ORAL ARGUMENT SCHEDULED FOR MARCH 20, 2006

No. 05-1268

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

WILLIAM R. TOBEY
Acting Solicitor

DAVID M. SHEWCHUK
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7999

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the American Federation of Government Employees, National Border Patrol Council, AFL-CIO (AFGE or union) and United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C. (CBP or agency). AFGE is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C.*, Case No. WA-CA-02-0811, decision issued on May 20, 2005, reported at 60 F.L.R.A. (No. 170) 943.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

AALJ	*Ass'n of Admin. Law Judges, et al. v. FLRA*, 397 F.3d 957, (D.C. Cir. 2005)
AFGE, union or petitioner	American Federation of Government Employees, National Border Patrol Council
Authority	Federal Labor Relations Authority
CBP or agency	United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C.
DHHS	*United States Dep't of Health and Human Serv.s, Social Security Admin., Baltimore, MD.*, 36 F.L.R.A. 655 (1990)
FLETC	Federal Law Enforcement Training Center
INS	Immigration and Naturalization Service's Border Patrol
JA	Joint Appendix
MOU	Memorandum of Understanding
Pet. Br.	Petitioner's Brief
SSA	*Social Security Admin., Ofc. of Hearings and Appeals, Charleston, S.C.*, 59 F.L.R.A. 646 (2004)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
ULP	unfair labor practice

ORAL ARGUMENT NOT YET SCHEDULED

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THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on May 20, 2005. The Authority's decision is published at 60 F.L.R.A. (No. 170) 943. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-

Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether the Authority correctly held that the agency did not commit unfair labor practices in violation of § 7116(a)(1) and (5) of the Statute because, although the agency unilaterally reduced the number of hours allotted for remedial firearms training, that change had only a *de minimis* effect on employees' conditions of employment.

STATEMENT OF THE CASE

This case arises out of an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint based on a charge filed by the American Federation of Government Employees, National Border Patrol Council ("AFGE," "union," or "petitioner"). In pertinent part, the complaint alleged that the United States Department of Homeland Security, Border and Transportation Security Directorate, Bureau of Customs and Border Protection, Washington, D.C. ("BCBP" or "agency") violated § 7116(a)(1) and (5) of the Statute by reducing the number of hours of remedial firearms training available to employees, without first notifying the union or

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

offering the union an opportunity to bargain over the reduction. This failure was alleged to violate the Statute and repudiate the parties' Memorandum of Understanding (MOU).[2] The Authority held that no unfair labor practices had occurred. AFGE now seeks review in this Court under § 7123(a) of the Statute.

STATEMENT OF THE FACTS

A. Background

The National Border Patrol Council is the exclusive representative of all non-supervisory employees in border patrol sectors nationwide. Joint Appendix (JA) 63. These employees, formerly assigned to the Immigration and Naturalization Service's (INS) Border Patrol, are now employed by BCBP, within the Department of Homeland Security.

Included within the bargaining unit are a number of Basic Trainee Officers (BTOs). BTOs are first-year probationary employees; their first ten months is spent in training, acquiring the skills necessary to perform as Border Patrol officers. JA 63-64. In addition to firearms proficiency, BTOs are required to acquire a range of skills, including immigration law, naturalization law, physical

[2] The complaint also alleged that the Border Patrol committed a ULP by changing the types of agency-authorized, personally owned firearms that employees are allowed to carry. The Administrative Law Judge found no ULP on this allegation, and the Authority affirmed the Judge's holding. The union does not challenge this aspect of the Authority's holding. *See* Petitioner's Brief at 3.

fitness/physical training, and Spanish language skills. JA 78. The failure to master any one of these areas may result in a BTO's termination.

The union and the agency subscribe to a collective bargaining agreement which provides, in relevant part, that the agency will notify the union prior to changing conditions of employment and allow the union 30 days to initiate bargaining over the changes. JA 18 (Article 3A), JA 67. However, Article 3A explicitly provides that "[n]othing in this article shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law." JA 18. The parties have also agreed to a MOU, reinforcing the union's statutory right to bargain over, among other things, changes to BCBP's Firearms Policy. JA 42. As explained by the union president, the MOU is simply "a reiteration of Article 3A," and creates no union rights or agency responsibilities beyond those provided by the Statute. JA 76.

1. The agency's Firearms Policy and revisions thereto

The agency's Firearms Policy "provides policy and procedural information regarding all aspects of the Service's Firearms Program." *See* JA 23 at page 1. The policy establishes agency standards for, among other matters, the issuance, carriage, maintenance, and use of firearms by BCBP employees.

One such standard concerns the number of hours of remedial firearms training available to BTOs. One version of the Firearms Policy, adopted in 1996,

contained language providing that BTOs who failed to qualify with a handgun during their ten months of training would be provided 80 hours of remedial training. JA 46. According to union witnesses, the 80-hour figure was deliberate, and the result of bargaining with agency representatives. JA 80.

As early as 1997, however, the agency notified the union that it believed the 80-hour provision was a typographical error, and that 8 hours was both the bargained-for allotment and the only figure that made sense. RX 17 at 2. *See also* JA 119. As the agency explained at the time, "[a] trainee officer who is unable to successfully complete the regular [50-hour] course of firearms instruction, and the eight hours of remedial training at [the Federal Law Enforcement Training Center], is not going to benefit from additional hours of remedial training. Further, a basic trainee that has just completed approximately 50 hours of firearms training should not receive more [remedial] training than an incumbent officer," who is entitled to only 40 hours of remedial training. RX 17 at 1-2. Additionally, remedial training (in whatever amount) is conducted at and by the Federal Law Enforcement Training Center (FLETC), which trains law enforcement employees for a number of federal agencies. Tr. 173-74. FLETC protocols and regulations, over which the agency has no control, apply to the training of BCBP employees enrolled at FLETC, and allow only for eight hours of remedial training. *Id*. For these reasons,

BCBP testified that it never offered – and no BTO ever received – 80 hours of remedial training. Tr. 172, JA 121.

In order to bring the Firearms Policy's language in line with agency practice, BCBP initiated procedures to amend the Firearms Policy's remedial training provisions. *Id.* The change was first introduced in a January 2001 meeting of the agency's Firearms and Force Board (a management/union board formed to assist with policy review and formulation), JA 47-48, and approved by agency management on May 15, 2001. RX 16 at 32-35. An amended Firearms Policy, reflecting the reduction from 80 hours to eight, was released on March 1, 2002. JA 23-27. The agency did not formally notify the union or afford the union an opportunity to bargain in advance of the change. *See, e.g,*, JA 118.

2. Effects of the revision

As noted, agency witnesses testified that BCBP never offered 80 hours of remedial training to any BTO. The reduction from 80 hours to eight hours, then, was effectively implemented as early as 1996. As a result, at the administrative hearing, the parties were able to introduce evidence showing the cumulative effect that the unilateral change had had on unit employees from 1996 to January 2004 (the date of the administrative hearing).

The General Counsel offered evidence showing that, over that eight-year period, there had been only one BTO from among the union's roughly 8,000

firearms-carrying bargaining unit members (Tr. 63) who may have been terminated, in part, because of his failure to qualify with a firearm after basic training and eight hours of remedial training. JA 95. The union president confirmed that this individual was the only bargaining unit employee affected by the non-availability of 80 remedial hours, JA 96, and was unable to testify as to whether there were other areas (such as proficiency in Spanish or comprehension of immigration law) that may have primarily or cumulatively been responsible for this probationary employee's termination.

The General Counsel also offered testimony that one or more employees in another bargaining unit, the National Immigration and Naturalization Service Council, had been terminated after receiving less than 80 hours of remedial firearms training.[3] JA 96. Here, too, the General Counsel was unable to show how many employees were affected, or whether firearms qualification was the only, or even most important, factor contributing to the terminations.

Aside from the one unit employee who was terminated after having received only eight hours of remedial training and testimony of one or more similarly affected employees in another unit, the General Counsel did not offer any evidence

[3] The National Immigration and Naturalization Service Council represents immigration inspectors, detention enforcement officers, and other bargaining employees within the former Immigration and Naturalization Service. They are separate and distinct from AFGE's unit of employees. JA 109.

or testimony pertaining to the effect that reducing remedial training had, or reasonably forseeably will have, on unit employees.

B. The ALJ's Decision

In his recommended decision, the Administrative Law Judge held that the agency had committed ULPs by unilaterally reducing the amount of available remedial firearms training and, in so doing, repudiating the terms of the parties' MOU. JA 141-42. In reaching this recommended decision, the Judge considered and rejected the agency's argument that the reduction in training was nonnegotiable because "there is no … forseeable impact on conditions of employment that would be greater than *de minimis*." JA 133.

Based on his review of the record as a whole, the Judge made three findings with respect to the impact of the reduction in remedial training. First, he found that "the impact of the reduction of remedial training hours is somewhat speculative;" second, that "there is no evidence that any employee has yet required the full 80 hours of remedial training, nor is there any evidence as to whether any employee has required more than 8 hours of remedial training;" and, third, that "a Basic Trainee Officer who does not eventually qualify in firearms proficiency, after whatever amount of remedial training is authorized, is subject to termination." JA 137.

From these three factual findings alone, the Judge proceeded to conclude that "the reduction of remedial firearms training is above the *de minimis* level in its foreseeable effect on the work situation of bargaining unit employees[.]" JA 139. In support of this conclusion, the Judge observed that "it is undisputed that the failure of a [BTO] to complete firearms qualification may lead to his or her termination. Furthermore, there is evidence that a nonmember of the bargaining unit has been terminated because of his failure to qualify after [eight] hours of remedial training." JA 139. The Judge also determined that, because BCBP had failed to fulfill its statutory obligations with regards to notice and bargaining, the agency had repudiated the parties' MOU. Consistent with the parties' pleadings, the Judge determined that the "sole purpose of the MOU is to restate and reinforce the [agency's] bargaining obligation" under § 7116(a)(5) of the Statute. JA 142. "Therefore, a violation of the [agency's] bargaining obligation under the Statute was a *per se* breach of the MOU." JA 141.

The agency excepted to the Judge's preliminary decision. To the Authority, the agency argued that the reduction in remedial training had no more than a *de minimis* effect upon employees and, thus, the agency had no obligation to bargain over the change prior to implementation, and had not repudiated the parties' MOU. JA 148.

C. The Authority's Decision

On review, the Authority agreed with BCBP's argument, and held that no ULPs had occurred when the agency changed the number of hours of remedial firearms training.

The Authority began by observing that "it is well established" that, prior to implementing a change in the conditions of employment, agencies must offer unions notice of the change and an opportunity to bargain over the change *unless* the change's effect on conditions of employment is no greater than *de minimis*. JA 151, citing *United States Penitentiary, Leavenworth, Kan.*, 55 F.L.R.A. 704, 715 (1999). Additionally, the Authority noted that the General Counsel bears the burden of proving "each and every element of an alleged" ULP. JA 152, citing *United States Dep't of Commerce, Patent and Trademark Office*, 54 F.L.R.A. 360, 370 (1998), *petition denied*, *NAGE v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999). Therefore, in the instant case, the General Counsel bore the burden of proving that the change's effect on unit employees was, or forseeably would be, greater than *de minimis*.

Based on a review of the record, the Authority determined that the General Counsel had failed to show that unit employees were affected by the reduction in remedial training. The Authority acknowledged that the record indicates that one unit employee, a probationary trainee, was terminated after having received basic

firearms training and only 8 hours of remedial training. JA 152. However, the General Counsel was unable to show that this employee's termination was caused by, or even principally attributable to, the agency's failure to provide him with more than 8 hours of remedial training. "[T]here are other requirements that trainees must meet in order to successfully complete their training programs. There is no showing that this particular trainee met those other requirements and would have been retained had the employee been given, and successfully completed, additional firearms training." JA 152. The Authority found that there was "no evidence that any employee had ever received more than [eight] hours of remedial training," JA 152, yet, the record was devoid of any other evidence showing an actual effect on unit employees. *Id*.

The Authority did not end its analysis at this point; instead, it continued to examine the record in order to determine whether the evidence showed that a future impact might be foreseeable. JA 152. The Authority found no such basis. Noting that the 8-hour policy had been in effect since 1996, and that "the General Counsel presented no evidence that any bargaining unit employees were terminated from their positions or otherwise harmed during this time [by the reduction in remedial training]," the Authority agreed with the Judge's assessment that future effects were speculative in nature. JA 152-53. Because mere speculation of future impact does not prove a greater than *de minimis* effect on unit

employees, the Authority concluded that "based on the record evidence, we find that the impact of the change on bargaining unit employees' conditions of employment was not more than *de minimis*." JA 153. As such, the agency was not required to formally notify the union or bargain over the change, and the Authority held that no ULP had been committed. *Id*.

Finally, consistent with the Judge's and parties' interpretation of the MOU – that it simply "restate[s] and reinforce[s]" the agency's statutory bargaining obligation, and does not impose any new burden on the agency – the Authority held that the agency had not repudiated the parties' MOU by implementing the reduction in remedial training. JA 153.

The union now petitions this Court for review of the Authority's decision and order.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that

such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Co. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp.*, 967 F.2d at 665. So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal. *Fed. Deposit Ins. Co.*, 977 F.2d at 1496.

Where, as here, the Authority interprets its own enabling statute, "we are mindful that we owe great deference to the expertise of the Authority as it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations." *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001) (internal quotations omitted). Similarly, "we defer to the Authority's interpretation of its own precedent." *Nat'l Treas. Employees Union v. FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Review of the Authority's factual determinations is narrow. "We are to affirm the FLRA's findings of fact 'if supported by substantial evidence on the record considered as a whole.'" *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted); *see also* 5 U.S.C. § 7123(c) ("[t]he findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive").

SUMMARY OF ARGUMENT

Accordingly, the union's petition for review should be denied.

ARGUMENT

THE AUTHORITY CORRECTLY HELD THAT THE AGENCY DID NOT COMMIT UNFAIR LABOR PRACTICES IN VIOLATION OF § 7116(A)(1) AND (5) OF THE STATUTE BECAUSE, ALTHOUGH THE AGENCY UNILATERALLY REDUCED THE NUMBER OF HOURS ALLOTTED FOR REMEDIAL FIREARMS TRAINING, THAT CHANGE HAD ONLY A *DE MINIMIS* EFFECT ON EMPLOYEES' CONDITIONS OF EMPLOYMENT.

A. The Authority Correctly Applied its Law and the Precedent of this Court.

In reaching its decision, the Authority correctly applied its own law and the precedent of this Court. Specifically, the Authority applied a *de minimis* analysis, under which agencies may be found to have committed a unilateral implementation ULP *only* if the General Counsel has proven that the implementation has, or reasonably forseeably will have, a greater than *de minimis* effect on bargaining unit employees. As will be shown below, the General Counsel was unable to make such a showing in this case, and the Authority was therefore required to reverse the ALJ and find that no ULP had been committed.

1. Under existing law, changing conditions of employment without notice and opportunity to bargain is a ULP only if the change results in a greater than de minimis effect upon unit employees.

Under Authority precedent, specifically ratified by this Court, "an agency has an obligation to bargain … [only] if the resulting change has more than a *de*

minimis effect on conditions of employment." *Social Security Admin., Ofc. of Hearings and Appeals, Charleston, S.C.*, 59 F.L.R.A. 646, 653-54 (2004) (*SSA*); *pet. for review denied sub nom., Ass'n of Admin. Law Judges, et al. v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) (*AALJ*) .

In *SSA*, the Authority extended the *de minimis* doctrine, which had previously been applied only to cases involving agencies' exercises of reserved management rights, to also include cases where the change would otherwise be substantively negotiable. As the Authority found in *SSA*, "efficient accomplishment of the operations of the Government is best served by applying the same standard irrespective of whether a management change concerns the exercise of a management right or the exercise of a substantively negotiable matter." *SSA* at 653. On review, this Court explicitly endorsed the Authority's refinement. "Effectiveness and efficiency in government can hardly be thought to require bargaining" over *de minimis* changes. *AALJ* at 962..

In the instant case, the Authority correctly identified and applied its precedent. "An agency is required to provide … notice of the change and an opportunity to bargain … *if the change will have more than a de minimis effect* on conditions of employment." JA 151 (emphasis added). Because the Authority concluded here that "the effect of the change in remedial training was *de minimis*," its holding that "the [agency] was not obligated to notify … and bargain over the

change, and … its failure to do so did not violate the Statute," necessarily follows. JA 152.

2. The General Counsel bears the burden of proving the greater-than-*de minimis* effect of a unilateral change.

Under Authority precedent and regulations, the General Counsel is responsible for proving each and every element of a ULP complaint. *See, e.g.*, JA 152 citing *United States Dep't of Commerce, Patent and Trademark Ofc.*, 54 F.L.R.A. 360, 370 (1998), *petition for review denied*, *NAGE v. FLRA*, 179 F.3d 946 (D.C. Cir. 1999); 5 C.F.R. § 2423.32 (2005) ("The General Counsel shall present the evidence in support of the complaint and have the burden of proving the allegations of the complaint[.]")

In unilateral implementation cases, the General Counsel must prove that the change's effect is greater than *de minimis*; there can be no statutory violation without this proof. *See, e.g., SSA* at 655 (holding that no ULP had occurred because "the change in this case has not been shown to be more than *de minimis* …"). The General Counsel, then, must show as an element of its case that the change's effect was greater than *de minimis*. If the General Counsel fails to do so, the Authority is required by law to find that no ULP was committed. 5 U.S.C. § 7118(a)(8). The Authority correctly focused its inquiry on whether the General Counsel had sustained its burden of proof, recognizing that the General Counsel

bore the burden of proving that the reduction in remedial training had a greater than *de minimis* effect.

B. Applying its *De Minimis* Analysis, the Authority Reasonably Determined that the General Counsel had not Shown the Change's Effect to be Greater than *De Minimis*.

In reviewing the ALJ's recommended decision, the Authority reasonably determined, based upon record evidence, that the General Counsel had not proved that the reduction in remedial training had, or reasonably forseeably would have, a greater than *de minimis* effect on unit employees.

1. Record evidence does not show that the reduction in remedial training had any provable effect on bargaining unit employees.

On the record below, the General Counsel did not show that BCBP's reduction in remedial training had, or reasonably forseeably would have, a greater than *de minimis* effect on unit employees. In reaching this conclusion, the Authority properly considered the change's provable effect on unit employees over an eight-year period. "[BCBP's] policy had been in effect since 1996. … [T]he General Counsel presented no evidence that any bargaining unit employees were terminated from their positions or otherwise harmed during this time, solely as a result of the employees' failure to receive 80 hours of remedial training." JA 152-53.

Under Authority precedent, agencies may implement unilateral changes to conditions of employment at their own peril. *See, e.g., General Serv.s Admin., Nat'l Capital Region, Fed. Protective Serv. Div., Washington, D.C.*, 50 F.L.R.A. 728, 733 (1995); *see also* 18 F.L.R.A. 731, 732 (1985) ("[I]f an agency changes conditions of employment without affording the Union the opportunity to bargain and it is subsequently determined that the agency should have negotiated over the proposed change, the agency's failure to do so is a violation of §§ 7116(a)(1) and (5) of the Statute. Conversely, if it is subsequently determined that the agency had no duty to bargain over the change, the agency's failure to have done so before making the change is not a violation of the Statute.") (footnotes omitted).

Where an agency makes a unilateral change in advance of an Authority ruling, it accepts the risk that the Authority will later find the change to be unlawful. Frequently, however, the agency's action allows the Authority to see the change's exact effect on unit employees. *See, e.g.*, 20 F.L.R.A. 129, 146 (1985) (ALJ observing that, because the agency had "acted at its peril" in unilaterally changing conditions of employment, "we need only be concerned with the actual impact because the change has taken place and we can assess its impact").

Similarly, in this case, any effect caused by the reduction in remedial training should have manifested itself over the eight-year period between the agency's implementation and the administrative hearing. However, as identified

by both the Judge (JA 139) and the Authority (JA 152), the most that can be said of the General Counsel's case is that one bargaining unit BTO and one or more non-unit employees were terminated for uncertain reasons after receiving less than 80 hours of remedial firearms training.

The Authority correctly noted the deficiencies in the General Counsel's case. "[T]he General Counsel presented no evidence that any bargaining unit employees were terminated from their positions [as a result of the policy change] or otherwise harmed during this time … ." JA 152. Specifically, with respect to the one unit BTO who was terminated, the General Counsel did not demonstrate that "additional firearms instruction would have been beneficial to [the terminated bargaining unit] employee." More critically, the General Counsel did not address, and the record does not show, whether the terminated union employee had successfully qualified in each of the other required proficiencies. The Authority was therefore entirely accurate in its assessment that "there is no showing that this particular trainee met those other requirements and would have been retained had the employee been given, and successfully completed, additional firearms training." JA 152.

To the contrary, as the Authority correctly concluded, the General Counsel's entire case on the change's effect was nothing more than "speculative." JA 152, citing the Judge's identical conclusion at JA 137. Considering the evidence in the

record, it is possible – but far from proven – that the terminated employee was released primarily or solely because of his inability to qualify with firearms. It is similarly possible – but hardly proven – that additional training would have enabled the employee to qualify with his weapon. Nor did the General Counsel offer proof to show that, despite the lack of effect during the eight-year period from 1996 to 2004, the agency should reasonably have foreseen a greater than *de minimis* effect on union employees.

In sum, the only conclusion supported by the record is that the General Counsel failed to carry its burden and prove that the change's effect on unit employees was greater than *de minimis*.

2. The union's arguments on this point are unavailing.

In its brief, the union raises three principal objections to the Authority's *de minimis* conclusion: first, that the Authority's consideration of the lack of impact over the eight-year period is misplaced (Petitioner's Brief (Pet. Br.) 31); second, that the Authority's *de minimis* holding here is inconsistent with earlier cases (Pet. Br. 34-37); and, third, that the Authority did not give due consideration to the change's effect on members of other bargaining units (Pet. Br. 33-34). As discussed below, none of these claims are well founded.

a. The Authority correctly looked to the eight-year period from 1996 to 2004 in an effort to find some indication of the change's impact on unit employees.

The union's first contention is that the true scope of the change's effect cannot be understood by looking, as the Authority did, at the lack of effects over the eight-year period from 1996 to 2004. In this connection, the union claims in its brief that the Authority cannot expect to find effects as early as 1996 because "it must be assumed that the [a]gency abided with the negotiated policy until its announced change in that policy." Pet. Br. 31.

In so claiming, the union overlooks testimony at the hearing that the agency never offered any employee 80 hours of remedial training, Tr. 172, 175, and the Judge's and Authority's finding that there was "no evidence that any employee had ever received more than 8 hours of remedial training." JA 152. Although the union believed that it had bargained for 80 hours of remedial training, the agency never offered that benefit to employees, and so the effects of the unilateral action would have been immediately apparent. Furthermore, even if the union's supposition that "the [a]gency was abiding by the 80-hour policy" until the formal change in 2002 is correct, that still results in a two-year period between the formal change and the hearing when one would expect the change's effects to have become apparent.

b. The Authority's holding in this case – that speculation is insufficient to show that a change's effect is greater than de minimis – is consistent with precedent.

Next, the union argues that the Authority's *de minimis* determination in this case is inconsistent with other cases, in that the reduction in remedial training "is 'more significant' than the effect found to be more than *de minimis*" in other cases. Pet. Br. 34. The union misses an important distinction: the changes in each of those cases had certain, definite effects, while the effect in this case is, as both the Judge and Authority found, "speculative" at best. JA 152, 137. The Authority has addressed cases where a change's effect is speculative, rather than certain or even reasonably forseeable, and has held that speculative effects do not trigger an obligation to notify or bargain. *See United States Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 F.L.R.A. 574, 576 (1992) ("[A]t the time the decision was made, the reasonably foreseeable effect of the Respondent's decision to discontinue recertification training was not more than *de minimis*. We reach this conclusion because at the time of the change, any concerns that the effect of the change was more than *de minimis* were speculative[.]"). The Authority's decision in the instant case is therefore entirely consistent with its precedent, under which the General Counsel may not rely on mere speculation to prove its case.

The union's argument is also based on a fundamental error. The union cites cases in which the Authority found, for instance, changes in seating assignments to have a greater than *de minimis* effect, and asks the Court to content itself with a superficial comparison of the seemingly mundane changes in those cases to the purportedly weightier change in the instant case. However, in each of the cases cited by the union, the General Counsel was able to prove each element of its case, and show that the effects of the changes were greater than *de minimis*. In the seating change case cited by the union, for example, the General Counsel proved that the changes affected "one-fourth of all [bargaining unit] employees," causing one employee to lose access to a window, and moving other employees "about fifty feet away from their prior" work stations. *United States Dep't of Health and Human Serv.s, Social Security Admin., Baltimore, Md.*, 36 F.L.R.A. 655, 660, 668 (1990) (*DHHS*).

The General Counsel made no such proof in this case. As the Authority recognized, the record does not prove that, over an eight-year period, *any* union employee – much less one-third of the bargaining unit – was affected by the unilateral reduction in remedial training. It is unclear if the one terminated union employee's termination had any connection to his inability to secure 80 hours of remedial training. It is possible, as discussed above, that the employee failed to qualify in one or more other areas, rendering his firearms performance irrelevant.

The General Counsel also did not prove that the terminated employee would have benefited from a full 80 hours of remedial training. After having received 50 hours of regular training and eight remedial hours, there is no basis in the record for surmising that further training would have allowed the terminated employee to qualify. Unlike *DHHS*, then, where the effect on unit employees was clear and identifiable, the effect in this case is nothing more than "speculative."

In sum on this point, where, as here, the General Counsel has been unable to prove a critical element of its case, comparison to other cases is of no value. It is wholly irrelevant that the change in this case might seem more significant than, for instance, a change in seating assignments. The fact remains, the General Counsel was simply unable to prove its case.

c. The Authority gave the proper weight to evidence of the change's effect on non-bargaining unit employees.

Contrary to the union's arguments, the Authority did not "reject[] evidence of employees in the other INS [union] … being fired for lack of firearms skills." Pet. Br. 33. Rather, the Authority correctly took note of this evidence, and treated it as relevant, but not dispositive.

Under well-settled Authority precedent, a ULP for unilateral implementation must be based on the change's effect on *unit employees*. If a change's effect on non-unit employees (or employees in a unit represented by a different, non-

charging union) is greater than *de minimis*, there is still no ULP unless the effect on unit employees is also greater than *de minimis*. *See, e.g.*, JA 151, citing *United States Dep't of the Treasury, Internal Revenue Serv.*, 56 F.L.R.A. 906, 913 (2000); *see also AALJ* at 959 (no obligation to bargain unless a change "has more than a *de minimis* effect on the unit employees' conditions of employment" (citations omitted)).

On a related topic, this Court has added, "[w]e are not aware of any case - in either the public or private sectors - in which an employer has been required to bargain with a union over the conditions of employment of employees in another bargaining unit … [t]here is a good reason why no such case appears to exist - for a court to so hold would violate the fundamental principle that a union is the exclusive representative of employees in the certified or recognized unit, and those employees only." *United States Dep't of the Navy v. FLRA*, 952 F.2d 1434, 1442 (D.C. Cir. 1992).

Under this accepted approach, a change's effect on non-unit employees may be relevant, but it is certainly not dispositive. Therefore, while it was reasonable for the Authority to consider "the claimed termination of other, unspecified agency employees who were provided only [eight] hours of remedial training," it was also reasonable to discount this evidence, noting both the uncertainties surrounding the testimony, and that "evidence of any impact on non-bargaining unit employees

does not serve to establish an impact on bargaining unit employees[.]" JA 152. If the General Counsel had been able to show that the two bargaining units were identically situated, then the Authority likely would have given greater weight to the change's effect on the other unit. Under the facts in the record, however, the Authority acted reasonably, especially in light of the fact that, even here, the General Counsel did not show that (a) the employees were terminated solely for firearms shortcomings or (b) that further training might have allowed the terminated employees to qualify with their firearms.

C. The Union's Remaining Arguments are Barred by § 7123(c).

The union's two remaining arguments, that the Authority applied an incorrect standard in its findings of fact, and that the parties' MOU conferred bargaining obligations in excess of the agency's statutory obligations, were not urged before the Authority and are barred by § 7123(c) of the Statute.

Under § 7123(c), "[n]o objection that has not been urged before the Authority … shall be considered by the court[.]" Both the Supreme Court and this Court have recognized that § 7123(c) is jurisdictional in nature. *Equal Employment Opportunity Comm. v.* FLRA, 476 U.S. 19, 23 (1986); *Am. Fed'n of State, County, and Municipal Employees v. FLRA*, 395 F.3d 443, 452 (D.C. Cir. 2005). Furthermore, under this Court's precedent, § 7123(c) is to be applied strictly: a party raising an objection to the Court must have raised every "twist" of

its argument to the Authority. *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987). With respect to both union arguments discussed below, the union failed to raise its objections to the Authority, and those arguments are thus not properly before this Court.

1. The union's argument that the Authority incorrectly utilized a substantial evidence standard in reaching its factual conclusions in not properly before this Court.

The union claims, Pet. Br. 37-38, that the Authority erred by mistakenly using a substantial evidence standard in reaching its findings of fact. However, the union did not raise this objection to the Authority in a motion for reconsideration. If the union genuinely believed that the Authority had committed reversible error by applying an incorrect standard – rather than "merely [using] an unfortunate choice of words," Pet. Br. 37 – then its remedy was to seek reconsideration from the Authority before proceeding with its petition for review. The union's inaction has deprived this Court of the opportunity to hear the Authority's explanation for the language in question, which is precisely the circumstance that § 7123(c) seeks to prevent. Moreover, this concern does not appear well-founded. The Authority consistently refers to the "record evidence" in its analysis and conclusions. *See* JA 152-53.

2. The union concedes that its MOU argument is not properly pled and may not be considered by this Court.

The union offers two arguments pertaining to BCBP's alleged repudiation of the parties' MOU. The first argument, consistent with the Authority's conclusion that the MOU simply restates the agency's § 7116(a)(5) bargaining obligation, is that the agency was required to give the union notice and an opportunity to bargain and, by failing to do, the agency also repudiated the MOU. As explained above, the *de minimis* nature of the change relieved BCBP of its statutory duties, and, by extension, BCBP did not repudiate the MOU.

The union now argues, for the first time, that the parties' MOU imposes bargaining obligations above and beyond the agency's statutory obligations. This argument is barred by § 7123(c); the union never objected to the conclusion, originally reached by the ALJ and affirmed by the Authority, that the MOU simply restates statutory obligations.

In its brief, the union invites this Court to consider this second argument, in complete disregard of § 7123(c)'s jurisdictional limitation. In a footnote to its argument, the union even acknowledges, "no exception was timely presented to the FLRA that challenged the ALJ's position that the MOU merely incorporates the agency's statutory duty to bargain[.]" Pet Br. 42, n. 6. The union is a "frequent litigator in this Court," and this Court should reject its effort to bypass the jurisdictional constraints of § 7123(c) of the Statute. *Nat'l Treas. Employees Union v.* FLRA, 414 F.3d 50, 59 n. 5 (D.C. Cir. 2005).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

William R. Tobey
Acting Solicitor

David M. Shewchuk
Attorney
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7999

January 2006

CERTIFICATION PURSUANT TO FRAP 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is written in a proportionally-spaced 14-point font and contains 6,829 words.

January 27, 2006

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David M. Shewchuk
Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, AFL-CIO,	)	
Petitioner	)	
v.	)	No. 05-1268
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

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

Mark D. Roth, General Counsel
Charles A. Hobbie, Deputy General Counsel
American Federation of Government Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Kevin M. Grile
Assistant General Counsel
American Federation of Government Employees, AFL-CIO
300 S. Ashland Ave., Ste. 302
Chicago, IL 60607

_____
Thelma Brown
Paralegal Specialist

January 27, 2006