No. 98-70912

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, COUNCIL 147,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

and

SOCIAL SECURITY ADMINISTRATION, SANTA ROSA
DISTRICT OFFICE, SANTA ROSA, CALIFORNIA,
Intervenor

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") in Social Security Administration, Santa Rosa District Office, Santa Rosa, California, 54 FLRA (No. 45) 444 (June 19, 1998); Record Excerpts (RE) 4. The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. II 1996) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to section 7123(a) of the Statute. Petitioner American Federation of Government Employees, AFL-CIO, Council 147 ("AFGE" or "petitioner" or "the union") filed a petition for review within the 60-day time limit provided by section 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority properly determined that the agency's refusal to negotiate over a 5 U.S.C. § 7106(b)(1) matter was not an unfair labor practice because Section 2(d) of Executive Order No. 12871 does not constitute a statutory "election" to bargain under 5 U.S.C. § 7106(b)(1).

STATEMENT OF THE CASE

I. Nature of the Case

This case arose as an unfair labor practice (ULP) proceeding concerning allegations that the refusal by the Social Security Administration, Santa Rosa District Office, Santa Rosa, California ("SSA" or the "agency") to bargain over its decision to move a bargaining unit employee violated section 7116(a)(1) and (5) of the Statute. 54 FLRA at 445-46; RE 5-6. Specifically, the ULP complaint alleged that Executive Order No. 12871[2]

constituted an "election," on behalf of the agency, to negotiate over matters within section 7106(b)(1) of the Statute,[3] and because moving an employee is such a matter, the agency was obligated to bargain before making such a decision. 54 FLRA at 446; RE 6.

The Authority, basing its conclusion on the reasoning set forth in U.S. Department of Commerce, Patent and Trademark Office, 54 FLRA (No. 43) 360 (June 19, 1998), petition for review filed, Patent Office Professional Assoc. v. FLRA, No. 98-1377 (D.C. Cir. Aug. 17, 1998) (Commerce II); RE B1,[4] found that the agency did not commit a ULP. 54 FLRA at 448-49; RE 8-9. Although it confirmed that the employee's move was a section 7106(b)(1) matter subject to negotiation "at the election of the agency," the Authority determined that Executive Order No. 12871 is an Executive Branch internal management direction and not an "election" to bargain under section 7106(b)(1). Id. Therefore, the agency was not required by the Statute to bargain with the union over the decision to move the employee. 54 FLRA at 449; RE 9.

II. Background

A. The Federal Service Labor-Management Relations Statute and Executive Order No. 12871

1. The Statute

The Statute governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. See 5 U.S.C. § 7105(a)(1), (2); see also Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 93 (1983) (BATF). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. See 5 U.S.C. § 7105(a)(2)(I); BATF, 464 U.S. at 92-93; U.S. Dep't of Interior, Bur. of Indian Affs. v. FLRA, 887

F.2d 172, 173 (9th Cir. 1989).
The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. See BATF, 464 U.S. at 92-93.
Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." BATF, 464 U.S. at 97. See California Nat'l Guard v. FLRA, 697 F.2d 874, 876 (9th Cir. 1983) (Calif. Guard).
Under the Statute, an agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment, and upon the request of either party, execute a document embodying the agreed upon terms. See 5 U.S.C. §§ 7103(a)(12), 7114(b)(2), 7114(b)(5). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). If good faith negotiations result in an impasse, the impasse may be referred to the Federal Service Impasses Panel for resolution. See 5 U.S.C. § 7119. The Statute further provides that it is a ULP for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or to refuse to "negotiate in good faith." 5 U.S.C. § 7116(a)(1) and (5).
There is no duty to bargain, however, over proposed contract language that would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a "compelling need" exists. 5 U.S.C. § 7117(a); see California Guard, 697 F.2d at 879. There also is no duty to bargain over proposed contract language regarding the management rights set forth in section 7106(a) of the Statute. 5 U.S.C. § 7106(a). Examples of these rights include the right to determine the mission of the agency, 5 U.S.C. § 7106(a)(1); the right to hire, 5 U.S.C. § 7106(a)(2)(A); the right to assign work, 5 U.S.C. § 7106(a)(2)(B); and the right to

"determine the personnel by which agency operations shall be conducted," id.

The instant case involves 5 U.S.C. § 7106(b)(1), which is recognized as an exception to the management rights set forth in section 7106(a). See Commerce II, 54 FLRA at 374; RE B15; see also National Association of Government Employees, Local R5-184 and U.S. Department of Veterans Affairs, Medical Center, Lexington, Kentucky, 51 FLRA 386, 393 (1995). Matters arising under section 7106(b)(1)--"the numbers, types, and grades of employees or positions assigned to any organizational subdivision," 5 U.S.C. § 7106(b)(1)--are recognized as "permissive" subjects of bargaining. Commerce I, 53 FLRA at 870. "[A]n agency may elect to, but absent an election is not required to, bargain about section 7106(b)(1) subjects." Id.

2. Executive Order No. 12871

In 1993, President Clinton issued Executive Order No. 12871. The Executive Order provides, inter alia, that "[t]he head of each agency subject to the provisions of [the Statute] . . . shall . . . negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same . . . ." Executive Order No. 12871 § 2(d); RE B49-50. The Executive Order further provides that the Order "is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative or judicial review." Id. § 3; RE B50. The impact of Section 2(d) of the Executive Order on section 7106(b)(1), and the enforceability of the Order through the ULP provision of the Statute, are at issue in this case.

STATEMENT OF THE FACTS

I. Factual Background

At the employee's request, the agency moved a bargaining unit employee from one work unit of the Santa Rosa District Office to another. 54 FLRA at 445; RE 5. The work of the two units differed in some minor respects, but the similarities were such that the move had no effect on the employee's job title, tour of duty, shift, work area, or work equipment. Id.

Prior to the move, the union president requested that the decision to move the employee be subject to negotiation based upon section 7106(b)(1) and

Executive Order No. 12871. 54 FLRA at 445-46; RE 5-6. The agency agreed to bargain over the impact and implementation of the decision to move the employee, pursuant to section 7106(b)(2) and (3) of the Statute, but the union declined to make any proposals in that area. The agency determined not to bargain over the actual decision to move the employee--the section 7106(b)(1) matter. 54 FLRA at 446; RE 6.

The FLRA's General Counsel issued a ULP complaint alleging that the President, through Executive Order No. 12871, exercised the agency's discretion to negotiate under section 7106(b)(1) and, therefore, the agency was obligated to bargain. As a result, the General Counsel contended that the agency violated section 7116(a)(1) and (5) by refusing to bargain over the decision to move the unit employee from one work unit to another. Id.

The Administrative Law Judge (ALJ) confirmed that the decision to move the employee was a section 7106(b)(1) matter, and thus it was within the agency's discretion to decide whether to negotiate with the union. The ALJ then concluded that the agency did not elect to negotiate with the union. Id. In so finding, the ALJ determined that the President did not exercise the agency's discretion to elect to bargain through the issuance of Executive Order No. 12871. 54 FLRA at 446-67; RE 6-7. The ALJ therefore recommended that the Authority dismiss the ULP complaint. 54 FLRA at 447; RE 7.

II. The Authority's Decision

The Authority agreed with the ALJ that the complaint should be dismissed. 54 FLRA at 449; RE 9. As relevant here, the Authority viewed its decision to that effect as "governed" by its holding in Commerce II that Section 2(d) of Executive Order No. 12871 does not constitute an "election" to negotiate under section 7106(b)(1).[5] 54 FLRA at 448; RE 8.

As found in Commerce II and discussed in more detail below, the Authority concluded that Section 2(d) "'unambiguously states [that it is] a direction,'" not a statutory "election", "'by the President to agency officials to engage in bargaining over [the] subjects defined in the Statute.'" Id. (quoting Commerce II, 54 FLRA at 387). The Authority further held that construing Section 2(d) as an "internal management direction" is also necessitated by Section 3's language barring judicial and

administrative review of the Executive Order. Id. According to the Authority, "[t]he fact that the nature of the Executive Order's direction is indeed mandatory does not . . . render it a statutory election enforceable in an unfair labor practice proceeding." 54 FLRA at 448-49; RE 8-9. Based upon this analysis, the Authority held that the agency was not required to bargain with the union in this case and therefore dismissed the complaint.[6] 54 FLRA at 449; RE 9.

III. The Commerce II Decision

As indicated above, in the instant case the Authority relied upon Commerce II's holding regarding the impact of Executive Order No. 12871 on section 7106(b)(1) of the Statute. In Commerce II, the Authority concluded that the President's direction to agencies to negotiate over matters within section 7106(b)(1) does not constitute an "election" by the agency that is enforceable in a ULP proceeding. 54 FLRA at 362; RE B3. The Authority reached this decision based upon five discrete considerations, set forth below. Id.

A. The language of Section 2(d)

The Authority began with an analysis of the precise wording of Section 2(d). 54 FLRA at 376; RE B17. The Authority noted that all parties agreed that the sole source of the asserted "election" under section 7106(b)(1) is Section 2(d) of the Executive Order. Id. Section 2(d) is one of five subsections in which the Executive Order directs particular actions that the head of each agency "shall" take. Id.

Relying upon basic definitions of the word "shall," the Authority determined that use of the word makes the direction to the head of the agency mandatory. Id. A mandatory direction, however, does not equate to the President's making an enforceable "election" under section 7106(b)(1). 54 FLRA at 377; RE B18. Thus, reading Section 2(d) to be a "direction to agencies enforceable not only by the President as chief executive, but also by a prosecutor through adjudicatory proceedings before the Authority, appealable to and ultimately enforceable by the Federal courts" would require the "words in Section 2(d) [to] have a meaning beyond their plain terms." Id. Noting that "[n]ot every order from a superior to a

subordinate amounts to a requirement that is enforceable by administrative agencies and/or the courts," the Authority concluded that "Section 2(d) can be mandatory in nature without constituting a [s]tatutory election that is enforceable in [ULP] proceedings." 54 FLRA at 378; RE B19.

B. The purpose of the Executive Order

Second, the Authority considered the overall purpose of Executive Order No. 12871 and concluded on this basis as well that Section 2(d) "should be construed in accordance with its terms," and not "translated into a statutory election." 54 FLRA at 378-79; RE 19-20. Analysis of overall purpose, for an Executive Order just as with a statute, is appropriate in determining the meaning of a specific provision. 54 FLRA at 379; RE B20 (citing Sutherland Statutory Construction § 31.06 (5th ed. Supp. 1998) (Sutherland)).

Based upon its review of the Executive Order as a whole, the Authority concluded that the Executive Order's "express purpose . . . is to facilitate the formation of labor-management partnerships in order to implement the Government reform objectives of the National Performance Review." Id. The Authority found this purpose to be confirmed by Sections 1 and 2 of the Order. Id.

Section 1 expressly confirms this purpose, as it creates the National Partnership Council, an entity "charged with, among other things, 'supporting the creation of labor-management partnerships and promoting partnership efforts.'" Id. With regard to Section 2, the Authority noted that the section's five directions to agency heads regarding actions to be taken deal with matters "outside the framework of legal rights and obligations defined in the Statute." 54 FLRA at 380; RE B21. Thus, the Authority reasoned, "the context in which the command in Section 2(d) appears does not indicate that it is intended to effect an action under the Statute." Id.

C. The impact of Section 3 of the Executive Order

Third, the Authority reviewed the language of Section 2(d) in light of Section 3 of the Executive Order, which provides:

This order is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right to administrative

or judicial review, or any other right, substantive or procedural, enforceable
by a party against the United States, its agencies or instrumentalities, its
officers or employees, or any other person.
Executive Order No. 12871 § 3; RE B50. Particularly persuasive to the Authority
was the statement in Section 3 that the Order is "'intended only to improve the
internal management of the executive branch.'" Commerce II, 54 FLRA at 380; RE
B21. This statement of intent, read together with Section 3's express bar on
administrative or judicial review, convinced the Authority that its
interpretation of Section 2(d) as an exclusively internal management direction
was correct. 54 FLRA at 381; RE B22.
The Authority concluded that if it construed Section 2(d) as an "election"
under section 7106(b)(1), it would then be enforceable by the Authority and
subject to judicial review. 54 FLRA at 380; RE B21. According to the
Authority, such construction would "ignore[] Section 3 entirely" and render
it "nugatory with respect to Section 2(d)." 54 FLRA at 381; RE B22. This,
in the Authority's view, ran counter to the canon of statutory construction
that provides, "'a statute should be interpreted so as not to render one
part inoperative.'" 54 FLRA at 382; RE B23 (quoting South Carolina v.
Catawba Indian Tribe, Inc., 476 U.S. 498, 510 n.22 (1986)) (South Carolina).
The Authority accordingly found that Section 3 "compels the conclusion" that
"Section 2(d) cannot be construed as an election that is reviewable and
enforceable under the Statute." 54 FLRA at 381-82; RE B22-23.
D. Office of Personnel Management Guidance
The Authority's fourth area of analysis centered on the parties' arguments
regarding the impact of the Office of Personnel Management's (OPM) December
16, 1993 Guidance (Guidance) to agencies regarding Executive Order No.
12871.[7] The Authority noted initially that "[t]here is no basis in the
record to view OPM's issuance as evidencing the President's intent in the
Executive Order." 54 FLRA at 382; RE B23. As a result, the Authority did
not rely on the Guidance as a parallel to statutory legislative history.
Id.

However, the Authority noted that even if it viewed the Guidance as evidence of the President's intent, it was not "persuaded that it establishes that Section 2(d) constitutes an election." 54 FLRA at 383; RE B24. Although the Guidance states that bargaining over subjects within section 7106(b)(1) is "mandatory," this language suggests only that failure to negotiate in that manner violates the Executive Order and not the Statute. 54 FLRA at 384; RE B25.

Also, the Authority found that other statements in the Guidance suggest that "OPM does not view the Executive Order as taking an action that is enforceable in unfair labor practice proceedings." 54 FLRA at 385; RE B26.

Specifically, the Authority noted that the Guidance's direction that parties engage in "interest-based bargaining" prescribes how the mandated bargaining is to be conducted and goes beyond the Statute. Id. Thus, OPM's Guidance interprets the Executive Order as requiring more than the Statute requires without suggesting that these additional requirements are enforceable in ULP proceedings. Id.

E. Giving meaning to the Executive Order

Finally, the Authority disagreed with arguments suggesting that failure to enforce the purported section 7106(b)(1) "election" would "render[] the Executive Order 'meaningless.'" Id. As the Authority stated, "[w]e question the underlying premise that a President's directive to his agency heads in general, or the direction in Section 2(d) in particular, can only be meaningful if it can be enforced in administrative and judicial proceedings." 54 FLRA at 385-86; RE B26-27.

The Authority also reviewed responses to surveys conducted of labor and management that indicated issues considered non-negotiable in the past were being considered and negotiated. 54 FLRA at 386; RE B27. Thus, the Authority found "considerable basis for viewing the Executive Order as, indeed, meaningful even in the absence of statutory enforcement of the bargaining direction in Section 2(d)." 54 FLRA at 387; RE B28.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." AFGE, Local 2343

v. FLRA, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); Department of Veterans Med. Ctr. v. FLRA, 16 F.3d 1526, 1529 (9th Cir. 1994); Overseas Educ. Ass'n, Inc. v. FLRA, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (Chevron). A court should defer to the Authority's construction as long as it is reasonable. See id. at 845. Further, as the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." BATF, 464 U.S. at 97 (citation omitted); see also AFGE, Local 2987 v. FLRA, 775 F.2d 1022, 1025 (9th Cir. 1985). As the instant case demonstrates, among the "complexities of Federal labor relations" that the Authority must address as part of its everyday work is the interrelationship of the Statute and other laws, rules, and regulations governing the federal employment relationship. West Point Elementary Sch. Teachers Ass'n v. FLRA, 855 F.2d 936, 940 (2d Cir. 1988); Department of the Treasury v. FLRA, 837 F.2d 1163, 1167 (D.C. Cir. 1988).

SUMMARY OF ARGUMENT

The Authority properly determined that the agency did not commit a ULP when it refused to bargain over its decision to move a bargaining unit employee. Although the decision to move the employee is a matter covered by section 7106(b)(1) of the Authority's Statute, the Authority correctly ruled that Section 2(d) of Executive Order No. 12871 does not constitute an enforceable "election" to negotiate about such matters under section 7106(b)(1). The

Authority's interpretation of its own Statute is supported by the overall language and purpose of the Executive Order and, as petitioner acknowledges, is entitled to deference.

Regarding the impact of Executive Order No. 12871 on the Statute, the plain language of Section 2(d) indicates that it was not intended to constitute an "election" to negotiate under section 7106(b)(1). There is no legal requirement that directions from a superior to a subordinate, such as the Executive Order's direction from the President to agencies to bargain over matters covered by section 7106(b)(1), are necessarily administratively or judicially enforceable. Accordingly, it would be erroneous to infer from Section 2(d)'s mandatory character that it equates to an "election" under section 7106(b)(1) to negotiate that is enforceable under the Statute's ULP procedures.

The express purpose of the Executive Order--facilitation of labor-management partnerships--further supports the Authority's conclusion that Section 2(d) should not be construed as an "election" under section 7106(b)(1). The creation and implementation of labor-management partnerships, to which virtually the entire Executive Order is directed, are matters not addressed by the Statute. Because the Executive Order's overall orientation is toward matters not covered by the Statute, it was reasonable for the Authority to conclude that Section 2(d) was similarly directed, and was not intended to effect an enforceable "election" to negotiate under section 7106(b)(1).

Finally, Section 3 of the Executive Order confirms that Section 2(d) is not an enforceable section 7106(b)(1) "election" to bargain. Section 3 expressly states that the Executive Order was issued "only" to improve the internal management of the Executive Branch. Moreover, Section 3 specifically denies any intent to create any right to administrative or judicial review, or any other enforceable right. A finding that Section 2(d) is an enforceable "election" would flout this clear language of Section 3. In contrast, the Authority's interpretation of Section 2(d) in light of Section 3 comports not only with the language of Section 3, but also with

established principles of statutory construction that caution against interpretations of executive orders that would render one part inoperative, as well as with case law regarding private rights of action under executive orders. Because the Authority's determination in this case is reasonable and correct, the petition for review should be denied.

ARGUMENT

THE AUTHORITY PROPERLY DETERMINED THAT THE AGENCY'S REFUSAL TO NEGOTIATE OVER A 5 U.S.C. § 7106(b)(1) MATTER WAS NOT AN UNFAIR LABOR PRACTICE BECAUSE SECTION 2(d) OF EXECUTIVE ORDER NO. 12871 DOES NOT CONSTITUTE A STATUTORY "ELECTION" TO BARGAIN UNDER 5 U.S.C. § 7106(b)(1)

The Authority correctly analyzed the impact of the Executive Order's Section 2(d) on the Statute's section 7106(b)(1), and reasonably determined that Section 2(d)'s direction to agency management did not constitute an enforceable "election" under the Statute such that the agency had committed a ULP. The Authority issued its decision against a background of well-established Authority precedent. According to that precedent, matters covered by section 7106(b)(1) of the Statute are considered "permissive" subjects of bargaining. See Commerce I, 53 FLRA at 870. Authority precedent also "clearly states that an agency that elects to bargain over section 7106(b)(1) matters may withdraw from bargaining at any time before reaching agreement." Id. at 871. As a result of this ability to withdraw, "the Authority has not previously found that an agency acted unlawfully in refusing to bargain over a section 7106(b)(1) subject." Id. Accordingly, although the Authority has found that once agreement has been reached on a section 7106(b)(1) matter, the agreement is enforceable, see id. at 873, it has also held that "an agency official who elects to bargain with a union about permissive subjects but later withdraws that election prior to reaching agreement does not commit an unfair labor practice," id. at 874.[8] As petitioner acknowledges, this case "involves a pure question of statutory construction," (Pet. Brief at 20), and the Authority's view is therefore

entitled to deference. See Chevron, 467 U.S. at 844. Petitioner has not demonstrated how the Authority's interpretation of the Statute is in any way "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[9] See 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A). As a result, and as set forth below, the petition for review should be denied.

A. The plain language of the Executive Order indicates that it was not intended to create an enforceable "election" to bargain under section 7106(b)(1) of the Statute

As the Authority held in Commerce II, nothing in the "precise words" of Section 2(d), "or elsewhere in the Executive Order, expressly states that the President is making an 'election under the Statute.'" 54 FLRA at 377; RE B18. Thus, the assertion that Section 2(d) creates an enforceable "election" to bargain--or as petitioner suggests, that the agency is "duty-bound to bargain," Pet. Brief at 32--seeks to give the words in Section 2(d) "a meaning beyond their plain terms." 54 FLRA at 377; RE B18.

The fact that, as the parties agree, Section 2(d) constitutes a mandatory direction from the President to the agencies to bargain on section 7106(b)(1) matters is not to the contrary.[10] As the Authority reasoned, 54 FLRA at 378; RE B19, there is no legal requirement that necessarily makes an order from a superior to a subordinate administratively or judicially enforceable. Cf., e.g., Chen v. Carroll, 866 F. Supp. 283, 287 (E.D. Va. 1994) (finding that an executive order direction that the Attorney General and Secretary of State "'provide for' enhanced consideration" of certain individuals in immigration situations, was not equivalent to a legally enforceable "requirement that such enhanced consideration be given"). Yet this is precisely the position advanced by petitioner. Petitioner in effect seeks to "translate the verb 'shall' [in Section 2(d)] into such an election, making the direction to agencies enforceable not only by the President as chief executive, but also by a prosecutor through adjudicatory proceedings before the Authority, appealable to and ultimately enforceable by the Federal courts." 54 FLRA at 377; RE B18. Such an interpretation

finds no support in principles of statutory construction or case law, and should be rejected.

Equally unsupportable is petitioner's argument that the Authority's rationale in this regard leads to the "absurd result" that complying agencies are "subject to the coverage of the Statute," while noncomplying agencies "evade statutory coverage." Pet. Brief at 33-34. First, regardless of whether an agency complies with Executive Order No. 12871, it remains subject to the provisions and mandates of the Statute. Second, because of the mandatory direction in Section 2(d), a noncomplying, insubordinate agency is nevertheless accountable to the President. As the Authority noted in Commerce II, "[w]e question the underlying premise that a President's directive to his agency heads in general, or the direction in Section 2(d) in particular, can only be meaningful if it can be enforced in administrative and judicial proceedings." 54 FLRA at 385-86; RE 26-27.

Petitioner also errs in asserting that because of the acknowledged mandatory nature of Section 2(d), this Executive Order should be enforceable in the same manner as was Executive Order No. 11491. Pet. Brief at 29 (citing Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1973) (Old Dominion)). Old Dominion is inapposite. That case addressed the President's authority to issue an Executive Order regarding the operation of the Executive Branch. Old Dominion, 418 U.S. at 273 n.5. There is no issue in the instant case concerning the President's authority to issue Executive Order No. 12871. Rather, this case deals with the impact of the Executive Order on the operation of section 7106(b)(1) of the Statute. Furthermore, Executive Order No. 11491 contained explicit remedial provisions for any violations of its mandates. See, e.g., Executive Order No. 11491 § 4, 3 C.F.R. (1969 Comp.) at 191, reprinted in 5 U.S.C. § 7101 note (1994) (authorizing the Federal Labor Relations Council to adjudicate ULP cases under the Order). Executive Order No. 12871, in contrast, lacks such express remedial provisions, and, as discussed infra pp. 24-27 regarding Section 3 of the Order, prohibits any administrative or judicial remedies. See Executive Order No. 12871 § 3; RE B50.

B. The purpose and intent of the Executive Order demonstrate that Section 2(d) should not be construed as making an "election" to bargain under section 7106(b)(1) of the Statute

Analyzing the Executive Order according to accepted principles of statutory construction, the Authority also correctly determined that the overall purpose of the Executive Order supports the conclusion that Section 2(d) was not intended to serve as a statutory "election" to negotiate under section 7106(b)(1).[11] See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95 (1993) (In interpreting a statute, the Court "look[s] to the provisions of the whole law, and to its object and policy."). The Executive Order's express purpose is to "facilitate the formation of labor- management partnerships in order to implement the Government reform objectives of the National Performance Review." Commerce II, 54 FLRA at 379; RE B20. This purpose "sheds . . . light on how Section 2(d) should be construed." Id.

Both Sections 1 and 2 support the Authority's finding that the focus of the Executive Order is limited to the creation and promotion of labor-management partnerships. Section 1, establishing the National Partnership Council, clearly has this purpose. See id. Similarly, regarding Section 2, the five actions agency heads are directed to take therein, including the direction to negotiate over section 7106(b)(1) matters, were expressly included to effectuate the implementation of labor-management partnerships, as the title of that section indicates. See 54 FLRA at 380; RE B21.

The Authority's determination that Section 2(d) was not intended as an "election" under section 7106(b)(1) of the Statute is consistent with the predominant character of the Executive Order, discussed above. The creation and implementation of labor-management partnerships, to which virtually the entire Executive Order is directed, are matters that the Statute does not address. These matters are, as the Authority discussed, "outside the framework of legal rights and obligations defined in the Statute." Id.

Because the undeniable orientation of the Executive Order is toward matters

not covered by the Statute, it is reasonable to conclude that Section 2(d) has a similar focus, and was not intended to "effect an action under the Statute." Id. Thus, both the plain language and the purpose of the Executive Order support the Authority's conclusion in this case.

C. Executive Order Section 3 confirms that Section 2(d) is not an "election" to bargain under section 7106(b)(1) of the Statute

The plain language of Section 3 of the Executive Order supports the Authority's decision in this case. The Authority's interpretation of Section 3 of the Executive Order is consistent with the manner in which such executive orders have been interpreted in the past, and with precedent in this and other circuits concluding that such orders do not establish a private right of action. Moreover, the Authority's interpretation comports with the discretionary nature of such Presidential directives. Thus, the Authority properly interpreted the Executive Order and its effect under section 7106(b)(1) of the Authority's Statute.

Section 3 demonstrates conclusively that Section 2(d) does not constitute an "election" enforceable under section 7106(b)(1). The very first sentence of Section 3 expresses the Executive Order's limited scope. According to Section 3, the Executive Order was issued "only to improve the internal management of the executive branch." Executive Order No. 12871 § 3 (emphasis added); RE B50.

The second clause of Section 3's first sentence underscores the Executive Order's intent not to create enforceable rights where none previously existed. Section 3 states in this regard that it "is not intended to, and does not, create any right to administrative or judicial review, or any other right . . . enforceable by a party." Id. This express statement in the Executive Order refutes petitioner's argument that, with the advent of the Executive Order, unions now have new rights, and agencies new obligations, enforceable through the Statute's ULP procedures administered by the FLRA and enforced by the Courts under 5 U.S.C. § 7123.

To ensure the accuracy of its interpretation of Section 3's language, the Authority analyzed alternative constructions of Section 2(d) and their relationship to this language of Section 3. Commerce II, 54 FLRA at 381; RE B22. As the Authority observed, construing Section 2(d) as an internal

management directive allows the agency to elect to negotiate without offending the language of Section 3. Id. Construing Section 2(d) as an enforceable "election" to negotiate, however, "ignores Section 3 entirely and, indeed, renders it nugatory with respect to Section 2(d)." Id.[12]

The Authority's interpretation of the Executive Order with respect to the "election" provisions of section 7106(b)(1) accords with established principles of statutory construction. It is inappropriate to interpret an executive order in a manner that would "'render one part inoperative,'" as would occur with the latter construction above. Commerce II, 54 FLRA at 382; RE B23 (quoting South Carolina, 476 U.S. at 510 n. 22 (1985)).[13]

Further support for the Authority's interpretation of the impact of Section 3 on its ultimate conclusion regarding Section 2(d) is found in case law regarding private rights of action under executive orders. In Utley, for example, this Court examined an executive order to determine whether the order created a private right of action. 811 F.2d at 1285-86. In concluding that the executive order did not create such a right, the Court relied upon the "'elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" Id. at 1285 (citation omitted).

In the instant case, Section 3 of the Executive Order clearly provides that there is to be no private right of action. As in Utley, this Court "must be chary of reading other [remedies]," such as enforceability of Section 2(d) through the Statute, "into it." Id.; see also Zhang v. Slattery, 55 F.3d 732, 748 (2d Cir. 1995) (observing that nothing in the executive order there at issue "indicated that the order was anything other than a directive issued to one of [the] cabinet officers," and despite the noncompliance by the Attorney General, concluding that "it is not the role of the federal courts to administer the executive branch"); Chen Zhou Chai v. Carroll, 48 F.3d 1331, 1339 (4th Cir. 1995) ("A court should not enforce an executive order intended for the internal management of the President's cabinet.").

Finally, the very nature of an executive order--the President has broad discretion to issue such orders, see Old Dominion, 418 U.S. at 273 n.5--supports the Authority's determination in this case. Petitioner, arguing that the Executive Order effects a statutory "election", notes that "[i]f the President does not desire the effects of a [s]ection 7106(b)(1) election that is Government-wide, his option is to rescind the election that has been made." Pet. Brief at 42. Given the Authority's interpretation of the Executive Order, such Presidential action is unnecessary. On the other hand, if the Authority's interpretation of the Order were at odds with the President's desires, he could have, during the five months since the Authority's decisions issued, clarified or amended this order to reflect his intent.[14]

In sum, the overall language and intent of the Executive Order supports the Authority's conclusion that Section 2(d) is not an enforceable "election" under section 7106(b)(1). As this ultimate determination by the Authority is an interpretation of its own organic Statute, it is entitled to deference. Petitioner concedes that it is the Authority's responsibility to determine whether Presidential directives implicate the Statute. Pet. Brief at 38. The Authority has reasonably concluded that Executive Order No. 12871 does not effect an "election" under the Statute. Thus, the Court should deny the petition for review in this case.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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December 1998

CERTIFICATION PURSUANT TO FRAP RULE 32
AND CIRCUIT RULE 32(e)(4),
FORM OF BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32(e)(4), I certify that the attached brief is monospaced, has 10.5 or less characters per inch, and contains 7,287 words.

December 2, 1998

_____
Ann M. Boehm

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 147, AFL-CIO,
Petitioner

v. No. 98-70912

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

and

SOCIAL SECURITY ADMINISTRATION,
SANTA ROSA DISTRICT OFFICE, SANTA
ROSA, CALIFORNIA,
Intervenor

_____

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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STATUTORY ADDENDUM

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§ 7103. Definitions; application
(a) For the purpose of this chapter-

* * * * * * * * * *

(12) "collective bargaining" means the performance of the mutual obligation
of the representative of an agency and the exclusive representative of

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

* * * * * * * * * *

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

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

* * * * * * * * * *

§ 7105. Powers and duties of the Authority

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

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

* * * * * * * * * *

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

* * * * * * * * * *

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

* * * * * * * * * *

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-

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

(2) in accordance with applicable laws-

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

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

* * * * * * * * * *

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

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

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

§ 7114. Representation rights and duties

* * * * * * * * * *

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

* * * * * * * * * *

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

* * * * * * * * * *

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

* * * * * * * * * *

§ 7116. Unfair labor practices
(a) For the purpose of this chapter, it shall be an unfair labor practice
for an agency-
(1) to interfere with, restrain, or coerce any employee in the exercise by
the employee of any right under this chapter;

* * * * * * * * * *

(5) to refuse to consult or negotiate in good faith with a labor
organization as required by this chapter;

* * * * * * * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult
(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in
good faith shall, to the extent not inconsistent with any Federal law or any
Government-wide rule or regulation, extend to matters which are the subject
of any rule or regulation only if the rule or regulation is not a
Government-wide rule or regulation.

* * * * * * * * * *

§ 7119. Negotiation impasses; Federal Service Impasses Panel
(a) The Federal Mediation and Conciliation Service shall provide services
and assistance to agencies and exclusive representatives in the resolution
of negotiation impasses. The Service shall determine under what
circumstances and in what matter it shall provide services and assistance.
(b) If voluntary arrangements, including the services of the Federal
Mediation and Conciliation Service or any other third-party mediation, fail
to resolve a negotiation impasse-
(1) either party may request the Federal Service Impasses Panel to consider
the matter, or
(2) the parties may agree to adopt a procedure for binding arbitration of
the negotiation impasses, but only if the procedure is approved by the
Panel.
(c)(1) The Federal Service Impasses Panel is an entity within the Authority,
the function of which is to provide assistance in resolving negotiation
impasses between agencies and exclusive representatives.
(2) The Panel shall be composed of a Chairman and at least six other
members, who shall be appointed by the President, solely on the basis of

fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either-

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may-

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be

promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under-

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * * * * * * * * *

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the

failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * * * * * * *

[1] Pertinent statutory provisions are set forth in Addendum A to this brief.

[2] Executive Order No. 12871, 3 C.F.R. (1993 Comp.) at 655, reprinted in 5 U.S.C. § 7101 note (1994), is set forth at RE B47-50.

[3] Section 7106(b)(1) provides, in relevant part, that "[n]othing in this section shall preclude any agency and any labor organization from negotiating at the election of the agency, on the numbers, types, and grades or positions assigned to any organizational subdivision, work project, or tour of duty . . . ." 5 U.S.C. § 7106(b)(1) (emphasis added).

[4] Before issuing its Commerce II decision, the Authority issued a partial decision and order in U.S. Department of Commerce, Patent and Trademark Office, 53 FLRA (No. 70) 858 (Nov. 17, 1997) (Commerce I) directing the parties in that case and in four other cases--the instant case being one of those four--as well as amicus curiae, to submit written responses to questions regarding the relationship between Executive Order No. 12871 and section 7106(b)(1).

[5] The Authority also relied upon the Commerce II affirmation of Authority precedent holding that section 7106(b) of the Statute is an exception to the section 7106(a) management rights provision. 54 FLRA at 448; RE 8. This determination is relevant because the employee's move is a section 7106(b)(1) matter. Id. Neither the Authority's conclusion regarding the interrelationship between section 7106(b) and section 7106(a), nor the conclusion that the employee's move is a section 7106(b)(1) matter is challenged in this proceeding. In fact, petitioner concedes these points as areas on which both petitioner and the Authority agree. See Petitioner's Brief (Pet. Brief) at 20-27. Because there is no challenge to these determinations, the Authority will not address these matters herein.

[6] Member Wasserman dissented in the instant case, 54 FLRA at 450; RE 10, and in Commerce II, 54 FLRA at 392; RE B33.

[7] The relevant portions of the Guidance provide that "'bargaining over the subjects set forth in 5 U.S.C. § 7106(b)(1) is now mandatory,'" and that in the event of an impasse on a section 7106(b)(1) matter, either party could present the impasse to the Federal Service Impasses Panel or an interest arbitrator for resolution. Commerce II, 54 FLRA at 383-84; RE B24-25.

[8] Petitioner's claim (Pet. Brief at 26-27, 32-33) that the Authority has on numerous occasions enforced elections to bargain under section 7106(b)(1) ignores the crucial distinction between the enforceability of contract provisions reflecting management elections to negotiate and the obligation to negotiate prospectively on section 7106(b)(1) matters. Although the Authority has enforced post-agreement elections to negotiate over section 7106(b)(1) matters (see cases cited in Pet. Brief at 32), it has not prospectively required

an agency to bargain over a section 7106(b)(1) matter.

[9] Petitioner directly challenges only three of the five considerations relied upon by the Authority in making its Commerce II determination that governs its holding in the instant case. Petitioner does not in any manner challenge the Authority's findings regarding whether statutory enforcement is necessary to give the Executive Order meaning (54 FLRA at 385-87; RE B26-28), and, at most, only indirectly challenges the Authority's findings regarding the OPM Guidance, by relying upon the Guidance as authority for its arguments regarding the mandatory nature of the direction to bargain under section 7106(b)(1), (Pet. Brief at 30).

Petitioner's reliance on the OPM Guidance to support its position is misplaced. First, the Authority explained that there is no basis in the record to view the Guidance as "evidencing the President's intent in the Executive Order." 54 FLRA at 382; RE B23. Second, the Authority stated that even if the Guidance were evidence of the President's intent, it does not establish that Section 2(d) "constitutes an election." 54 FLRA at 383; RE B24. Finally, and as noted by the Authority, OPM filed a brief with the Authority in Commerce II stating that the Executive Order is an "'internal directive'" and does not itself "'constitute the election it mandates.'" Id. n.24.

[10] Petitioner incorrectly asserts that the parties agree that Section 2(d)'s order to agencies to bargain over section 7106(b)(1) matters is "legally binding." Pet. Brief at 30-31. The manner in which Section 2(d) is binding is precisely what is at issue in this case.

[11] As this Court has recognized, principles of statutory construction are appropriate to apply in interpreting executive orders. See Utley v. Varian Assoc., Inc., 811 F.2d 1279, 1285 (9th Cir. 1987) (Utley). See also Sutherland § 31.06 ("The same rules of construction that are used for statutes and administrative regulations are used to interpret an executive order.").

[12] The determination that the Executive Order is an internal management directive not appropriately enforceable by the Authority through ULP proceedings is consistent with the public statements of the national president of the

American Federation of Government Employees, petitioner herein. In an article regarding the Authority's decision in Commerce II, the national president stated "it was not up to [the] FLRA to 'decide whether agency heads appointed by the President of the United States should follow [his] orders. Only President Clinton can enforce his promises--and he must.'" Clinton Order to Agency Heads Not Enforceable by FLRA, Panel Rules, Government Employee Relations Report (BNA), Vol. 36, No. 1770, at 725 (June 29, 1998).

[13] Petitioner, however, contends that the Authority's interpretation of the Executive Order is erroneous. Specifically, by referring to Authority case law regarding Executive Order No. 12564--Drug-Free Federal Workplace, petitioner asserts that the Authority's interpretation of Executive Order No. 12871 is inconsistent with its prior interpretation of an executive order. Pet. Brief at 38-40. This argument fails because the Authority's interpretation of Executive Order No. 12564 focused on whether it constituted a "law" under 5 U.S.C. § 7117(a)(1), see, e.g., American Federation of State, County, and Municipal Employees, Local 3097 and U.S. Department of Justice, Justice Management Division, 42 FLRA 412, 421 (1991), and not whether its language constituted an "election" under section 7106(b)(1). Furthermore, Executive Order No. 12564 does not contain the nonenforceability language found in Section 3 of Executive Order No. 12871. See Executive Order No. 12564, 3 C.F.R. (1986 Comp.) at 224, reprinted in 5 U.S.C. § 7301 note (1994).

[14] In fact, President Clinton has previously amended Executive Order No. 12871. See Executive Order No. 12983, 60 Fed. Reg. 66,855 (1995); RE B50-51.