OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1728

TITLE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner
V. FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

PLACE Washington, D. C.

DATE January 22, 1986

PAGES 1 thru 44

ALDERSON REPORTING

(202) 628-9300
[illegible] STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

- -x

EQUAL EMPLOYMENT OPPORTUNITY :

COMMISSION :

Petitioner :

v. : No. 84-1728D

FEDERAL LABOR RELATIONS :

AUTHORITY, ET AL. :

- -x

Washington, D.C.

Wednesday, January 22, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

CAROLYN B. KUHL, ESQ., Washington, D.C.;

on behalf of Petitioner.

RUTH E. PETERS, ESQ., Washington, D.C.;

on behalf of Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Ms. Kuhl, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF CAROLYN B. KUHL, ESQ.

ON BEHALF OF PETITIONER

MS. KUHL: Thank you, Mr. Chief Justice, and may it please the Court.

The issue in this case is whether a Government employee union can require a Government agency to bargain over, and therefore to make a subject of grievance arbitration, a proposal that would give the union the right to enforce the provisions of Circular A-76.

The court below held that a Government employee union can enforce the circular, but this result is anomalous. A-76 is a management directive. It flows from the authority of the President to manage the budget and to manage the Executive Branch, and it implements the President's economic policies.

The circular itself expressly reserves to the President and to his delegates the authority to enforce the circular. But the decision below turned enforcement of the A-76 directive and of the President's management authority, and in turn the interpretation of the directive, over to arbitrators, with review perhaps only

by the Federal Labor Relations Authority, perhaps no judicial review.

This result is not only contrary to the express language of the circular, but it also interferes with the authority of the President to give directives to his subordinates and to enforce those directives in his own way. It should not be assumed that Congress would have intended this anomalous result and this disruptive result, absent some clear statutory authority.

But on the contrary, the statute in fact requires no such solution. Let me try to condense here very quickly the statutory provisions that are at issue. All the parties agree that Title 7 of the Civil Service Reform Act gives management the right to make determinations with respect to contracting out, and all parties also agree that the only constraint on that management right is that it be -- that is, the only constraint that's at issue in this case -- is that the right to contract out be exercised "in accordance with applicable laws."

So that the question for decision is whether the phrase "in accordance with applicable laws" gives the union a right that no one other that the President has, the right to enforce circular A-76. The first and

most important reason why the "in accordance with applicable laws" language does not give the union the right to enforce the circular is because A-76 is not a law at all.

QUESTION: Well, Ms. Kuhl, suppose that we agreed that the circular is not a law for purposes of Section 7106. Does that end the case, or do we still have to determine whether non-compliance with the circular is the subject of a grievance under the Act notwithstanding whether it's included in a collective bargaining agreement?

MS. KUHL: That ends the inquiry in our view, Justice O'Connor.

QUESTION: What is the inquiry? If you say it's not a law under 7106?

MS. KUHL: That's correct. If you say it's not a law, that ends the inquiry, because --

QUESTION: I thought your opponent says it doesn't, because in any event it's grievable under the Act.

MS. KUHL: That's right. But it's our submission that the language of 7106, which says nothing in this chapter shall interfere with management rights, that that applies to not only the negotiability issue, but also to the grievability issue, and the Respondents

have not presented any reason why Congress would have said nothing in this chapter when in fact it meant nothing relating to bargainability or negotiability.

QUESTION: I take it, though, that you take the position that under Section 7117(a)(1) --

MS. KUHL: Yes.

QUESTION: -- the circular is a rule or regulation?

MS. KUHL: Well, of course the language there is a bit different. It doesn't say "laws." It says "laws, rules, and regulations." And we also have some rather specific legislative history there that indicates that Congress was concerned that unions not be able to create rules that would conflict with Government-wide policies. It did not want inconsistencies among the agencies.

So that there's, number one, a difference in language and, number two, some rather specific legislative history. And in fact, the Respondents agree that A-76 is a law, rule, or regulation within the meaning of 7117.

QUESTION: Counsel, is the circular reproduced in your brief anythere?

MS. KUHL: The circular has been lodged with the Court, Justice.

QUESTION: Is it very long?

MS. KUHL: Well, I can show it to you. It's really fairly long.

QUESTION: Yes, but that isn't the full circular. That's the circular plus the appendices, is it not?

I'm a little surprised that neither side has seen fit to produce the circular in any papers that are filed here for the Court to consider at the bench. I happen to have it, but I just wondered why not.

MS. KUHL: Well, I apologize if the Court does not have those materials available to it. This is the supplement, Your Honor is correct. The directive itself is in the Federal Register at volume 48 beginning at page 37110.

QUESTION: It's all of ten pages, eleven maybe.

MS. KUHL: It's quite short. My apologies to the Court.

To continue then as to why A-76 is not a law within the meaning of the "in accordance with applicable laws" language, A-76 itself makes clear that it is not a law and that it's only binding effect flows from the President's authority. The circular states that it does not establish and shall not be construed to create any

basis for anyone to challenge agency action or inaction on the grounds that that action or inaction was not in accordance with the circular.

The only challenge to agency action that the circular permits is by a very expedited appeals procedure that the circular creates within the agency. And it's important that this procedure is a very rapid one. People who would like to challenge the agency's decision to contract out must file their appeal within 15 days, and the agency within itself must decide within 30 days. And again, theres no furthet right to review beyond that appeal within the agency.

Every court and administrative body other than the court below that has been asked to enforce circular A-76 has respected the limitations that are contained within the language of the circular itself and has refused to create third party enforcement rights. Two Courts of Appeal have turned down challenges brought under the Administrative Procedure Act and the Ninth Circuit has ruled in direct conflict with the decision of the court below.

And perhaps most importantly, the Merit System Protection Board, which is the Congress agency which has authority to enfore employee rights in a non-union context, the MSTB has held that an employee's challenge

to a reduction in force brought on the theory that the reduction in force was required by an incorrect decision to contract out, that that kind of challenge would not be brought predicated on A-76.

Thus, is seeking the right to enforce A-76, the union is seeking a right that non-union employees indisputably do not have, and it's our view that Congress did not anywhere express any intent to create this kind of disparity.

QUESTION: What effect would the proposal have on management rights, other than an effect on grievance and arbitration procedures? Would there be any other effect?

MS. KUHL: Well, it would have really a very substantive effect. The union suggests that its proposal is a modest one of trying to enforce A-76. But because they want to enforce A-76, but don't want to accept the conditions under which the President was willing to issue A-76, the union's discretion to make contracting out decisions is very severely impinged when grievance --

QUESTION: Not the union's.

QUESTION: The union's?

MS. KUHL: I'm sorry, I misspoke. The agency's authority to make, discretion to make

contracting out decisions.

QUESTION: I just wonder what effect it would have other than on grievance and arbitration. If it has one, I haven't heard.

MS. KUHL: Well, when a grievance is filed, Justice O'Connor, the agency is really placed in a difficult dilemma. The agency --

QUESTION: Well, it is -- you agree that it would have no effect other than on grievance and arbitration procedures?

MS. KUHL: Well, the grievance and arbitration -- I think our point is that the grievance and arbitration procedures would affect the substance of contracting out, because the agency's decisions will be affected.

QUESTION: Well, the other side takes the position that the Act requires that these matters be subject to grievance and arbitration anyway.

MS. KUHL: That's correct, but that's because they do not admit that the "nothing in this chapter" language applies to the grievance proceedings as well as to the negotiability context.

But the reason why there's a substantive problem here and not just a procedural problem for the agency is because when a grievance is filed the agency

is faced with quite a dilemma. It either has to decide to proceed with the contract, in which case it risks later having --

QUESTION: Well, be a little more concrete. The kind of a grievance that would be filed is that when there's a proposal to contract out the union would grieve and say that you're not following the right procedures and you must not do this until you do; is that it?

MS. KUHL: That's right. And to be a little more concrete, they might say, for example, well, you didn't determine personnel cost correctly in making your comparison between in-house costs and costs that would be incurred using an outside contractor.

QUESTION: And if the arbitrator agreed with them, the contracting out would be interfered with, I gather?

MS. KUHL: It would be. And in fact, it's interesting, the Authority even agrees that management discretion would be interfered with under those circumstances. They say at least in some cases.

Now, their proposed solution we think is not really a solution at all. They say the arbitrators will stay their hands; don't worry, the arbitrators will not be permitted to second guess discretionary judgments of

the agency.

But in fact, the Authority doesn't cite any statutory language which would so constrain the authority of the arbitrator. And actually, I draw the conclusion from that that the Authority doesn't fully believe what is says. They say that the management rights clause does not apply to the grievance proceedings, but yet they say, well, when arbitrators get into a discretionary area they'll stay their hands.

But they don't propose -- the Authority does not propose any standards by which arbitrators are to decide when to stay their hands. And moreover, if the arbitrators do not stay their hands in the discretionary area, there can indeed be review by the Federal Labor Relations Authority.

But as I've stated, it is questionable whether -- it's an open question as to whether there can be any judicial review beyond that point.

QUESTION: I take it you submit alternative theories by which you could prevail, the theory that 7106 ends the inquiry if the circular is not a law or the theory that 7117(a)(1) ends the case if we say it's a rule or regulation that's inconsistent.

MS. KUHL: That's correct, and we have yet another variation on the first theory. If A-75 is a law

-- and of course we don't concede that it is a law -- but if it is a law, we say that it is not an applicable law within the meaning of the statute. And the reason that we say that is because we read the "in accordance with applicable laws" language to give unions the right only to enforce laws that have rights personal, directly personal, to the employees.

If you read the phrase "in accordance with applicable law" more broadly than that, you run into some quite anomalous results, and Respondents do not explain why this result could have been intended by Congress.

They wouldn't draw any lines. They would say "in accordance with applicable law" means that so long as the agency's action is constrained by some law somewhere, and so long as the agency's action has some effect on employees somehow, then there can be review or the unions can enforce that law.

But to just give a hypothetical of why that reads "in accordance with applicable laws" much too broadly, suppose Congress instructs the Forest Service to give priority to fire prevention, and suppose that the Forest Service then decides that it should conduct a reduction in force and some Forest Service personnel are included in that reduction in force.

The Authority's construction, the Respondent's construction, would seem to allow the union to come in and argue that the reduction in force was not in accordance with applicable law because Congress had indicated that fire prevention was a priority.

QUESTION: Well, under the union's theory, would that then be decided by an arbitrator?

MS. KUHL: That's correct, it would be decided by --

QUESTION: Whether the fire service -- Forest Service was laying off the right people?

MS. KUHL: That's right, it would be decided by an arbitrator.

So that their construction really leads to the conclusion or would suggest that Congress intended to create very broad private rights of action for union employees. But this Court has held that private rights of action should be inferred only when Congress has intended to create such remedies, and there is no indication of a Congressional intent here to create such broad rights of action.

To give the unions this kind of broad right of action would create a great disparity, as I've suggested before, between union and non-union employees in terms of the type of statutes that they can seek to enforce.

And as I say, there's no evidence Congress intended this.

What we can glean from the legislative history is that Congress intended to take traditional personnel decisions that either union on non-union employees could bring under the old executive order regime and to give unions the ability to take these kinds of rights and raise them through the grievance proceedings. The broad interpretation that the Respondents would give to the "in accordance with applicable law" language would also interfere with the management rights that are preserved in 7106 subsection (a)(1).

To look at the structure of the statute, subsection (a)(1) management rights, which are the right of the agency to control the mission and the budget and the number of employees of the agency, is not constrained by the "in accordance with applicable law" phrase. In other words, the agency insofar as the union is concerned does not have to act in accordance with applicable laws in setting the mission of the agency.

But the Respondent's interpretation of "in accordance with applicable law" would allow a challenge to be brought under (a)(2) that would reach just the same result that's precluded under subsection (a)(1). This is rather difficult, but let me try and give a

hypothetical.

Under subsection (a)(2), under the Respondent's theory, the union can require that layoffs comply with applicable law. But under their reading they might be able, for example, to argue that the Forest Service was not complying with Congress' fire prevention priorities when it laid off people in the fire prevention area.

But in fact, this kind of challenge would be exactly the sort of challenge that (a)(1) does not permit. It would be a challenge to the mission of the agency.

So that while the Respondents try to suggest that they have a coherent interpretation of the statute as a whole, in fact their interpretation does conflict one part of a statute with another, and it also tries to read out certain parts of the statute. For example, it does not give any effect to the language saying "nothing in this chapter shall effect." It reads that right out of the statute.

To go back again to mission, particularly with regard to A-76 and the consequences that will flow if arbitral review of A-76 decisions is permitted. These decisions, if permitted -- that is, if arbitral review is allowed -- will inevitably interfere with

management's authority to contract out, because every aspect of circular A-76 involves matters of agency discretion.

One of the chief reasons why courts have declined under the APA to review compliance with A-76 is that it lacks meaningful standards by which to judge an agency's exercise of discretion. And to give just one example of the kind of discretionary judgments that are involved in an agency's carrying out circular A-76, when the cost comparison is done by the agency it is premised on a management study that the agency has to conduct to determine the most efficient composition by which the agency could perform the function, so that already you have an element of estimation, an element of exercise of agency judgment, in just determining what the in-house cost comparison is to be based on.

The circular then goes on to say that, in determining personnel costs, one makes a staffing estimate that also is cabined by the tools, judgmental tools, that the agency is to use. And as I've mentioned before, even the Authority admits that this kind of arbitral review for compliance with A-76 will at least sometimes impinge on ageny discretion. But again, the solution that they offer is a clearly inadequate one of just the hope that arbitrators will stay their hands

when they get into somehow the fine discretionary area.

If the Court has no further questions, at this time I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Ms. Peters.

ORAL ARGUMENT OF RUTH E. PETERS, ESQ.

ON BEHALF OF RESPONDENTS

MS. PETERS: Mr. Chief Justice and may it please the Court:

One of the responsibilities entrusted to the Federal Labor Relations Authority by Congress is the task of determining the negotiability of collective bargaining proposals in the federal sector. This case arose nearly six years ago now when AFGE submitted a proposal which provided that Petitioner EEOC agree to comply with OMB circular A-76 and other applicable laws and regulations concerning contracting out. The Authority found the proposal to be negotiable.

Underlying the Authority's determination are three basic propositions to which the Authority has adhered since the first days of its enabling statute, the first proposition here being that the statute does indeed reserve to management as non-negotiable the substantive exercise in accordance with applicable laws of the management rights enumerated in Section

7106(a)(2); however, a proposal such as the one here that imposes no substantive limitations of its own making, that simple restates management's obligation to comply with applicable legal requirements when exercising those reserved rights, is negotiable.

The second proposition here being that the statute in the federal sector defines the scope of the negotiated grievance procedure. Thus, even in the absence of a proposal such as the one here, with or without such a proposal, disputes about the applications of laws, rules, and regulations such as the circular, affecting conditions of employment, are within the scope of the grievance procedure unless the parties agree through negotiations to exclude such grievances.

The final proposition here is likewise rooted in the notion that the statute prescribes the scope and the coverage of a negotiated grievance procedure in the federal sector. Thus, no Government-wide rule or regulation, including the circular, even a rule or regulation purporting to address the permissible scope in some fashion of the grievance procedure, may be applied in a manner that is inconsistent with the scope as defined by this Act of Congress.

Having stated these propositions, I would also like to note, because I think it is pertinent to an

understanding of this case, one proposition in which the Authority's decision takes absolutely no root, and that is this Authority decision and no Authority decision of which I am aware either is based upon or provides any support for the notion that in the area of management's reserved rights choices of policy or matters of discretion that management reserves to itself are somehow susceptible to the bargaining process or to the grievance procedure.

An examination of the first proposition, that proposals such as the one here are negotiable, demonstrates the faithfulness of the Authority in this decision to the text of the statute and to its own decisional precedent. The statute does reserve to management in Section 7106(a)(2), along with other rights, the non-negotiable substantive authority to make determinations with respect to contracting out.

The Authority in its decisional precedent has recognized, respected, and effectuated that reservation of authority to management. But this authority reserved to management is not unfettered. By the literal terms of the statute, that authority is subject, first of all, to the negotiation of procedures under Section 7106(b)(2) and appropriate arrangements under Section 7106(b)(3).

Furthermore, the statute expressly provides that management's contracting out authority, as well as the other enumerated reserved rights, must be exercised in accordance with applicable laws. Thus, a bargaining proposal like this one is not rendered non-negotiable simply because it mentions a reserved right.

Indeed, in a long line of decisional precedent, the Authority has consistently found to be negotiable proposals like the one in this case, proposals that impose no substantive criteria of their own making, but instead simply restate management's obligation to act in accordance with applicable laws.

QUESTION: It is a little difficult to conceive of a policy circular like this as being a law, though, isn't it?

MS. PETERS: Well, I would note that it was published for notice and comment in the Federal Register, and that even Petitioner would have it be a rule or regulation within the meaning of Section 7117.

QUESTION: But not necessarily a law. I think it is somewhat conceptually difficult to think of this circular as being a law.

MS. PETERS: In terms of Section 7106, I think that a natural meaning given to that term and the term that the Authority has given to the term "in accordance

with applicable law" means applicable legal requirements. And certainly, in any of the legal criteria that apply to the rights there, whether it be contracting out or discipline or promotions or work assignments, any of the underlying laws, rules, or regulations could involve expressions of executive or Congressional policy.

Even our own statute and most Congressional enactments have some policy root.

QUESTION: Well, what if a Director of OMB, instead of issuing a circular, had simply called in the administrative officers of all the agencies and departments and said: Look, I'm going to tell you now how we're going to handle contracting out, and he told them maybe in 15 minutes or a half an hour what the substance of this circular.

And they took notes and then went back and said: All right, here's how we're told to handle contracting out. Now, is that an applicable law under the statute?

MS. PETERS: In that situation, it may not be. Whatever checks or balances or review there would be of such a procedure probably wouldn't come from collective bargaining or the arbitration process. It might come from a Congressional oversight committee or the public

at large, but not this process.

QUESTION: Well, what if a third party interested in contracting out were to try to litigate the question of whether EEOC had properly complied with the OMB directive? Do you think it could bring a lawsuit saying, look, you didn't follow the OMB requirements here?

MS. PETERS: They may have access to the Comptroller General.

QUESTION: Do you think -- that wouldn't be a lawsuit. Do you think they could bring a lawsuit?

MS. PETERS: Well, that I do not know. The precedent that exists to this time seems to me either to be based upon a pre-1979 version of the circular, that is during that period, or based upon precedent developed in that period.

One of the Claims Court's decisions cited by AFGE in its brief suggests at 4 Claims Court page 198 -- and it's the International Graphics Division case -- that the post-1979 case, Local 2855 versus Brown, that relied upon previous cases, relied upon a version of the circular in 1967 that said no specific standards or guidelines are set present for determining whether cost savings justify going, contracting rather than staying in-house.

But the Claims Court suggests that the vitality of this aspect of that case, which I believe is an Eleventh Circuit case, was diminished by the replacement in 1979 of that portion of the circular with the specific and detailed -- and this is the language of the Claims Court -- cost comparison handbook. So what would happen now in litigation, I am not sure.

But it would appear that disappointed bidders or offerors could go to the Comptroller General under certain circumstances. They have entertained review of what they call the mandatory procedures set forth in the cost comparison handbook.

And it seems to me that, looking at the Comptroller General cases cited by AFGE in its brief, that when a disappointed bidder or offeror goes there that the Comptroller General conducts the same sort of analysis that occurs under arbitration of applicable laws in our program.

QUESTION: Well, Ms. Peters, suppose we disagree with you and think the circular isn't a law under the terminology of Section 7106. Does that end the case?

MS. PETERS: Well, I'm not sure conceptually how it would not be an applicable law, first of all, particularly in view of the fact, for example, that OMB

itself --

QUESTION: Well, just suppose that we disagree with you and think it's not. Does that end the case?

MS. PETERS: In my view and in the authority's view, the scope of the grievance procedure is defined by the statutory definition of "grievance," and the statutory definition of "grievance" talks about matters, first of all, relating to the employment of an employee, and secondly about the misapplication of laws, rules, or regulations affecting conditions of employment.

So even if it weren's a law, perhaps a question of whether it's a Government-wide rule or regulation, which ever Petitioner would agree it is under Section 7117, would be pertinent. There are perhaps other applicable laws.

QUESTION: How would it be pertinent?

MS. PETERS: Pardon?

QUESTION: You just said that would be pertinent. Why would it be pertinent?

MS. PETERS: If it were a rule or a regulation, even if it could not be considered a law, and if it contained some mandatory criteria --

QUESTION: And the Authority's position is that any applicable rule or regulation is grievable?

MS. PETERS: That relates -- that affects

conditions of employment. Of course --

QUESTION: Is that because of the definition of a grievance in the statute?

MS. PETERS: That is correct.

QUESTION: And so it doesn't make any difference whether in the collective bargaining agreement it says that management will abide by all rules and regulations?

MS. PETERS: That is correct. Both AFGE and NTEU indicated in their briefs to this Court --

QUESTION: So a grievance -- under this scheme, grievances are not limited to construing and applying the collective bargaining agreement, is that it?

MS. PETERS: That is correct, under our statutory scheme. The language of the statute --

QUESTION: That's in the statutory definition?

MS. PETERS: Yes, it is.

QUESTION: Do you have -- does the agency have authority to issue regulations to implement the statute?

MS. PETERS: Our statute? Yes, we do. We have both formal and rulemaking -- formal and informal rulemaking authority, as this Court has noted in BATF.

QUESTION: So what do you call the statute, the Federal Labor Relations Law?

MS. PETERS: Yes, it's called the Federal Service Labor Management Relations Statute, yes.

QUESTION: You feel -- and is it clear that the agency is entrusted with the enforcement of that statute?

MS. PETERS: Of our statute, yes. We are an independent body set up by provisions 5 U.S.C. 7101 through 7135 --

QUESTION: And you construe the language of the statute to apply to a situation like this, whether this is a law or whether it isn't for another purpose? You would say it nevertheless is enough of a Government regulation to be grievable within the meaning of the statute?

MS. PETERS: Petitioner has found it to be a Government-wide rule or regulation within the meaning of Section 7117 of the statute. And if fact, the Office of Management and Budget extended national consultation rights to unions unier Section 7117(d)(1) of the statute, which -- national consultation rights are extended --

QUESTION: So why should be debate some abstract thing like whether this presidential directive

is a "law" or not? Why don't we just say, ask whether it's grievable anyway?

MS. PETERS: Well, that would I think be the pertinent point. This is of course a negotiability proceeding. All this decides -- all the Authority decided here is whether this proposal is negotiable. And in response to the --

QUESTION: Well, it needn't be negotiable to be grievable.

MS. PETERS: That is correct. But the Authority's theory that it is negotiable is because it places no substantive limitations of its own making upon management's rights. And the issue of grievability arose when the authority stated in its decision that if EEOC, the Petitioner, were interpreting this as somehow -- by placing this in the contract --

QUESTION: To make it negotiable, don't you have to say that it's a law? Don't you have to win on that issue?

MS. PETERS: Well, in our view it is -- in our view, the natural meaning of the phrase "in accordance with applicable laws" means applicable legal requirements. Many of those requirements may be discretionary, and they would not be susceptible to a grievance procedure.

In the area of management rights, essentially management holds all the cards. It first of all determines the underlying policy. For example, in the reduction in force area or the layoff area, which is a reserved management right, it determines, for example, whether reductions in forces are preferable to furloughs, and it also determines whether reductions in force should be based upon seniority or performance or some combination thereof.

Having established policies, it also chooses the criteria by itself, without grieving or bargaining, upon which it exercises such rights and effectuates such policies. To the extent that it chooses discretionary criteria for itself, those would not be susceptible to the grievance procedure, and this is true whether it is contracting out or layoff or discipline or any of the reserved management rights.

But to the extent that management chooses for itself mandatory criteria against which compliance can be measured -- and it would appear that the Comptroller General at least in this area has been able to find some mandatory criteria, although there are also some discretionary ones against which compliance can be measured -- that would be susceptible to the grievance procedure to the extent that it affects conditions of

employment.

QUESTION: Ms. Peters, may I ask you a question at this point?

MS. PETERS: Yes.

QUESTION: That's true whether or not this provision is included in the contract under your submission?

MS. PETERS: That is correct.

QUESTION: Under your submission, would the inclusion of this provision in the contract make anything subject to the grievance procedure that would not already be subject to the grievance procedure?

MS. PETERS: The inclusion of this in the contract would make nothing subject to the grievance procedure which is not already.

QUESTION: And why is it so important to the union then?

MS. PETERS: Both NTEU, the amicus, and AFGE, our Respondent, our joint Respondent here, indicated in their brief to this Court that it is simply a common practice in the federal sector, where so many things are subject to law --

QUESTION: Is it worth litigating about? I'm just wondering.

MS. PETERS: It is what we are litigating.

QUESTION: Is it worth all the time if it really doesn't make any difference, if it's customary to do it? Is that really a sufficient reason?

MS. PETERS: For putting it in the contract?

QUESTION: Yes, if you have the same rights without it.

QUESTION: Or for ordering them to bargain, if it isn't important.

MS. PETERS: Well, of course simply -- it is in line with long-established precedent to find this negotiable. This is not the first time that the Authority has found an "in accordance with applicable laws" provision to be negotiable, and in terms of ordering them to bargain, the Petitioner can say that it does not want such a provision in the contract.

We are not telling them to agree to the provision. We're simply telling them to bargain.

QUESTION: At least it would make the contract shorter if you left the provision out.

QUESTION: And bargaining much shorter.

QUESTION: I'm not sure I've got your point in some of these colloquies.

MS. PETERS: Yes.

QUESTION: Is it your position that the phrase in the statute "in accordance with applicable law" means

that they conduct an arbitration to decide what that means, what is applicable law?

MS. PETERS: Arbitration only would view mandatory criteria that somehow affect, that affect conditions of employment. That is the extent to which arbitration is involved in an area such as this or in any other of the areas reserved to management, such as layoff or promotion, for example.

QUESTION: Well, I'm still not sure I have your answer. Who decides --

MS. PETERS: Yes.

QUESTION: -- whether something is in accordance with applicable law?

MS. PETERS: Well, the arbitrator would look at something and see --

QUESTION: You mean the arbitrator and not the agency, not the statutory agent that's engaging in the contracting out?

MS. PETERS: The statutory agent would be an employing agency, and it would have one view, perhaps, of the applicable law. The arbitrator, as with the other management rights --

QUESTION: But you're saying that must be arbitrated?

MS. PETERS: Under the statute, the express

terms of the statute, the grievance procedure extends to misapplications or misinterpretations or violations of laws, rules, or regulations, and that would include laws, Government-wide rules or regulations, or agency regulations.

QUESTION: And that includes --

MS. PETERS: Yes, in our view, yes.

QUESTION: Your position is that applicable law includes the circular?

MS. PETERS: That is correct, yes.

QUESTION: Ms. Peters --

MS. PETERS: Yes.

QUESTION: Did the agency interpret the proposal with respect to circular A-76 to mean that, if it were agreed to or otherwise came into effect, that the provisions of circular A-76 as it then stood would bind EEOC as to the employees, even though OMB were to change the circular?

MS. PETERS: I don't know if that's what the Petitioners here have in mind. Authority precedent makes clear that it doesn't permit that. For example, in the lead case in the contracting out area where the Authority protected the substantive rights of management to choose its own criteria and make its own policy, in that case, NFFE Local 1167, the proposal simply was to

put portions of the circular as it existed into the contract, and the Authority found that non-negotiable because it would bind them to that even if the circular changed.

But a proposal such as this in the Authority's view, simply "in accordance with applicable laws," does not, because management retains the right and there are no specific provisions of the circular or other applicable laws in the contract, so that management can change those during the life of the contract and those will be the applicable provisions in any grievance or arbitration or in any other way that they affect employees.

QUESTION: Ms. Peters --

MS. PETERS: Yes.

QUESTION: -- why couldn't this have been settled within the administrative section of Government?

MS. PETERS: Well, we are an independent agency and we are an adjudicatory --

QUESTION: Is there no way to -- there's nobody who can settle this?

MS. PETERS: Well, we are here as Respondents, Justice Marshall, and this case began when we made an adjudication of a negotiability dispute. The Petitioner

petitioned for review and the D.C. Circuit --

QUESTION: But this is a case of the United States versus the United States.

MS. PETERS: Perhaps, perhaps. But we are set up to be an independent agency to resolve labor disputes within the Federal Government. And in the words of Judge Starr of the D.C. Circuit, we are set up to favor neither management nor labor, and therefore we are neutral, we are independent, and our adjudicatory decisions are reviewed --

QUESTION: The Government pays for all of these expenses, the briefs, and everything, on both sides.

MS. PETERS: That is correct, that is correct.

QUESTION: On both sides.

MS. PETERS: That is correct.

QUESTION: And that's a controversy?

MS. PETERS: Well, the statute does provide precisely for judicial review in the courts of appeals under much the same scheme as decisions of the NLRB are subject to judicial review in the courts of appeals.

QUESTION: May I ask you the other side of the question I asked a little bit ago.

MS. PETERS: Certainly.

QUESTION: Assume for just purposes of argument that apart from the agreement that questions of this kind would not be grievable. Would the inclusion of this clause make them grievable if they otherwise were not grievable?

MS. PETERS: Well, the statute also provides in its definition of "grievance" that grievances extend to disputes over collective -- provisions in the collective bargaining agreement. So, assuming for the sake of argument that this would make them grievable, putting it in the contract would.

But it continues to be our position --

QUESTION: Your position is it doesn't make any difference. Your opponent's position, of course, is that it's critical.

MS. PETERS: That is correct.

QUESTION: Okay.

QUESTION: Well, it certainly would be grievable if you put it in the contract, wouldn't it? I mean, if somebody raised an issue about what it meant?

MS. PETERS: It is within the statutory definition of "grievance." It expressly refers to such disputes as being --

QUESTION: About the meaning of the contract.

MS. PETERS: Yes, collective bargaining

provisions.

QUESTION: Or about the enforcement.

MS. PETERS: The exact provision is that: "The effect or interpretation or a claim of breach of a collective bargaining agreement" comes within the statutory definition of grievance.

QUESTION: Doesn't it follow that if some disputes under the meaning of the circular A-76 are now grievable and some are not, because there are always different kinds of disputes, putting this provision in the contract would make everything grievable? It would expand the -- wouldn't it necessarily expand the subjects that would be grievable?

MS. PETERS: Respectfully, no, Justice Stevens. This is no different from any of the other Government-wide rules or regulations that govern the other reserved rights of management. All of them I am sure contain some discretionary aspects. Some of them contain some mandatory criteria that affect conditions of employment.

It is the Authority's long-established precedent in the way that it treats review of arbitration awards and in the way that it treats other portions of adjudicatory responsibilities that only the mandatory criteria become subject to the grievance

procedure, and to the extent that they affect conditions of employment.

QUESTION: I'm a little troubled by that statement, because I suppose it gets back to what the Chief Justice was asking. You have to go through grievance and arbitration to determine whether the agency discretion will be allowed or not. It's going through the process to which the Government objects, I guess.

MS. PETERS: Well, if the Government objects --

QUESTION: It is your position that that is not a burden; let them go through the process, and at the end of the line the arbitrator will say: Well, that's subject to agency discretion, so the Government wins -- I mean, the agency wins.

MS. PETERS: It certainly is not a burden that is outside the contemplation of Congress, if it is a burden at all, because Congress made such matters subject to the grievance procedure. And Petitioner and other employing agencies do have one avenue. The exceptions to the grievance procedure as defined by statute are either the five subjects enumerated in the statute -- there are five subject areas -- or they are matters that the parties themselves agree to exclude

from the grievance procedure through negotiations.

So therefore, Petitioner can propose during collective bargaining negotiations that contracting out matters or any other matters that it does not want to have subject to the grievance procedure be excluded from the broad scope of the grievance procedure. But absent such, absent such negotiations and agreement between the parties, the statutory definition is quite explicit and quite express in its breadth and in terms of what it covers.

Despite the fact that contracting out is not one of the five subjects expressly excluded by Congress, the Petitioner has contended throughout this litigation that matters concerning contracting out are not grievable. In essence, Petitioner has argued that the statute's designation of a subject as a management right also operates to preclude the subject from the scope of the grievance procedure.

But Petitioner acknowledges to this Court that grievances over discipline and promotions are permissible, ever though discipline and promotions are reserved management rights. But Petitioner's reliance on the phrase in Section 7106 "nothing in this chapter shall affect" as having that effect of removing it from the grievance procedure is unavailing.

First of all, if they were correct about that language it would mean that even discipline and promotions were not grievable, and they have acknowledged that those subjects are grievable. Furthermore, relying on that phrase in isolation just doesn't take into account the "in accordance with applicable laws" language or the fact that the statute expressly says that it is subject to procedures and appropriate arrangements bargaining.

And of course, the legislative history certainly indicates that that section of the statute is meant only to prohibit bargaining in certain respects and it does not treat the grievability of matters.

Petitioner now also makes the argument to this Court that, even if it were somehow coming within the grievance procedure, it nevertheless should be excluded because contracting out determinations bear only indirectly on the employment relationship. But of course there are any number of indications of the direct effect of contracting out matters on the bargaining unit employees, and that contracting out affects or is a condition of employment.

Among these indications are the very terms of the circular, which since 1979 has recognized the stake that employees and their bargaining representatives have

in contracting out by providing them access to the circular's appeals procedure for challenging cost comparisons.

The circular, I would note, describes its appeals procedure as a mechanism "intended to protect the rights of all directly affected parties." Moreover, the circular provides that employees should be informed about the undertaking and the progress of cost studies, and agency regulations, which also involve grievable matters to the extent that they impose mandatory criteria, agency regulation such as the Air Force and Army regulations referenced in AFGE's bried have specific provisions about employee and union involvement in aspects of the cost study.

And the circular itself also addresses arrangements for employees who are adversely affected by the conversion to contract performance of services. And as I have noted before, the Office of Management and Budget extended national consultation rights over the circular to federal sector unions, and those are extended with regard to laws, rules, or regulations -- excuse me, Government-wide regulations affecting any substantive change in any condition of employment.

And furthermore, the notion that Congress intended to exclude contracting out matters from the

scope of the grievance procedure doesn't find any support in the legislative history or the language. And to the extent that private sector precedent provides an appropriate analogy for our program, that law strongly supports the status of contracting out as a condition of employment and of its susceptibility to the grievance procedure.

But this does not mean, of course, to say that anything, no matter how attenuated its relationship or effects on employment, would be subject to the grievance procedure, but that matters such as this are. Disputes involving contracting out determinations, to the extent that they affect -- excuse me.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Kuhl?

REBUTTAL ARGUMENT OF

CAROLYN B. KUHL, ESQ.

ON BEHALF OF PETITIONER

MS. KUHL: I'd just like to make one point briefly, if I may. Of course, it is our submission that 7106 states -- or applies not only to negotiability, but also to the grievance procedure, so that the reason why we're debating here whether A-76 is a law or not is because 7106 constrains not only negotiability, but also

arbitrability.

QUESTION: Don't you have to convince us that the agency's interpretation of the relevant statute if just contrary to the statute?

MS. KUHL: Well, I'm --

QUESTION: And there's just not any room for their position?

MS. KUHL: Well, I'm glad you asked that question, because it does raise the question of agency deference. And number one, we do say that their construction is just simply contrary to the statute, and that is something that this Court, even giving deference, can't accept.

QUESTION: And you have to convince us of that, don't you?

MS. KUHL: Well, but also the agency has not been consistent in its interpretation, and I think --

QUESTION: Well, a lot of agencies aren't and we still defer.

MS. KUHL: Well, but it is on this very --

QUESTION: And your office frequently asks us to.

(Laughter.)

MS. KUHL: Well, it is unusual for us to be arguing against agency deference here.

QUESTION: Isn't there something of a little bit of reciprocal deference involved here, too? Two agencies?

MS. KUHL: Well, and indeed, as to the interpretation of A-76, it should be the interpretation of the Office of Management and Budget that should prevail. But on the issue of whether 7106 applies to grievances, the Authority's own decisions have held -- and I might just cite AFGE Local 1958 and Department of Transportation, a 1981 decision.

That decision and others, the PATCO decision, have held that whenever a proposal for negotiation creates a possibility, ever a possibility, that an arbitrator will second guess the agency's management discretion, the result should be that there should be no negotiation over that proposal, as well as ultimately no grievances may be brought on the proposal.

For those reasons, we ask that the Court reverse the decision or the judgment below.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:58 a.m., oral argument in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

84-1728 - EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Petitioner V.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTEP)