Ensured

The district court held that the HR system created by the regulations violates the HSA's statutory command to "ensure" employees' right to bargain collectively because it permits DHS officials, managers, and supervisors to unilaterally abrogate collective bargaining agreements and bargaining obligations. The court's conclusion was correct and should be affirmed.

1. The district court correctly ruled the Unions' challenge justiciable

The government contends that the district court erred in ruling justiciable the Unions' challenge to the regulations authorizing agency managers and supervisors to unilaterally abrogate valid agreements.⁹ Its arguments are without merit.

⁹ On appeal, the government now concedes that the Unions' other claims regarding Subpart E are justiciable. See Opening Br. for the Appellants (Gov't Br.) at 28-29 n.5. Thus, it acknowledges that the Unions can challenge whether the HR system ensures employees' rights to bargain collectively insofar that they allege that (1) the regulations severely restrict the subjects of bargaining and (2) relegate the resolution of bargaining disputes to an internal management controlled board, rather than a neutral, third-party adjudicator. Id. The government also now concedes that, because the Unions are likely to appear before the FLRA in the near future, their claim that the regulations

As the district court recognized, "federal sector unions have standing to challenge regulations that affect their abilities to represent the interests of their members in collective bargaining." JA 145 (citing NTEU v. Devine, 577 F. Supp. 738, 743-45 (D.D.C. 1983), aff'd 733 F.2d 114 (D.C. Cir. 1984)); see also Clinton v. City of New York, 524 U.S. 417, 433 n.22 (1998) (citing Northeastern Fla. Ch., Associated Gen. Contractors of Amer. v. Jacksonville, 508 U.S. 656, 666 (1993) (holding that "a denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result"). In fact, the government does not appear to take issue with this well-established principle. Instead, it contends that the Unions' claims are not justiciable because it is allegedly "entirely unclear how DHS will exercise the authority conferred" upon it to abrogate collective bargaining agreements. Gov't Br. at 27. The government's contention misapprehends both the law and the nature of the injury that the reservation of the illegal power to abrogate agreements inflicts upon the Unions.

It is black letter law that "a purely legal claim in the context of a facial challenge . . . is 'presumptively reviewable.'" Sabre, Inc. v. Dep't of Transp., 429 F.3d 1113, 2005 U.S. App. LEXIS 25114, *16 (D.C. Cir. 2005) (citing Nat'l

unlawfully purport to assign that independent agency new duties and functions is justiciable. Id.

Ass'n of Home Builders v. United States Army Corps of Engineers, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (quoting Nat' Mining Ass'n v. Fowler, 324 F.3d 752, 757 (D.C. Cir. 2003))). Moreover, as the district court in OCONUS DOD Employee Rotation Action Group v. Cohen, 144 F. Supp. 2d 1, 6 (D.D.C. 2000), appreciated, this Circuit has "recognized and sanctioned" the practice of bringing a "pre-enforcement challenge to the lawfulness of agency regulations" under the Administrative Procedure Act ("APA"). Id. (citing NTEU v. Devine, 733 F.2d 114). The Unions contend that, as a matter of law, the regulations giving DHS the authority to unilaterally abrogate agreements are facially invalid because the reservation of such authority is inconsistent with the statutory requirement that employees' rights to bargain collectively be ensured. 5 U.S.C. § 9701(b)(4). Accordingly, their claims are governed by NTEU v. Devine and, therefore, are reviewable.

Further, the injury that the Unions suffer under the regulations at issue is an immediate one, which does not depend upon how, or even whether, DHS exercises the illegal authority it has reserved to itself.¹⁰ As the district court recognized,

¹⁰ Although irrelevant to the question whether the Unions' claims are justiciable, it bears noting that the government's claim that it will rarely, if ever, exercise its authority to abrogate agreements is completely implausible. The preamble to the regulations makes it perfectly clear that DHS (albeit incorrectly) considers the authority not to be bound by its

when "good-faith bargaining leads to a contract that one side can disavow without remedy, the right to engage in collective bargaining ab initio is illusory." JA 145. Collective bargaining "would be on quicksand, as the Department would retain the right to change the underlying bases for the bargaining relationship and absolve itself of contract obligations while the Unions would be bound." JA 147; see also JA 150. Under the circumstances created by the regulations, "a deal is not a deal, a contract is not a contract, and the process of collective bargaining is a nullity." JA 147.

The immediate practical impact of DHS' reservation of unilateral authority to abrogate agreements is manifest. The Unions cannot effectively formulate strategies or evaluate tradeoffs to secure concessions from DHS because DHS (and even individual managers and supervisors) could later neutralize any concessions DHS had made at the table. As the district court understood, it does not matter "[w]hether DHS actually declares

agreements essential to its managerial authority. See, e.g., 70 Fed. Reg. at 5279 (in explaining the need to abrogate agreements, the Agencies stated that "[o]ur frontline managers must not be bound by past agreements when they must face current and future exigencies"); id. at 5310 (it is "imperative that these regulations and any implementing directives trump provisions of existing collective bargaining agreements if these provisions are inconsistent with the recommendations or directives"); id. (permitting management to abrogate agreements through issuance of regulations or policies needed because "[t]he prospect of subjecting critical Department-wide human resources policies to modification through bargaining in over 70 separate bargaining units is untenable").

a contract clause unenforceable next month or three years from now. . . ." JA 147. It is the change wrought on the bargaining process itself by the presence of these powers that causes immediate injury to the Unions. "Certainly, the Plaintiff Unions have standing to complain, on behalf of themselves and on behalf of their members, about these intended and inevitable regulatory effects prior to implementation."¹¹ JA 147.

2. **The district court properly held that a binding, enforceable agreement is a sine qua non of collective bargaining**

As discussed above (at 10), the regulations authorize DHS managers and supervisors to abrogate valid collective bargaining agreements in two ways. First, managers and supervisors may ignore the terms of collective bargaining agreements where they deem that it "may be necessary to carry out the Department's mission." See, e.g., 5 C.F.R. §§ 9701.511(a)(2);

¹¹ For these reasons, the cases the government cites (Gov't Br. at 27) are inapposite. In AT&T, the Court held that "federal courts do not normally entertain pre-enforcement challenges to agency rules and policy statements" when "there is no immediate effect on the plaintiffs' primary conduct." AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 386 (1999) (internal citations omitted). The court below correctly found that the power to abrogate agreements would have an "immediate effect" on the Unions' primary conduct because of the fundamental change wrought in the collective bargaining relationship. Further, the government's discussion of whether a party bringing a facial challenge to a regulation must show that there is "no set of circumstances" under which the regulation could be validly applied is beside the point. The Unions' claim does not concern the circumstances under which DHS applies its regulation (i.e., invalidates an agreement). It concerns the very reservation of the authority to do so.

9701.515(d)(2). Second, agreements may be nullified by "implementing directives," regulations, or management policies. See 5 C.F.R. § 9701.515(d)(5).

The district court correctly discerned that having one party (i.e., management) reserve essentially unchecked authority to nullify agreements is inconsistent with the HSA's requirement that the HR system "ensure" employees' right to bargain collectively. JA 156. As the district court observed, the "sine qua non of good-faith collective bargaining is an enforceable contract once the parties reach agreement." JA 153. Bargaining "is an illusion if any resulting agreement is unenforceable, which is the effect of allowing one party to ignore negotiated terms." JA 173 (second decision).

The district court's decision was grounded in the language of the statute (requiring the Agencies to "ensure" employees' "rights to bargain collectively") and an understanding of the meaning of "collective bargaining," as Congress has historically employed that term. While the government is correct that each system of "collective bargaining" created by Congress has had unique features (Gov't Br. at 32-33), it fails to appreciate that each such system is also characterized by certain defining elements. Perhaps the most important element is the requirement that the parties engage in good faith negotiations over conditions of employment, leading to a binding and enforceable

contract. See 29 U.S.C. § 158(a)(5), (d) (private sector); 5 U.S.C. §§ 7103(a)(12), 7116(a)(5) (federal sector); 45 U.S.C. § 152 (Fourth) (common carriers).

The DHS regulations clearly fail to incorporate this defining element. As the district court held (JA 156), any bargaining conducted under the regulations would yield the same results as a system in which only "conferring" is required, because DHS could simply disregard the Unions' views, even those that are incorporated into a collective bargaining agreement. As Congress specifically required that the HR system ensure "the right to bargain collectively," a system that relegates the Unions to a conferring role cannot be squared with the statute.¹²

3. **There is no merit to the government's contentions that the regulations permitting management to unilaterally abrogate agreements are consistent with the HSA**

In its brief (at 37-42), the government takes issue with the district court's conclusions regarding the lawfulness of the

¹² Congress knows the difference between "collective bargaining" and "collaborating" or "conferring," as shown by its conscious use of each of those concepts at various places in the statute. Thus, under section 9701(e), the Agencies were required only to "collaborate" with the Unions, rather than to bargain collectively, over the regulations creating the new HR system. Similarly, any adjustments to those regulations are to be made after collaboration, not bargaining. Id. But Congress provided the Unions with stronger rights when operating within the system the regulations create, as the regulations must ensure collective bargaining, rather than provide for collaboration or conferring.

regulations that reserve to management the unilateral right to abrogate agreements. Each of its contentions is unpersuasive.

a. The government first claims (Gov't Br. at 38-39) that the court read 5 C.F.R. § 9701.511(a)(2) too broadly when it found that its authorization to DHS managers and supervisors to "take whatever action may be necessary to carry out the Department's mission" is an unlimited grant of authority to violate collective bargaining agreements. In its brief to this Court, however, the government offers no real limiting construction of the regulatory language to support its claim that the district court read the regulation too broadly.¹³ Instead, it claims that the word "necessary" is "famously ambiguous." Gov't Br. at 39.

First, there is some irony in the Agencies' claim in litigation that they are not certain exactly what is meant by regulatory language that they authored. See also Gov't Br. at 42 (purporting to be uncertain as to what kinds of "policies" can override collective bargaining agreements under the regulations, and who may be considered an official "authorized"

¹³ In the proceedings below, the government suggested that the phrase might authorize DHS to act when necessary "to perform its duties most effectively." JA 154 n.18. The government's construction was derived from FLRA case law that is not binding under the DHS regulations. Id. The court was appropriately unconvinced that this construction "adds any material limitation to management's right under the Regulations to ignore negotiated contracts." JA 172 (second dec.).

to determine a conflict between "policies" and agreements). After all, because the Agencies wrote the regulations, it is their interpretation that effectively controls their meaning. See Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945).

Further, even if the term "necessary" were ambiguous, any ambiguity would have to be resolved in favor of DHS management because the power reserved in Section 9701.511(a)(2) is subject to the rule of construction contained in 5 C.F.R. § 9701.106(a)(2). That regulation requires that DHS be given great deference when it declares that an action "may be necessary to carry out the Department's mission." Id.

For these reasons, the court below correctly held that, in reality, there is nothing ambiguous about the scope of the power the Agencies reserved in Section 9701.511(a)(2). JA 146-47; JA 172-73 (second dec.). In fact, it is hard to imagine a management action that would not fall within the confines of that section's authority (i.e., an action that "may be necessary" for the agency to "carry out its mission"). And it is equally hard to imagine a circumstance under which the HSLRB, a management-controlled board bound to grant great deference to DHS, would overrule an action made by DHS management on the ground that it acted in excess of its authority under that provision.

b. In its brief (at 39), the government draws a totally unconvincing analogy between the regulation preserving DHS' authority to abrogate agreements whenever a manager or supervisor concludes that an action "may be necessary to carry out the Department's mission" (5 C.F.R. § 9701.511(a)(2)), and the much narrower provision in Chapter 71 that permits agencies to "take whatever actions may be necessary to carry out their missions during emergencies" (5 U.S.C. § 7106(a)(2)(D)). It states that the reservation of the broader authority at DHS was a reasonable response to DHS' special mission, which requires it to "prevent future emergencies." Gov't Br. at 39.

The district court correctly rejected this contention. It recognized that the absence of the phrase "during emergencies" "is no mere modification but, instead, the assertion of full authority to follow or ignore the terms of collective bargaining agreements almost at will." JA 173 (second dec.). Further, the Chapter 71 provision contemplates that the exercise of the management right will be temporary, i.e., during a defined "emergency." The DHS regulation has no such temporal limitation.

c. The government is similarly mistaken in relying (Gov't Br. at 40) on the executive orders that governed federal-sector labor relations prior to enactment of the FSLMRS to support its contention that the regulations authorizing DHS to abrogate

agreements through issuance of an implementing directive, regulation, or policy are consistent with collective bargaining. There are two critical flaws in its logic. First, the executive order program was not devised by Congress, and it did not purport to establish a system of "collective bargaining." Indeed, Congress enacted the FSLMRS in 1978 to replace the discredited, one-sided executive order regime with a system of "collective bargaining," which Congress explicitly found to be "in the public interest." 5 U.S.C. § 7101(a)(1).

Second, and more to the point, even if the executive orders had been enacted by Congress and even if they purported to establish a collective bargaining system, those orders did not authorize management to abrogate agreements through the subsequent issuance of regulations. They only authorized management to refuse to bargain over matters inconsistent with such regulations.¹⁴ Henry H. Robinson, Negotiability in the Federal Sector 2 (1981).

¹⁴ The government also neglects to mention that Executive Order 11,838, issued by President Ford, significantly narrowed agencies' previous authority to avoid bargaining through issuance of regulations. Because "agencies had taken advantage of this situation and issued many regulations that served to restrict excessively the scope of bargaining," President Ford required agencies to show that their regulations were justified by a "compelling need." See Robinson, supra, at 2, cited in JA 136. This limitation was incorporated into Chapter 71.

In fact, under the FSLMRS, it is an unfair labor practice for an agency to attempt to abrogate collective bargaining agreements through the issuance of agency regulations. See 5 U.S.C. § 7116(a)(7). Indeed, even if there is a "compelling need" for an agency regulation, a contrary provision in a collective bargaining agreement remains in force and effect until its expiration. See United States Dep't of the Army, Fort Campbell Dist., Third Reg., Fort Campbell, Ky. and AFGE Local 2022, 37 F.L.R.A. 186, 193 (1990). Thus, federal sector experience confirms the court's conclusion that it is inconsistent with collective bargaining to permit agencies to abrogate their agreements through issuance of a regulation or policy.¹⁵

d. The government also contends that there is "no realistic concern" that DHS will use its authority to issue

¹⁵ Collective bargaining agreements in the federal sector can be overridden by statutes, executive orders, and government-wide regulations. See 5 U.S.C. §§ 7103(a)(14); 7117(a)(1). As the court recognized (JA 153-54 n.17), however, such laws and regulations are distinguishable from DHS directives, rules and policies because they are issued by authorities "outside the scope of the collective-bargaining relationship." Id. And, at a minimum, they require Presidential approval and, therefore, "would not often be issued." See Dep't of Health & Human Serv. Family Support Admin. v. FLRA, 920 F.2d 45, 48 (D.C. Cir. 1990). Agency implementing directives, regulations, and policies, on the other hand, are issued by "the very entity which committed itself to contract terms." Id. JA 153-54 n.17. It is inconsistent with collective bargaining to allow "the very entity which committed itself to contract terms" to invalidate those terms. Id.

formal agency regulations to “eviscerate collective bargaining wholesale” because such regulations could only be promulgated pursuant to delegated authority and “presumably could” be subject to judicial review. Gov’t Br. at 41. But the availability of judicial review of formal DHS regulations under the APA is beside the point. Such review would focus on the reasonableness of the regulation in light of the agency’s delegated authority. The concern here is not whether an agency rule will meet APA “reasonableness” standards, but with whether that rule conflicts with a collective bargaining agreement that the Agency entered with the union. Moreover, the power in section 9701.515(d)(5) extends to less formal implementing directives and to totally informal and undefined “policies,” for which the government does not even acknowledge that judicial review is a possibility. Accordingly, the government’s arguments that the power to abrogate agreements appearing in section 9701.515(d)(5) is limited by the availability of judicial review under the APA, is wholly unpersuasive.

e. There is also no merit to the government’s complaint that the district court did not afford the Agencies the deference they were due under Chevron. It is a fundamental premise of administrative law that agencies cannot override Congress’ expressly stated intent when exercising their regulatory authority. See Chevron v. Natural Resources Defense

Council, 467 U.S. 837, 842-43 (1985); see also Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004) ("for an agency to be able to claim all the authority possible under Chevron, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent"). In this case, that is precisely what the Agencies have attempted to do. Thus, while Congress gave the Agencies the authority to design an HR system that was "flexible" and "contemporary," it also imposed an independent requirement that the regulations "ensure" collective bargaining rights. The Agencies had no discretion to jettison a defining element of "collective bargaining" (i.e., a binding and enforceable agreement) for the purposes of enhancing "flexibility."¹⁶

¹⁶ The government's further observation that Congress evinced its intent to vest the Agencies with broad discretion when it authorized them to create the HR system "notwithstanding" various sections of Title 5 (Gov't Br. at 30-31) is beside the point. The court below found (and the Unions have never disputed) that the Agencies were not bound to follow Chapter 71 of Title 5 in designing their system. The legal defect the court identified was not that the Agencies departed from Chapter 71; it was that the scheme they devised does not ensure "collective bargaining" rights at all.

B. The Provisions Authorizing DHS Managers and Supervisors Unilaterally To Take Matters off of the Bargaining Table Are Irreconcilable with the HSA's Guarantee of Employees' Rights To Bargain Collectively

In the course of making the point that "any collective bargaining negotiations pursuant to [the] terms [of the regulations] are illusory," the court specifically noted that the Agencies had reserved for management "the power to take any matter off the bargaining table simply by issuing department-wide directives, policies, or other regulations." JA 153. Nonetheless, as the government observes in its brief (at 37), the district court does not appear to have "independently invalidate[d]" Section 9701.518(d). Further, while the court found section 9701.511(a)(2) invalid to the extent that it allowed management to rely upon the agency's mission needs to override the terms of existing collective bargaining agreements, it did not separately address the question whether it was lawful for DHS to use that regulation to take matters off the bargaining table in the first instance. Because the district court's decision is not explicit on this point, the Unions respectfully request that this Court confirm that these regulations are invalid as inconsistent with the HSA, for the reasons set forth below.

1. As noted above (at 30-32), the district court found that the "sine qua non of good faith bargaining is an

enforceable contract once the parties reach agreement." JA 153. Another essential element of good faith bargaining, we submit, is this: the existence of a set of rules regarding the subject matter of negotiations that binds both parties, which neither party can unilaterally change in the middle of bargaining. See NLRB v. McClatchy Newspapers, 964 F.2d 1153, 1162 (D.C. Cir. 1992) (a unilateral change "not only violates the plain requirement that parties bargain . . . , but also injures the process of collective bargaining itself"). The existence of such jointly binding rules is an essential element of good faith bargaining. The power to take otherwise negotiable matters off the bargaining table through the simple issuance of a policy or regulation or a declaration that action "may be necessary" to accomplish the agency's mission is, in essence, the power not to bargain at all.

Thus, with the ability to declare matters non-negotiable at the bargaining table, DHS need not provide the union with meaningful concessions to secure an agreement. It can simply refuse to discuss the issue. Nor would DHS be required to prove the merit of its position to the HSLRB during impasse resolution proceedings. In fact, the regulations empower DHS managers and supervisors to simply implement unilaterally their views on every single condition of employment. That result cannot be

consistent with Congress' directive to ensure employees' rights to bargain collectively.

2. The invalidity of these regulations is further illustrated by the HSA's statutory scheme. Section 9701(e) sets out detailed procedures for establishing and adjusting the new HR system. The regulations circumvent this detailed scheme by permitting DHS managers and supervisors to adjust the system unilaterally on an ad hoc basis.

Under 5 U.S.C. § 9701(e), the Agencies are required to provide written notice of the proposed HR system (and any adjustments to that system) to each union representing affected employees. Id. § 9701(e)(1)(A)(i). Absent extraordinary circumstances, the unions have 30 days to review and make recommendations on the proposal. Id. § 9701(e)(1)(A)(ii). The Agencies must give "full and fair consideration" to the unions' recommendations. Id. § 9701(e)(1)(A)(iii).

The Agencies must notify Congress if they decide to reject any of the unions' recommendations. Id. § 9701(e)(1)(B)(i). In addition, they must "meet and confer" for at least 30 days with the unions that made the recommendations in an effort to reach an agreement. Id. § 9701(e)(1)(B)(ii). Upon request by a majority of the unions, or at the Secretary's option, the services of the Federal Mediation and Conciliation Service are

to be used during the meet and confer period. Id. § 9701(e)(1)(B)(iii).

The DHS Secretary may ultimately implement the proposed system (or an adjustment) over the objection of one or more unions, but only if he has determined "that further consultation and mediation is unlikely to produce agreement." Id. § 9701(e)(1)(C)(ii). The Secretary must notify Congress promptly of "implementation of any part of the proposal" and furnish "an explanation of the proposal, any changes made to the proposal as a result of recommendations from employee representatives, and . . . the reasons why implementation is appropriate under [the collaboration rules]." Id. § 9701(e)(1)(C)(iii).

Congress created this elaborate process to ensure that employees would have a meaningful opportunity to participate in every aspect of the system's design and to set itself up as a check on any regulatory decisions with which it disagreed. The authority reserved for DHS managers and supervisors to alter the scope of bargaining set forth in the regulations subverts this carefully wrought collaboration process. Certainly Congress would not have gone to the trouble to require collaboration both when the HR system is established and when it is adjusted if it contemplated that managers and supervisors could circumvent the process through regulations, policies, or declarations of necessity.

Accordingly, the regulations are invalid insofar as they remove from the scope of bargaining actions that a manager or supervisor deems "necessary to carry out the Department's mission" and matters that are addressed in a regulation, implementing directive, or policy. We respectfully request that the Court clarify this point so as to provide the parties with clear guidance on the validity of the challenged regulations.

C. The Regulations So Limit the Scope of Bargaining as To Deprive Employees of Their Right To Bargain Collectively

As the district court recognized, bargaining under the regulations is largely "restrict[ed] to issues that affect individual employees." JA 137. Specifically, the management rights regulation gives DHS "full discretion over all aspects of the Department except those that might be seen as personal employee grievances. . . ." JA 138; see also, supra, at pp. 8-10. The court noted (JA 157) that these severe restrictions on bargaining would have "a dramatic effect on the work lives of the employees the plaintiffs represent." It nonetheless upheld the regulations on the grounds that Congress gave the Agencies the authority to establish the "metes and bounds for collective bargaining at DHS." Id.

The district court's decision on this point was incorrect and should be reversed. While the court was correct that the HSA gave the Agencies the authority to alter the scope of

matters subject to the bargaining obligation under existing law, the Agencies' discretion is cabined by the statutory requirement that rights to bargain collectively be ensured and by the APA's requirement that the agency have a reasonable justification for so radically reducing the scope of collective bargaining.

The dramatic limitations that the regulations impose on the scope of the matters about which DHS is obliged to bargain are described in detail, supra, at pp. 7-9. In particular, the regulations: (1) prohibit all bargaining over what were formerly "permissive" subjects (the numbers, types, and grades of employees assigned to any subdivision or work project, or tours of duty, or the technology, means or methods of doing work) (5 C.F.R. § 9701.511(a)(2)); (2) drastically restrict "impact and implementation" bargaining, by eliminating entirely bargaining over procedures used when management exercises its rights as to "operational" matters (i.e., work assignments and deployments);¹⁷ (3) relieve DHS of the obligation to provide

¹⁷ Under Chapter 71, whenever management is exercising one of its enumerated rights, it is required to bargain with the union over "procedures" that management will observe and "appropriate arrangements" for employees adversely affected by the exercise of the management right. 5 U.S.C. § 7106(b)(2)-(b)(3). In the context of "operational" type rights (i.e., the right to assign work) management decides what work must be performed and when, as well as what kind of personnel and how many will perform it. Unions negotiate with management over procedures for selecting among qualified personnel to do the work. This strikes a balance between "the non-negotiable substantive rights of management and the negotiable procedures to be followed when

union with advance notice of the exercise of its rights, so that the limited procedures bargaining that is permitted in the context of non-operational (i.e., personnel) matters will take place after, rather than before, management takes action (see 5 C.F.R. § 9701.511(a)(3), (b), (d)); and (4) substantially limit the scope of bargaining over "appropriate arrangements" for employees adversely affected by the exercise of a management right.¹⁸ See 5 C.F.R. § 9701.511(e).

These severe restrictions on the scope of bargaining, particularly in combination with management's authority to unilaterally take matters off the bargaining table, are inconsistent with any reasonable reading of the requirement that the HR system ensure "collective bargaining." No collective bargaining system ever devised by Congress has limited bargaining to only those matters relating to individual employees. On the contrary, the purpose of collective

management exercises its rights." NFFE v. FLRA, 681 F.2d 886, 892 (D.C. Cir. 1982) (quoting Veterans Admin. Med. Ctr. v. FLRA, 675 F.2d 260, 262 (11th Cir. 1982)).

¹⁸ For operational rights, DHS is only required to bargain over "appropriate arrangements" where the exercise of the management right has "a significant and substantial impact" on the bargaining unit or on those employees in the bargaining unit affected by the exercise of the right, and only when the action or event is expected to exceed 60 days. See 5 C.F.R. § 9701.511(e)(2)(i). This is a material departure from the de minimis test that applies under the FSLMRS. See Dep't of Health & Human Serv., Soc. Sec. Admin. and AFGE, Local 1760, 24 F.L.R.A. 403 (1986).

bargaining is to funnel workplace disputes to the bargaining table for resolution. The regulations take the opposite approach.

In fact, the limitations that have been imposed are not justified by the needs that DHS has articulated, even under a deferential standard of review. The Unions do not quarrel with DHS' assertion that it must be able "to act quickly . . . not just in emergency situations but, more importantly, in order to prepare for or prevent emergencies." 70 Fed. Reg. at 5278. But other than its talismanic incantation of this and related "justifications," the government does not explain how eliminating all forms of bargaining related to work assignment issues is reasonably necessary to that goal. After all, the Unions do not contend that they should be able to bargain over the need to assign or deploy employees, or over the introduction of latest security technologies. See id. Rather, they seek to negotiate procedures for determining which individual employees are assigned or deployed.¹⁹

The Agencies also make the bald statement that any negotiated procedures would be rendered "meaningless" because, they claim, deviations from collective bargaining agreements

¹⁹ An example of such a procedure would be an agreement that, when feasible, the agency will solicit qualified volunteers for a new work assignment, rather than arbitrarily choosing a particular individual. See SA 0058-0059 (Art. 20, Sec. 5, of NTEU-CBP contract establishing procedures for reassignments).

would be "constant" in the "operational environment today." Id. at 5279. They similarly claim that bargaining over procedures and arrangements after DHS exercises a management right (rather than prior to exercise of the right, as is required under Chapter 71) would be "constant" and "divert" DHS managers and supervisors from accomplishing DHS' mission. Id. These unsupported statements about "constant" change amount to mere speculation. Moreover, they are just not credible. There is no reason to believe that the parties could not negotiate agreements that are flexible enough to take into account DHS' operational needs, as do police departments, fire departments, and other first responders nationwide. Indeed, DHS could propose and insist upon contract provisions that ensure flexibility. While Congress certainly intended to give DHS flexibility to depart from existing law where such departures are actually necessary, it did not give DHS a blank check to eviscerate collective bargaining rights wholesale.

D. The Regulations Fail To Ensure Collective Bargaining Rights Because They Do Not Provide for a Neutral, Third-Party Adjudicator of Labor Disputes

Under the regulations, all bargaining disputes are to be resolved by an internal body called the HSLRB, whose members are hired, fired, and reappointed solely at the discretion of the DHS Secretary. As described in detail, supra (at pp. 11-12), the HSLRB adjudicates all disputes concerning the scope of

bargaining and the duty to bargain in good faith; most unfair labor practice charges; information request disputes; exceptions to arbitration awards in cases involving the exercise of management rights or the duty to bargain; and negotiation impasses. See 5 C.F.R. § 9701.509(a)(1)-(6). In addition, the HSLRB has the broad authority to "[a]ssert jurisdiction over any matter concerning Department employees that has been submitted to the FLRA if the Board determines that the matter affects homeland security." Id. § 9701.509(a)(7). The regulations further grant the HSLRB far-reaching power to issue "binding, Department-wide opinions," apparently on any subject it chooses. Id. § 9701.509(b).

In the court below, the Unions argued that--particularly when combined with the other unilateral authority the regulations reserve to DHS management--the use of a management-controlled board, rather than a neutral adjudicator, violates the statutory command that employees' rights to bargain collectively be ensured. The district court deemed the Agencies' justification for employing an internal, management-controlled board to decide these disputes to be "thin." JA 157. Nonetheless, it was not willing to conclude that the failure to provide a neutral body to investigate and adjudicate bargaining disputes contravened the statutory requirement to ensure employees' collective bargaining rights. JA 157-58.

The court's holding was legally erroneous. A "fair trial in a fair tribunal," whether in an administrative or judicial proceeding, "is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955); Gibson v. Berryhill, 411 U.S. 564, 579 (1973). It is not only actual bias that renders an adjudicative system unfair, for "our system of law has always endeavored to prevent even the probability of unfairness." Murchison, 349 U.S. at 136.

These due process principles are fully applicable in the collective bargaining context. A credible, neutral dispute resolution mechanism (which includes judicial review of decisions) is necessary to ensure employees' rights to bargain collectively. Indeed, "there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes." Groves v. Ring Screw Works, 498 U.S. 168, 173 (1990).

For these reasons, the collective bargaining systems that Congress has devised over the years have used adjudicatory bodies that are not controlled by either management or labor. FLRA and NLRB members are appointed by the President and confirmed by the Senate. See 5 U.S.C. § 7104(a); 29 U.S.C. § 153(a). Because it adjudicates labor disputes in the public sector, the FLRA has an added measure of balance in that no more than two members may be from the same political party. See 5

U.S.C. § 7104(a). The National Railroad Adjustment Board, which resolves disputes concerning grievances or the application of agreements concerning rates of pay, rules, or working conditions under the Railway Labor Act, consists of an equal number of members appointed by labor and management. See 45 U.S.C. § 153(i).

In fact, Congress has already found that a management-controlled board cannot credibly oversee a system of "collective bargaining" in the federal sector. It replaced the Federal Labor Relations Council (FLRC), which had adjudicated disputes under the executive order regime, with the FLRA, an independent agency.²⁰ See S. Rep. No. 95-969, at 7-8, 99 (1978), reprinted in 2 Legislative History of the Civil Service Reform Act of 1978, Comm. Print 96-2, 1461, 1471-72, 1563 (Mar. 27, 1979) (hereafter "CSRA Legis. Hist."); H.R. Rep. No. 95-1403, at 41-42, reprinted in 1 CSRA Legis. Hist., 636, 678-79 (Congress replaced the FLRC with the FLRA to "assure impartial adjudication of labor-management cases by providing for a new

²⁰ The members of the HSLRB are actually even less neutral than the members of the FLRC were. At least the FLRC's members held positions subject to Senate confirmation. Further, the FLRC's decisions involved disputes that arose government-wide, so the Council's members were more often than not resolving disputes at agencies other than their own. By contrast, the members of the HSLRB are accountable to no one but the Secretary and are assigned to adjudicate disputes arising within the very department he heads.

Board whose members are selected independently--nominated by the President and confirmed by the Senate . . .").

Moreover, the HSLRB is further flawed because its members apparently will be responsible for investigating labor disputes, as well as deciding them. JA 147-48 n.13. Congress rejected as "unfair" this type of regime "when it passed the Taft-Hartley Act in 1947, amending the National Labor Relations Act to create the position of General Counsel of the National Labor Relations Board as prosecutor and members of the NLRB as neutral adjudicators." Id. A system in which one body is the "investigator, prosecutor, jury, and judge all rolled into one" was described as "failed" and "discredited." Id. (citations to legislative history omitted). That conclusion is all the more compelling where, as here, the investigator, prosecutor, jury and judge are all an arm of management and are all instructed to give great deference to decisions of management.

It follows that the district court erred in holding that the Agencies had discretion to assign responsibility for adjudicating labor disputes to an internal, management-controlled board. A neutral arbiter of bargaining disputes is essential to any collective bargaining system. Because that is

absent here, the HR system fails to ensure employees' right to bargain collectively.²¹

II. THE AGENCIES LACKED THE AUTHORITY TO AMEND 5 U.S.C. CHAPTER 71 BY CONSCRIPTING THE FLRA TO RESOLVE LABOR DISPUTES ARISING UNDER THE DHS REGULATIONS

In addition to creating the HSLRB to hear and resolve bargaining disputes under the statute, the regulations conscript the FLRA, an independent agency, to perform a number of adjudicatory functions in cases arising exclusively under the DHS regulations. Specifically, the Agencies purport to confer jurisdiction on the FLRA to review decisions of the HSLRB. See 5 C.F.R. §§ 9701.508(h); 9701.510(a)(5)). In addition, the regulations provide that FLRA will conduct hearings and resolve complaints of the unfair labor practices identified in 5 C.F.R. § 9701.517(a)(1)-(4), (b)(1)-(4). See 5 C.F.R. § 9701.509(a)(1).

For the reasons set forth below, the district court's decision, holding that the Agencies acted in excess of their statutory authority when they conscripted the FLRA to act as an

²¹ At this point, it is unclear whether the regulations provide any basis for seeking judicial review of HSLRB decisions. The Agencies' plan to secure such judicial review by assigning appellate responsibilities to the FLRA has correctly been ruled unlawful. JA 158-60. While the Unions believe that, in light of the district court's decision, judicial review of HSLRB decisions would be available in the district courts pursuant to 5 U.S.C. § 702, the government has not conceded that point in this litigation. Of course, the absence of such review would render the use of the management-controlled board to resolve labor disputes all the more problematic.

intermediate appellate board, was correct and should be affirmed. Further, the Agencies also exceeded their statutory authority when they assigned the FLRA responsibility for adjudicating unfair labor practices that arise under the DHS regulations. The district court's decision upholding that aspect of the regulations must, accordingly, be reversed.

A. The Agencies Lack the Statutory Authority To Expand the FLRA's Jurisdiction by Regulation

The FLRA is an independent agency in the executive branch established by Chapter 71. See H.R. No. 95-1403, reprinted in 1 CSRA Legis. Hist., at 678; see also 1 CSRA Legis. Hist. at 752 (supplemental views on bill providing for a "truly independent, neutral and full-time" FLRA). Its powers and duties are set forth comprehensively at 5 U.S.C. § 7105. Section 7105(a)(1) states that "[t]he Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter [Chapter 71], and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter" (emphasis added). Section 7105(a)(2) lists eight specific duties arising under Chapter 71 that the FLRA is to perform and further provides that the FLRA shall "take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter." 5 U.S.C. § 7105(a)(2)(I) (emphasis added).

It is well established that administrative agencies may only exercise the power that Congress has delegated to them. See Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355, 376 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power on it").²² As the text of the FLRA's enabling statute demonstrates, when Congress created the FLRA, it expressly limited that agency's jurisdiction to matters arising under Chapter 71. Cf. 5 U.S.C. § 1204(a)(1) (conferring broader subject-matter jurisdiction on the MSPB, authorizing it to hear and adjudicate "all matters within the jurisdiction of the Board under" Title 5, chapter 43 of title 38, "or any other law, rule, or regulation") (emphasis supplied)). Neither the text nor the legislative history of the HSA provides any indication that Congress intended to amend the FLRA's jurisdiction or assign it additional duties and functions under the new HR system. Indeed, unlike the MSPB, the FLRA is nowhere mentioned in the text of the HSA. Thus, the HSA cannot

²² See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000) ("an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"); Lyng v. Payne, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"); Railway Labor Exec. Ass'n v. Nat'l Mediation Bd., 29 F.3d 655, 670 (D.C. Cir. 1994), cert. denied, 514 U.S. 1032 (1995) ("Agencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature"); Killip v. OPM, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (an agency is "but a creature of a statute"; "[a]ny and all authority pursuant to which an agency may act must be grounded in an express grant from Congress").

reasonably be read as containing an "express grant from Congress" of authority for the FLRA to rule on matters that do not arise under Chapter 71. See Killip, 991 F.2d at 1569 (citing Lyng, 476 U.S. at 937).

The government argues, nonetheless (Gov't Br. at 42-48), that the Court should infer that Congress intended to delegate to the Agencies its legislative authority to alter the FLRA's jurisdiction. That argument fails for two reasons. First, the inference the government would draw is not supported by the statutory language upon which the government relies. Second, because entertaining the government's inference would raise serious questions about the constitutionality of the HSA, this Court should not adopt it.

The inference the government urges the Court to draw (and with which the district court agreed) is based on the following reasoning: The HSA authorizes the Agencies to create a new HR system, "notwithstanding" the provisions contained in Part III of Title 5. See 5 U.S.C. § 9701(a). Congress further identified in the Act various provisions of law that fall within Part III of Title 5 that the Agencies are directed not to "waive, modify, or otherwise affect" in creating the new system. Id. § 9701(b)(3). Although Chapter 71 falls under the "notwithstanding clause," it is not identified as one of the provisions that the Agency may not "waive, modify, or otherwise

affect." Accordingly, the government claims, Congress effectively gave the Agencies the authority in section 9701(b)(3) to "waive, modify or otherwise affect" Chapter 71. See Gov't Br. at 45; JA 158-59.

This logic is fundamentally flawed. The fact that Congress instructed the Agencies that they were prohibited from "waiv[ing], modify[ing], or otherwise affect[ing]" certain statutory provisions does not constitute an affirmative grant of authority to "waive, modify or otherwise affect" other unnamed provisions of law. The only reasonable reading of section 9701(b)(3) is that it contained Congress' instructions as to which components of existing law would continue to bind DHS, and to remain in full force and effect, without modification. It does not follow that, by instructing DHS to follow certain existing statutory provisions as written, Congress was authorizing the Agency to rewrite other statutory provisions.

Further, the inference in which the government urges the Court to indulge is unreasonable because of the conflict that the implicit grant of authority would pose for the FLRA's independence and neutrality as the arbiter of labor relations matters government-wide. As described above (at 11-13), under the regulations, the Agencies have selectively identified and assigned functions to the FLRA, made the FLRA subordinate to the management-controlled HSLRB in discharging its functions, and

dictated timetables and procedures the FLRA must follow when adjudicating cases. The notion that Congress would have sub silentio granted the Agencies the authority to so subordinate the FLRA to their control is simply not plausible in light of the role the Director of OPM plays as the representative of management throughout the executive branch.

Finally, even if the government's contrary reading of the HSA to authorize the Agencies to amend or modify Chapter 71 were a plausible one, this Court should reject it because that reading would raise serious separation of powers questions under the reasoning of the Supreme Court in Clinton v. City of New York, 524 U.S. 417 (1998). That case involved a challenge to the constitutionality of the Line Item Veto Act, which authorized the President, under certain defined circumstances, to "cancel" spending measures contained in duly enacted legislation. Id. at 436. The Supreme Court observed that when the President cancelled the two spending measures at issue in the case, he had "[i]n both legal and practical effect . . . amended two Acts of Congress by repealing a portion of each." Id. at 438; see also id. at 447 (Act impermissibly gave the President "the unilateral power to change the text of duly enacted statutes"). As the Court held, "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." Id.

It follows that if the President lacks constitutional authority "to enact, to amend, or to repeal statutes," then his designees--the DHS Secretary and OPM Director--also lack that authority. Yet that is precisely the authority they urge that Congress granted them here. That is, they claim that Congress empowered them to amend, i.e., "modify," Chapter 71 to expand the FLRA's jurisdiction so that it might to hear and resolve ULP charges brought pursuant to the DHS regulations and act as an appellate body reviewing HSLRB decisions.

Courts, of course, do not pass on constitutional issues where "a construction of the statute is fairly possible by which the question may be avoided." See, e.g., United States v. Clark, 445 U.S. 23, 27 (1980). In a case of statutory ambiguity, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Concrete Pipe and Products v. Constr. Lab. Pension Trust, 508 U.S. 602, 628-629 (1993) (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 575 (1988)). The court's reluctance to decide constitutional issues is especially great where, as in this instance, "they concern the relative powers of coordinate

branches of government." Public Citizen v. Dep't of Justice, 491 U.S. 440, 466 (1989) (citation omitted).

In short, the Court should reject the Agencies' interpretation of the HSA and hold that the Agencies are without authority to amend Chapter 71. The provisions that enlist the FLRA to serve as an intermediate appellate body and to hear and resolve matters (including unfair labor practices) that arise purely under the new regulations are unlawful.

B. Even if the Agencies Had the Authority To "Modify" the FLRA's Jurisdiction, the District Court Correctly Held That Assigning an Appellate Role to the FLRA Is Unlawful Because It Works a Fundamental Alteration of the FLRA's Statutory Charter

Notwithstanding the foregoing, the district court held that the Agencies had the discretion to "modify or otherwise affect" the statutory provisions contained in Chapter 71. It found, however, that they had exceeded that authority by "fundamentally transforming [the FLRA's] functions." JA 160. Thus, under the regulations "the FLRA would merely be reviewing HSLRB and DHS compliance with Chapter 97; it would not be performing its traditional duty to 'conduct hearings and resolve complaints of unfair labor practices' under Chapter 71. . . ." JA 158. Further, the court noted, "because the Regulations promulgated pursuant to Chapter 97 substantially redefine DHS' bargaining obligations (including its duties vis-à-vis information requests and impasse), the matters the FLRA would review would no longer

fall 'under' or 'in' Chapter 71." Id. (internal citations omitted).

In ruling that the Agencies' changes to Chapter 71 "can be justified only if [they] make[] a less than radical or fundamental change," the district court relied upon the Supreme Court's decision in MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994). In that case, the Court observed that "[v]irtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion." In MCI, the Court declined to defer to the FCC's interpretation of the term "modify" because its interpretation would encompass "radical" and "fundamental" changes. Id. at 229. The Court had "not the slightest doubt" that Congress had spoken directly to the issue, and that the FCC's interpretation of "modify" went "beyond the meaning that the statute can bear." Id. at 228-29. See also Amgen, Inc. v. Smith, 357 F.3d 103, 117 (D.C. Cir. 2004) (relying on MCI to hold that same limitations inherent in the word "modify" also inhere in the word "adjustment").

The government attempts to distinguish MCI, arguing that the word "modify" has a different meaning in the HSA than it had in the MCI case and that the HSA "authorizes 'fundamental' as opposed to 'moderate' changes to the provisions governing the FLRA." See Gov't Br. at 46. In support of its argument, it relies exclusively on the "notwithstanding" clause in 5 U.S.C. §

9701(a). Id. at 46-47. The government's reliance is misplaced. The purpose of the "notwithstanding" clause was to allow the Agencies not to comply with otherwise binding provisions of Title 5 in their new HR system. As described above (at 57-59), that clause does not grant the Agencies the power to affirmatively change existing statutes, much less to do so in a manner that fundamentally transforms them.

The government further argues that because it also has the power to waive or "otherwise affect" statutes, it can effect "complete change ('waive'), moderate change ('modify'), and everything in between ('otherwise affect')." Gov't Br. at 47. It offers no support for its conclusion that "otherwise affect" means to make a change that is more dramatic than a "modification" i.e., "fundamental change." The district court correctly concluded that "affect" "connotes an even lesser degree of change" than "modify." JA 159-60 (citing Black's Law Dictionary 62 (8th ed. 2004)).

The government alternatively claims that the changes to the FLRA wrought by the regulations are not fundamental. See Gov't Br. at 47-48. It contends that the FLRA is to act much like a district court would act in a challenge to agency action brought pursuant to the APA. Id. We submit that transforming the FLRA from a fact-finding, independent arbiter of first resort of labor disputes into an entity conducting circumscribed APA

review of another fact-finder, applying entirely different negotiability rules, is "fundamental" under any definition of the term.

Accordingly, the district court correctly held that the Agencies lacked the authority to draft the FLRA to review the decisions of the HSLRB and the courts decision on that point should be affirmed. Further, for the reasons set forth in Part A above (at 53-59), the court's decision should be reversed in part, insofar as it sanctioned the Agencies' use of the FLRA to hear and adjudicate unfair labor practices arising purely under the new regulatory scheme.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE PENALTY MITIGATION STANDARD CONTAINED IN THE REGULATIONS IS CONTRARY TO THE HSA BECAUSE IT IS NOT DESIGNED TO FURTHER THE FAIR, EFFICIENT, AND EXPEDITIOUS RESOLUTION OF DISCIPLINARY CASES

As discussed above (at 12-13), the regulations adopt a new standard that is designed to limit the authority of the MSPB (and arbitrators) to mitigate the penalties imposed on DHS employees for disciplinary infractions. See 5 C.F.R. § 9701.706(k)(6). Under current law, Chapter 77 authorizes the MSPB to mitigate agency-imposed penalties that it finds unreasonable. The MSPB has adopted a multi-factor reasonableness test pursuant to this authority. See Douglas v. Veterans Admin., 5 M.S.P.R. 280, 1981 MSPB LEXIS 886, *11-21 (1981). The DHS regulations replace the MSPB's reasonableness

test with a standard for mitigation that, as a practical matter, is virtually impossible to meet. Under the new regulations, the MSPB may not mitigate even an unreasonable penalty unless it is "so disproportionate to the basis for the action as to be wholly without justification." 5 C.F.R. § 9701.706(k)(6).

The district court ruled below (JA 160-63) that this regulation violates the HSA's requirement that changes to MSPB procedures "further the fair, efficient, and expeditious resolution of matters involving Department employees." 5 U.S.C. § 9701(f)(2)(C). The government challenges that ruling on appeal. See Gov't Br. at 48-51. It argues that the Unions lack standing to challenge the new mitigation standard and/or that their challenge is premature. On the merits, the government claims that the new "wholly without justification" standard is a fair one that the Agencies were entitled to adopt because DHS is responsible for protecting homeland security and is therefore allegedly "in the best position to determine the most appropriate adverse action for poor performance or misconduct." Id. at 50.

As we show below, the government's arguments are meritless. This Court should affirm the district court's decision striking down 5 C.F.R. § 9701.706(k)(6) as inconsistent with the HSA.

A. The Unions' Challenge to the New Mitigation of Penalties Standard Is Justiciable

The district court correctly held that the Unions and their members had standing to challenge the new, highly deferential penalty mitigation standard contained in the regulations, and that their claims were ripe for review. As an initial matter, the government's brief ignores the fact that the Unions' collective bargaining agreements contain their own standards for evaluating the reasonableness of agency-imposed penalties, which employ the existing Douglas factors approach to mitigation. See SA 0085-0086 (Art. 28, Sec. 5, of NTEU-CBP contract). By operation of the regulations, such contractual provisions would be "erase[d]" as "inconsistent with the Regulations" if the new mitigation standard takes effect. JA 146; see also 5 C.F.R. § 9701.506(a). The imminent cancellation of these negotiated terms deprives the Unions and their members of contractual benefits and, therefore, inflicts concrete and immediate injury upon them.²³

Second, as the representatives of approximately 60,000 DHS employees (JA 134), the Unions have standing to challenge the

²³ Cf. Brock v. Roadway Express, Inc., 481 U.S. 252, 260-61 (1987) (plurality op.); Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991); Johnston-Taylor v. Gannon, 907 F.2d 1577, 1581 (6th Cir. 1990) (all holding that rights conferred by collective bargaining agreements are property rights subject to the due process clause).

mitigation standard because some of the employees they represent are "likely to appear" before the MSPB (and before arbitrators) "in the near future," to have cases adjudicated under the illegal standard. See Gov't Br. 28-29 n.5 (recognizing Unions' standing to challenge regulations affecting FLRA jurisdiction because of the likelihood that the Unions will be appearing before the agency). Application of the new standard will necessarily injure employees because it imposes upon them a decidedly more stringent burden of proof when they challenge disciplinary penalties.²⁴ It would also injure the Unions by making it more difficult for them to successfully represent their members. See Spann v. Colonial Vill., Inc., 899 F.2d 24, 27 (D.C. Cir.), cert. denied, 498 U.S. 980 (1990) (citing Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)).

Accordingly, the district court correctly held that the Unions, "[a]s regular litigants before the MSPB on behalf of DHS employees, . . . have immediate standing to complain of such a

²⁴ In its brief (at 28), the government observes that the new penalty mitigation standard "is not self-defining, and it remains to be seen how the MSPB will flesh it out in actual cases." When they published the regulations, however, the Agencies confirmed that the standard is "significantly more limited than MSPB's current mitigation authority under the standard first enunciated in Douglas v. Veterans Administration (5 M.S.P.R. 280 (1981))." 70 Fed. Reg. at 5281. Indeed, the Agencies acknowledged that their intent was "to explicitly restrict the authority of MSPB to modify . . . penalties to situations where there is simply no justification for the penalty." Id.

material change in that agency's normal standard and the deference that it imposes before any individual employee is subject to an adverse action under the HR system." JA 149. The government's arguments to the contrary should be rejected.

B. The Penalty Mitigation Regulation Does Not Further the Fair, Efficient, and Expeditious Resolution of Disciplinary Cases, as the HSA Requires

The district court held that the new penalty mitigation regulation did not satisfy the statutory standard that must be met to justify a departure from current MSPB procedures. The court so held because the new regulation permits DHS to discipline or discharge employees "without effective recourse;" and "puts the thumbs of the Agencies down hard on the scales of justice in their favor." JA 163. As the court aptly observed, using this standard in place of the current penalty mitigation standard--an already "generous standard in an agency's favor"--"would render MSPB review almost a nullity and . . . could effectively insulate DHS adverse actions from review." Id.

The district court's reasoning was sound and its decision should be affirmed. The new regulations would prohibit the MSPB and arbitrators from mitigating even unreasonable disciplinary penalties, if the smallest sliver of justification exists, giving every benefit of the doubt to DHS. See 70 Fed. Reg. at 5281. As noted above (at 65 n.24), the Agencies acknowledge that the new standard provides the MSPB with "significantly more

limited authority [to mitigate penalties] than the current standard." That concession is telling given the fact that penalties are almost never mitigated under the existing standard.²⁵

On appeal, the government recycles the argument it made below that the "wholly without justification" standard is lawful because it is similar to standards of review that courts apply in other contexts. See Gov't Br. at 50. The district court correctly rejected this analogy. It recognized that the cases the government cited below, like those it cites here, concern the standards that courts use when they review decisions that have been made by administrative adjudicators, not the standards employed by administrative agencies in the first instance to adjudicate the rights of individuals. See id.; JA 162. As the district court recognized, "the Agencies are not 'simply shar[ing] the views of the courts' when they seek to adopt a more stringent standard by which MSPB would make its mitigation determinations." JA 163.

In its brief, the government also contends that the new standard is fair in the context of the entire scheme, which it asserts imposes a more stringent evidentiary standard on DHS

²⁵ The MSPB Annual Report for Fiscal Year 2004 (the most recent year available) shows that only 2% of the total number of cases adjudicated on the merits resulted in mitigated penalties. See http://www.mspb.gov/foia/forms-pubs/rpt_annual2004/2004_annua_report.htm (site last visited Jan. 20, 2006).

than does existing law. Gov't Br. at 49. The government is referring to the fact that, for a very narrow category of cases where actions are taken against employees on the basis of their performance (rather than their conduct), the regulations require the agency's action to be supported by a "preponderance of the evidence" rather than by "substantial evidence." Compare 5 U.S.C. § 7701(c) with 5 C.F.R. § 9701.706(d).

This justification, articulated for the first time in its brief to this Court, is completely contrived. History shows that the vast majority of cases in which the new penalty mitigation standard would apply would be conduct-based adverse actions under Chapter 75 for which the preponderance of evidence standard has always governed.²⁶ See 5 U.S.C. § 7701(c)(1)(B).

Further, even if the regulations made it more difficult for DHS to sustain a charge of misconduct in some tiny proportion of cases, there is no logical connection between the level of proof needed to establish the infraction and the fairness of the resulting penalty. The government's position is akin to claiming that it is fair to impose the death penalty for shoplifting because the crime must be proven beyond a reasonable doubt, rather than by a preponderance of the evidence. Clearly,

²⁶ The MSPB Annual Report for Fiscal Year 2004 shows that performance cases make up less than 3% of the MSPB's total docket. See http://www.mspb.gov/foia/forms-pubs/rpt_annual2004/2004_annua_report.htm (site last visited Jan. 20, 2006).

the legitimacy of the penalty is a matter to be considered separately from whether the underlying charge of wrongdoing has been proven.

Finally, the Agencies contend that the new mitigation standard is justified by the fact that DHS "bears full accountability for homeland security" and thus, it argues, "is in the best position to determine the most appropriate adverse action for poor performance or misconduct." Gov't Br. at 50 (citing 70 Fed. Reg. at 5281). This assertion proves too much. Every agency "bears full accountability" for the matters within its jurisdiction and, therefore, could make the same claim about being in the best position to determine appropriate penalties. Further, under established standards, the MSPB does not substitute its judgment for that of the agency in determining penalties. It upholds penalties unless they "exceed the bounds of reasonableness," a very deferential standard. See Casteel v. Dep't of Treasury, 97 M.S.P.R. 521, 524 (2004) (MSPB "must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that the [MSPB's] function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised"). Accordingly, the government has failed to justify its departure from the existing penalty mitigation standards in light of the HSA's requirements.

IV. THE REGULATIONS ASSIGNING NEW JURISDICTION TO THE MSPB ARE CONTRARY TO LAW

Count IV of the Unions' complaint alleges that the Agencies exceeded their statutory authority when they assigned an intermediate appellate role to the MSPB in matters involving mandatory removal offenses (5 C.F.R. § 9701.707(c)). Characterizing the question as "not entirely clear," the district court disagreed with the Unions' argument, despite its observation that it was "extraordinary" for Congress to give the Agencies the power to "modify or adjust the jurisdiction of an independent agency." JA 165. The district court's decision was incorrect and should be reversed by this Court.²⁷

The MSPB's powers and functions are set forth at 5 U.S.C. § 1204. Chapter 12 of Title 5 is in Part II of Title 5 and so is not among the provisions of law covered by the "notwithstanding" clause in 5 U.S.C. § 9701(a). Therefore, it is not disputed that the role played by the MSPB under the new regulations must be consistent with 5 U.S.C. § 1204.

The district court correctly observed that, under 5 U.S.C. § 1204(a)(1), the MSPB is empowered to "hear and adjudicate

²⁷ Count IV also alleged that the Agencies lacked the authority to impose new operational procedures on the MSPB, including changes in the time limits for filing an appeal with the MSPB, limitations on discovery, and provisions allowing disposition of cases on summary judgment. The district court rejected that challenge and the Unions do not pursue that aspect of the court's decision on appeal.

. . . all matters within the jurisdiction of the Board under . . . any . . . law, rule or regulation." JA 165. This provision gives the MSPB subject-matter jurisdiction based on OPM regulations, exercising its authority under Title 5 to issue government-wide personnel regulations.

There is no indication that Congress contemplated that regulations like those at issue here, which were promulgated jointly by OPM and DHS, and which affect only one agency, would fall within the "law, rule, or regulation" language of Section 1204(a)(1).²⁸ In any event, even assuming that the Agencies have the authority to confer subject-matter jurisdiction upon the MSPB to resolve matters arising under the DHS regulations, the Agencies have done more than confer subject-matter jurisdiction; they have transformed the MSPB's functions in a manner that cannot be reconciled with 5 U.S.C. § 1204(a)(1).

Thus, 5 U.S.C. § 1204(a)(1) limits the nature of the MSPB's authority (even when subject-matter jurisdiction is granted by

²⁸ In Cowan v. United States, 710 F.2d 803 (Fed. Cir. 1983), the Federal Circuit reserved the issue of whether reference to "regulation" in 5 U.S.C. § 1204(a)(1) includes regulations issued by an agency other than OPM that affects only that agency. See id. at 805 n.7 (holding that the MSPB "has no plenary jurisdiction"). In a decision it issued two years later, it articulated the narrower construction. See Saunders v. MSPB, 757 F.2d 1288, 1289 (Fed. Cir. 1985) ("The jurisdiction of the Board is limited to those matters specifically delineated by Congress or granted to it by way of regulatory authority exercised by OPM.") (emphasis added). See also 5 C.F.R. § 1201.3(a) (referring exclusively to OPM-issued, government-wide regulations).

regulation) to the authority to "take final action" on a matter. 5 U.S.C. § 1204(a)(1). As the Board itself has recognized, the MSPB "is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch, albeit one exercising independent quasi-judicial functions." Parker v. Defense Logistics Agency, 1 M.S.P.R. 505, *18 (1980). The Board was not constructed to sit in an appellate role and was not intended to apply the scope of review of a court of appeals. Id. It is the Board's decision (not the decision of the employing agency) that "must be articulated in a reasoned opinion providing an adequate basis for review by a Court of Appeals." See Parker v. Defense Logistics Agency, 1 M.S.P.B. 489, 497 (1980). It follows that the Board's decision, and not the decision of the employing agency, "constitute[s] the acts of 'the Government' for purposes of judicial review." Douglas, 1981 MSPB LEXIS 886, *21.

The role the regulations provide for the MSPB conflicts with this statutory charter. Because the MSPB would be reviewing DHS decisions under an extremely deferential standard, it is--for all practical purposes--the decision of DHS (through its mandatory removal panel) that constitutes the "act of the Government" under review. Further, it is the MSPB that is acting as an appellate panel, reviewing the decision of another adjudicative body, the MRP. This arrangement conflicts with

Chapter 12. As described above, the Agencies, therefore, lacked the statutory authority to assign the MSPB an intermediate appellate role.

V. THE DISTRICT COURT PROPERLY ENJOINED SUBPART E IN ITS ENTIRETY BECAUSE THE ILLEGAL REGULATIONS ARE NOT SEVERABLE

The government's final (albeit thinly developed) contention (see Gov't Br. at 51-52) is that the district court erred in denying its motion to narrow the scope of its injunction, which covered Subpart E as a whole. It contends (at 52) that the court should have granted the government's motion to narrow the injunction because the Agencies would have "preferred" the system established under the regulations to the existing one, even without the provisions the Court found illegal, i.e., those reserving DHS the authority to abrogate agreements, and those assigning an intermediate appellate role to the FLRA. The government's contention is inconsistent with established principles governing severability.

First, the unadorned speculation of counsel as to what the regulators would have done had they known the outcome of the Court's decision is entitled to no weight. See MD/DC/DE Broadcasters Ass'n v. FCC, 253 F.3d 732, 735 (D.C. Cir. 2001) (en banc) (rejecting counsel's arguments for severability in petition for rehearing on grounds that the agency, the FCC, "is a collegial body . . . ; it speaks through its orders, not

through counsel's filings"). When the invalidated provisions are "an integral part of the regulations," the court "intrude[s] into the function of [the agency] in selectively excising specific language in the rules." McCulloch Gas Processing Corp. v. Dep't of Energy, 650 F.2d 1216, 1230-31 (Temp. Emer. Ct. App. 1981).

Therefore, the test for severability is whether there is "substantial doubt" that the agency "would have adopted the same disposition regarding the unchallenged portion if the challenged portion were subtracted. . . ." Broadcasters Ass'n, 253 F.3d at 796 (emphasis added) (citing Fed. Power Comm'n v. Idaho Power Co., 344 U.S. 17, 20-21 (1952)); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944)); see also Davis County Solid Waste Mgt. & Energy Recovery Special Serv. Dist. v. EPA, 108 F.3d 1454, 1469 (D.C. Cir. 1997) ("The real question for severability analysis is not whether the EPA separately issued standards for existing large units, but rather whether the EPA would have adopted the same standards for existing large plants had the EPA not erroneously interpreted section 129 . . ."). In cases where substantial doubt exists, the courts routinely send the entire regulatory scheme back to the agency for reconsideration. See Alliance for Cmty. Media v. FCC, 10 F.3d 812, 830 (1993), vacated en banc on other grounds, 15 F.3d 186

(D.C. Cir. 1994). This “keeps judges out of the business of administrators.” Id. (citing Fed. Power Comm’n, 344 U.S. 17).

In this case, the administrative record plainly establishes “substantial doubt” that the Agencies would have adopted the remainder of Subpart E, as written, without the regulations the district court held invalid. Under the court’s decision, the scheme for adjudicating disputes arising under Subpart E is dramatically altered by the elimination of FLRA review of the decisions of the HSLRB. Without the FLRA, judicial review of HSLRB decisions will be had, if at all, in the district courts under the APA.

This result is contrary to several key aspects of the system designed by the Agencies for review of bargaining disputes. First, the Agencies intended to give the parties only 15 days to appeal. 5 C.F.R. § 9701.508(h)(1). By contrast, parties would have six years to file an action under the APA challenging a decision of the HSLRB. See 28 U.S.C. § 2401(a). Further, the Agencies required the FLRA to complete its review of the HSLRB’s decisions in no more than 45 days after a party’s timely response to the appeal. See 5 C.F.R. § 9701.508(h)(2). If the FLRA fails to act by this deadline, it is deemed to have upheld the HSLRB’s decision, and the losing party has an immediate right of appeal pursuant to 5 U.S.C. § 7123. The

Agencies obviously have no power to impose such time limits by regulation on district courts.

Second, under the system envisioned by the regulations, all unfair labor practices ("ULPs") would receive the same form of judicial review in the courts of appeals. Eliminating the FLRA's review of HSLRB decisions creates an illogical bifurcated review scheme: ULPs involving management rights and bargaining issues would be heard by the HSLRB (see 5 C.F.R. § 9701.509(a)), perhaps with review in the district courts and then the courts of appeals. Other ULPs would be heard by the FLRA (see 5 C.F.R. § 9701.510(a)), with review in the courts of appeals pursuant to 5 U.S.C. § 7123. There is no indication that the Agencies ever countenanced such an unusual and awkward system.

To the contrary, the administrative record shows that the Agencies' decision to assign the FLRA the responsibility for reviewing HSLRB decisions was a carefully considered one. In their proposed regulations (69 Fed. Reg. 8030-8071 (Feb. 20, 2004)), the Agencies noted the conundrum they faced concerning judicial review of decisions of the HSLRB. Id. at 8042. The Agencies requested comments on whether they should remain silent on the issue or provide for FLRA review, under a very deferential standard, with subsequent judicial review in the courts of appeals under 5 U.S.C. § 7123.

In the explanatory text accompanying the final regulations, the Agencies noted that "a commenter argued that the Homeland Security Act gave neither DHS nor OPM the power to confer jurisdiction on FLRA to hear appeals from HSLRB decisions." 70 Fed. Reg. at 5307. The Agencies "disagree[d]" and explained that "after further consultation with FLRA . . . , we have adopted the second option in § 9701.508(g), which provides that either party may request review of the record of an HSLRB decision by FLRA." Id.

This regulatory history establishes at least a "substantial doubt" that the Agencies would have chosen the approach they now propose--remaining silent on judicial review of HSLRB decisions--had they known the approach they did take--providing for FLRA review--was illegal. In fact, the administrative record shows that the Agencies carefully considered this matter and expressed a clear preference for an approach now deemed illegal, even though the legal problems had been raised during the comment phase. This indicates the Agencies' clear preference for a judicial review approach other than the one they are left with now, after the district court's decision invalidating the regulations assigning an intermediate appellate function to the FLRA.

The administrative record also makes it clear that the regulators saw the authority to disregard collective bargaining

agreements as essential to the "management flexibility" they coveted.²⁹ JA 173-74. The district court, accordingly, was "persuaded that the remainder of the 'regulations would not have been passed but for [the] inclusion of the [offending provisions].'"³⁰ JA 174 (quoting Davis County, 108 F.3d at 1460). The court also correctly held that "the offending provisions are so intertwined with the remainder of Subpart E that, if severed, the Subpart could no longer "sensibly serve the goals for which [it was] designed.'" JA 174 (quoting MD/DC/DE Broadcasters II, 253 F.3d at 734). For these reasons as well, the district court correctly denied the government's motion to narrow the injunction.

CONCLUSION

On the basis of the foregoing, this Court should affirm the district court's decision that the HR system fails to ensure employees' right to bargain collectively for the reasons outlined above; affirm the district court's decision that the Agencies are without authority to assign to the FLRA jurisdiction to review decisions of the HSLRB; and affirm the

²⁹ See, e.g., supra, at p. 28 n.10.

³⁰ In so holding, the court agreed with the Unions that more regulations than those identified by the government are invalid under the court's holding. See JA 174 and n.8. Thus, it was "reluctant to make changes in the Regulations that were not considered by the Agencies." JA 174.

district court's decision that the regulation establishing a new penalty mitigation standard (5 C.F.R. § 9701.706(k)(6)) is invalid. Further, the court should reverse the district court's decision upholding the regulations insofar as they narrow the scope of matters subject to bargaining, establish the HSLRB, assign the FLRA responsibility for resolving unfair labor practice charges arising under the HR system, and assign an appellate role and new procedures to the MSPB.

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[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 05-5436, 05-5437

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

NATIONAL TREASURY EMPLOYEES UNION, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

MICHAEL CHERTOFF, SECRETARY,
DEPARTMENT OF HOMELAND SECURITY, et al.,

Defendants-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OPENING BRIEF FOR THE UNION-APPELLEES

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CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certify as follows:

A. Parties and Amici

Plaintiffs-Appellees/Cross-Appellants are the National Treasury Employees Union; American Federation of Government Employees, AFL-CIO; National Association of Agriculture Employees; National Federation of Federal Employees, FD-1, IAMAW, AFL-CIO; and the Metal Trades Department, AFL-CIO. Defendants-Appellants/Cross-Appellees are Michael Chertoff, Secretary of the Department of Homeland Security, and Linda Springer, Director of the Office of Personnel Management.

B. Rulings Under Review

The rulings under review are the orders and memorandum opinions issued on August 12, 2005, and October 7, 2005, by United States District Judge Rosemary M. Collyer in Civ. No. 05-201 (RMC). The rulings are reported at 385 F. Supp. 25 1 and 394 F. Supp. 2d 137.

C. Related Cases

This case has not previously been before this Court. Counsel are not aware of any related cases currently pending in this or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the undersigned counsel hereby certifies as follows:

1. The National Treasury Employees Union; the American Federation of Government Employees, AFL-CIO; the National Federation of Federal Employees, FD-1, IAMAW; the National Association of Agriculture Employees; and the Metal Trades Department, AFL-CIO (collectively "the Unions") are unincorporated, non-profit organizations serving as the exclusive representative of federal government employees pursuant to 5 U.S.C. §§ 7101-7135.

2. None of the Unions has a parent company.

3. No publicly held company has any ownership interest in any of the Unions.

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GLOSSARY

<i>Agencies</i>	U.S. Department of Homeland Security and U.S. Office of Personnel Management
<i>CBP</i>	U.S. Bureau of Customs and Border Protection
<i>CSRA</i>	Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978)
<i>DHS</i>	U.S. Department of Homeland Security
<i>FLRA or Authority</i>	Federal Labor Relations Authority
<i>FLRC</i>	Federal Labor Relations Council
<i>FSLMRS</i>	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
<i>HR System</i>	Human Resources Management System for the U.S. Department of Homeland Security
<i>HSA or Act</i>	Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2230 (2002)
<i>HSLRB</i>	Homeland Security Labor Relations Board
<i>MRP</i>	Mandatory Removal Panel
<i>MSPB</i>	Merit Systems Protection Board
<i>NLRB</i>	National Labor Relations Board
<i>OPM</i>	U.S. Office of Personnel Management
<i>Unions</i>	National Treasury Employees Union; American Federation of government Employees, AFL-CIO; National Federation of Federal Employees, FD-1, IAMAW; National Association of Agriculture Employees; Metal Trades Department, AFL-CIO