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# American Federation of Government Employees v. Federal Labor Relations Authority: Cushioning the Impact of the Federal Service Impasses Panel on Collective Bargaining in the Federal Sector

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**AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES v. FEDERAL  
LABOR RELATIONS AUTHORITY:  
CUSHIONING THE IMPACT OF THE  
FEDERAL SERVICE IMPASSES PANEL  
ON COLLECTIVE BARGAINING IN THE  
FEDERAL SECTOR**

Private sector employees enjoyed collective bargaining rights<sup>1</sup> for more than twenty-five years prior to their public sector counterparts in the federal sphere.<sup>2</sup> Federal employees were originally

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<sup>1</sup> See National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-187 (1982)). The political climate fostered by the Great Depression and the New Deal legislation was favorable to federal legislation which was conceived to be essential to the growth of organized labor. See 1 THE DEVELOPING LABOR LAW 25 (C. Morris ed. 1983) [hereinafter LABOR LAW]. The Depression and its concomitant mass insecurity steered the workers toward labor unions. See H. MILLIS & E. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 20 (1950). Pursuant to section 7 of the National Labor Relations Act of 1935 ("NLRA"), commonly known as the Wagner Act, employees were empowered to form labor organizations, to bargain collectively through these organizations, and to engage in concerted activities to enforce their rights. R. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 1 (1976). The judiciary has ruled that the right to engage in concerted activities encompasses the right to strike. See Comment, *Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity*, 13 SAN DIEGO L. REV. 931, 932 (1976). The Wagner Act reflected a congressional attempt to spawn industrial peace in interstate commerce through the formation of labor unions as an effective voice for the individual worker. R. GORMAN, *supra*, at 1. See also C. GREGORY, LABOR AND THE LAW 230 (1946) (Wagner Act was congressional attempt to remedy harm to national economy caused by strife over organizational activities of unions). The National Labor Relations Board ("NLRB"), as chief mechanism for the administration and enforcement of the Wagner Act, *id.* at 233, must implement congressional intent in situations which were not foreseen in detail when the legislation was enacted and in anticipated situations which could not have been provided for with adequate specificity. *Id.*

The Wagner Act passed constitutional muster in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). The Supreme Court found that acts which directly burden or obstruct interstate commerce are within the reach of congressional power. *Id.* at 31. The Court asserted that Congress' power to regulate interstate commerce was plenary and could be exercised to protect interstate commerce from any danger which threatens it. *Id.* at 37. The Court held that the determination of whether a specific act affects commerce in such a close and intimate fashion as to be within the realm of congressional power, and therefore within the authority granted to the NLRB, was to be resolved on an ad hoc basis. *Id.* at 32.

<sup>2</sup> See 29 U.S.C. § 152(2) (1982) ("employer" does not include United States, any state, or political subdivision). See also R. GORMAN, *supra* note 1, at 1 (NLRA is primary body of

accorded collective bargaining rights via an executive order issued by President Kennedy.<sup>3</sup> Federal labor-management relations were

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federal law controlling labor-management relations in *private* industry).

Prior to the 1960's, ideology, the nature of governmental employment, and the legal environment inhibited public employee unionism. See R. KEARNEY, *LABOR RELATIONS IN THE PUBLIC SECTOR* 9 (1984). Restrictions on public employees' collective bargaining rights partially derived from the conception that the relationship of the public employer to the public employee differs from the private employer-private employee relationship in that the former is sovereign while the latter is not. See *Developments in the Law - Public Employment*, 97 HARV. L. REV. 1611, 1616 (1984) [hereinafter *Public Employment*]. The sovereign employer traditionally retained the power to impose the terms and conditions of employment upon its public employees. See M. NESBITT, *LABOR RELATIONS IN THE FEDERAL GOVERNMENT SERVICE* 83 (1976); see also Note, *The Minnesota Public Employment Labor Relations Act of 1971: Another Public Employment Experiment*, 57 MINN. L. REV. 134, 141 (1972) (negotiation by public employer, regarded as entity which could not relinquish its right to act unilaterally, deemed illegal delegation of authority). The sovereignty doctrine, which had experienced various measures of success in suppressing government unions, assumed the aura of ideology. R. KEARNEY, *supra*, at 9.

The nature of governmental employment, a second factor which inhibited public employee unionism and collective bargaining, featured strong job security, good pensions, and merit system protections against many forms of management abuse in the federal sector. *Id.* at 10; see also W. GERSHENFELD, J. LOEWENBERG, & B. INGSTER, *SCOPE OF PUBLIC-SECTOR BARGAINING* 3 (1977) (public employees did not press for organization and collective bargaining because content with job security). Finally, prior to the extensive changes which took place at all levels of government during the 1960's, the legal environment was strongly opposed to public sector unionism. R. KEARNEY, *supra*, at 10.

<sup>3</sup> Exec. Order No. 10,988, 3 C.F.R. 521 (1963). The primary objective of the executive order was to provide federal employees with a greater opportunity to engage in the administration of their jobs, thereby contributing to the effective conduct of public business. M. NESBITT, *supra* note 2, at 134. The restricted scope of bargaining and the ban on bargaining over wages, benefits, and union security provisions led to dissatisfaction with the executive order among the union ranks. See R. KEARNEY, *supra* note 2, at 44. Kennedy's executive order provided that arbitration could only be advisory and that agency head approval was required for enforcement of an arbitration determination. See Smith & Wood, *Title VII of the Civil Service Reform Act of 1978: A "Perfect" Order?*, 31 HASTINGS L.J. 855, 859 (1980). The executive order circumvented the subject of impasse resolution and failed to provide a viable alternative to the strike, which was still prohibited in the federal sector. See Comment, *Federal Sector Strike Injunctions: Who May Request Them and Where?*, 31 AM. U.L. REV. 681, 687-88 (1982).

President Nixon's Executive Order No. 11,491 supplanted Kennedy's Executive Order 10,988 in 1970. See Exec. Order No. 11,491, 3 C.F.R. § 861 (1970), reprinted in 5 U.S.C. § 7101 app., at 793-98 (1982). Executive Order 11,491 created the Federal Labor Relations Council ("FLRC"), a disinterested third party which was to be responsible for the administration and construction of the new order. R. KEARNEY, *supra* note 2, at 45; Comment, *supra*, at 688.

The Nixon order created the Federal Service Impasses Panel (Panel), which was empowered to consider negotiation impasses upon either party's request, and to "take any action it considers necessary to settle an impasse." Exec. Order No. 11,491 § 5, 3 C.F.R. § 861 (1970), reprinted in 5 U.S.C. § 7101 app., at 794 (1982). Moreover, the Panel could authorize arbitration or third party fact-finding to resolve impasses. See *id.* at § 7101 app., at 797. The Panel's purpose was to make collective bargaining more meaningful and to maintain govern-

subsequently given a statutory basis through the promulgation of Title VII of the Civil Service Reform Act,<sup>4</sup> the administration of which was entrusted to the Federal Labor Relations Authority ("Authority").<sup>5</sup> The statute authorized the Federal Service Impasses Panel ("Panel") to continue to take any necessary action to resolve negotiation impasses, including the imposition of "binding" terms in contracts.<sup>6</sup> Section 7114(c) of Title VII provides that any

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ment sovereignty in the strike issue. See Cunningham, *Labor-Management Relations in the Federal Sector: Democracy or Paternalism?*, 31 LAB. L.J. 636, 641 (1980). The Panel, an independent unit within the Federal Labor Relations Council, fulfilled the need for a central third party agency to settle disputes. See M. NESBITT, *supra* note 2, at 288.

<sup>4</sup> 5 U.S.C. §§ 7101-7135 (1982). Courts had declined to review actions arising under the executive orders on the ground that there was no statutory basis supporting federal question subject matter jurisdiction. See Smith & Wood, *supra* note 3, at 874. Federal employees sought a statutory basis for labor-management relations, since they recognized that any future President or Congress could modify or rescind the executive order. R. KEARNEY, *supra* note 2, at 46. This led to the enactment of the Civil Service Reform Act of 1978. *Id.* Title VII of the Act established a statutory basis for federal sector labor-management relations, enacting into law for the first time the rights and obligations of the employees, agencies and labor organizations. See H.R. REP. NO. 1403, 95th Cong., 2d Sess. 38 (1978). See also Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1978*, 17 SAN DIEGO L. REV. 857, 857-58 (1980) (Title VII immunized federal sector labor-management relations from presidential modifications). The Act was a codification of the rights previously accorded to federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect their working conditions. See 5 U.S.C. § 7101(a) (1982); S. REP. 989, 95th Cong., 2d Sess. 17 (1977).

<sup>5</sup> 5 U.S.C. § 7104 (1982). The Federal Labor Relations Authority ("Authority") was intended to be the NLRB's public sector counterpart in the federal sphere. See Coleman, *The Civil Service Reform Act of 1978: Its Meanings and Its Roots*, 31 LAB. L.J. 200, 202 (1980); H.R. REP. NO. 1403, 95th Cong., 2d Sess. 417 (1977). See also *New Jersey Air Nat'l Guard v. Federal Labor Relations Auth.*, 677 F.2d 276, 280 (3d Cir. 1982) (Authority established to play role analogous to that of NLRB in private sector), *cert. denied*, 459 U.S. 988 (1982).

The Authority is composed of three full time executives who cannot engage in any other business or employment or hold any other position with the United States Government. See 5 U.S.C. § 7104(a) (1982). By replacing the highly politicized FLRC with the independent, bipartisan and neutral Authority, Congress intended to promote effective labor-management relations in the federal sector. See 124 CONG. REC. 27,534, 27,550 (1977). Impartiality was to be guaranteed in labor-management cases by requiring that the members of the Authority be chosen independently rather than by virtue of their services as federal managers. S. REP. NO. 969, 95th Cong., 2d Sess. 7-8, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 2723, 2730.

<sup>6</sup> 5 U.S.C. § 7119(c)(5)(C) (1982). The Panel is composed of at least seven members appointed by the President based on their fitness to perform the duties and functions involved, their familiarity with government operations, and their knowledge of labor-management relations. See *id.* at § 7119(c)(2) (1982).

An impasse is a deadlock in negotiations caused by the failure of collective bargaining to produce an agreement, thereby confronting the parties with the decision of whether to continue bargaining. See Decker, *Pennsylvania's Public Employee Relations Act (Act 195) and Impasse-The Public Employer's Right to Make Unilateral Changes in Employment*

agreement between the parties to the negotiations, namely the federal agency and the federal employees' representatives, is contingent upon approval by the agency head.<sup>7</sup> Recently, in *American Federation of Government Employees v. Federal Labor Relations Authority*,<sup>8</sup> the Court of Appeals for the District of Columbia Circuit held that the Authority reasonably construed Title VII by ruling that agency head disapproval of a term imposed by the Panel was sanctioned under section 7114(c), and that arbitration was an improper forum for the review of such disapproval.<sup>9</sup>

In *American Federation of Government Employees*, the American Federation of Government Employees ("Union") sought a Statement of General Policy from the Authority addressing the issue of whether the agency heads can disapprove agreements imposed on the parties by the Panel.<sup>10</sup> The Authority determined

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*Conditions*, 86 DICK. L. REV. 1, 2 (1981). If a negotiation impasse cannot be resolved by voluntary arrangements such as mediation, either party may request the Panel to consider the matter. See 5 U.S.C. § 7119(b)(1) (1982). Alternatively, the parties may agree to submit the negotiation impasse to binding arbitration if the Panel approves of the procedure. *Id.* at § 7119(b)(2).

If either party requests the Panel to consider the impasse, the Panel must either recommend procedures for its resolution or "assist the parties in resolving the impasse through whatever methods and procedures . . . it may consider appropriate to accomplish the purpose of this section." *Id.* at § 7119(c)(5)(A)(ii). If the parties are still unable to reach a settlement, the Panel may conduct hearings on the matter and "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." *Id.* at § 7119(c)(5)(B)(iii). This power has been construed by the Panel to include the imposition of terms in contracts. See Howlett, *Interest Arbitration in the Public Sector*, 60 CHI.-J.KENT L. REV. 815, 835-36 (1984). See also *Nebraska Military Dep't v. Federal Labor Relations Auth.*, 705 F.2d 945, 950 n.7 (8th Cir. 1983) (Panel may force adoption of disputed proposals). Such final and binding action renders this step of dispute resolution the equivalent of interest arbitration. See FEDERAL SERVICE IMPASSES PANEL, A GUIDE TO DISPUTE RESOLUTIONS USED BY THE FEDERAL SERVICE IMPASSE PANEL 4 (1980). Therefore, the Panel functions as a mechanism of last resort in the expeditious resolution of disputes after negotiations reach an impasse. See *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984).

<sup>7</sup> See 5 U.S.C. § 7114(c) (1982). Section 7114(c) provides that an agency head must approve any agreement consistent with the chapter and all other applicable laws, rules or regulations within 30 days. *Id.* at § 7114(c)(2) (1982). The agreement automatically becomes binding on the parties at the end of the 30-day period if the agency head does not disapprove in that period. *Id.* at § 7114(c)(3) (1982). The agency head's disapproval of a provision in a locally negotiated agreement pursuant to section 7114(c) review is tantamount to an allegation of non-negotiability for purposes of appeal to the Authority. See *National Fed'n of Fed. Employees*, 7 F.L.R.A. 608, 608 (1982).

<sup>8</sup> 778 F.2d 850 (D.C. Cir. 1985).

<sup>9</sup> See *id.* at 862-63.

<sup>10</sup> *Id.* at 854-55. *Interpretation and Guidance*, 15 F.L.R.A. 564 (1984), the publication in which the Authority printed its determination, was the focus of the court's review, since the facts which prompted the request for guidance were considered irrelevant to the court's

that agency heads are authorized under section 7114(c) of the Civil Service Reform Act ("Act") to review the legality of all provisions of the collective bargaining agreement, including Panel-imposed terms.<sup>11</sup> Further, the Authority found that the Union could only seek review of an agency head's disapproval of such provisions through the expedited review of negotiability issues under section 7117(c) of the Act, or through claims of unfair labor practices against the agency.<sup>12</sup>

The District of Columbia Circuit Court explained the relevant provisions of the Act<sup>13</sup> and applied a deferential standard of review in affirming the Authority's decision.<sup>14</sup> Writing for the majority, Judge Wald rejected the Union's contention that the "binding" provision in section 7119(c)(5)(C) automatically precludes head of agency review of a Panel-imposed term.<sup>15</sup> Judge Wald also deter-

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decision. *See American Federation*, 778 F.2d. at 855 n.9.

<sup>11</sup> *Interpretation and Guidance*, 15 F.L.R.A. 564, 567 (1984).

<sup>12</sup> *See id.* at 567-68. The Authority determined that the agency head's disapproval of the agreement is tantamount to an assertion of non-negotiability and, therefore, not reviewable through the negotiated grievance procedure. *See id.*

<sup>13</sup> *See American Fed'n*, 778 F.2d at 851-54. The majority asserted that Congress created mechanisms to resolve negotiability disputes arising from the sections of the Act which provide that certain subjects are non-negotiable. *See id.* at 852. The court found that a government agency's duty to negotiate in good faith under the Act does not encompass every matter, and that the Act specifically excludes from negotiation matters inconsistent with federal law, any governmental or agency rule or regulation and certain management prerogatives. *See id.* at 852-53. Judge Wald noted that section 7117(c) entitles a union to an expedited review of negotiability issues by the Authority, which must render a decision at the earliest practicable date. *See id.* at 853. The majority determined that negotiability issues may be raised subsequent to the execution of an agreement when the agency head rejects the agreement within 30 days under section 7114(c)(2) and when a party raises the illegality of an agreement which has already taken effect in an unfair labor practice proceeding. *Id.* at 853-54.

The court noted that the Panel is not authorized to decide negotiability disputes because such disputes are within the Authority's domain. *See id.* at 854. The majority found that Panel decisions, which are not directly reviewable by the courts, may be indirectly reviewed in the context of an unfair labor proceeding when the agency fails to comply with a Panel-imposed term. *See id.* Either the Authority or the court may determine that a failure to comply is warranted because the subject is non-negotiable. *Id.*

<sup>14</sup> *Id.* at 856, 861. The court, in accordance with precedent, noted that a "reasonably defensible" construction of the Act by the Authority should be sustained. *See id.* at 856. The majority reasoned that the court's task was not to determine whether the Authority's interpretation of the Act was the best, but rather, to determine whether its interpretation was clearly contrary to the statute or unreasonable. *See id.* at 861.

<sup>15</sup> *See id.* at 856-57. The majority found that Panel-imposed terms are binding only to the extent that such terms are within the Panel's statutory authority. *See id.* at 856. It noted that the parties could seek resolution of negotiability issues in an unfair labor practice proceeding and, therefore, the term "binding" could not be dispositive. *See id.* at 856-57. Judge Wald determined that since the agency head need not comply with a Panel-imposed

mined that the word "agreement" as used in section 7114(c)(1), that provides for head-of-agency review, encompasses all terms of collective bargaining agreements whether such terms result from negotiation or imposition by the Panel.<sup>16</sup>

The majority suggested that the Act's policy of expeditious review of negotiability issues was promoted by allowing the agency head to disapprove the agreement within the thirty day period.<sup>17</sup> Thus, the Authority's harmonization of sections 7114(c)(1) and 7119(c)(5)(C) was reasonable.<sup>18</sup> The agency head's disapproval of the agreement, which is the equivalent of an assertion of nonnegotiability, was held not reviewable via a negotiated grievance procedure.<sup>19</sup>

Judge Ginsburg, dissenting, agreed that neither the clear language nor the legislative history of the Act resolved the conflict between sections 7114(c)(1) and 7119(c)(5)(C).<sup>20</sup> However, Judge Ginsburg asserted that the Authority's interpretation frustrated the congressional purpose underlying the Act, and therefore was

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term which is ultimately found to be non-negotiable, the sole issue is whether the agency head can trigger expeditious review of the negotiability issue under section 7114(c). *See id.* at 857.

<sup>16</sup> *See id.* at 857. The majority cited *American Fed'n of Gov't Employees, Locals 225, 1504 & 3723 v. Federal Labor Relations Auth.*, 712 F.2d 640, 646 n.24 (D.C. Cir. 1983) for the proposition that Panel-imposed terms adopted by the parties become part of the collective bargaining agreement. *See id.*

<sup>17</sup> *See American Fed'n*, 778 F.2d at 859. The court determined that Congress established the 30 day period because it was unwilling to place a perpetual burden on the agency head to review every proposal as it arose in the course of daily bargaining. *See id.* at 858. Judge Wald found that participation of the Panel did not safeguard against the imposition of illegal terms since the Panel does not decide negotiability disputes. *See id.* at 858-59.

The court felt that prohibiting the agency head's invalidation of a Panel-imposed term within 30 days compels the agency head to challenge the provision through noncompliance and a subsequent defense of non-negotiability in the resultant unfair labor practice proceeding. *Id.* at 859-60. The majority noted that agency head invalidation of a term voids the entire agreement and is not limited to the allegedly illegal provision. *Id.* at 860 n.16. Judge Wald noted that the court's decision merely delays the whole process by giving the agency head an extra 30 days to assert non-negotiability, which his subordinates could have done prior to the Panel's decision. *See id.*

<sup>18</sup> *Id.* at 861. The court felt that neither the plain meaning nor the legislative history of the Act required that the agency head's authority to approve be subordinated to the Panel's authority to impose settlement. *See id.* at 857.

<sup>19</sup> *Id.* at 861-62. The majority determined that the Authority is the proper forum for review of an agency head's invalidation under the expedited negotiability appeal provision of section 7117(c). *See id.* at 862.

<sup>20</sup> *Id.* at 864 (Ginsburg, J., dissenting). Judge Ginsburg noted that Congress evidently desired the Panel to be the final arbiter in contract disputes between agencies and unions; it also intended to maintain the boundaries of management set forth in the Act. *Id.* (Ginsburg, J., dissenting).

not a "reasonably defensible" construction of the Act.<sup>21</sup> Noting that the bargaining capacity of federal employees hinges on the equitability of the impasse resolution procedure,<sup>22</sup> the dissent cautioned that the Authority's decision, which unduly postpones the resolution of the validity of the Panel-imposed settlement, creates the potential for agency abuse of that procedure.<sup>23</sup> The dissent suggested that the agency head review should not extend to Panel-imposed settlements, and that the unauthorized rejection of a Panel-imposed term by an agency head is a simple contract violation, properly challenged through the grievance procedure and arbitration.<sup>24</sup>

The *American Federation of Government Employees* court sustained the Authority's construction of the Act, which subjected Panel-imposed terms to agency head review, and determined that the parties' negotiated grievance procedure was an inappropriate forum for review of an agency head's invalidation of such terms. It is submitted that the majority properly upheld the Authority's interpretation of the Act, which was reasonably defensible. It seems clear that Congress must amend the Act to accomplish satisfacto-

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<sup>21</sup> See *id.* (Ginsburg, J., dissenting).

<sup>22</sup> *Id.* at 865 (Ginsburg, J., dissenting). The dissent opined that Congress intended the Panel to be a substitute for the right to strike by enabling the unions to compel a recalcitrant agency to accept a termination of the dispute. *Id.* at 864 (Ginsburg, J., dissenting).

<sup>23</sup> *Id.* at 865-66 (Ginsburg, J., dissenting). Judge Ginsburg determined that the Authority's interpretation created "suspicion and distrust on the part of the union and intransigence, even guile, on the part of the agency." *Id.* at 867 (Ginsburg, J., dissenting).

According to Judge Ginsburg, the Authority, beset by its backlog of cases, may not issue a decision for three years, thereby rendering the Panel-imposed term worthless to the union when it is finally upheld in some cases. *Id.* at 866 (Ginsburg, J., dissenting). The dissent noted that some losses generated by the time lapse are incapable of compensation through retroactive relief. *Id.* (Ginsburg, J., dissenting). Judge Ginsburg concluded that the Authority's decision vitiated the bargaining capacity of federal employees without serving any overriding consideration relating to efficiency and effectiveness of government. *Id.* at 867 (Ginsburg, J., dissenting).

<sup>24</sup> *Id.* at 868 (Ginsburg, J., dissenting). The dissent determined that Congress anticipated that the Panel members would be far more sophisticated and knowledgeable than the agency head in determining the compatibility of contract provisions with the applicable laws. See *id.* (Ginsburg, J., dissenting). The dissent analogized Panel members to national officers, whose negotiated contracts were statutorily excepted from agency head approval. See *id.* (Ginsburg, J., dissenting).

Moreover, Judge Ginsburg noted that the Panel, in accordance with its own procedures, must decline jurisdiction of any negotiability issues and allow resolution of such issues by the Authority. *Id.* (Ginsburg, J., dissenting). The dissent concluded that the composition and procedures of the Panel, as well as the administrative process, furnished adequate protection from overreaching Panel decisions without eroding the other objectives of the Act. *Id.* (Ginsburg, J., dissenting).



rily its goal of granting federal employees meaningful collective bargaining rights. This Comment will suggest a proposed amendment whereby the Panel would be statutorily authorized to employ final offer arbitration in the resolution of negotiation impasses. The proposed amendment would permit the agency head to review the final offers of the parties and raise any negotiability issues within a thirty day period *preceding* the imposition of a settlement by the Panel.

#### DEFERENTIAL STANDARD OF REVIEW

When the Authority declares an interpretation, it should be accorded considerable weight because the Authority is entrusted with the Act's administration and enforcement.<sup>25</sup> An administrative agency's construction, if it reasonably accomodates the conflicting policies that were committed to its care, should not be disturbed by the court in the absence of a clearly contrary plain meaning or legislative history.<sup>26</sup> The Authority's interpretation reasonably accomodated the policy of allowing management to "run the shop" with the policy of rendering collective bargaining more meaningful for federal employees.<sup>27</sup> Furthermore, a Panel-imposed term is part of the collective bargaining agreement,<sup>28</sup> and neither the language nor the legislative history of the Act exempts

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<sup>25</sup> See, e.g., *American Fed'n of Gov't Employees, Local 2986 v. Federal Labor Relations Auth.*, 775 F.2d 1022, 1025 (9th Cir. 1985) (court must defer to Authority's reasoned and supportable construction of Act); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 744 F.2d 842, 847 (D.C. Cir. 1984) (court should uphold Authority's defensible construction of the Act), *cert. granted*, 105 S. Ct. 3497 (1985), *cert. dismissed*, 106 S. Ct. 1678 (1986); *American Fed'n of Gov't Employees, Locals 225, 1504, & 3723 v. Federal Labor Relations Auth.*, 712 F.2d 640, 643 (D.C. Cir. 1983) (Authority interpretation of Act commands respect).

<sup>26</sup> See *United States v. Shimer*, 367 U.S. 374, 383 (1961). See also *N.L.R.B. v. Brown*, 380 U.S. 278, 291 (1965) (courts can overturn administrative agency decision which frustrates underlying congressional purpose).

<sup>27</sup> See *infra* note 31. Section 7114(c) enables the agency to "run the shop" by ensuring that the agreement conforms to applicable laws, rules or regulations. S. REP. NO. 969, 95th Cong., 2d Sess. 109, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2723, 2831 (Section 7219 in Senate Report). Section 7119(c)(5)(B) makes collective bargaining more meaningful for federal employees by providing neutral third party resolution of negotiation impasses. See S. LEVITAN & A. NODEN, WORKING FOR THE SOVEREIGN 56 (1983) (involvement of neutral party in negotiations was significant concession to unions); M. NESBITT, *supra* note 2, at 288 (Panel satisfied need for central third party agency to settle disputes).

<sup>28</sup> See *American Fed'n of Gov't Employees, Locals 225, 1504, & 3723*, 712 F.2d 640, 646 n.24 (D.C. Cir. 1983); see also *International Bhd. of Elec. Workers, Local 121*, 10 F.L.R.A. 198, 199 (1982) (impassé resolution procedures of Panel operate as one aspect of collective bargaining process).

such a term from agency head review.<sup>29</sup> Accordingly, it is submitted that the majority properly sustained the Authority's interpretation.

### THE CONTINUED PROHIBITION ON THE RIGHT TO STRIKE

The Act adopted a middle ground in federal labor relations by striking a balance between the collective bargaining rights of federal employees and the need to preserve the federal government's ability to function in an effective and efficient fashion.<sup>30</sup> Although employees were given greater rights, management retained the right to "run the shop."<sup>31</sup> Congress recognized that it could not simply transplant the labor practices of the competitive private sector marketplace to the federal sector.<sup>32</sup> Congressional refusal in

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<sup>29</sup> See 5 U.S.C. § 7114(c) (1982) (no exemption for Panel-imposed terms); S. REP. NO. 969, 95th Cong., 2d Sess. 109, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2723, 2831 (same). An agency head's invalidation of the agreement under section 7114(c) is the equivalent of an assertion of non-negotiability. See National Fed'n of Fed. Employees, Local 1505, 7 F.L.R.A. 608, 608 (1982). Since section 7105(a)(5)(E) clearly authorizes the Authority to resolve issues of negotiability, the Authority's determination that arbitration was not the appropriate forum for review of the agency head's disapproval was also reasonable. See *Interpretation and Guidance*, 11 F.L.R.A. 626, 628 (1983). See also *National Treasury Employees Union v. Federal Labor Relations Auth.*, 691 F.2d 553, 561 (D.C. Cir. 1982) (Congress intended issues of negotiability to be decided by Authority).

<sup>30</sup> See 5 U.S.C. § 7101(b) (1982) (objective is to prescribe rights and obligations of federal employees and to establish procedures designed to meet special requirements and needs of government); H.R. REP. NO. 1403, 95th Cong., 2d Sess. 12 (1978) (Act strikes proper balance between public interest and federal employees' demands to have greater voice in applicable employment policies); 124 CONG. REC. 29,167; 29,197 (1978) (Congress intended to balance authority of management with protection of at least the existing rights of federal employees). One of the underlying policies of the Act was to grant federal sector employees the right to organize, bargain collectively and participate in decisions which affect them, with full regard for the public interest and the effective conduct of public business. 5 U.S.C. § 7101(a) (1982); see H.R. CONF. REP. NO. 1717, 95th Cong., 2d Sess. 127, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2860, 2860-61; see also H.R. REP. NO. 1403, 95th Cong., 2d Sess. 102 (1978) (President Carter's objective was to make federal sector labor relations comparable to those of their private sector counterparts, while recognizing special requirements of federal government and overriding public interest in effective conduct of public business).

<sup>31</sup> See 124 CONG. REC. 25,713; 25,716 (1978) (Act, while granting federal employees greater rights, preserved management's right to run shop); see also 124 CONG. REC. 25,713, 25,720 (1978) (management retains rights essential to flexible and effective operation); S. REP. NO. 969, 95th Cong., 2d Sess. 12, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 2723, 2734 (Act insures agencies' right to manage government operations effectively and efficiently).

<sup>32</sup> See 124 CONG. REC. 29,167; 29,200 (1978). Representative Rousselot noted that public and private sector labor relations cannot be equalized because the government is not a competitive business but rather provides the public with certain essentials of life, which cannot

granting federal employees the right to bargain over wages, salaries and money-related fringe benefits exemplifies congressional recognition of the differences between private and federal sector labor-management relations.<sup>33</sup>

Congress also demonstrated its unwillingness to equate federal labor-management relations with its private sector counterpart by denying federal employees the right to strike,<sup>34</sup> which is the most important economic weapon in the private sector.<sup>35</sup> An underlying rationale of this antistrike policy is that any strike against the federal government is an attack upon the state and a challenge to the government's authority.<sup>36</sup> The essentiality doctrine, which asserts that the services provided by the federal government are essential and cannot be disrupted without posing a threat to the public welfare, supplies further bolstering for the anti-strike policy.<sup>37</sup>

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otherwise be legitimately furnished the private sector. *See id.* at 29,200-01. *See generally*, Fetscher, *Negotiating with the Public: Montana's Public Employee Bargaining Act*, 36 MONT. L. REV. 80, 80 (1975) (unlike private employers' primary profit objective, public sector is concerned with furnishing services to public, so general public suffers the hardships caused by impasses, strikes and other conflicts in public sector).

<sup>33</sup> *See* 5 U.S.C. § 7106(a)(1) (1982). While the expenditure of public funds for the provision of the essential services furnished by public employees is justifiable, granting federal employees the right to bargain over their wages, salaries and benefits would subordinate the public interest to the interests of federal sector employees. *See* 124 CONG. REC. 29,167, 29,200-01 (1978).

<sup>34</sup> *Cf.* 5 U.S.C. § 7103(a)(2)(v) (1982) (definition of employee excludes strike participants); *Id.* at § 7116(b)(7)(A) (unfair labor practice for labor organization to participate in or call a strike). *See also* Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731, 777 (1983) (Title VII reaffirmed anti-strike policy by adopting several provisions that reflect continued legislative opposition to federal employee strikes). Air traffic controllers are among the groups of federal employees who are prohibited from striking. *See Air Transport Ass'n of America v. PATCO*, 667 F.2d 316, 317 (2d Cir. 1981). In *PATCO*, striking air traffic controllers were permanently enjoined from violating 5 U.S.C. § 7311, and were required to pay coercive fees. *Id.* at 317, 323.

<sup>35</sup> *See Public Employment, supra* note 2, at 1700; Olson, *Advances to Impasse Resolution: The Use of the Legal Right to Strike in the Public Sector*, 33 LAB. L.J. 494, 494 (1982). *See also* Note, *Comparison of Impasse Procedures: The New York City Collective Bargaining Law and the New York State Taylor Law*, 9 FORDHAM URB. L.J. 1039, 1040 (1981) (ban on public sector strikes has eliminated weapon long regarded as essential for unions to achieve their objectives).

<sup>36</sup> *See* Cunningham, *supra* note 3, at 640. *See also* R. KEARNEY, *supra* note 2, at 214 (sovereignty doctrine asserts that government concession to striking public workers would be equivalent to a direct challenge to people's will since sovereignty is constitutionally vested in citizens).

<sup>37</sup> *See* Cunningham, *supra* note 3, at 640-41; Note, *supra* note 35 at 1040. Representative Rudd felt that the disruption of essential services, for which there is no alternative source of supply, threatens the public well-being and causes extreme hardship to individuals and businesses nationwide. *See* 124 CONG. REC. 29,167, 29,190 (1978). *See also* McGuire &

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Federal employees, having been denied the right to strike, need a more viable alternative to impasse resolution than the mechanisms currently provided by the Act.<sup>38</sup> The current impasse resolution procedures provided by the Act, such as mediation and fact-finding, fail to accomplish the Act's goal of promoting more effective federal sector collective bargaining.<sup>39</sup> It has been urged that compulsory interest arbitration is necessary in public sector labor-management relations, where the employees do not fully enjoy collective bargaining rights.<sup>40</sup> The critics of compulsory arbitration assert that such binding arbitration has a "chilling effect" on negotiations.<sup>41</sup> This criticism has spawned final offer arbitration, a

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Dench, *Public Employee Bargaining Under the Municipal Public Employees Labor Relations Act: The First Five Years*, 27 ME. L. REV. 25, 108 (1975) (peaceful impasse resolution procedures necessary because labor disputes can impair delivery of public services).

<sup>38</sup> Cf. *Public Employment*, *supra* note 2, at 1706 (prohibition on federal sector strikes would be inconsequential if satisfactory channels of impasse resolution are made available).

<sup>39</sup> See McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes*, 72 COLO. L. REV. 1192, 1192 (1972). See also Anderson, MacDonald & O'Reilly, *Impasse Resolution in Public Sector Collective Bargaining—An Examination of Compulsory Interest Arbitration in New York*, 51 ST. JOHN'S L. REV. 453, 453 (1977) (compulsory binding interest arbitration developed to replace ineffective traditional methods of impasse resolution to avert work stoppages by public employees caused by deadlocked contract negotiations). Mediation is the stage where a third party intervenes to aid in negotiations. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 4 (2d ed. 1985). Fact-finding refers to the stage where a fact-finder investigates and assembles all the facts surrounding the dispute and issues a report which may include recommendations. *Id.* These approaches rely on the willingness of the parties to compromise and frequently fail to produce effective solutions. McAvoy, *supra*, at 1192.

<sup>40</sup> See F. ELKOURI & E. ELKOURI, *supra* note 39, at 15. In compulsory interest arbitration, an arbitrator must decide future contract terms which will bind parties who have failed to achieve a new agreement through collective bargaining. See Craver, *Public Sector Impasse Resolution Procedures*, 60 CHI[-]KENT L. REV. 779, 784 n.24 (1984). A number of states have instituted binding arbitration of contract terms to avoid work stoppages that result from impasses. See CONN. GEN. STAT. ANN. § 7-473c (West Supp. 1985); IOWA CODE ANN. § 20.22 (West 1978); MICH. COMP. LAWS ANN. §§ 423.31- 423.242 (West 1978); N.Y. CIV. SERV. LAW § 209 (McKinney 1983). Proponents of binding arbitration assert that these procedures would prevent disruption of public services by eliminating the public employee strike. See Arnold, *The Historical Development of Public Employee Collective Bargaining in Nebraska*, 15 CREIGHTON L. REV. 477, 490 (1982).

<sup>41</sup> See Anderson, MacDonald & O'Reilly, *supra* note 39, at 456. The critics claim that the availability of interest arbitration as a final procedure discourages serious bargaining and compromise since the parties may believe they can gain more through neutral arbitration than through negotiation. See *id.* See also *Public Employment*, *supra* note 2, at 1709 (prospect of arbitration has "chilling effect" on parties during negotiations, especially on their willingness to achieve compromise).

process by which the arbitrators select one of the last best offers submitted by the two sides.<sup>42</sup>

The power vested in the Panel to resolve impasses has been interpreted to include the authority to impose contract terms and the orders of the Panel have been considered binding arbitration.<sup>43</sup> However, this binding arbitration is not absolute, because Panel orders are subject to review by both the Authority and the courts.<sup>44</sup>

It is suggested that Congress amend the Act in order to meet a bifurcated goal: (1) clearly establish the Panel as a final offer arbitrator in federal sector negotiation impasses; and (2) provide for agency head review of the parties' final offers thirty days *prior* to imposition of a settlement by the Panel.<sup>45</sup> It is further suggested

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<sup>42</sup> See Anderson, MacDonald & O'Reilly, *supra* note 39, at 495. Laner & Manning, *Interest Arbitration: A New Terminal Impasse Resolution Procedure For Illinois Public Sector Employees*, 60 CHL[-]KENT L. REV. 839, 843 (1984). Final offer arbitration can be either "total package," where the arbitrators choose one of the last best offers in its entirety or issue-by-issue, where the arbitrators select between the final offers on an issue-by-issue basis. See Anderson, MacDonald & O'Reilly, *supra* note 39, at 495-98. The proponents of final offer arbitration find that it adequately replaces the right to strike by compelling each party to advance reasonable proposals because of their mutual fear that the other party's offer will be adopted. See Laner & Manning, *supra*, at 843; Comment, *Final Offer Mediation-Arbitration and the Limited Right to Strike: Wisconsin's New Municipal Employment Bargaining Law*, 1979 Wis. L. Rev. 167, 177. Therefore, final offer arbitration encourages the parties to compromise and bargain. *Id.* at 177; see also McCabe, *Problems in Federal Sector Labor-Management Relations Under Title VII of the Civil Service Reform Act of 1978*, 33 LAB. L.J. 560, 563 (1982) (final offer arbitration compels both parties to look cautiously at the merits of proposals they advance).

<sup>43</sup> See, e.g., *Nebraska Military Dep't v. Federal Labor Relations Auth.*, 705 F.2d 945, 950 n.7 (8th Cir. 1983) (Panel's authority to resolve impasses encompasses compelling the parties to adopt disputed proposals); *Department of Defense v. Federal Labor Relations Auth.*, 659 F.2d 1140, 1146 (D.C. Cir. 1981) (Act provides for binding arbitration by the Panel if negotiations reach impasse), *cert. denied*, 455 U.S. 945 (1982); Howlett, *supra* note 6, at 835-36 (Panel's power to resolve impasses includes ordering the inclusion of contract provisions and such an order is binding arbitration).

<sup>44</sup> See *American Fed'n of Gov't Employees, Local 2986 v. Federal Labor Relations Auth.*, 775 F.2d 1022 (9th Cir. 1985); *National Ass'n of Gov't Employees v. Federal Labor Relations Auth.*, 771 F.2d 1449 (11th Cir. 1985); *New York Council, Ass'n of Civilian Technicians v. Federal Labor Relations Auth.*, 757 F.2d 502 (2d Cir.), *cert. denied*, 106 S. Ct. 137 (1985); *National Treasury Employees Union v. Federal Labor Relations Auth.*, 712 F.2d 669 (D.C. Cir. 1983). See also *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984) (judicial review available when unfair labor practice proceeding is instituted).

<sup>45</sup> Cf. McCabe, *supra* note 42, at 563 (Panel should employ final offer arbitration to compel parties to engage in serious bargaining). The purpose of the Act was to grant federal employees greater collective bargaining rights, while preserving the rights of management to "run the shop." See 124 CONG. REC. 25,713, 25,716 (1977). Collective bargaining is rendered ineffective in the absence of a threat which induces labor and management negotiators to agree to a contract. See Anderson, MacDonald & O'Reilly, *supra* note 39, at 509. Final offer arbitration, which compels the parties to narrow their differences because of their mutual

that a failure to raise issues of negotiability within such thirty day period should render such Panel-imposed terms binding, and any dispute relating to these terms should be resolved through the negotiated grievance procedure.<sup>46</sup>

### CONCLUSION

Congress intended to grant federal employees meaningful collective bargaining rights, while permitting management to retain the right to "run the shop" through the enactment of Title VII of the Civil Service Reform Act of 1978. Panel-imposed terms, which are considered part of the collective bargaining agreement, were not statutorily exempted from agency head review under section 7114(c). The Authority's interpretation, which was supportable and reasonably accommodated the two conflicting policies of the Act, was properly sustained by the majority. However, Congress should amend the Act to grant federal employees meaningful collective bargaining rights. The proposed amendment would statutorily authorize the Panel to institute final offer arbitration and permit the agency head to review the parties' final offers thirty days prior to the imposition of a settlement by the Panel. Subsequent to this thirty day period, any disputes concerning Panel-imposed terms should be resolved through the negotiated grievance procedure.

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fear that the other party's offer will be accepted, operates as an incentive to compromise and reach agreement and should provide an adequate substitute for the right to strike. Laner & Manning, *supra* note 42, at 843; Comment, *supra* note 32, at 177. *But see Public Employment, supra* note 2, at 1706 (arbitration not fully satisfactory substitute for right to strike). Issue-by-issue final offer arbitration is more conducive to meaningful collective bargaining than "total package" final offer arbitration, because the arbitrator can consider each issue on its own merits. *See* Garber, *Compulsory Arbitration in the Public Sector: A Proposed Alternative*, 26 *ARB. J.* 226, 232 (1971). The suggested amendment would make collective bargaining more meaningful for federal employees and management would retain the right to "run the shop" through high-level review of the offers which potentially will become part of the Panel-imposed settlement.

<sup>46</sup> *Cf.* Louis A. Johnson Veterans Admin. Medical Center, 15 F.L.R.A. 347, 350 (1984) (disputes relating to meaning and application of provisions of parties' collective bargaining agreement properly resolved through negotiated grievance procedure); R. SMITH, H. EDWARDS, & R. CLARK, *LABOR RELATIONS IN THE PUBLIC SECTOR: CASES AND MATERIALS* 893 (1974) (grievance arbitration involves determination of rights under an existing contract). It is also suggested that the agency head should be precluded from raising negotiability issues upon the expiration of the 30 day review period.