SUPREME COURT OF THE UNITED STATES

In the Matter of:

FEDERAL LABOR RELATIONS AUTHORITY,

Petitioner,

v.

ABERDEEN PROVING GROUND, DEPARTMENT OF THE ARMY

No. 86-1715

Pages: 1 through 40

Place: Washington, D.C.

Date: February 23, 1988

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Washington, D.C.

Tuesday, February 23, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

RUTH E. PETERS, ESQ., Solicitor, Federal Labor Relations Authority, Washington, D.C.; on behalf of the petitioner.

LAWRENCE S. ROBBINS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the respondent.

I N D E X

P R O C E E D I N G S

(11:03 A.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 86-1715, Federal Labor Relations Authority versus Aberdeen Proving Ground, Department of the Army.

Ms. Peters, you may proceed whenever you are ready.

ORAL ARGUMENT OF RUTH E. PETERS, ESQ.

ON BEHALF OF THE PETITIONER

MS. PETERS: Mr. Chief Justice, and may it please the Court, this case arises under Title 7 of the Civil Service Reform Act of 1978, the statutory scheme for labor-management relations in the federal sector. The case involves a principle that is as basic to labor relations in the federal sector as it is in the private sector, namely, an employer's obligation to bargain over negotiable matters before making changes in the working conditions of employees.

The case also involves the relationship between Section 7117 of Title VII, which describes the substantive scope of bargaining in the federal sector and establishes administrative procedures for resolving scope of bargaining or negotiability issues, and the statutory unfair labor practice provisions which make it an unfair labor practice for a federal employer to refuse to bargain in good faith and also establish procedures for adjudicating unfair labor practice cases.

In this case, when respondent Aberdeen Proving Ground announced that it would curtail operations the day after Thanksgiving and that employees would be placed on forced annual leave for that day, the exclusive representative of Aberdeen's employees proposed that the employees instead be granted administrative leave for that day. Aberdeen refused to bargain on the union's proposals, stating that agency regulations precluded a grant of administrative leave in those circumstances.

In the unfair labor practice case that ensued, the Authority reexamined and reaffirmed its previous holdings that the authority is empowered to resolve in a unilateral change unfair labor practice proceeding an employer agency's defense that bargaining is barred by an agency regulation for which a compelling need exists.

The Authority's consistent holdings on this point are, we submit, faithful to the text and the purposes of the Authority's enabling Act, consistent with the Authority's undisputed ability to resolve other negotiability differences in unilateral change unfair labor practice cases, consistent with the practice under the executive order program that predated Title VII, and constitute an appropriate harmonizing of the negotiability and unfair labor practice provisions of Title VII.

However, respondent Aberdeen argues that compelling

need issues alone among all the negotiability defenses available to an employer may only be resolved in the appeal procedures established in Section 7117, and indeed that the employer's obligation to bargain is not even triggered until the Authority resolves the compelling need issue in the negotiability appeal forum.

Aberdeen's proffered view of Section 7117 cannot be squared with the structure, the purposes, and the history of that provision and would not give effect to the unfair labor practice provisions of the statute. It is incorrect to view Congress's intending that an employer's mere assertion of a compelling need for an agency regulation should be permitted to disrupt the bargaining obligation in unilateral change cases when Congress also intended that agency regulations be one of the statute's least restrictive bars to bargaining.

The Authority's consistent construction of its enabling Act, we submit, should be upheld. To examine the issues in this case it is helpful to review very briefly the scope of bargaining in the federal sector. A federal sector employer's statutory obligation to bargain with the exclusive representative is as a general matter a broad obligation.

However, the statutory terms governing federal sector bargaining, besides defining the scope of matters included in the bargaining obligation, also enumerate several

matters that are excluded from the scope of the duty to bargain. For example, Section 7117(a)(1) of the statute provides that the duty to bargain does not encompass proposals that would bring about an inconsistency with federal law or government-wide regulation. Also excluded from the duty to bargain are proposals that would improperly intrude on the exercise of the management rights listed in Section 7106, and the statute in Section 7117(c) establishes a negotiability appeal procedure for resolving those kinds of scope of bargaining questions.

The statute in Section 7117(a0(2) also excludes from the bargaining obligation proposals which would bring about an inconsistency only with those regulations for which there is a compelling need, and Section 7117(b) establishes an appeal procedure for resolving this type of negotiability issue.

The Authority's regulations implementing Section 7117 provide that when an employer agency refuses to bargain over a union's proposal during ongoing negotiations because the proposal is alleged to be outside the scope of the duty to bargain, and when no unilateral change or contemplated changes in conditions of employment are involved, then the negotiability issues are to be resolved through the negotiability appeal procedure set forth in Section 7117.

QUESTION: Ms. Peters, this case arose out of one

day's work, the decision of the respondent to close down on the day after Thanksgiving in 1981?

MS. PETERS: Yes.

QUESTION: And the union still wants to bargain over that?

MS. PETERS: There has been no compliance that we know of, and certainly even if the bargaining had taken place there is at least a notice posting remedy as well and the employer here continues to resist the notion that an unfair labor practice would be apprpropriate --

QUESTION: So if you win, then there will be some kind of bargaining about that one day in 1981 presumably?

MS. PETERS: If we prevail, the merits of the compelling need, the Authority's compelling need determination that there is no compelling need for the agency regulation have not yet been resolved. I think the matter would have to be remanded to the Court of Appeals, unless, of course, the employer decided at that point to comply with the Authority's order in all respects.

QUESTION: While I have you interrupted, is there some legislative history that indicates that Congress considered and rejected the very position that you are taking today on behalf of the Authority?

MS. PETERS: No, there is not. One of the bills that led to the enactment of the statute was the House bill

reported out of the House Committee. That bill, although it referred to a compelling need determination, would have for the first time in a rather fundamental fashion broadened the scope of bargaining beyond what had existed under the executive order by permitting bargaining in an area in which an employer did not ordinarily have administrative discretion, that is, matters covered by government-wide regulation, unless there were a compelling need for the government-wide regulation.

And also the House report accompanying that bill indicated that other types of scope of bargaining issues other than these government-wide regulation issues would always be decided in unfair labor practice cases. However, that provision was rejected, did not make its way into law. Instead, what we have here is a system that is fairly much analogous to the executive order program. That is, the basic contours of the scope of bargaining are pretty much the same. An employer is not obliged to bargain over matters that are inconsistent with federal law or government-wide regulation or with agency regulations, but only to the extent that a compelling need exists for the agency regulation. And also there is a statutory management right --

QUESTION: Now, if a -- if the SG is right, then I take it the agency head, that would be the Department of Defense in this case, would have an opportunity to come before the hearing and make the presentation on the compelling need

for the particular regulation. Is that right?

MS. PETERS: The --

QUESTION: Is that right?

MS. PETERS: Yes, the Section 7117(b) provides that The authority may at its discretion in that appeal procedure hold a hearing. To my knowledge, the authority has never held a hearing on a compelling need issue under those negotiability appeals procedures. Of course, there is nothing to prevent any higher level agency first of all from internally notifying a subordinate level that when such an issue comes up, to let them know so that they can submit a written paper or assist them in the pleadings before the Authority, but the Solicitor General --

QUESTION: Well, if it were just decided in -- as part of the unfair labor practice question, then I take it the Department of Defense in this case would not be a party to that and wouldn't be able to appear and argue about the need for its regulation.

MS. PETERS: Well, sometimes the higher agency level is indeed a party respondent and sometimes not. It is not in this case, but for example I think in both -- let's see, in the first case to be decided, I think Defense Logistics Agency, at least the primary national subdivision, I think, was a party respondent to that case, and in some of these other cases that the authorities decided in the unfair labor

practice proceeding as well. The higher agency level is named as a party respondent, not in all cases.

QUESTION: That is purely accidental. That is purely accidental. It may be and it may not be.

MS. PETERS: Well, it is not accidental. It is alleged that they themselves have --

QUESTION: I understand, but --

MS. PETERS: -- engaged in an unfair labor practice that --

QUESTION: -- but you can't be assured that when this issue of necessity is raised, the highest level of the agency will have an opportunity to argue to it.

MS. PETERS: I think we can be assured that they will have the opportunity if they wish. They may not always be a party, but the Authority's regulations would permit someone to take part in an unfair labor practice.

QUESTION: That is nice of the Authority, but the Authority wouldn't have to do that if it didn't want to, right?

MS. PETERS: Well, I would be rather surprised if the Authority wouldn't in these circumstances. Further, even if it did --

QUESTION: But the Authority wouldn't have to if it didn't want to. Is that -- yes or no?

MS. PETERS: Well, I --

QUESTION: Yes or no?

MS. PETERS: It wouldn't have to if it didn't want to, but then on a petition for review someone would suggest perhaps that it had improperly denied someone access and in any event its views on intervention or taking parts in proceedings it seems to me are fairly liberal, but furthermore, an attorney or labor relations specialist from a higher agency level could assist the people involved in the Authority litigation at the level of bargaining in any fashion that it wished, so really there is -- it can't be said that if the higher agency level wishes in some fashion to make its views known, that it would be really precluded from having an opportunity to do so.

QUESTION: Congress providing explicitly for that in the other section was really doing something that is entirely superfluous. If all you say is true, it is inevitable that those opinions would be heard. Congress was just being silly in the other section explicitly to require the agency head to have a word, right?

MS. PETERS: No, I don't think Congress was being silly in any of these provisions. And in fact, I think what the Authority has tried to do is to give effect to both the negotiability and the unfair labor practice provisions. Precisely why Congress first made hearings discretionary but then also required that agencies be involved if there were a

hearing is really not clear. As we suggested in our brief and petition, perhaps it would be to provide the agency one more chance to waive the issue of compelling need before the resources were expended upon going forward with a hearing on the matter, but we would note that in the absense of a hearing, and to my knowledge there hasn't been a hearing on compelling need issues, there is no requirement that the agency be -- participate in the negotiability appeal procedure.

The Authority's determination that it is empowered to resolve an employer's compelling need negotiability defense in a unilateral change case draws support first of all from Section 7117. It is apparent from the text and structure of Section 7117 that these provisions have as their object purpose to describe the substantive scope of the bargaining obligation and to provide procedures for resolving negotiability issues, and this purpose is as apparent in the compelling need provisions as in the other parts of Section 7117.

The Authority gives effect to these provisions by construing Section 7117 as providing the appropriate forum for resolving negotiability issues that emanate from ongoing collective bargaining negotiations when no unilateral change issues are involved, but given the purpose of the provisions, to describe and determine the extent of the bargaining obligation, it seems difficult indeed to view any word or

part of these provisions as establishing a condition precedent for the duty to bargain or as defining when the duty to bargain arises, and any attempt to read the terms of Section 7117 as precluding the resolution of compelling need issues in unilateral change cases must begin with the acknowledgement that not a single word in Section 7117 explicitly addresses the relationship between that section and the unfair labor practice provisions of the statute.

As the D.C. Circuit recently noted in NLRBU versus FLRA, cited in our reply brief, the relationship between the statute's negotiability provisions and its unfair labor practice procedures is profoundly ambiguous. In this context the Authority's construction of the statutory terms to give effect to both the negotiability and the unfair labor practice provisions surely must pass a test of reasonableness.

The Authority's construction of the statute draws further support from the historical development of the compelling need test, which was introduced during the executive order era in order to broaden the scope of bargaining and to limit the availability of agency regulations as a bar to bargaining, and indeed, given the stringent criteria developed by the authority, like its executive order predecessor for evaluating compelling need, and given that the employer bears the burden of demonstrating the existence of a compelling need, agency regulations serve as one of the

least restrictive bars to bargaining. In this context, it would seem incongruous to view Congress as intending that compelling need determinations serve as a condition precedent to the triggering of the bargaining obligation or to view compelling need determinations as the sole negotiabillity defense that may not be resolved in a unilateral change unfair labor practice case.

In addition, the Authority's practice of resolving negotiability defenses, including compelling need defenses in a unilateral change unfair labor practice case derives support from consideration of important public policies. First, the effective administration of the statute is fostered when all the issues, including all the employer's negotiability defenses, can be resolved in one proceeding.

The dispute resolution process is streamlined in the Congressional purpose of facilitating and promoting collective bargaining is served. But furthermore, and indeed the D.C. Circuit in upholding the Authority's view in Defense Logistics Agency considered the second point perhaps even more important access to the unfair labor practice forum affords employees and their union access to appropriate remedies for an employer's unilateral change in working conditions. As the D.C. Circuit pointed out in that case, when bargaining -- when an employer refuses to bargain during ongoing negotiations, the only detriment to the employee is

that the employee itself is not able to better or change the status quo, so --

QUESTION: Ms. Peters --

MS. PETERS: Yes.

QUESTION: As I understand the government's contention is that Section 7117(a)(2), which is reproduced on 3A of your petition for writ of certiorari, when it says that the duty to bargain extends only if the authority is determined under Subsection (b) of this section that no compelling need exists, that that is the only way that a compelling need determination may be made that will influence the bargaining -- now, what is your response in terms of just specific statutory provisions to that?

MS. PETERS: Yes. Well, as we indicated earlier, the purpose of Section 7117 is to describe the scope of bargaining, not when bargaining arises, and so any of the particular words or phrases must be read in that context.

QUESTION: Even if it says "only if?"

MS. PETERS: Well, only says only, but it seems to me it is only referring to the substantive evaluation of whether there is a compelling need. Their using that word it seems to me, could -- is at least an overly legalistic.

QUESTION: It doesn't say only if there is a compelling, it says only if the Authority is determined under Subsection (b) of this section that no compelling need

exists.

MS. PETERS: Well, it seems to me that if that word were the governing word in Section 7117, that it would lead to results even beyond those described here, for example.

QUESTION: But the word "only" is not ordinarily an ambiguous word. If it says this shall be done only in this way, it means only that and not otherwise. And you have to really swallow that here, don't you?

MS. PETERS: Well, I think it must be read in context. It cannot be taken out of Section 7117 in its entirety, and it seems to me that that provision, placing the emphasis on that word, for example, could lead one to the conclusion that, for example, when an agency makes alternative arguments about a single bargaining proposal alleging both Section 7117(b) defenses and Section 7117(c) defenses, that the Authority would have to hold two proceedings there.

But of course the Authority has always, and has never been subject to challenge so far as I know, conducted unified proceedings addressing all negotiability issues in one proceeding, and it would also seem to suggest perhaps that every agency regulation out there that touches on conditions of employment would have to somehow walk through the Authority's door before bargaining could begin, and for example -- and there is certainly no thought of that so far as

I know in the federal sector program. In fact, the Fourth Circuit's first decision, the Fort Belvoir decision, arose when the subordinate level in the union requested a waiver of the higher level agency and the waiver was denied, but certainly it describes a fact pattern where parties felt free to seem a waiver on an agency regulation rather than going to the Authority. The Authority said that only it and only in that proceeding could decide a compelling need issue.

So it seems to me that first of all there is no plain language that would assist us, unfortunately, in the construction of these statutory terms, and that even if they were, they could not be read as overriding the purposes of the statute as a whole.

Finally, I would just want to note that there are no drawbacks resulting from the Authority's practice of resolving compelling need issues in unilateral change cases. Aberdeen's suggestion that a determination of compelling need issues in the unfair labor practice forum somehow restricts the Agency ability to regulate its affairs is simply without basis.

The Authority's case law makes clear that an agency is not barred from promulgating regulations or even from disseminating these regulations to subordinate levels of the agency. The agency's regulations also do fix the rights and obligations within the agency, including within the bargaining unit, unless the employer and the union agree

otherwise in collective negotiations. And the only requirement on the employer is the statutory one to bargain before implementation of the agency regulation as to the bargaining unit.

Further, if a compelling need is found the employer will not be required to bargain over inconsistent proposals and even if there is no compelling need found and the Authority orders that the change be rescinded, such a remedy would only deprive the employer of the results of a unilateral change that it should have not made in the first place without bargaining.

In short, as the D.C. Circuit opined in Defense Logistics Agency, the Authority has good reasons for its construction of its enabling statute, reasons that are firmly rooted in the terms and the history and the purposes of the statute, and that give effect to both the negotiability and the unfair labor practice provisions in this enactment.

We respectfully request that the Authority's construction of the statute be upheld, and also that the judgment of the court below be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Peters.

We will hear now from you, Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS, ESQ.

ON BEHALF OF THE RESPONDENT

MR. ROBBINS: Thank you, Mr. Chief Justice, and

may it please the Court. The Authority has reached an interpretive impasse in this case becuase it embarked on the wrong path at the outset. Correctly viewed, this case does not require the Court to seek out private labor law analogs or delve into pre-Act legislative history or balance free-floating notions of efficiency or general public policy.

This is instead a case about the plain meaning of a statute that speaks directly to the question presented and answers, and the answer that the statute provides is this. A proceeding under Section 7117(b) is the only means by which to challenge the compelling need for an agency-wide regulation when such a regulation is asserted as a bar to federal sector collective bargaining.

I would like to begin with the statute iteslf. Right up front, Section 7117(a)(2) states that the duty to bargain in good faith shall extend to matters that are the subject of agency-wide regulations only if the Authority has determined under Subsection (b) there is no compelling need for the regulation at issue.

These words are not silent, nor are they, as the Authority suggests in its reply brief, merely the starting point for analysis. Only if the Authority has determined the compelling need issue does the duty to bargain in good faith arise at all with respect to agency-wide regulation matters, and only, as the Fourth Circuit put it in the Fort

Belvoir decision, is a "highly singular" word. It doesn't suggest that there are lots of other ways to do the same thing, and as we read the statute and as we read its plain language, unless and until that compelling need determination has been made there is simply no duty to bargain at all with respect to matters covered by the regulations, and thus the Authority's assertion throughout its brief that there is this thing called a continuing duty to bargain is misplaced in this context because the bargaining duty cannot continue unless and until it first arises, and it doesn't arise under the statute until the compelling need determination has been made, and not just made in any way the Authority sees fit to make it.

It says quite explicitly it must be made under Subsection (b), not in the ULP forum, not in any other forum, under Subsection (b), and until that determination has been made, the ULP process simply cannot get under way.

We believe the language is plain, and that its purpose is evident and quite sensible, for the ULP process is manifestly inappropriate for resolving disputes concerning the compelling need for agency-wide regulations, and the facts of this case illustrate my point.

Here a federal agency, the Department of Defense and its primary national subdivision, the Department of the Army, promulgated regulations governing anticipated closures at agency facilities. The machinists and aerospace workers

contended that those regulations lacked a compelling need. When it made that claim, it asserted in effect two propositions first, that the Army and the Defense Department could not apply the regulations, their regulations in a particular case that they plainly intended to cover, and second, that the local employer, here Aberdeen Proving Grounds, may not follow a regulation that its parent agency explicitly directed it to obey.

A union asserts both such propositions every time it asserts that an agency-wide regulation lacks a compelling need, and in our judgment that tells us two things about what an ideal system ought to look like for resolving compelling need. First, the ideal system ought to entitle the agency that issued the regulation a chance to be heard on the question whether its regulation has a compelling justification and deserves to be applied according to its terms. It shouldn't just be a fortuity. It shouldn't just be up to the agency if it feels like it. It should be right in the statute and be required.

And second, the system, the ideal system should not saddle the local employer with an unfair labor practice simply because it obeyed a regulation that its parent agency directed it to follow, and in our view that is just exactly the system that Congress enacted. First, Section 7117(a)(2) says that there is no duty to bargain unless and until the Authority has

made a compelling need determination under Subsection (b) and that is just another way of saying that the local employer cannot be charged with the ULP simply because it has followed its parent's regulations. Second, Section 7117(b) creates a procedure that entitles the issuing agency to be heard on the question whether its regulation passes the compelling need test.

Under Subsection (b)(3) a hearing may be heard at which the issuing agency is a necessary party, at which the general counsel who is the prosecutor in the ULP forum is not entitled to be present, and in which the only issue to be determined is the question of compelling need.

Now, earlier during the argument I believe Justice O'Connor put a question to Ms. Peters concerning whether there is any relevant legislative history. We believe there is, and it is not just legislative history of the sort that is a filigree on the plain meaning of the statute, but it was Congress's explicit answer to the question presented in this case.

Now, to be sure, as Ms. Peters notes, correctly, the answer was given in the context of a predecessor statute, one in which the compelling need language was used with respect to government-wide regulations and not agency-wide regulations, but the statutory language with respect to compelling need was identical. It was the same exact substantive test, the

compelling need procedures were identical, and the House took up the question whether the ULP forum would be available to resolve the compelling need questions for government-wide regulations, and this is the answer they gave:

"The Committee intends that disputes concerning the negotiability of proposals and matters affecting working conditions except for questions of compelling need under Section 7117 be resolved through the filing and processing of unfair labor practice charges under Section 7116 and 7118."

That is the answer to the question presented in this case. Now, that answer doesn't go away simply because Congress didn't enact the version of Section 7117 that was in the House bill. Indeed, there is good reason to think the answer is even more relevant given what they did subsequently, because the scope of the bargaining obligation got smaller after the House bill was put in.

The government-wide regulations became a complete bar to negotiations, and agency-wide regulations, which had previously not been a bar at all under the prior bill, became a bar to the extent they were justified by compelling need. So the fact, it seems to me, that the prior bill didn't become law doesn't argue for overlooking the meaning that the -- or in this case the House of Representatives imposed on the identical language that confronts the Court this morning.

Let me say also with respect to the 7117(c) argument

that has been made, the Authority takes the view, and has taken the view this morning that because under Section 7117(c) there are these optional alternative procedures either in the ULP forum or in the so-called negotiability appeal forum, that therefore the same option ought to exist with respect to compelling need, we don't think the plain language of those statutes can absorb that argument. Indeed, in our view the contrast between these provisions underscores the argument we make this morning.

For unlike Section 7117(b) which states that the Authority shall determine compelling need in any collective bargaining dispute in which it arises, Section 7117(c) provides that if with respect to any other negotiability dispute an agency alleges that there is no duty to bargain in good faith, the union may appeal under the expedited negotiability procedures detailed in the balance of Section 7117(c).

There is no language in Section (c) that is comparable to that in Section (b), nothing that is -- that commands the Authority that it shall determine negotiability when a compelling need issue is the bar that is asserted by the agency, and nor for that matter does Section 7117(c) state as (a)(2) does that the duty to bargain in good faith does not arise at all unless and until the Authority has determined the negotiability issue in the expedited compelling need process.

All Section 7117(c) does is to give the union an option, an option that finds no analogy whatever in the compelling need provisions. We believe that contrast is significant. The fact that Congress carved out one type of negotiability dispute in which it made an affirmative demand to the Authority that it shall determine it and determine it in a particular way, and in all other negotiability cases gave an explicit option to resort to either forum suggests that Congress didn't simply back into the plain language of the statute, but chose and chose deliberately.

And as I suggested before, it chose wisely, because compelling need determinations for agency-wide regulations are an unusual and unique type of dispute which deserves and ought to be resolved in a special expedited forum in which the issuing agency has the right, the statutory right to be present.

Let me say a brief word about the argument the Authority makes with respect to the executive order practice. This argument, as I understand it, suggests that because there existed under the executive order regime a right in the Assistant Secretary of Labor to decide all negotiability issues, that that same power must reside in an ALJ to decide compelling need questions in the ULP forum.

That argument, we believe, is wrong for two reasons. First, it misstates the historical record. It is true, to be

sure, that Executive Order 11838 gave the Assistant Secretary the power to decide negotiability issues that had previously arisen during disputes but which had theretofore been outside his jurisdiction. But there is no reason at all to believe that that power also entitled him to decide compelling need questions in particular.

Quite the contrary is the case. For at the same time that Executive Order 11838 empowered the Assistant Secretary to decide negotiability questions in general, it also created a separate and distinct and quite detailed procedure for resolving the compelling need for agency-wide regulations in particular.

Previously agency regulations had been a complete bar to negotiations under the executive order practice. Executive Order 11838 relaxed that limitation but did so in a particular and, we believe, in a deliberate compromise fashion by giving the jurisdiction to the Federal Labor Relation Council, the Authority's predecessor, and only under particular procedural circumstances. There is no hint that the Assistant Secretary of Labor also inherited that new power at the same time.

But even if the Authority's interpretation of the executive order practice were correct, and we believe it isn't, there is no persuasive reason to think that Congress intended to enact the same procedure, for it didn't adopt the

language, and as the Court of Appeals observed in the decision in Fort Belvoir, Congress clearly had this executive order practice before it when it enacted Title VII, and yet far from adopting the same procedures, it instead adopted the language that we now find in Section (a)(2) and (b).

The Authority offers no convincing explanation how the superseded language of the executive order, which in our view it in any event misconstrues, can overcome the plain meaning of the compelling need provision.

QUESTION: Mr. Robbins, is the Authority's position or interpretation of the statute entitled to some particular deference? I know you can argue that there's -- let's assume that there's room in the statute for their construction. Is that the agency that is charged with enforcing this statute? Is it entitled to deference?

MR. ROBBINS: It is entitled to deference, Justice White. There is, I should say, Justice White,--

QUESTION: Well, of course, the agency that is supposed to determine compelling need has some interest in it, too. Is that the Defense Department in this case?

MR. ROBBINS: In this case it is -- well, there are two regulations at issue that are parallel and overlapping. There is an Army regulation, which is the primary national subdivision, and the other one is the Defense Department regulation.

We don't dispute that there is deference due to the Authority. Indeed, this Court made that quite clear in the BATF case in --

QUESTION: But your argument is that there is just not room for the agency's construction?

MR. ROBBINS: It is just not -- it is not in the ball park. I mean, their construction couldn't be, I think, more plainly precluded. I might suggest that there is at least some suggestion in the legislative history that Congress did not expect the ordinary rules of deference to apply with respect to the FLRA. I am referring now to remarks made by Congressman Ford after the adoption of Title VII in which he said that he expected the courts will scrutinize the actions of the Authority with less of the deference given to other administrative agencies.

We don't take that position here this morning. We think it doesn't square with BATF. But we don't think deference is a problem for us.

QUESTION: You are clearly on the SG's plain language team this week, Mr. Robbins. I am glad to hear that.

(General laughter.)

MR. ROBBINS: You won't hear Holy Trinity from me this morning.

QUESTION: I didn't think so.

QUESTION: Mr. Robbins, what does the word "deference" mean? Does that mean we must take what they say, or we just pay some attention to it, or there is strong -- what do you think it means?

MR. ROBBINS: Well, I can tell you I think what it means in this case.

QUESTION: It means that we pay no attention to them.

MR. ROBBINS: No, no, I think it --

QUESTION: To what extent should we respect their views?

MR. ROBBINS: I think it means what this Court has said it means in Chevron and Cardoza-Fonseca, which means at least this much, that when the Authority is construing, in the process of construing plain language, and gives in this case what it believes the plain language means, if this Court applying the ordinary canons of statutory construction determines on the contrary that there is a plain meaning to the statute that is contrary to the agency's interpretation, it must go with the statute and not with the agency.

That is what has happened here.

QUESTION: Well, I understand, but does that mean we gave them no deference, or we gave them deference, but having given them deference we still concluded they were wrong?

MR. ROBBINS: I can sign off on the second one without fear of contradiction, I think. You should certainly

listen to them. They have been working with the statute, but they just got it wrong here, and they got it so far wrong in the face of a statute that is so --

QUESTION: Doesn't deference mean, listen, that is all?

MR. ROBBINS: No, no, I don't think so.

QUESTION: Well, what else?

MR. ROBBINS: I think deference means that, for example, if you came to the view that the statute was silent on a particular matter or that there were two fairly available constructions, sure, the implementing agency has the primary call on what the statute means.

QUESTION: Well, suppose one construction is yours and one is the agency's. Which one do we take?

MR. ROBBINS: Well, I don't see it as such a Hobson's Choice. It seems to me that the interpretation --

QUESTION: Well, assuming it is a choice, which one should we take?

MR. ROBBINS: If ours is the one that in your judgment the statute plainly requires, you have got to take hours. I mean, it seems to me that --

QUESTION: And say with all deference we take the opposing position. But I think you say we have to say with all deference we oppose your position. We reject your position.

MR. ROBBINS: Sure.

QUESTION: But if we don't put that lanugage in there it is wrong?

MR. ROBBINS: I am sorry, Justice Marshall?

QUESTION: If we don't use in deference language we are in error?

MR. ROBBINS: Well, no. Well, I suppose it is -- there is no problem framing the opinion in a way that respects the arguments and the policy judgments that the authority has made, but our view is that in the final analysis there is no way to construe Section (a)(2) in a way that is consistent with the regulations and the practices that the Authority has offered this morning.

I am continually struck by the fact that after all the briefs have been submitted and after the arguments have been made, the Court has yet to hear an argument based on the statute from the Authority here, and that suggests that all the deference in the world can't save an analysis that is completely untethered. There is no language --

QUESTION: But you know, three pretty good judges came to the other conclusion, three excellent judges, I should say, came to the other conclusion in the D.C. Circuit. Maybe we shouldn't defer to them, either.

Why are you pausing? You are not pausing as to whether they were excellent judges?

MR. ROBBINS: No.

(General laughter.)

MR. ROBBINS: No, they are excellent judges. I think they regarded it as a close call. I mean, they sort of said, well, you know, the Authority makes Arguments X and those are okay. they are no great shakes, but the arguents on the other side don't really overcome them, so we will flip a coin and the authority gets deference.

I think some of the arguments that we have tried to suggest to the Court in our briefs were not made in the D.C. Circuit. Nobody, for example, uncovered the quote from the House report that we think is a definitive construction of the statute.

QUESTION: No, but they quote the plain language right out at the beginning and say this is the plain language, and then they go right by it. They do meet head on the plain language argument.

QUESTION: Your position is, you don't need to look at the legislative history at all.

MR. ROBBINS: Correct. I believe the D.C. Circuit got it wrong, and got it wrong just as far as the Authority has and in just the same ways.

QUESTION: And so the ball bounces.

MR. ROBBINS: Well, it is now in this Court, and it seems to me that the plain language is all we need, but in

this case we can rest on quite a number of other bases as well.

QUESTION: Yes, but if judges are equally divided on whether this is plain language or not, that may be enough to say that it isn't plain at all.

MR. ROBBINS: I don't think so, Justice White. Judges get things wrong.

(General laughter.)

MR. ROBBINS: And people disagree about very difficult issues as to which there is nevertheless a clearly correct answer. I don't regard the existence of a dispute as much evidence that the dispute doesn't have an answer and that the answer isn't a clearly correct one.

QUESTION: You are saying if we split five to four on whether there is plain language, if five say it is plain language and four say it is not plain language, you say the five have the right answer?

MR. ROBBINS: I would, of course, if it is my answer.

(General laughter.)

MR. ROBBINS: I think the Court split in Cardoza-Fonseca, which as I recollect was a plain language decision.

QUESTION: And yet your office is arguing in another case the mere fact that some other courts had come out another way and that some courts had entered a stay was

-- do you know the case I am talking about?

MR. ROBBINS: I do.

QUESTION: Was demonstration of the fact that the government's position was a responsible position. There was substantial justification for it. Now, why couldn't we say here that the decision of this panel of superb judges on the D.C. Circuit is per se evidence that this is a reasonable position, and since it is a reasonable position we defer to the agency?

MR. ROBBINS: Well, among other things, it seems to me that the EJA statute that we were attempting to argue about in that other case responds to many different concerns, and whether or not attorneys' fees ought to go to the prevailing party doesn't necessarily raise quite the same questions as whether Congress meant what it said when it used words like "only" and used words like "under Subsection (b)."

It seems to me Congress couldn't have said what it meant any more clearly. I have been trying to think of another statute they could have written. I suppose they could have said, by the way, if the Authority ever promulgates regulations like 24 or 24.3, toss them out on their ear.

QUESTION: Or a foonote that said, we mean it, or something.

MR. ROBBINS: Yes. We are not kidding. These are real things. They could have put it in italics. But I think

they did a good enough job. Indeed, I think it is sufficiently clear that there is really no need to turn to the very definitive legislative history.

Let me just say that in conclusion that the error in our judgment that the Authority has made today is the same one it made in BATF that came before this Court five years ago, and though it requests this Court's deference, we believe what this Court said in that case remains true today. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins.

Ms. Peters, you have seven minutes remaining.

ORAL ARGUMENT BY RUTH E. PETERS, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MS. PETERS: Thank you, Mr. Chief Justice.

I have just a few brief points to make,

First of all, respondent has suggested that the ideal system that Congress had in mind was the issuing agency as a necessary party to any compelling need determination by the Authority.

I would suggest that if Congress had that ideal system in mind it would have made it plain, as it were, by

requiring that in the statute, but in fact it did not. The only reference to agencies as necessary parties are when the Authority in its discretion holds hearings under Section 7117(b), and the Authority to my knowledge ordinarily does not and in fact has not held hearings in those types -- in that type of appeal procedure.

Secondly, I would again just emphasize that there is no plain language in 7117. There is not a single word that directly and explicitly discusses the relationship between Section 7117 and the unfair labor practice procedures.

QUESTION: Ms. Peters, can I ask --

MS. PETERS: Yes.

QUESTION: -- has the Authority ever found no compelling need without holding a hearing? You say they have never held a hearing. So I guess --

MS. PETERS: Yes, under Section 7117. Yes, and as we noted, there are -- in our brief we noted the number of cases that there were, and that by far those are cases in which the Authority has not found compelling need.

QUESTION: Has not found a compelling need.

MS. PETERS: Yes, that's right.

QUESTION: And they are all cases without hearings?

MS. PETERS: The ones that are held under the negotiability procedure, yes. The 12 or 13 or so that were unfair labor practice procedures, unless there was a

stipulated record in some of them, there would have been hearings, and the agency, if it were named as a party, would have been a party, and could have asked to intervene or be an amicus if it were not.

QUESTION: Yes, that is -- I had thought that perhaps the agency would only hold a hearing if it was -- as many courts might, that they would be, for example, very reluctant to reverse the Court below without full argument, but would be willing to affirm without setting the case for argument. You are telling me that that is not the key to whether you have a hearing or not.

MS. PETERS: No, the Authority makes the compelling need determination, not the issuing agency. The Authority issues the regulations and applies those regulations.

Secondly, as to the respondent's point that the Authority has yet to make an argument based on the statute, I would say that that is simply incorrect, and would direct the Court's attention not only to the arguments made by counsel but to the Authority's decision which discusses explicit terms of the statute and decides on the basis of those terms that there is a distinction between ongoing negotiations where negotiability defenses must be raised through the appeal procedure and unilateral change situations where they can be raised in the unfair labor practice procedure.

And in terms of the respondent's notion that

Congress explicitly considered and rejected the practice that we have suggested, again, we would suggest that that is wrong. Not only was the legislative proposal for compelling need for government-wide regulations not enacted, but there is nothing in the legislative history to indicate that those types of negotiability determinations which would have been the only ones left under that legislative proposal could not be made in the unfair labor practice proceeding in a unilateral change context. It simply indicates, and in fact the Court in Defense Logistics Agency found support in the legislative history to indicate that even those compelling need determinations were directed only at the ongoing negotiations scenario, and not necessarily at the unilateral change situation.

And so not only was it not -- not enacted, but there is simply nothing in the proposal that would support the respondent's argument here, and in terms of their reliance upon the difference of language in Section 7117(b) that the Authority shall determine compelling need issues and the language in 7117(c) that the union may appeal, we would point out that those provisions simply aren't parallel, and contrary to the respondent, there is a parallel provision in Section 7117(c) which, of course, directs the Authority that it shall determine those issues, too, when they are presented to the Authority. That provision is in Section 7117(c)(6). Whereas

the language "the union may appeal" in Section 7117(c) simply indicates that the union need not appeal but can issue a counterproposal or bargain on the employer's proposal or withdraw its proposal or do whatever it wishes instead of appealing, and also that that optional language prevents the 15-day time limit from automatically being triggered if there is an allegation of nonnegotiability in the Section 7117(c) proceeding.

QUESTION: What if the agency who has -- what if the Defense Department, at the same time this unfair labor practice proceeding is going on, determines that there is a compelling need for the regulation? Can the Authority come to a different conclusion?

MS. PETERS: Yes, indeed. The Authority makes compelling need determinations, not -- the Defense Department is certainly the issuing agency, but the Authority has issued the regulations that list the criteria for making these determinations, and also puts the burden squarely on the employer, and as we indicated in our brief, by a very large part compelling need determinations result in a finding that there is no compelling need for the agency regulations.

QUESTION: Well, the statute says that these compelling need determinations shall be made only in accordance with, with -- what is the section?

MS. PETERS: Section 7117(a)(2) is the section upon

which the respondent principally relies.

QUESTION: Well, what if a determination is made pursuant to that section?

MS. PETERS: Under that section again the Authority applies -- the same criteria govern and the same burden is on the employer agency, be it a negotiability determine or an unfair labor practice determination, the same criteria apply, the burden remains upon the employer agency, and the employer agency of course --

QUESTION: Could the authority redetermine it in an unfair labor practice proceeding?

MS. PETERS: Well, having once made the determination with respect to a particular regulation as how it fits against a particular proposal, I am not sure that there would be any need to, but of course the executive order addressed the notion of seriatim proceedings and thought that it would be better to put everything in one proceeding, and the Authority has simply continued with that practice.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Ms. Peters.

The case is submitted.

(Whereupon, at 11:57 o'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1715

CASE TITLE: FLRA v. Aberdeen Proving Ground

HEARING DATE: Tuesday, February 23, 2988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT.

Date: 2/27/88

Margaret Daly

Official Reporter

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