71 FLRA No. 191

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
(Petitioner)

0-PS-38

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DECISION ON REQUEST FOR GENERAL STATEMENT
OF POLICY OR GUIDANCE

September 30, 2020

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

Pursuant to § 2427.2 of the Authority's Regulations,[1] the Office of Personnel Management (the Petitioner) requests that the Authority issue a general statement of policy or guidance regarding whether "zipper clauses"—provisions that would foreclose or limit midterm bargaining during the term of a collective-bargaining agreement (CBA)—are a mandatory subject of bargaining.[2] Specifically, the Petitioner asks us to find that zipper clauses are a mandatory subject of bargaining.[3] We find that they are.

II. Background

As the basis for its request, the Petitioner asserts that the Authority's precedent regarding zipper and reopener clauses has created an anomaly because only reopener clauses can be bargained to impasse.[4] According to the Petitioner, the Authority's failure to address whether parties must bargain over a zipper clause creates a "fundamental inequity" for parties seeking to adopt a zipper clause.[5] Because the Federal Service Impasses Panel (the Panel) may resolve negotiation impasses over only mandatory subjects of bargaining, the Petitioner argues that the Authority's lack of clarity about zipper clauses precludes the Panel from considering proposals that *limit* midterm bargaining, but not reopener proposals that *broaden* midterm bargaining.[6] Therefore, the Petitioner urges that the Authority should enable parties to bargain zipper clauses to impasse by finding that such clauses are mandatory subjects.

The Petitioner also argues that finding zipper clauses to be mandatory will allow agencies and unions to clearly define their bargaining obligations during the term of an agreement. As a result, the Petitioner argues that zipper clauses may potentially avoid disputes about midterm bargaining, reduce the number of unfair-labor-practice charges regarding midterm proposals, and create more efficiency during midterm bargaining. Furthermore, the Petitioner contends that precedent supports "considering zipper clauses to be mandatory subjects of bargaining" because such proposals "clearly involve the parties' midterm bargaining rights and obligations[,] which have been found to be mandatory subjects of bargaining."[7]

In its request, the Petitioner asked the Authority to issue a general statement holding that:

> Zipper clauses are a mandatory topic of bargaining and, therefore, parties may bargain to impasse regarding both reopener and zipper clauses.

The Authority invited interested persons to submit written comments on whether a general statement was warranted under § 2427.5 of the Authority's Regulations,[8] and, if so, what the Authority's policy or guidance should be.[9] The Authority has carefully considered the Petitioner's arguments and the comments submitted concerning the request in reaching the decision below.

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[1] 5 C.F.R. § 2427.2.
[2] Petitioner's Request (Request) at 1.
[3] *Id.*
[4] A reopener clause specifies the conditions under which a party may seek further negotiations during the life of a CBA. *See NTEU*, 64 FLRA 156, 157-59 (2009) (Member Beck dissenting). Like zipper clauses, reopener clauses may take a variety of forms. *Cf. NAGE, Local R1-109*, 64 FLRA 132, 134 (2009) (Member Beck dissenting) (proposal that required bargaining if an employee was found unqualified to carry a weapon was "akin to a negotiable reopener provision").
[5] Request at 2.
[6] *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009) ("It is well established that insisting to impasse on a permissive subject of bargaining violates the [Federal Service Labor-Management Relations] Statute.").
[7] Request at 2.
[8] 5 C.F.R. § 2427.5.
[9] Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Whether "Zipper Clauses" Are Mandatory Subjects of Bargaining, 85 Fed. Reg. 17,767 (Mar. 31, 2020).

III. Discussion

A. Evolution of Precedent Leading to the Petitioner's Request

Mandatory subjects of bargaining are topics within the required scope of bargaining.[10] As mentioned earlier, any party may bargain to impasse over mandatory topics.[11] Decades ago, the Authority and the U.S. Courts of Appeals engaged in a yearslong legal tug-of-war about whether the Federal Service Labor-Management Relations Statute (the Statute) required midterm bargaining,[12] and whether the Statute made proposals about midterm bargaining mandatory subjects that parties may negotiate to impasse.[13] At different times, the Authority provided different answers to those questions.[14] Further, the U.S. Courts of Appeals disagreed with one another about what the Statute required.[15] Consequently, the U.S. Supreme Court intervened.

After recounting the arguments on all sides of the questions before it, the Court determined that, where midterm bargaining was concerned, the Statute revealed "ambiguity, not certainty."[16] And on the basis of that thoroughgoing "statutory ambiguity," the Court concluded that "Congress delegated to the Authority the power to determine—within appropriate legal bounds—whether, when, where, and what sort of midterm bargaining is required."[17]

On remand from the Court, the Authority looked once again at whether the Statute required midterm bargaining and whether the parties must negotiate over proposals concerning their midterm-bargaining obligations.

Initially, the Authority held that the Statute required midterm bargaining,[18] for several reasons. The Authority observed that nothing in the Statute distinguished between obligations for midterm and term bargaining.[19] In addition, matters appropriate for collective bargaining are "sometimes unforeseen and unforeseeable," and the Authority concluded that such matters should be addressed through midterm negotiations, rather than "the more adversarial grievance/arbitration process."[20] Further, the Authority determined that the "mutual" obligation to bargain in good faith called for equalizing the positions of the parties by requiring both sides to negotiate over midterm changes that the other initiated.[21] Moreover, the Authority determined that midterm bargaining would likely lead to more efficient negotiations by allowing parties to address concerns in a timely manner, and by relieving the need to bargain over every conceivable topic during term negotiations, even when many of those topics might prove insignificant during the CBA's term.[22]

Next, the Authority addressed whether the Statute made reopener clauses mandatory subjects for negotiations. The Authority held that it did,[23] for two reasons. First, the Authority held that a reopener clause would merely restate a statutory obligation, and proposals restating statutory obligations were within an agency's obligation to bargain.[24] Second, the Authority held that a proposal about midterm bargaining was not inconsistent

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[10] *FDIC, Headquarters*, 18 FLRA 768, 771 (1985).
[11] *Id.*
[12] For the sake of simplicity, from this point forward, the shorthand phrase "midterm bargaining" refers to bargaining over union-drafted, negotiable proposals during the term of a CBA, where: (1) the proposals are not in response to an agency-initiated change to conditions of employment; (2) the proposals are not covered by an existing agreement; and (3) the union has not waived any right that it may have to bargain over those proposals.
[13] *See generally NFFE, Local 1309 v. Dep't of the Interior*, 526 U.S. 86 (1999) (*Local 1309*).
[14] An early loss in court appears to have prompted the Authority's change in position. *Compare IRS*, 17 FLRA 731, 732-37 (1985) (*IRS I*) (holding that the Statute does not require midterm bargaining), *rev'd & remanded by NTEU v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987), *abrogated by Local 1309*, 526 U.S. at 98, *and NAGE, SEIU, AFL-CIO*, 24 FLRA 147, 147-49 (1986) (citing *IRS I*, 17 FLRA 731) (holding that reopener clauses are mandatory subjects of bargaining), *with IRS*, 29 FLRA 162, 165-68 (1987) (holding, on remand, that Statute requires midterm bargaining, and reopener clauses are mandatory subjects of bargaining).
[15] *Compare NTEU v. FLRA*, 810 F.2d at 296, 301 (finding by U.S. Court of Appeals for the District of Columbia Circuit that Statute unambiguously compels midterm bargaining and requires parties to negotiate over proposals concerning midterm bargaining), *abrogated by Local 1309*, 526 U.S. at 98, *with SSA v. FLRA*, 956 F.2d 1280, 1281 (4th Cir. 1992) (finding by U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) that Statute unambiguously limits the obligation to bargain to proposals (1) for term agreements and (2) over management-initiated changes to conditions of employment), *abrogated by Local 1309*, 526 U.S. at 98, *and U.S. Dep't of Energy v. FLRA*, 106 F.3d 1158, 1163-64 (4th Cir. 1997) (finding by Fourth Circuit that Statute prohibits parties from agreeing to proposals allowing midterm bargaining), *vacated & remanded*, *Local 1309*, 526 U.S. at 101.
[16] *Local 1309*, 526 U.S. at 94.
[17] *Id.* at 98-99 (citations omitted).
[18] *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 45 (2000) (*Interior*) (Member Cabaniss concurring, in part, and dissenting, in part).
[19] *Id.* at 51.
[20] *Id.*
[21] *Id.* (citing 5 U.S.C. § 7103(a)(12)).
[22] *Id.* at 52.
[23] *Id.* at 54.
[24] *Id.* (citing *NFFE, Local 405*, 42 FLRA 1112, 1136 (1991)).

with law or government-wide rule or regulation.[25] However, the Authority declined to address whether zipper clauses were mandatory subjects for negotiation, which eventually led to the request in this case.

We find that by resolving the Petitioner's question concerning zipper clauses—a question that has persisted for decades without a clear answer—we will provide guidance with "general applicability" under the Statute[26] on a matter that currently confronts parties in the context of a labor-management relationship.[27] Therefore, we grant the Petitioner's request for a general statement.[28]

B. Empowering the Parties to Answer a Question that the Statute Does Not

As previously mentioned, the Supreme Court held that the Statute does not clearly require or prohibit midterm bargaining.[29] In its decision on remand from the Supreme Court, the Authority decided that the Statute requires midterm bargaining.[30] However, the Authority's first consideration to support that conclusion is flawed. In particular, the Authority found that the Statute does not distinguish between obligations for midterm and term bargaining.[31] But in one important respect, those obligations are distinguishable: The parties' mutual obligation to bargain in term negotiations is clearly established in the Statute,[32] whereas a mutual obligation to bargain midterm is not.[33] Indeed, that indeterminacy in the Statute's text was the driving force behind the Supreme Court's ruling.[34] Although the Court recognized that the Authority could resolve that ambiguity, and the Authority did so, we find it more appropriate to recognize that the Statute neither requires nor prohibits midterm bargaining. Instead, the Statute leaves midterm-bargaining obligations to the parties to resolve as part of their term negotiations.[35]

Thus, we now hold that proposals that concern midterm-bargaining obligations—whether they resemble

[25] *Id.*
[26] 5 C.F.R. § 2427.5(c).
[27] *Id.* § 2427.5(d). The dissent need only refer to this discussion of the "general applicability" of this matter that "currently confronts parties in the context of a labor-management relationship" to assuage its misplaced concern that we have not addressed the regulatory criteria for issuing general statements. Dissent at 12 & n.29; *see* 5 C.F.R. § 2427.5 (listing factors the Authority shall consider in determining whether to issue a statement of policy or guidance including "[w]hether the resolution of the question presented would have general applicability under the [Statute]" and "[w]hether the question currently confronts parties in the context of a labor-management relationship").
[28] To the extent that this conclusion is inconsistent with the Authority's statement, twenty years ago, that the parties' obligations to bargain over zipper clauses would be "more appropriate[ly resolved] where the matters are squarely presented," *Interior*, 56 FLRA at 54, we find that the passage of an additional two decades without any clear guidance on zipper clauses militates in favor of issuing a general statement now.
[29] The dissent argues that "this finding is nothing new." Dissent at 11. And we have not maintained otherwise. But the suggestion that we cannot reexamine our precedent without a "new" judicial finding to spur our reevaluation sits uncomfortably alongside cases in which previous majorities—of which the dissenting Member was a part—overturned Authority precedent without any judicial prompting. *E.g.*, *NTEU, Chapter 302*, 65 FLRA 746 (2011) (Member Beck dissenting) (overruling Authority precedent without intervening judicial precedent); *NTEU*, 65 FLRA 509 (2011) (Member Beck dissenting, in part) (same); *U.S. EPA*, 65 FLRA 113 (2010) (Member Beck concurring) (same); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring, in part) (same).
[30] *See* note 12.
[31] *Interior*, 56 FLRA at 51.
[32] Indeed, in the long history of litigation over these issues, there has been universal agreement that the obligation to "meet and negotiate in good faith for the purposes of arriving at a collective[-]bargaining agreement" compels bargaining over negotiable proposals for a term CBA. 5 U.S.C. § 7114(a)(4).
[33] *Local 1309*, 526 U.S. at 92 ("[A]ll agree that the Statute itself does not expressly address union-initiated midterm bargaining.").
[34] *Id.* at 98 ("[W]e find ambiguity created by the Statute's use of general language that might or might not encompass various forms of midterm bargaining."). The dissent wholly ignores this conclusion by characterizing midterm bargaining as "an essential statutory right." Dissent at 14. If the right were undeniably essential, as the dissent maintains, it would not have taken twenty years after the Statute's enactment for the Authority and the courts to settle upon whether it even existed. *Id.*
[35] We note that the Authority previously denied a different request from the Petitioner for a general statement of policy or guidance about whether the Statute requires midterm bargaining, and that denial was based, in part, on the fact that the "guidance sought by [the Petitioner was] sufficiently provided by existing Authority precedent." *U.S. OPM*, 71 FLRA 423, 423 (2019) (citing *NTEU*, 64 FLRA 156; *Interior*, 56 FLRA 45). However, the previous request did not concern zipper clauses, and the precedent on which the Authority based its previous denial did not resolve whether zipper clauses were within the duty to bargain. In the request at issue here, the question of the parties' obligations to negotiate zipper clauses has been squarely raised. And because those obligations depend, in some respects, on whether the Statute itself compels midterm bargaining, we find it necessary to address the Statute's midterm-bargaining requirements in order to properly evaluate whether zipper clauses are mandatory subjects of bargaining. *See NTEU v. FLRA*, 399 F.3d 334, 340-43 (D.C. Cir. 2005) (reviewing, with approval, Authority precedent holding that a proposal that requires a party to waive a unilateral right must be a permissive, not mandatory, subject of bargaining).

reopener or zipper clauses, or take some other form—are mandatory subjects of bargaining under the Statute.[36]

That treatment is consistent with the Authority's previous recognition that matters relating to the parties' midterm-bargaining relationship plainly relate to conditions of employment.[37] Further, the Statute presumes that all matters relating to conditions of employment are mandatory subjects of bargaining unless the text explicitly or by unambiguous implication vests in a party an unqualified, or "unilateral," right.[38] As explained above, the Statute does not, on its own, explicitly or by unambiguous implication vest either party with a unilateral right to engage in midterm bargaining.[39] In other words, because neither party would be required to waive a statutory right, any proposal concerning midterm bargaining would come within the default rule that all matters relating to conditions of employment are mandatory subjects of bargaining.[40]

Moreover, § 7114(a)(4) of the Statute provides further support—beyond the default rule—for treating proposals concerning midterm bargaining as mandatory subjects for negotiation.[41] Specifically, that section says that the parties "may determine appropriate techniques, consistent with the provisions" of § 7119—concerning negotiation impasses—"to assist in any negotiation."[42] For example, adding a reopener clause to a CBA may allow the parties to expedite bargaining by presently avoiding topics of little immediate concern that "could unnecessarily and inefficiently broaden and prolong term negotiations."[43] On the other hand, adding a zipper clause to a CBA may provide management with an assurance that its other contractual commitments will not be interpreted as imposing an ongoing midterm-bargaining obligation.[44] In other words, management negotiators can have greater confidence that, if they agree to union-favored proposals that recognize additional midterm bargaining obligations for the agency, then those obligations can be counterbalanced with an appropriately tailored zipper clause.[45] Thus, the parties may adopt proposals concerning midterm bargaining as "appropriate techniques . . . to assist in any negotiation,"[46] which is an additional reason for finding them to be mandatory subjects of bargaining.[47]

In sum, the Supreme Court determined that "the Statute does not resolve the question of midterm

[36] The dissent cannot decide whether it disagrees with our decision for being too broad, Dissent at 11 (criticizing, in the dissent's words, "the purported need to respond to a request for a policy statement that did not even *present* this question"), or too narrow, *id.* at 14 n.39 (criticizing the failure to "attempt to explain how the parties should proceed with respect to midterm bargaining if their term agreement contains neither a zipper nor a reopener clause"). These conflicting expressions of dissatisfaction—because we have allegedly decided *too much* and also *too little*—show that the dissent's displeasure stems more from our conclusion than our reasoning. Unless our analysis maintained the status quo from 2016, it could never be sufficiently "thorough and well-reasoned" for the dissent's liking. *Id.* at 11.

[37] *NTEU*, 64 FLRA at 157.

[38] *Id.*

[39] Consistent with note 12, we reiterate that we are not discussing scenarios in which management exercises a right under § 7106(a) or (b)(1) to make changes to conditions of employment during the term of a CBA and a union seeks negotiations under § 7106(b)(2) or (b)(3) due to those changes—situations commonly known as "impact-and-implementation bargaining."

[40] Notwithstanding the dissent's gratuitous hyperbole, Dissent at 14, one need only read that "any proposal concerning midterm bargaining would come within the default rule that all matters relating to conditions of employment are mandatory subjects of bargaining" to grasp the implications for negotiability, impasse, and unfair-labor-practice cases involving midterm-bargaining proposals. While this general statement cannot offer answers for every question that may arise regarding parties' future midterm-bargaining obligations, the absence of absolute certainty inheres in most statutory interpretations, including those that the Authority set forth in *Interior*. 56 FLRA at 54, 56-57 (majority refused to clarify whether zipper clauses were mandatory subjects of bargaining, despite dissent's insistence that the analysis ignored an essential area of concern).

[41] 5 U.S.C. § 7114(a)(4).

[42] *Id.*

[43] *Interior*, 56 FLRA at 52.

[44] *E.g.*, *Sw. Div., Naval Facilities Eng'g Command, San Diego, Cal.*, 44 FLRA 77, 92-93, 95 (1992) (ALJ found that CBA provision "stat[ing] that certain past practices shall remain in effect, '. . . unless modified pursuant to notification and bargaining,'" did not empower union to bargain midterm about terminated alternative work schedules because: (1) parties had bargained over such schedules during term negotiations and set aside union's proposal on the topic; and (2) CBA's zipper clause said that midterm bargaining was permitted only for union proposals that were "not previously set aside during negotiations").

[45] *See id.*

[46] 5 U.S.C. § 7114(a)(4).

[47] The dissent takes a dim view of the parties' abilities to reach amicable agreements on reopener and zipper clauses, Dissent at 13-14, all the while claiming to have the utmost respect for the principle that collective bargaining "contribut[es] to the effective conduct of public business," *id.* at 13 (alteration in original) (quoting 5 U.S.C. § 7101(a)(1)(B)). Thus, the dissent is in the peculiar position of hailing the effectiveness of collective bargaining and simultaneously bemoaning our decision for requiring the parties to *engage in collective bargaining* over an additional topic. In addition, the dissent ignores that, if the parties cannot resolve any disagreements over reopener or zipper clauses, they may request assistance from the Federal Mediation and Conciliation Service, as well as a final resolution from the Panel.

bargaining, nor the related question of bargaining about midterm bargaining."[48] And the Court held "that Congress delegated to the Authority the power to determine—within appropriate legal bounds—whether, when, where, and what sort of midterm bargaining is required."[49] After reexamining the statutory ambiguities that the Supreme Court identified, we clarify that the Statute neither requires nor prohibits midterm bargaining, and that *all* proposals concerning midterm-bargaining obligations (including zipper clauses) are mandatory subjects for negotiation that may be bargained to impasse.[50]

[48] *Local 1309*, 526 U.S. at 100.
[49] *Id.* at 98-99 (citations omitted).

[50] The dissent misconstrues this conclusion as putting unions at "the mercy of management to initiate workplace changes in response to the potentially life-threatening hazards posed by [the current public-health] crisis." Dissent at 13. First, the dissent's concern would apply only to parties that do not have applicable reopener provisions in their agreements. Second, even among those without an applicable reopener clause, the dissent's concern would extend only to parties that do not already protect employees' health and safety in their agreements. Third, because many parties already include health and safety provisions in their agreements, even in the absence of our decision today, the covered-by doctrine would arguably preclude further bargaining by those parties on employee health and safety initiatives, unless the parties mutually agreed to reopen their existing agreements or already included a reopener clause that applied in this situation. Fourth, nothing in our decision prevents parties from mutually agreeing to reopen their existing agreements to address the current circumstances.

Member DuBester, dissenting:

No less than ten months ago, I joined my colleagues in denying a request for a general statement of policy or guidance addressing whether an agency has a statutory obligation to bargain over union proposals concerning mandatory subjects of bargaining during the term of the parties' agreement.[1] We denied this request because it did not "satisfy the standards governing the issuance of general statements of policy and guidance" set forth in our regulations.[2] And we based this conclusion upon our finding that the guidance sought "is sufficiently provided by existing Authority precedent; the question presented can be more appropriately resolved by other means; and there is no reason to conclude that the issuance of an Authority statement would prevent the proliferation of cases involving the same or similar question."[3]

That decision did not have a long shelf-life. Today, the majority abandons its short-lived judicial restraint and reverses decades of Authority precedent governing the duty to bargain midterm with practically no regard for the Federal Service Labor-Management Relations Statute's (the Statute's) language, purpose and history. And it does so absent an actual case or controversy, in response to a request for a policy statement that *did not even ask* us to address this question. The federal labor-management relations community deserves better.

Acting on its own accord, the majority concludes it is compelled to find that the Statute does not vest unions with the unilateral right to demand midterm bargaining based upon the Supreme Court's decision in *NFFE, Local 1309 v. Department of the Interior* (*NFFE, Local 1309*).[4] In that decision, issued more than twenty years ago, the Court concluded that Congress delegated to the Authority "the power to determine – within appropriate legal bounds – whether, when, where, and what sort of midterm bargaining is required" under the Statute.[5]

Notably, this is *precisely* what the Authority did in *U.S. Department of the Interior, Washington, D.C.* (*Interior*),[6] the decision we issued upon reconsideration of the cases remanded by the Court in *NFFE, Local 1309*. And after engaging in the analysis mandated by the Court, which included a thorough examination of the Statute's text, legislative history and purpose, and extensive briefs submitted by the labor-relations community, the Authority concluded that the Statute imposes a duty upon agencies to bargain over union-initiated midterm proposals.

Unlike today's decision, the Authority did not reach its conclusion in *Interior* lightly. Upon examining both the Statute's text and legislative purpose, it noted that Congress "has unambiguously concluded that collective bargaining in the public sector 'safeguards the public interest,' 'contributes to the effective conduct of public business,' and 'facilitates and encourages the amicable settlements of disputes.'"[7] And it found "[n]othing in the plain wording of the Statute" to "support[] the inference that these conclusions are not as applicable to midterm bargaining as they are to term bargaining."[8] Rather, the Authority agreed with the Court that collective bargaining under our Statute is "'a continuing process' involving, among other things, 'resolution of new problems not covered by existing agreements.'"[9]

Interior also found that when Congress enacted the Statute, it "unquestionably intended to strengthen the position of federal unions and make the collective-bargaining process a more effective instrument of the public interest."[10] On this point, it noted that the Statute "define[s] the obligation to bargain as 'mutual.'"[11] And it concluded that requiring midterm bargaining is necessary to preserve this mutuality because of the undisputed right of agencies to change conditions of employment during the term of a bargaining agreement.[12] It further concluded that "midterm bargaining[] is in the public interest because it 'contributes to stability in federal labor-management relations and effective government.'"[13]

Significantly, the Authority also found that recognizing this statutory right "serves the public interest in a more efficient Government because it will likely lead to more focused negotiations."[14] It found this to be true because the scope of midterm bargaining is necessarily limited to specific issues. Additionally, it reasoned that without midterm bargaining, unions would be required "to raise matters [during term bargaining] that do not currently present problems, but might do so in the future," which

[1] *U.S. OPM*, 71 FLRA 423 (2019).
[2] *Id.* at 423 (citing 5 C.F.R. § 2427.5).
[3] *Id.* (further concluding that the subject matter of the request was so "dependent upon the circumstance of the parties and the agreement language at issue" that it should be "developed more fully in the context of an actual dispute between the parties").
[4] 526 U.S. 86 (1999).
[5] *Id.* at 98-99 (citations omitted).
[6] 56 FLRA 45 (2000) (Member Cabaniss concurring, in part, and dissenting, in part).
[7] *Id.* at 51 (quoting 5 U.S.C. § 7101(a)(1)).
[8] *Id.*
[9] *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 46 (1957)).
[10] *Id.* (quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983) (*ATF*)); *see also id.* (further finding that "'equalizing the positions of labor and management at the bargaining table' is a primary goal of the Statute" (quoting *AFGE v. FLRA*, 750 F.2d 143, 148 (D.C. Cir. 1984))).
[11] *Id.* (quoting 5 U.S.C. § 7103(a)(12)).
[12] *Id.* ("Requiring an agency, during the term of an agreement, to bargain over a union's proposed changes in negotiable conditions of employment thus maintains the mutuality of the bargaining obligation prescribed in the Statute.").
[13] *Id.* at 52 (quoting *NTEU v. FLRA*, 810 F.2d 295, 300 (D.C. Cir. 1987) (*NTEU I*)).
[14] *Id.*

would "unnecessarily and inefficiently broaden and prolong term negotiations."[15]

Also, unlike today's decision, the Authority did not decide *Interior* in a vacuum. Rather, it based its findings and conclusions upon briefs submitted by both parties, the General Counsel and other interested parties who responded to a Federal Register notice specifically requesting their views regarding the statutory basis of the midterm bargaining obligation.[16] Upon reviewing these comments, it found the record "devoid of probative evidence of excessive costs or disruption to agency operations as a result of union-initiated midterm bargaining."[17] And based on this record, it dismissed, as "unsupported and speculative," arguments contending that union-initiated midterm bargaining "has been or will be harmful to the federal sector labor relations program."[18]

In short, the Authority concluded in *Interior* that requiring agencies to bargain over union-initiated proposals during the term of a collective bargaining agreement "is consistent with Congress's commitment to collective bargaining in the federal sector"[19] because it "furthers the Statute's goal of enabling employees, 'through labor organizations of their own choosing' to more timely participate in 'decisions which affect them' and in cooperatively resolving disputes."[20] And it reasonably found that negotiating such matters "is preferable to addressing them through the more adversarial grievance/arbitration process."[21]

In today's decision, the majority jettisons *Interior*, along with related precedent enforcing unions' statutory right to initiate midterm bargaining, based upon the Court's finding in *NFFE, Local 1309* that the Statute does not "'expressly address union-initiated midterm bargaining.'"[22] But this finding is nothing new. Indeed, as noted, it was this very finding that compelled the Authority to undertake its thorough and well-reasoned analysis in *Interior* more than twenty years ago.

The Authority has been repeatedly cautioned that it "must either follow its own precedent or 'provide a reasoned explanation for' its decision to depart from that precedent."[23] As with previous policy statements in which the majority has reversed our precedent,[24] today's decision falls well short of this standard.

Apart from its purported need to respond to a request for a policy statement that did not even *present* this question for resolution, the majority has not set forth any reason why we must now reexamine our decision in *Interior*. It has certainly not demonstrated that the Authority erred in that decision.[25] And it has replaced *Interior* with a statutory analysis that simply does not withstand scrutiny.

This is apparent from the majority's conclusion that "the parties' mutual obligation to bargain in term negotiations is clearly established in the Statute, whereas a mutual obligation to bargain midterm is not."[26] It bases this conclusion – which serves as the lynchpin of its analysis – upon its observation that "there has been universal agreement" that § 7114(a)(4) of the Statute compels bargaining over a term agreement.[27]

Of course, this is true. But this does not demonstrate, as a principle of statutory interpretation, that this provision does not *also* establish a duty to bargain midterm. Indeed, the Court in *NFFE, Local 1309* rejected this very premise, finding that "[o]ne can easily read" the language of § 7114(a)(4) "as including an agreement reached at the conclusion of midterm bargaining."[28] Tellingly, the majority offers no explanation for its conclusion that the duty to "meet and negotiate in good faith for the purposes of arriving at a collective bargaining

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[15] *Id.* On this basis, the Authority found that union-initiated midterm bargaining "will not result in significant costs or disruptions that would outweigh the benefits of such bargaining." *Id.*

[16] *Id.* at 47 (noting that interested parties "were asked to address the following question: 'In the context of resolving this case, what policy considerations and empirical data should the Authority balance in determining whether, when, and where union-initiated midterm bargaining is required?'" (quoting Opportunity To Submit Amicus Curiae Briefs in an Unfair Labor Practice Proceeding Pending Before the Federal Labor Relations Authority, 64 Fed. Reg. 33,079, 33,081 (Jun. 21, 1999))).

[17] *Id.* at 53 (further finding that "constraints on union-initiated midterm bargaining" – such as limiting bargaining to matters not covered by the parties' term agreement – "make it unlikely that it will lead to continuous issue-by-issue bargaining").

[18] *Id.* at 54.

[19] *Id.*

[20] *Id.* (quoting 5 U.S.C. § 7101(a)(1)).

[21] *Id.* at 51.

[22] Majority at 5 n.33 (quoting *NFFE, Local 1309*, 526 U.S. at 92).

[23] *NFFE, FD-1, IAMAW, Local 951 v. FLRA*, 412 F.3d 119, 124 (D.C. Cir. 2005) (quoting *Local 32, AFGE, AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985)). The D.C. Circuit cautioned that the "deference owed to an expert tribunal cannot be allowed to result in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *NTEU I*, 810 F.2d at 297 (citing *ATF*, 464 U.S. at 97).

[24] *See, e.g.*, *U.S. OPM*, 71 FLRA 571, 578 (2000) (Dissenting Opinion of Member DuBester).

[25] Rather than providing a reasoned explanation for discarding our decision in *Interior*, the majority merely asserts that it need not wait for "judicial prompting" to reverse Authority precedent. Majority at 5 n.29. But as judicial precedent makes clear, we should not reverse Authority precedent simply because we can.

[26] Majority at 5.

[27] *Id.* at 5 n.32.

[28] *NFFE, Local 1309*, 526 U.S. at 93.

agreement" in § 7114(a)(4) pertains solely to negotiations leading to a term agreement.

Moreover, the majority relies upon this statutory ambiguity to conclude that it is "more appropriate" to "recognize that the Statute neither requires nor prohibits midterm bargaining."[29] But this is nothing more than circular logic. The majority fails to explain *why* its interpretation of the Statute is "more appropriate," particularly in light of the contrary conclusion reached by our decision in *Interior*, which – as discussed – resolved this ambiguity by carefully and thoroughly examining the Statute's text, history, and legislative purpose.

Equally offensive is the manner in which the majority has issued today's decision. As an initial matter, the majority falls well short of demonstrating how its issuance of a policy statement on this matter is consistent with the Authority's governing regulations.[30]

But more remarkably, the majority issues today's policy statement only months after we denied a request for guidance on this *very* issue on grounds that the guidance sought was "sufficiently provided by existing Authority precedent."[31] And it does so in response to a request for guidance addressing a *different* matter – namely, whether "zipper clauses" are a mandatory subject of bargaining.[32] While the majority seems unfazed by this discrepancy because – in its words – the obligation to bargain over zipper clauses "depend[s], in some respects, on whether the Statute itself compels midterm bargaining,"[33] this nuance was missed by the parties who responded to our request for comments, most of whom reasonably based their responses upon the well-established principle that the Statute requires midterm bargaining.[34]

And as a practical – indeed, humane – matter, it is hard to imagine a more inopportune time for the Authority to divest unions of their right to initiate midterm bargaining. Unions often use midterm bargaining to propose solutions to health and safety issues that arise during the term of an agreement which could not have been anticipated while it was being negotiated. Indeed, the Supreme Court found that this aspect of midterm bargaining supports a conclusion that it "contribut[es] to the effective conduct of public business" within the meaning of § 7101(a)(1)(B) of the Statute.[35]

It is therefore not surprising that unions have initiated midterm bargaining to seek solutions to the unprecedented issues arising from the COVID pandemic, which currently affect nearly every aspect of the federal workplace.[36]

Yet, by virtue of today's decision, unions will no longer have the statutory right to initiate bargaining regarding such proposals, and will instead have to rely upon the mercy of management to initiate workplace changes in response to the potentially life-threatening hazards posed by this crisis.[37] To compound matters, unions have already been deprived of their ability to propose possible solutions to these issues through

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[29] Majority at 5.

[30] *See* 5 C.F.R. § 2427.5 (stating that, when deciding whether to issue a general statement of policy or guidance, "the Authority shall consider: (a) Whether the question presented can more appropriately be resolved by other means; (b) Where other means are available, whether an Authority statement would prevent the proliferation of cases involving the same or similar question; (c) Whether resolution of the question presented would have general applicability under the [Statute]; (d) Whether the question currently confronts parties in the context of a labor-management relationship; (e) Whether the question is presently jointly by the parties involved; and (f) Whether the issuance by the Authority of a general statement of policy or guidance on the question would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the [Statute].").

It is disingenuous, to say the least, for the majority to conclude that these factors have been established where, as discussed *infra*, it failed to solicit public comment on the matter actually addressed in today's decision. It is even more disingenuous for the majority to reach this conclusion in light of its earlier decision to *deny* a request for a policy statement on this matter because it did not satisfy our regulations.

[31] *U.S. OPM*, 71 FLRA at 423 (citing the "seminal decisions" in *Interior*, 56 FLRA 45 and *NTEU*, 64 FLRA 156 (2009)).

[32] Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Whether "Zipper Clauses" Are Mandatory Subjects of Bargaining, 85 Fed. Reg. 17,767 (Mar. 31, 2020).

[33] Majority at 5 n.35.

[34] This nuance was also undoubtedly missed by the parties who did not submit comments in the first place, but who would have done so had they known what the majority actually intended to address in this policy statement.

[35] *NFFE, Local 1309*, 526 U.S. at 94 ("Without midterm bargaining, for example, will it prove possible to find a collective solution to a workplace problem, say, a health or safety hazard, that first appeared midterm? The Statute's emphasis upon collective bargaining as 'contribut[ing] to the effective conduct of public business' suggests that it would favor joint, not unilateral, solutions to such midterm problems.") (citation omitted)).

[36] *See, e.g.*, NTEU, Comment Letter on Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Whether "Zipper Clauses" Are Mandatory Subjects of Bargaining (April 30, 2020).

[37] Moreover, even the union's right to engage in impact and implementation bargaining over such management-initiated changes has been recently curtailed by the majority. *See U.S. Dep't of Educ.*, 71 FLRA 968 (2020) (Member DuBester dissenting) (expanding the de minimis exception to bargaining over changes in conditions of employment).

labor-management forums, which were abolished by a 2017 Executive Order.[38]

Additionally, while the majority attempts to portray its decision as merely affording both unions and management enhanced flexibility to "determine appropriate techniques" to "assist" their negotiations,[39] there is nothing neutral about this decision. In reality, unions wishing to preserve their ability to initiate midterm bargaining will now be required to trade something of value at the bargaining table in hopes of securing what was, until today, a statutory right.[40]

In the meantime, unions that failed to secure a reopener clause in their current term agreement – because, of course, the agreement was negotiated under the assumption that such clauses were unnecessary – are apparently out of luck. Moreover, during any subsequent term bargaining, agencies will now be free to bargain to impasse over zipper clauses, thus allowing these provisions to be unilaterally imposed on unions through statutory impasse proceedings.[41]

In sum, the majority's decision constitutes the height of administrative and judicial irresponsibility. Employing faulty principles of statutory interpretation, the majority divests unions of an essential statutory right by means of a policy statement which it issues under false pretense. And because today's decision is unconnected to any case or controversy, was issued without relevant public comment, and lacks any contextual analysis, it is entirely unclear how it will affect decisions in future cases involving unfair labor practice complaints, negotiability appeals, exceptions to arbitration awards, and impasse proceedings.

One thing, however, is clear: we can, and must, do better than this. Accordingly, I dissent.

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[38] Revocation of Executive Order Creating Labor-Management Forums, Exec. Order No. 13,812, 82 Fed. Reg. 46,367 (Sept. 29, 2017). The majority cavalierly asserts that its decision will not impact unions' ability to respond to circumstances, like the COVID pandemic, that arise during the term of the parties' agreement. Majority at 8 n.50. But these assertions simply highlight the majority's failure to acknowledge the real-world implications of its decision. For instance, it is far from certain that any particular health and safety provision in a term agreement will be adequate to address the myriad of concerns that might arise as a result of the pandemic, including specific telework arrangements, leave or other accommodations, and work schedule adjustments. And to the extent that the majority takes solace in the fact that the parties may still "mutually agree[] to reopen their existing agreement" to address these concerns, *id.*, this merely illustrates an additional way in which unions will now be at the mercy of management to address these issues through collective bargaining.

[39] Majority at 7 (quoting 5 U.S.C. § 7114(a)(4)).

[40] Contrary to the majority's assertion, nothing about these observations reflects a "dim view" of the essential role played by collective bargaining in our Statute. Majority at 7 n.47 (criticizing the dissent for "bemoaning our decision for requiring the parties to engage in collective bargaining over an additional topic"). What I "bemoan" is the majority's disregard for the Statute's text, legislative history, and purpose in reaching today's decision.

[41] And the majority does not even attempt to explain how the parties should proceed with respect to midterm bargaining if their term agreement contains neither a zipper nor a reopener clause. It should go without saying that my disagreement with the majority's analysis does not arise from any concern that its decision is too "narrow" or "too broad." Majority at 6 n.36. Instead, as should be obvious to the majority, my disagreement arises from its failure to set forth a reasoned basis for discarding our well-established and thoroughly-reasoned precedent governing midterm bargaining, and to do so in response to a request for a policy statement that did not even ask us to address this question.