ORAL ARGUMENT NOT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9517

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1592,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JAMES F. BLANDFORD
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

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STATEMENT REGARDING PRIOR OR RELATED APPEALS

The case on review has not previously been before this Court or any other
court. Counsel for the Authority is unaware of any cases pending before
this Court or any other which are related to this case within the meaning of
Local Rule 28.2(C)(1) of this Court. IN THE UNITED STATES COURT OF APPEALS

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ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The order under review in this case was issued by the Federal Labor Relations Authority (Authority) on May 8, 2001. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review the Authority's final orders pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Did the Authority properly dismiss the union's petition for review of a federal employment collective bargaining dispute because the union failed and refused to serve the agency head as required by the Statute and the Authority's regulations.

STATEMENT OF THE CASE

Pursuant to § 7117(c) of the Statute, the American Federation of Government Employees, AFL-CIO, Local 1592 (Local 1592) filed with the Authority a petition for review of a collective bargaining dispute. The dispute concerned a federal employer's contention that its duty to bargain did not extend to a proposal Local 1592 had submitted for negotiation. Local 1592 did not serve a copy of the petition on the "head of the agency," the Secretary of Defense, as required by 5 U.S.C. § 7117(c)(2)(B). The Authority issued a Notice and Order to Show Cause, advising Local 1592 of this procedural defect, and providing Local 1592 with an opportunity to effect proper service. When Local 1592 made no attempt to effect proper service in response to the Notice and Order to Show Cause, the Authority dismissed the petition. Local 1592 seeks review of the Authority's order.

STATEMENT OF THE FACTS

A. Pertinent Negotiability Appeals Procedures

In recognition of the special requirements and needs of government, the Statute exempts certain matters from the Statute's otherwise broad obligation to bargain over conditions of employment. See FLRA v. Aberdeen Proving Grounds, Dep't of the Army, 485 U.S. 409, 410 (1988). The Statute further provides that if a federal employer alleges that its duty to bargain does not extend to a particular matter, the union may appeal that allegation to the Authority. 5 U.S.C. § 7117(c). These appeals are processed according to the provisions of § 7117(c) of the Statute and part 2424 of the Authority's regulations, 5 C.F.R. pt. 2424 (2001).

As particularly pertinent to this case, by statute, the petitioning union must furnish a copy of its negotiability appeal to the "head of the agency." 5 U.S.C. § 7117(c)(2)(B). This service requirement is repeated in the Authority's regulations. 5 C.F.R. §§ 2424.2(g), 2424.22(d).

B. The Proceeding and the Authority's Order under Review

Local 1592 is the exclusive representative of a unit of civilian employees at Hill Air Force Base, Utah (Hill AFB). In the course of collective bargaining, Hill AFB declared that certain bargaining proposals submitted by the union were outside the obligation to bargain under the Statute. Local 1592 thereafter filed a negotiability appeal with the Authority.

After resolving some initial procedural issues, including the dismissal and subsequent reinstatement of Local 1592's negotiability appeal, the Authority attempted to rectify a procedural deficiency in the case involving service of the appeal on the "head of the agency." See Add. B-1 to B-17.[2]

Specifically, in its Notice of Reinstatement and Order to Cure Procedural Deficiency (Reinstatement Order), the Authority advised Local 1592 that it had not served the "head of the agency," the Secretary of Defense, as required by the Statute and the Authority's regulations. Add. B-13 to B-14.

Citing a previous order in the proceeding, the Authority once again provided Local 1592 with the opportunity to properly serve the Secretary of Defense or his designee, whom the Authority's order identified. Add. B-14.

Local 1592 refused to effect the service directed by the Authority. Rather

than comply with the Authority's order, Local 1592 responded by contending that service on the Secretary of Defense was unnecessary and that service on the Secretary of the Air Force satisfied the statutory and regulatory requirements. Add. B-18.

On April 12, 2001, the Authority issued another Notice and Order to Show Cause. Add. B-18 to B-20. The Authority again advised Local 1592 that service on "the head of the agency" is an explicit requirement of § 7117(c)(2)(B) of the Statute. Add. B-19. In addition, the Authority explained that the Statute's definition of "agency" includes the Department of Defense, but not the Department of the Air Force (citing 5 U.S.C. §§ 101, 103, 104, 105, 7103(a)(3)). The Authority also explained that the Authority's regulations reiterate the statutory service requirements and incorporate by specific reference the Statute's definition of "agency" (citing 5 C.F.R. §§ 2421.2(a), 2424.2(g), 2424.22(d)). Id.

Further, the Authority commented in detail on Local 1592's reliance on the practices of the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC). The Authority found Local 1592's reliance misplaced. Add. B-19. With respect to the MSPB, the Authority noted that the MSPB's enabling statute does not set forth any service requirements (citing 5 U.S.C. § 7701). Id. Regarding the EEOC, the Authority pointed out that, unlike the Statute, the EEOC's enabling statute does not contain a definition of "agency" that excludes the military departments. Id. To the contrary, the Authority observed that the EEOC's enabling statute expressly gives the military departments parity with executive agencies for some purposes by explicitly extending employment discrimination prohibitions not only to "'executive agencies as defined in section 105 of title 5,'" but also to "'military departments as defined in section 102 of title 5 '" (quoting from 42 U.S.C. § 2000e-16(a)). Add. B-19 to B-20.

Attempting to eliminate the one remaining procedural impediment to processing Local 1592's negotiability appeal, the Authority provided Local 1592 with an additional opportunity to serve the Secretary of Defense or his designee. Add. B-20. When Local 1592 did not respond, the Authority was compelled to dismiss the negotiability appeal. The Authority's order was dated May 8, 2001. Add. B-23.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." Am. Fed'n of Gov't Employees, Local 2343 v. FLRA, 144 F.3d 85, 88 (D.C. Cir. 1998).

Because of its expertise in interpreting federal labor law the Authority "is entitled to considerable deference" when it interprets and applies the Statute's provisions. Am. Fed'n of Gov't Employees, Local 1592 v. FLRA, 744 F.2d 73, 75 (10th Cir. 1984) (quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983)). Authority action shall be set aside only if it is "arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law." United States Dep't of Energy v. FLRA, 880 F.2d 1163, 1165 (10th Cir. 1989) (citing 5 U.S.C. § 706(2)(A)).

Reviewing courts also grant a high degree of deference to an administrative agency's strict application of its procedural requirements. See Mountain Solutions, Ltd. v. FCC, 197 F.3d 512, 517 (D.C. Cir. 1999) (Mountain Solutions) (holding that an agency's strict construction of a procedural rule in the face of a waiver request is insufficient evidence of an abuse of discretion). The burden to show an abuse of discretion "is a heavy one." Id. Only where an agency has inconsistently applied a procedural rule will a reviewing court find that an agency abused its discretion in such matters. Id.; see also Hooper v. Nat'l Transp. Safety Bd., 841 F.2d 1150, 1151 n.2 (D.C. Cir. 1988) (holding that an agency may enforce a rule as strictly as it pleases as long as it does so uniformly).

SUMMARY OF ARGUMENT

The Court should uphold the Authority's order in this federal employment dispute, dismissing Local 1592's negotiability appeal. The Authority dismissed Local 1592's appeal because Local 1592 failed to comply with a mandatory statutory requirement that such appeals be served on "the head of the agency" involved in the dispute. Local 1592's appeal was dismissed only after Local 1592 repeatedly refused to obey the Authority's order that the

appeal be served on the Secretary of Defense or the Secretary's designee.

The Authority's order was based on a reasonable and correct interpretation of the Authority's enabling legislation. The language and structure of the Statute make it clear that Local 1592 was required to serve its appeal on the Secretary of Defense as "the head of the agency," not on the Secretary of the Air Force as Local 1592 insists. The Statute, part of Title 5 of the U.S. Code, expressly defines the term "agency" as an "Executive agency." 5 U.S.C. § 7103(a)(3). "Executive agency" is, in turn, defined as an "Executive department, a Governmental corporation and an independent establishment." 5 U.S.C. § 105. The Department of Defense, but not the Department of the Air Force, is included in Title 5's exhaustive list of Executive Departments. 5 U.S.C. § 101. In addition, not only is the Department of the Air Force omitted from the list of "Executive departments;" rather, it is specifically identified as a "Military department" in a different code section, 5 U.S.C. § 102. In those few instances in Title 5 where Congress has intended to extend the definition of "agency" to include Military departments, it has done so explicitly. See, e.g., 5 U.S.C. §§ 5721(1), 6121(1), 7531.

Foregoing reliance on the language of the Statute itself, Local 1592 mistakenly points to other statutory schemes to support its contention that the Secretary of Defense should not be considered the "head of the agency" under § 7117(c)(2)(B) of the Statute. However, and in stark contrast to § 7117's requirements, these other statutory provisions, governing federal employee appeals to the Equal Employment Opportunity Commission and to the Merit Systems Protection Board, either do not prescribe specific service requirements, or contain provisions dealing explicitly with the status of military departments in the administrative process.

Lastly, the Authority's order was not arbitrary or capricious. Specifically, Local 1592 was not prejudiced by the manner in which the Authority's applied the mandatory "agency head" service requirement of § 7117(c)(2)(B) of the Statute and the Authority's own regulations. The Authority's regulations provide adequate legal notice of the Statute's requirement that negotiability appeals be served on "the head of the

agency." Moreover, following its consistent practice, the Authority only dismissed Local 1592's appeal after Local 1592 refused to take advantage of the opportunity provided by the Authority for the Local to preserve its appeal by curing the appeal's statutory service defect. Local 1592 has only its own intransigence to blame for the Authority's subsequent dismissal of the Local's appeal. The Court should uphold the Authority's enforcement of the mandatory statutory requirement that Local 1592 refused to obey, and deny Local 1592's petition for review.

ARGUMENT THE AUTHORITY PROPERLY DISMISSED THE UNION'S PETITION FOR REVIEW OF A FEDERAL EMPLOYMENT COLLECTIVE BARGAINING DISPUTE BECAUSE THE UNION FAILED AND REFUSED TO SERVE THE AGENCY HEAD AS REQUIRED BY THE STATUTE AND THE AUTHORITY'S REGULATIONS

A. Service on the Secretary of Defense as the "Head of the Agency" Is a Nondiscretionary Mandate of the Statute

The statutory analysis upon which the Authority relied is straightforward and definitive. Section 7117(c)(2)(B) of the Statute provides that as part of instituting a negotiability appeal, a union must furnish a copy of its petition to "the head of the agency." Section 7103(a) defines terms used in the Statute, including the term "agency." This is particularly significant in this case, because it is axiomatic that where a statute includes an explicit definition, that definition must be followed, even if it varies from the term's ordinary meaning. Stenberg v. Carhart, 120 S. Ct. 2597, 2615 (2000); see also Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979) ("A definition which declares what a term means . . . excludes any meaning that is not stated.") .

Section 7103(a)(3) defines "agency" as "an Executive agency." For the purposes of Title 5 of the United States Code, "Executive agency" is defined as an "Executive department, a Governmental corporation and an independent establishment." 5 U.S.C. § 105. These terms also have explicit statutory

definitions. See 5 U.S.C. §§ 101, 103, 104. As pertinent here, 5 U.S.C. § 101 sets forth a list of Executive departments. The list includes the Department of Defense, but none of its subordinate components. Accordingly, the relevant agency in this case is the Department of Defense. See, e.g., Defense Criminal Investigative Serv. v. FLRA, 855 F.2d 93, 98 (3rd Cir. 1988) (holding that under the Statute, the Department of Defense, not a subordinate component, is the "agency"). As the "head" of the Department of Defense is the Secretary of Defense, 10 U.S.C. § 113(a), section 7117(c)(2)(B) required that Local 1592 serve a copy of its petition on the Secretary of Defense.

It is equally clear that the Department of the Air Force is not an "agency" within the meaning of section 7103(a)(1) of the Statute. The Department of the Air Force is plainly not an "Executive department." Instead, the Air Force is expressly listed in 5 U.S.C. § 102 as a "Military department."

Where Congress has intended to extend the definition of "agency" to include Military departments, it has done so explicitly. See, e.g., 5 U.S.C. §§ 5721(1), 6121(1), 7531. It has not done so in the Statute.

B. Local 1592's Arguments are Without Merit

Local 1592 does not take issue with the Authority's analysis of the plain statutory language. Rather, Local 1592 relies (Brief (Br.) at 8-9) on other distinctly different statutory schemes to support its contention that the Secretary of the Air Force should be considered the "head of the agency" under § 7117(c)(2)(B) of the Statute. In addition, Local 1592 contends (Br. at 9-12) that the Authority's insistence on service on the Secretary of Defense is arbitrary and capricious. However, none of Local 1592's arguments withstand scrutiny.[3]

1. Practices under Other Federal Employment Appeals Processes Are Not Relevant to Interpreting the Express Terms of the Statute

As the Authority properly held in its Notice and Order to Show Cause dated April 13, 2001, Local 1592's reliance on the practices of the EEOC and the

federal courts in processing discrimination complaints, and on the practices of the MSPB in processing other employment appeals, is misplaced. As demonstrated in Section A., above, the Authority's enabling Statute specifically mandates the service requirement that the Authority was compelled to enforce in this case. Accordingly, procedural requirements of other adjudicatory agencies, under different statutory schemes, are irrelevant and provide no support for Local 1592's position.

Local 1592 ignores the fact that, unlike the Statute, neither the statutory provisions governing discrimination complaints in the federal sector, nor those concerning employee appeals to the MSPB, prescribe specific service requirements. Thus, they contain nothing comparable to the express congressional determination regarding service of documents on "the head of the agency" that the Authority was required to enforce in this case. These other statutory schemes therefore have no direct relevance to the issue of whether the Authority has reasonably interpreted and applied the specific service requirements of § 7117(c)(2)(B) of the Statute.

Moreover, Local 1592 ignores other critical distinctions between the laws involved. Unlike the Authority's Statute, the EEOC's statutory provisions do not contain a definition of "agency" that excludes the military departments. To the contrary, the EEOC's enabling statute expressly gives the military departments parity with executive agencies for some purposes, by explicitly extending employment discrimination prohibitions not only to "executive agencies as defined in section 105 of title 5," but also to "military departments as defined in section 102 of title 5." 42 U.S.C. § 2000e-16(a). Consistent with this equivalent treatment of "executive agencies" and "military departments," section 2000e-16(c) expressly requires that "the head of the department, agency, or unit, as appropriate, shall be the defendant" in any civil action. 42 U.S.C. § 2000e-16(c). Thus, the EEOC's distinctly different statutory framework, giving particular recognition to military departments as defined in 5 U.S.C. § 102, makes EEOC practices with respect to the party status of military departments irrelevant as an aid to construing the Statute's service requirements pertaining to the "head of the agency."

Local 1592's reliance on MSPB practices is similarly misplaced. The MSPB's

enabling statute provides few, if any, procedural requirements. Rather, appeals to the MSPB are to be "processed in accordance with regulations prescribed by the [MSPB]." 5 U.S.C. § 7701(a)(2). The MSPB's regulations, in turn, do not require appellants to serve copies of their appeals at all. Instead, the MSPB effects service on "each party to the proceeding other than the appellant." 5 C.F.R. § 1201.26(b). Thus, nothing in MSPB's enabling act or its regulations even remotely requires service on the "head of the agency." Accordingly, even if the MSPB regularly identifies and serves a military department such as the Department of the Air Force as a party, such practice is irrelevant to the identification of the appropriate "head of the agency" under the Statute.[4]

2. Dismissal of Local 1592's Petition Was Not Arbitrary and Capricious

a. There Is No Prejudice Because Parties Are Provided Notice and Opportunity to Cure Service Defects

Although it knowingly refused to comply with simple and explicit Authority directions regarding proper service, Local 1592 takes the position (Br. at 10-11) that dismissal of its petition is unfair. Local 1592 complains in this regard that the Authority's regulations do not inform unions that the Authority regards the Department of Defense, rather than one of the military departments, as the "agency" in negotiability appeals. Local 1592's contention that the Authority has been unfair should be rejected for two reasons. First, although the Authority's regulations do not explicitly identify the Secretary of Defense as the agency head in a case like this, the regulations reiterate, and incorporate by reference, the statutory provisions that clearly require service on the Secretary of Defense. Specifically, the regulations expressly restate the statutory requirement that negotiability appeals be served on the "head of the agency." 5 C.F.R. § 2424.2(g). Furthermore, the definitional section of the regulations provides that the term "agency" as used in the regulations has the meaning set forth in § 7103(a) of the Statute. 5 C.F.R. § 2421.2(a).

Second and more significant, even if a reasonable question exists concerning the identity of the "agency head" in a particular case, the Authority has ensured that no union is prejudiced by following a consistently-applied practice of allowing petitioning unions to cure service defects when they arise. The Authority has held that proper service under section 7117(c)(2)(B) is not a jurisdictional prerequisite in negotiability appeals, and that failure to accomplish proper service is a curable procedural defect. E.g., Nat'l Fed'n of Fed. Employees, Local 122, 47 F.L.R.A. 1118, 1119-20 (1993). Where a service defect, including a failure to serve the agency head in a negotiability appeal, occurs, the Authority notifies the party of the defect and provides a reasonable time for correction. See, e.g., Ass'n of Civilian Technicians, Pennsylvania State Council, 54 F.L.R.A. 552, 554 n.4 (1998); Nat'l Treasury Employees Union, 46 F.L.R.A. 211, 214 (1992); Nat'l Union of Compliance Officers, 7 F.L.R.A. 10 (1981) (Compliance Officers). The Authority will dismiss a negotiability appeal for failure of proper service only when, after notice from the Authority, a party fails to correct its error in the allotted time. See, e.g., Compliance Officers, 7 F.L.R.A. at 10; Int'l Fed'n of Prof'l and Technical Eng'rs, Local 220, 20 F.L.R.A. 786, 786-87 (1985). Accordingly, Local 1592's concerns that lay representatives of unions will be confused to their detriment by the Statute's service requirements are baseless.

Indeed, this is precisely the procedural posture of this case. In a Notice and Order to Show Cause, dated October 17, 2001, issued at the beginning of the proceeding, the Authority informed Local 1592 that its petition failed to comply with the Authority's service requirement and provided explicit instructions on how to remedy the defect. Add. B-2. The Authority again informed Local 1592 of the service deficiency and of the actions required to cure the defect in the Authority's Reinstatement Order dated March 8, 2001. Add. B-13 to B-15. Finally, after Local 1592 explicitly refused to comply,

Add. 18, the Authority on April 13, 2001, issued another Notice and Order to Show Cause, specifically explaining why service on the Secretary of the Air Force did not satisfy the statutory requirement to serve the head of the agency, and providing Local 1592 one more opportunity to serve the Secretary of Defense in order to avoid dismissal of the petition. Add. B-19 to B-20. Only after Local 1592 once more declined to abide by the Authority's order was the negotiability petition dismissed. Add. B-23. Thus, the Authority's patient and constructive actions in the face of Local 1592's intransigence rebut any suggestion that the "head of the agency" service requirements of the Statute, as construed and applied by the Authority, operate in a prejudicial manner with respect to unions filing negotiability appeals under section 7117(c) of the Statute.

b. The Authority Applies its Procedural Rules in a Consistent Manner

Only where an agency has inconsistently applied a procedural rule will a reviewing court find that the agency abused its discretion in such matters. Mountain Solutions, 197 F.3d at 517. There is no evidence that the Authority has in any way inconsistently applied the service requirements of section 7117(c)(2)(B). As explained in Section (B)(1)(a) above, when faced with a union's failure to serve the agency head as required by the Statute, the Authority has adopted a consistently-applied practice of notifying unions of the defect, and providing a reasonable time for correction. However, where a party fails to timely correct the deficiency, the Authority will dismiss the petition.

The Authority's decision in Nat'l Fed'n of Fed. Employees, Local 341, 40 F.L.R.A. 1009 (1991) (NFFE) (denying reconsideration of 39 F.L.R.A. 1272), cited but incompletely described by Local 1592 (Br. at 9-10), is not to the contrary. Specifically, the procedural posture of NFFE was distinguishable from that in the instant case. Contrary to Local 1592's suggestion (Br. at 9-10), the Authority did not hold in NFFE that the Authority's notice to the agency head was a sufficient basis upon which to forgive a union's failure to comply with all statutory and regulatory service requirements.

In its initial decision in NFFE, the Authority decided the merits of the negotiability appeal for the union, noting that the employer had not filed a statement of position in response to the union's appeal. 39 F.L.R.A. at 1273-75. A subsequent request for reconsideration argued that the agency head never received a copy of the union's appeal. However, and unlike the instant case, the negotiability petition filed by the union in NFFE satisfied all statutory and regulatory requirements, including a certificate of service showing service on the agency head. 40 F.L.R.A. at 1010. The Authority held that in light of that fact and that the Authority had put the agency head's designee on notice that a petition had been filed, the agency had adequate knowledge and an opportunity to raise issues concerning either the merits of the appeal or the propriety of service. Id. at 1011. Although the agency head in the instant case received notice from the Authority that a petition had been filed, in stark contrast to the properly filed petition in NFFE, Local 1592 concedes that, despite numerous opportunities to correct its defect, it has willfully refused to comply with the Statute and the Authority's orders. See Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 152 (1984) (holding that although absence of prejudice is a factor to be considered in waiving procedural requirements once another factor that might justify a waiver is identified, absence of prejudice is not an independent basis for sanctioning deviations from established procedures). Local 1592 therefore has only its own inflexibility to blame for the dismissal of its negotiability appeal.

CONCLUSION

The union's petition for review should be denied.

Respectfully submitted,

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JAMES F. BLANDFORD

Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

September 27, 2001

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 4233 words.

_____
James F. Blandford

September 27, 2001

ADDENDUM A

 § 7103. Definitions; application

(a) For the purpose of this chapter-

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual-

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include-
(i) an alien or noncitizen of the United States who occupies a position
outside the United States;
(ii) a member of the uniformed services;
(iii) a supervisor or a management official;
(iv) an officer or employee in the Foreign Service of the United States
employed in the Department of State, the International Communication Agency,
the Agency for International Development, the Department of Agriculture, or
the Department of Commerce; or
(v) any person who participates in a strike in violation of section 7311 of
this title;
(3) "agency" means an Executive agency (including a nonappropriated fund
instrumentality described in section 2105(c) of this title and the Veterans'
Canteen Service, Department of Veterans Affairs), the Library of Congress,
the Government Printing Office, and the Smithsonian Institution, but does
not include-
(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority;
(G) the Federal Service Impasses Panel; or
(H) the United States Secret Service and the United States Secret Service
Uniformed Division.
(4) "labor organization" means an organization composed in whole or in part
of employees, in which employees participate and pay dues, and which has as
a purpose the dealing with an agency concerning grievances and conditions of
employment, but does not include-
(A) an organization which, by its constitution, bylaws, tacit agreement
among its members, or otherwise, denies membership because of race, color,
creed, national origin, sex, age, preferential or nonpreferential civil
service status, political affiliation, marital status, or handicapping
condition;
(B) an organization which advocates the overthrow of the constitutional form
of government of the United States;
(C) an organization sponsored by an agency; or
(D) an organization which participates in the conduct of a strike against

the Government or any agency thereof or imposes a duty or obligation to
conduct, assist, or participate in such a strike;
(5) "dues" means dues, fees, and assessments;
(6) "Authority" means the Federal Labor Relations Authority described in
section 7104(a) of this title;
(7) "Panel" means the Federal Service Impasses Panel described in section
7119(c) of this title;
(8) "collective bargaining agreement" means an agreement entered into as a
result of collective bargaining pursuant to the provisions of this chapter;
(9) "grievance" means any complaint-
(A) by any employee concerning any matter relating to the employment of the
employee;
(B) by any labor organization concerning any matter relating to the
employment of any employee; or
(C) by any employee, labor organization, or agency concerning-
(i) the effect or interpretation, or a claim of breach, of a collective
bargaining agreement; or
(ii) any claimed violation, misinterpretation, or misapplication of any
law, rule, or regulation affecting conditions of employment;
(10) "supervisor" means an individual employed by an agency having authority
in the interest of the agency to hire, direct, assign, promote, reward,
transfer, furlough, layoff, recall, suspend, discipline, or remove
employees, to adjust their grievances, or to effectively recommend such
action, if the exercise of the authority is not merely routine or clerical
in nature but requires the consistent exercise of independent judgment,
except that, with respect to any unit which includes firefighters or nurses,
the term "supervisor" includes only those individuals who devote a
preponderance of their employment time to exercising such authority;
(11) "management official" means an individual employed by an agency in a
position the duties and responsibilities of which require or authorize the
individual to formulate, determine, or influence the policies of the agency;
(12) "collective bargaining" means the performance of the mutual obligation
of the representative of an agency and the exclusive representative of
employees in an appropriate unit in the agency to meet at reasonable times
and to consult and bargain in a good-faith effort to reach agreement with

respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

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

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

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

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

(15) "professional employee" means-

(A) an employee engaged in the performance of work-

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work);

and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A) (i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph

(A) of this paragraph;
(16) "exclusive representative" means any labor organization which-
(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or
(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit-
(i) on the basis of an election; or
(ii) on any basis other than an election,
and continues to be so recognized in accordance with the provisions of this chapter;
(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use firefighting apparatus and equipment; and
(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

* * * * * * *

§ 7105. Powers and duties of the Authority

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

* * * * * * *

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

* * * * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

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(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation

to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by-

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall-

(A) file with the Authority a statement-

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

* * * * * * *

§ 7123. Judicial review; enforcement

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

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

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

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

transacts business or in the United States Court of Appeals for the District of
Columbia.

* * * * * * *

§ 101. Executive departments

The Executive departments are: The Department of State. The Department of the
Treasury. The Department of Defense. The Department of Justice. The Department
of the Interior. The Department of Agriculture. The Department of Commerce. The
Department of Labor. The Department of Health and Human Services. The Department
of Housing and Urban Development. The Department of Transportation. The
Department of Energy. The Department of Education. The Department of Veterans
Affairs.

§ 102. Military departments

The military departments are: The Department of the Army. The Department of the
Navy. The Department of the Air Force.

§ 103. Government corporation

For the purpose of this title -
(1) ''Government corporation'' means a corporation owned or controlled by the
Government of the United States; and
(2) ''Government controlled corporation'' does not include a corporation owned
by the Government of the United States.

§ 104. Independent establishment

For the purpose of this title, ''independent establishment'' means -
(1) an establishment in the executive branch (other than the United States
Postal Service or the Postal Rate Commission) which is not an Executive
department, military department, Government corporation, or part thereof, or
part of an independent establishment; and
(2) the General Accounting Office.

§ 105. Executive agency
For the purpose of this title, ''Executive agency'' means an Executive
department, a Government corporation, and an independent establishment.

§ 5721. Definitions

For the purpose of this subchapter -
(1) ''agency'' means -
(A) an Executive agency;

(B) a military department;
(C) a court of the United States;
(D) the Administrative Office of the United States Courts;
(E) the Library of Congress;
(F) the Botanic Garden;
(G) the Government Printing Office; and
(H) the government of the District of Columbia; but does not include a Government controlled corporation;

* * * * * * *

§ 6121. Definitions

For purposes of this subchapter -
(1) ''agency'' means any Executive agency, any military department, the Government Printing Office, and the Library of Congress;

* * * * * * *

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right -
(1) to a hearing for which a transcript will be kept; and
(2) to be represented by an attorney or other representative. Appeals shall be processed in accordance with regulations prescribed by the Board.
(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.
(2)(A) If an employee or applicant for employment is the prevailing party

in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless -

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision -

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment -

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which -

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable.

Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless -

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board.

The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may -

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently, if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of

other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

§ 113. Secretary of Defense

(a) There is a Secretary of Defense, who is the head of the Department of Defense, appointed from civilian life by the President, by and with the advice and consent of the Senate. A person may not be appointed as Secretary of Defense within 10 years after relief from active duty as a commissioned officer of a regular component of an armed force.

* * * * * * *

Section 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage
All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

* * * * * * *

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant
Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race,

color, religion, sex or national origin, brought pursuant to subsection (a) of
this section, Executive Order 11478 or any succeeding Executive orders, or after
one hundred and eighty days from the filing of the initial charge with the
department, agency, or unit or with the Equal Employment Opportunity Commission
on appeal from a decision or order of such department, agency, or unit until
such time as final action may be taken by a department, agency, or unit, an
employee or applicant for employment, if aggrieved by the final disposition of
his complaint, or by the failure to take final action on his complaint, may file
a civil action as provided in section 2000e-5 of this title, in which civil
action the head of the department, agency, or unit, as appropriate, shall be the
defendant.

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[Page 16]

TITLE 5--ADMINISTRATIVE PERSONNEL
CHAPTER II--MERIT SYSTEMS PROTECTION BOARD
PART 1201--PRACTICES AND PROCEDURES--Table of Contents
Subpart B--Procedures for Appellate Cases

Sec. 1201.26 Number of pleadings, service, and response.

* * * * * * *

(b) Service--(1) Service by the Board. The appropriate office of the Board will
mail a copy of the appeal to each party to the proceeding other than the
appellant. It will attach to each copy a service list, consisting of a list of
the names and addresses of the parties to the proceeding or their designated
representatives.
(2) Service by the parties. The parties must serve on each other one copy of
each pleading, as defined by Sec. 1201.4(b), and all documents submitted with
it, except for the initial appeal. They may do so by mail, by facsimile, by

personal delivery, or by commercial overnight delivery to each party and to each representative. A certificate of service stating how and when service was made must accompany each pleading. The parties must notify the appropriate Board office and one another, in writing, of any changes in the names or addresses on the service list.

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[Code of Federal Regulations]
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TITLE 5--ADMINISTRATIVE PERSONNEL
CHAPTER XIV--FEDERAL LABOR RELATIONS AUTHORITY, GENERAL COUNSEL OF THE FEDERAL LABOR RELATIONS AUTHORITY AND FEDERAL SERVICE IMPASSES PANEL
PART 2421--MEANING OF TERMS AS USED IN THIS SUBCHAPTER--Table of Contents

Sec. 2421.2 Terms defined in 5 U.S.C. 7103(a); General Counsel; Assistant Secretary.

(a) The terms person, employee, agency, labor organization, dues, Authority, Panel, collective bargaining agreement, grievance, supervisor, management official, collective bargaining, confidential [[Page 376]] employee, conditions of employment, professional employee, exclusive representative, firefighter, and United States, as used in this subchapter shall have the meanings set forth in 5 U.S.C. 7103(a). The terms covered employee, employee, employing office, and agency, when used in connection with the Presidential and Executive Office Accountability Act, 3 U.S.C. 401 et seq., shall have the meaning set out in 3 U.S.C. 401(b), and 431(b) and (d)(2). Employees who are employed in the eight offices listed in 3 U.S.C. 431(d)(2) shall be excluded from coverage if the Authority determines that such exclusion is required because of a conflict of interest, an appearance of a conflict of interest, or the President's or Vice President's constitutional responsibilities, in addition to the exemptions

currently set forth in 5 U.S.C. 7103(a).

* * * * * * *

(5 C.F.R. 2424.2 copied from bound volume)[Code of Federal Regulations]
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TITLE 5--ADMINISTRATIVE PERSONNEL
CHAPTER XIV--FEDERAL LABOR RELATIONS AUTHORITY, GENERAL COUNSEL OF THE FEDERAL
LABOR RELATIONS AUTHORITY AND FEDERAL SERVICE IMPASSES PANEL
PART 2424--NEGOTIABILITY PROCEEDINGS--Table of Contents
Subpart C--Filing and Responding to a Petition for Review; Conferences

Sec. 2424.22 Exclusive representative's petition for review; purpose; content;
severance; service.

* * * * * * *

(d) Service. The petition for review, including all attachments, must be served
in accord with Sec. 2424.2(g).

ADDENDUM B

[1] Pertinent statutory provisions are set forth in the attached Addendum
(Add.) A to this brief.
[2] Relevant orders of the Authority not included with Local 1592's brief
are provided in Add. B. See Circuit Rule 28.2(B). For ease of reference, Add.
B also includes those orders previously provided with Local 1592's brief.
[3] Although Local 1592's additional criticism (Br. at 6) of the Authority's

case processing performance is irrelevant to the merits of this case, the criticism's unfairness warrants a brief comment. As reflected in the Authority Program Highlights section of the FLRA's Annual Report for Fiscal Year 2000, available on the Authority's website (http://www.flra.gov/reports/annual00/22ar5.html), the average age of cases pending before the Authority at the close of the year was 86 days and less than 10 percent of cases pending merits review were over 9 months old.

[4] Similarly, the conventions the Authority follows to refer to agency subcomponents in its decisions is irrelevant to the proper legal interpretation of the specific, express service requirements imposed by § 7117(c)(2)(B).