ORAL ARGUMENT NOT SCHEDULED

No. 05-5076

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

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO

and

PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, AFL-CIO,

Appellants

v.

FEDERAL SERVICE IMPASSES PANEL

and

FEDERAL LABOR RELATIONS AUTHORITY,

Appellees

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL SERVICE IMPASSES PANEL AND THE FEDERAL LABOR RELATIONS AUTHORITY

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ORAL ARGUMENT NOT SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the district court proceeding before the United States District Court for the District of Columbia were the National Air Traffic Controllers' Association (NATCA) and the Professional Airways Systems Specialists (PASS), plaintiffs, and the Federal Service Impasses Panel (FSIP) and the Federal Labor Relations Authority (FLRA), defendants. NATCA and PASS are the appellants in this court proceeding; FSIP and FLRA are the appellees.

B. Ruling Under Review

The ruling under review in this case is the District Court's decision in *National Air Traffic Controllers Association, AFL-CIO and Professional Airways Systems Specialists, AFL-CIO v. FSIP and FLRA*, Case No. 04-0138 (D.D.C.), decision issued on February 22, 2005, reported at 2005 WL 418016.

C. Related Cases

This case has not previously been before this 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).

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS
(Continued)

Page

ADDENDA

Page No.

TABLE OF AUTHORITIES

CASES

Page No.

TABLE OF AUTHORITIES
(Continued)

Page No.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

TABLE OF AUTHORITIES (CONTINUED)

STATUTES

Page No.

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

MISCELLANEOUS

*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

BATF	*Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89 (1983)
Brewer	*Council of Prison Locals v. Brewer*, 735 F.2d 1497 (D.C. Cir. 1984)
Carswell AFB	*Carswell Air Force Base, Tex.*, 31 F.L.R.A. 620 (1988)
Colorado Nurses	*Colo. Nurses Association v. FLRA*, 851 F.2d 1486 (D.C. Cir. 1988)
FAA	Federal Aviation Administration
Griffith	*Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988
JA	Joint Appendix
Leedom	*Leedom v. Kyne*, 358 U.S. 184 (1958)
NATCA	National Air Traffic Controllers Association, AFL-CIO
NLRA	National Labor Relations Act
PASS	Professional Airways Systems Specialists, AFL-CIO
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	Unfair Labor Practice

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STATEMENT OF JURISDICTION

The judgment of the district court under review in this case was issued on February 22, 2005. A copy of the district court's unpublished memorandum opinion and order is at Joint Appendix (JA) 53. The district court concluded that it

was without subject matter jurisdiction over the complaint and dismissed the action. The appellants filed their notice of appeal of the district court's judgment on March 9, 2005, within the 60-day period for filing such an appeal under Fed. R. App. P. 4(a)(1). This Court has jurisdiction to review the district court's decision and order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that it was without subject matter jurisdiction over a complaint requesting the district court to declare that the Federal Service Impasses Panel erred by declining to assert jurisdiction over a collective bargaining dispute, and to order the Panel to resolve the dispute.

STATEMENT OF THE CASE

This case arose out of contract negotiations between the Federal Aviation Administration (FAA), and the National Air Traffic Controllers Association, AFL-CIO (NATCA) and the Professional Airways Systems Specialists, AFL-CIO (PASS) (collectively "the unions"). In July 2003, the unions filed requests with the Federal Service Impasses Panel (Panel) for assistance in resolving impasses in these negotiations. In response, the FAA contended that the FAA personnel system, authorized under 49 U.S.C. §§ 106(l) and 40122, divested the Panel of jurisdiction over the collective bargaining dispute between the unions and the FAA.

After the Panel solicited and received legal arguments on the issue of the Panel's jurisdiction from the parties, the Panel declined to assert jurisdiction over the bargaining dispute.

The unions subsequently filed suit in the district court against the Panel and the Federal Labor Relations Authority (Authority), seeking a declaration that the Panel erred in declining to assert jurisdiction, and an order requiring that the Panel resolve the bargaining impasses. The Panel and the Authority moved to dismiss the complaint for lack of subject matter jurisdiction or in the alternative for summary judgment. The District Court granted the motion filed by the Panel and the Authority and dismissed the complaint. This appeal followed.

STATEMENT OF THE FACTS

A. The Panel

The Panel was originally created by Executive Order 11491, 3 C.F.R. 861, 864 (1966-70 Compilation) and was designated as an entity within the Federal Labor Relations Council (FLRC). *See Council of Prison Locals v. Brewe*r, 735 F.2d 1497, 1499 n.2 (D.C. Cir. 1984) (*Brewer*). The FLRC was created by the Executive Order as the central policy-making and adjudicative agency for federal sector labor-management relations. Exec. Order 11491, § 4. The Panel was composed of at least three members appointed by the President, serving on a part-

time basis. Under the Executive Order, the Panel had the authority to recommend procedures for the resolution of collective bargaining impasses or to settle the impasse "by appropriate action." Exec. Order 11491, §§ 5 and 17. Under regulations promulgated by the Panel, the Panel also had the discretion to "dismiss" a request for assistance in resolving an impasse. 5 C.F.R. § 2471.6 (1978).

The Panel was reconstituted by § 7119 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000) (Statute)[1] essentially as it had existed under the Executive Order, as an "entity within" the Authority.[2] *See Brewer*, 735 F.2d at 1499-1500. Under the Statute, the Panel is composed of a Chairman and at least six other members, all of whom are appointed by the President, "solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations." 5 U.S.C. § 7119(c)(2). The Panel's function continued to be to "provide assistance in resolving negotiation impasses between agencies and exclusive representatives" of agency employees.

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[1] Relevant statutory and regulatory provisions are set out in Addendum (Add.) to this brief.

[2] The Statute was enacted as part of the Civil Service Reform Act of 1978. *See generally Dep't of Defense v. FLRA*, 659 F.2d 1140, 1144 (D.C. Cir 1981).

5 U.S.C. § 7119(c)(1). Any party engaged in collective bargaining under the Statute may request the Panel's assistance in resolving an impasse. 5 U.S.C. § 7119(b). Upon the submission of a request for Panel assistance, the Panel "shall promptly investigate any impasse presented to it" and assist the parties in resolving the impasse through whatever means the Panel "may consider appropriate." 5 U.S.C. § 7119(c)(5)(A). If the parties are unable to settle the dispute voluntarily, the Panel then "may . . . take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse." 5 U.S.C. § 7119(c)(5)(B)(iii).

The Panel has published regulations implementing § 7119 of the Statute. 5 C.F.R. §§ 2470.1-2473.1 (2005). As relevant here, the regulations provide that after having conducted an investigation and having given due consideration, the Panel shall either: "[d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction. . . .;" or take jurisdiction and take steps to resolve the impasse. 5 C.F.R. § 2471.6(a)(1).

B. The FAA personnel system

The genesis of this litigation is found in the FAA's unique personnel system. Congress has granted the FAA the authority to establish its own personnel system, exempt from many of the provisions of Title 5 of the United States Code and other federal personnel laws. The relevant statutory provisions are found at 49 U.S.C.

§§ 106(l) and 40122. The general grant of the authority to establish the FAA personnel system appears at 49 U.S.C. § 40122(g)(1), where Congress required that, in order to address "the unique demands on the agency's work force[,]" the system must provide for flexibility in "hiring, training, compensation, and location of personnel." 49 U.S.C. § 40122 (g)(1). Despite the FAA's exemption from many of the provisions of Title 5 that govern federal employment, certain of these provisions were to continue to apply. Among those provisions remaining applicable to the FAA are those in the Statute relating to collective bargaining.[3] 49 U.S.C. § 40122(g)(2).

Thus, the FAA was to be subject to the collective bargaining requirements of the Statute, including § 7119 relating to impasse resolution procedures before the Panel. However, Congress established a special procedure for the FAA to follow when negotiating over "changes to the [FAA] personnel management system." 49 U.S.C § 40122(a). Specifically, 49 U.S.C § 40122(a) provides:

(a) In General.—

[3] As the current 49 U.S.C. § 40122(g) was originally enacted, the FAA was exempt from the Statute. Pub. L. No. 104-50 § 347, 109 Stat. 460 (1995). Congress subsequently amended § 347 and added "chapter 71, relating to labor management relations[,]" to those provisions of Title 5 that were to remain applicable to the FAA. Pub. L. 104-122 § 1, 110 Stat. 876 (1996). The legislative evolution of the relevant provisions of Title 49 is set out in the district court decision (JA 4-5) as well as in the unions' brief (Br. 8-11).

> (1) Consultation and negotiation.--In developing and making changes to the personnel management system initially implemented by the Administrator of the Federal Aviation Administration on April 1, 1996, the Administrator shall negotiate with the exclusive bargaining representatives of employees of the Administration certified under section 7111 of title 5 and consult with other employees of the Administration.
>
> (2) Mediation.--If the Administrator does not reach an agreement under paragraph (1) with the exclusive bargaining representatives, the services of the Federal Mediation and Conciliation Service shall be used to attempt to reach such agreement. If the services of the Federal Mediation and Conciliation Service do not lead to an agreement, the Administrator's proposed change to the personnel management system shall not take effect until 60 days have elapsed after the Administrator has transmitted the proposed change, along with the objections of the exclusive bargaining representatives to the change, and the reasons for such objections, to Congress. The 60-day period shall not include any period during which Congress has adjourned sine die.

Finally, Congress expressly provided the FAA's Administrator with the authority to fix the compensation of FAA employees. 49 U.S.C. § 106(l). Section 106(l) also provides that, "[i]n fixing compensation and benefits of officers and employees, the Administrator shall not engage in any type of bargaining, except to the extent provided for in section 40122(a), nor shall the Administrator be bound by any requirement to establish such compensation or benefits at particular levels."[4] 49 U.S.C. § 106(l).

[4] Generally, where employee compensation is not fixed by law, but is left to the discretion of the employing agencies, agencies are obligated to bargain over

C. Factual background and proceedings before the Panel

1. Background

This case arose out of separate contract negotiations between the FAA and NATCA and PASS, two unions representing units of the FAA's employees. In July 2003, NATCA and PASS filed requests for Panel assistance in resolving bargaining impasses. JA 34, 91. Specifically, NATCA filed 1 request, 03 FSIP 144, growing out of negotiations between the FAA and 11 bargaining units covering approximately 1,800 employees. JA 34. PASS filed 4 different requests (03 FSIP 149, 150, 151, and 157) arising out of negotiations affecting 4 bargaining units involving approximately 4,000 employees. JA 91. The Panel consolidated all of PASS's cases. JA 29. In response to the unions' petitions to the Panel, the FAA filed two substantially identical Statements of Position, each contending that 49 U.S.C. §§ 106 and 40122(a) divested the Panel of jurisdiction over the collective bargaining disputes at issue. JA 34, 91. Thereafter the Panel solicited, and the parties provided, legal arguments on the issue of the Panel's jurisdiction. JA 35, 91.

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compensation. *See FDIC v. FLRA*, 977 F.2d 1493, 1494 (D.C. Cir. 1992) (citing *Fort Stewart Schools v. FLRA*, 495 U.S. 641 (1990)).

2. The Panel's decisions

On January 9, 2004, the Panel issued its decisions. JA 25, 29. In each case, the Panel concluded that "it is unclear whether the Panel has the authority to resolve the parties' impasse[s]." *Id.* The Panel stated that the FAA had "raised arguable questions" concerning the Panel's authority to resolve the disputes at issue. JA 27, 32. Further, according to the Panel, these "questions must be addressed in an appropriate forum before the Panel commits its resources to assist the parties in resolving the merits of their impasses." JA 28, 32. The Panel noted that it was not endorsing, either explicitly or implicitly, the FAA's statutory interpretations. JA 32 n.4.

3. Events subsequent to the Panel's decisions

On January 30, 2004, in accordance with the procedures set forth in 49 U.S.C. § 40122, the FAA submitted to Congress its proposed terms and conditions of employment that were the subject of the impasse with NATCA.[5] JA 35. No further action was taken until June 10, 2005, when the FAA notified NATCA that it intended to implement those terms and conditions of employment. Add. B at 1, Add C at 2.

[5] The record does not indicate whether the proposed terms and conditions of employment that were the subject of the impasse with PASS were submitted to Congress.

NATCA responded by letters dated June 15 and June 30, 2005, by requesting bargaining over the matter. NATCA stated that the passage of time since the submission to Congress had rendered the 2003 impasse "null and void." Add. B. NATCA also informed the Panel that NATCA considered the impasse to be "null and void." Add. D. After the FAA declined to bargain over the matters, NATCA filed an unfair labor practice (ULP) charge with the Authority alleging that the FAA had refused to bargain in good faith in violation of § 7116(a)(1) and (5) of the Statute. Add. C. The ULP charge is currently pending.

D. The district court's decision

Following receipt of the Panel's decisions and the FAA's submission to Congress, the unions jointly filed suit in the United States District Court for the District of Columbia seeking an order declaring that the Panel's decisions violated specific provisions of the Statute, and requiring the Panel to resolve the impasses as requested by the unions. JA 15-24.

The district court first identified the "relevant question" in the proceeding as "who should determine the interplay between [the Statute] . . . and the particular statutory provisions that affect labor relations at the FAA[.]" JA 5. Finding that the Authority is the appropriate forum to decide the question in the first instance, the district court concluded "that it is without jurisdiction" to entertain the union's

complaint. JA 7. In so holding, the court stated that what was at issue before the Panel was essentially an "obligation to bargain issue" and that the Panel does not have the authority to resolve such issues (citing *Am. Fed. of Gov't Employees v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985) and *Interpretation and Guidance*, 11 F.L.R.A. 626, 628 (1983)). JA 6-7. According to the district court, such questions are to be decided by the Authority. JA 7.

Noting the general rule that decisions of the Panel are not subject to judicial review, the district court also stated that a district court could exercise jurisdiction to invalidate a Panel order made "in excess of its delegated powers and contrary to a specific prohibition of the [Statute]" (citing *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500-1501 (D.C. Cir. 1984) (in turn citing *Leedom v. Kyne*, 358 U.S. 184, 188 (1958)). However, according to the district court, "[t]he Panel's refusal to resolve the parties' impasse in light of arguable legal questions concerning the Panel's authority cannot be deemed a violation of a clear and mandatory statutory provision." JA 8 (internal quotations omitted). In so finding, the district court recognized that the Panel must initially determine whether the impasse at issue is subject to its procedures, noting that impasses *in fact* may not necessarily be impasses legally subject to procedures under § 7119 of the Statute. JA 7-8.

For the reasons discussed above, the district court entered an order dismissing the unions' complaints. This appeal followed.

STANDARD OF REVIEW

The standard for this Court's review of the district court's dismissal of the complaint for lack of jurisdiction is *de novo*. *Ass'n of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 341 (D.C. Cir. 2002). However, to the extent that the Court finds it necessary to construe and apply provisions of the Statute, the Court must defer to the Authority's interpretation of those provisions. *E.g., Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (*BATF*).

SUMMARY OF ARGUMENT

1. As the district court recognized, Congress did not intend that orders of the Federal Service Impasses Panel (Panel) would be subject to review in any court. *Council of Prison Locals v. Brewer, 735 F.2d 1497, 1499-1501 (D.C. Cir. 1983)* (*Brewer*). Although the *Brewer* Court stated that jurisdiction might be present "in exceptional circumstances, . . . to invalidate a Panel order made in excess of its delegated powers and contrary to a specific prohibition of the [Statute]," *Brewer* 735 F.2d at 1500-1501, such exceptional circumstances are not present here.

2. It is well established that the exception established by *Leedom v. Kyne*, 358 U.S. 184, 188 (1958), is intended to be of extremely limited scope, available

only where an agency has contravened an unambiguous, specific, and mandatory statutory provision. The exception is not intended to provide review, otherwise precluded, for agency errors of law or fact, or to resolve disputes over statutory construction.

3. As the district court properly held, *Leedom* jurisdiction is not available in the instant case because the Panel's determination not to assert jurisdiction cannot be deemed a violation of a clear and mandatory statutory provision. The Panel's action was consistent with a reasonable interpretation of its statutory responsibilities. Further, the Panel's action was consistent with its long-standing practice, recognized by the Authority and this Court.

A. The unions essentially contend that § 7119 of the Statute requires the Panel to resolve every impasse presented to it, and that by declining to assert jurisdiction, the Panel violates this mandate. However, the district court recognized that the union's rigid interpretation of § 7119 is unreasonable. As the district court properly held, in considering an impasse the Panel must always first determine whether the impasse is subject to its jurisdiction.

B. Moreover, the Panel's decision to decline to assert jurisdiction where there are unresolved questions concerning jurisdiction is consistent with the Panel's long-standing, recognized administrative practice. This practice had its origin

under the Executive Order that governed federal sector labor relations before the 1978 enactment of the Statute. There is no indication that Congress intended to change the practice under the Statute. The Panel has publicized its practice in its regulations, first promulgated shortly after the enactment of the Statute, and in its annual reports to Congress. In addition, both the Authority and this Court have recognized and tacitly approved the Panel's practice.

For all these reasons, it cannot reasonably be asserted that by declining to assert jurisdiction in the instant case, the Panel violated a "clear and mandatory" statutory provision.

4. Finally, the district court properly found that the unions' remedy in this case lies in proceedings before the Authority. Contrary to the unions' contentions, it is not evident that such proceedings, particularly pursuant to the unfair labor practice provisions of § 7118 of the Statute, are foreclosed. However, and in any event, even if an alternative forum to the district court were not available with certainty, *Leedom* jurisdiction still does not obtain. As this Court has stressed, "it is not the unavailability of a remedy that triggers the [*Leedom*] exception, but the violation of a clear statutory demand." *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980). Since there has been no such violation in this case, the district court is without jurisdiction.

Accordingly, the district court's decision dismissing the unions' complaint should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER A COMPLAINT REQUIRING THE DISTRICT COURT TO DECLARE THAT THE FEDERAL SERVICE IMPASSES PANEL ERRED BY DECLINING TO ASSERT JURISDICTION OVER A COLLECTIVE BARGAINING DISPUTE, AND TO ORDER THE PANEL TO RESOLVE THE DISPUTE

A. Orders of the Panel are not subject to judicial review

As the district court recognized, it is well established that, absent extraordinary circumstances, orders of the Panel are not subject to judicial review. *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1499-1501 (D.C. Cir. 1983) (*Brewer*). In *Brewer*, as in the instant case, a federal sector union had sought district court review of a Panel order under statutes conferring general federal jurisdiction. *Id.* at 1499; *Council of Prison Locals v. Howlett*, 562 F. Supp. 849, 851 (D.D.C. 1983). The *Brewer* Court examined the language of the Statute, and the Statute's legislative history and concluded that Congress meant to foreclose direct judicial review of Panel orders in any federal court. *Brewer*, 735 F.2d at 1499-1500.

B. District court jurisdiction is not available under the *Leedom* exception

The unions do not dispute the well-settled law that orders of the Panel are not subject to judicial review. The unions argue, nonetheless, that district court jurisdiction is available under the doctrine of *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) (*Leedom*). However, although this Court has recognized that *Leedom* jurisdiction may be available "in exceptional circumstances, . . . to invalidate a Panel order made 'in excess of its delegated powers and contrary to a specific prohibition of the [Statute]'," *Brewer*, 735 F.2d at 1500-1501, such exceptional circumstances are not present here. As will be demonstrated below, the unions fail to establish that this case meets the stringent standards of *Leedom* jurisdiction.

1. The *Leedom* exception

Under *Leedom*, an otherwise nonreviewable agency action may be reviewable where an agency has "contravened a clear and specific statutory mandate." *United Food and Commercial Workers, Local 400 v. NLRB*, 694 F.2d 276, 278 (D.C. Cir. 1982). This Court has stressed that the *Leedom* exception is "intended to be of extremely limited scope." *Griffith v. FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) (internal quotes omitted) (*Griffith*). Noting that the limitations on *Leedom* jurisdiction are "nearly insurmountable," this Court has held that *Leedom* jurisdiction is not available to review agency decisions for errors of fact or law.

United States Dep't of Justice, Fed. Bureau of Prisons v. *FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993); *see also Boire v. Greyhound*, 376 U.S. 473, 481 (1964) (*Leedom* should "not . . . be extended to permit plenary district court review of [National Labor Relations] Board orders . . . whenever it can be said that an erroneous assessment of the particular facts . . . has led it to a conclusion which does not comport with the law."). As further explained, [g]arden variety errors of law or fact are not enough [to confer *Leedom* jurisdiction]." *Griffith*, 842 F.2d at 493. In that regard, this Court has recognized that *Leedom* jurisdiction is not available to resolve disputes over statutory construction. *Griffith*, 842 F.3d at 497-98.

Analysis of the Supreme Court's *Leedom* decision demonstrates the rigorous character of the exception's requirements. In *Leedom*, the National Labor Relations Board (Board) had determined that employees, who were held not to be professional employees within the meaning of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(12), should be included in a bargaining unit of acknowledged professional employees. *Leedom*, 358 U.S. at 185-86. This determination by the Board directly contravened the NLRA's explicit requirement that "'the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional

employees unless a majority of such professional employees vote for inclusion in such unit.'" *Id.* at 188-89 (quoting § 9(b) of the NLRA, 29 U.S.C. § 159(b)). Because of the Board's patent and admitted violation of the NLRA, the Court affirmed the district court's assertion of jurisdiction.

As will be discussed below, the circumstances of this case are not comparable to *Leedom* or any case where *Leedom* jurisdiction has been found. The Panel did not operate outside its statutory mandate in making its determination here. Rather, the Panel followed its long-standing practice of declining to assert jurisdiction where there was an underlying legal question concerning the extent of a party's obligation to bargain.

2. *Leedom* does not apply in the instant case

According to the unions (Br. 20), *Leedom* jurisdiction obtains because the Panel's actions violated § 7119(c)(5)(A) of the Statute, which states:

> (5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either–
>
> (i) recommend to the parties procedures for the resolution of the impasse; or
>
> (ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

The unions contend that by declining to assert jurisdiction over the impasses in this case, the Panel violated the "mandatory" requirements that the Panel take

steps to resolve the impasses. However, and as discussed below, the district court properly held (JA 8) that the Panel's refusal to resolve the parties' impasses in light of arguable questions concerning the Panel's authority cannot be deemed a violation of a "clear and mandatory" statutory provision. In that regard, the Panel's action was a reasonable application of its statutory authority, was consistent with long-standing administrative practice, and was consistent with practices approved by the Authority and this Court.

a. The Panel's action was a reasonable application of its statutory authority

The Panel's authorities and obligations are set out in § 7119(c)(5) of the Statute. The Statute first requires that the Panel promptly investigate the impasse presented to it. The unions cannot deny that the Panel initiated an investigation of the impasse. As a matter of fact, it was during the course of the Panel's investigation that the FAA asserted that the Panel was without jurisdiction to resolve the bargaining dispute. *See* JA 25, 29.

Further, § 7119(c)(5)(A) requires that the Panel assist the parties in seeking a resolution to the impasse, "through whatever methods and procedures . . . [the Panel] may consider appropriate." 5 U.S.C. § 7119(c)(5)(A)(ii). As this language reflects, the Statute clearly provides the Panel with wide discretion in determining the nature and extent of the assistance it is to provide under this section. Here,

once the FAA asserted that the Panel had no authority to intercede or otherwise take action in the bargaining dispute, the Panel examined the jurisdictional issue by requesting legal arguments from all parties. Nothing in this exercise of Panel discretion constituted a clear and patent violation of the requirements of § 7119(c)(5)(A) of the Statute. Further, where, as here, efforts to settle voluntarily the bargaining impasse are unavailing, the Statute does not mandate any particular action on the Panel's part.

Moreover, although § 7119(c)(5)(A) makes no explicit provision for a Panel determination not to assert jurisdiction over a bargaining dispute, such authority is implicit. As the district court reasonably held, in considering any request for assistance filed by a party to a collective bargaining dispute, the Panel must always determine in the first instance whether the matter is subject to the Panel's authority. To accept the unions' invitation to rule otherwise would convert § 7119 into a mandate compelling the Panel to sweep aside valid legal impediments to itsexercise of jurisdiction in order to resolve any dispute satisfying the generic definition of an "impasse." Such a contention is thoroughly implausible. *See United States v. Wilson*, 290 F.3d 347, 361 (D.C. Cir. 2002) (statutory constructions leading to absurd results are disfavored). In this connection, this Court has recognized that agencies have implicit powers that are necessary to

implement the legislative design. *See Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005). Certainly, for the Panel to make a threshold determination regarding its authority over a dispute, or the parties thereto, is such a necessary tool in implementing the Statute.

b. The Panel's action was consistent with recognized and long-standing administrative practice

Further, declining to assert jurisdiction in cases where there are colorable arguments regarding the Panel's authority to resolve an impasse is a long-standing and recognized administrative practice. This Court has noted that where Congress has not overturned by legislation a consistent course of administrative practice, congressional approval may be implied. *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1429 n.50 (D.C. Cir. 1983).

The Panel's practice has its origin under the Executive Order program that governed federal sector labor relations before enactment of the Statute. In that regard, regulations promulgated by the Panel under the Executive Order program provided that the Panel was not bound to resolve every "impasse" presented to it. Instead, the Panel could "dismiss" a request for assistance as it deemed appropriate. *See* 5 C.F.R. § 2471.6 (1978). In such cases, the Panel would, as it currently does, "decline to assert jurisdiction." *See, e.g., First Annual Report of the Federal Labor Relations Authority* at 45 (Add. E).

Nothing in the legislative history of the Statute indicates that Congress intended to change Panel practices. Congress can be presumed to have been aware of the Executive Order practice, and its determination not to change the practice evidences congressional approval. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (in analyzing legislative history of statutes, it is always appropriate to assume that Congress knows the existing law).

After the Statute's enactment, the Panel evidenced its intent to continue the practice of, where appropriate, dismissing requests for assistance by promulgating regulations incorporating that practice. In this regard, the Panel's current regulations provide that after having conducted an investigation and having given due consideration, the Panel shall either: "[d]ecline to assert jurisdiction in the event it finds that no impasse exists or that there is other good cause for not asserting jurisdiction . . . .;" or assert jurisdiction and take steps to resolve the impasse.[6] 5 C.F.R. § 2471.6(a). This action reflects the Panel's understanding that Congress intended that the authority to decline to assert jurisdiction that the Panel

[6] Section 2471.6(a) was initially promulgated as an interim regulation on July 30, 1979, approximately 6 month's after the effective date of the Statute. 44 Fed. Reg. 44740, 44774 (1979). The rule became final on January 17, 1980. 45 Fed. Reg. 3482, 3521 (1980). Section 2471.6(a) has continued unchanged to the present.

exercised under the Executive Order was to continue under the Statute.[7] *See NTEU v. MSPB*, 743 F.2d 895, 917 (D.C. Cir. 1984) (deference is due agency interpretation where rule promulgated was a continuation of a long-standing practice that Congress evidenced no intent to change and where rule is promulgated more or less contemporaneously with enactment of the statute).

In sum on this point, as demonstrated above, the Panel's action in this case was consistent with a long-standing practice of which Congress was presumably aware and which Congress tacitly approved. Such conduct cannot be considered a violation of a "clear and mandatory" statutory provision. Accordingly, *Leedom* jurisdiction is foreclosed.

c. The Panel's action was consistent with practices approved by the Authority and this Court

Not only has the Panel's action been tacitly approved by Congress, it has expressly been noted approvingly by the Authority and this Court. The Authority

[7] Not only is the Panel's practice of declining to assert jurisdiction published in the Panel's regulations, it has also been noted in the Panel's annual reports to Congress. *See, e.g.*, *Eleventh Annual Report of the Federal Labor Relations Authority* at 37 (Add. F). That Congress has been so informed has been recognized by this Court. *AFGE v. FLRA*, 778 F.2d 850, 844 (D.C. Cir. 1985) (*AFGE*) (citing House Committee on Post Office and Civil Service, 98th Cong., 2d Sess., *Fifth Annual Report of the Federal Labor Relations Authority* 96-97 (Comm. Print 1984).

first examined the Panel's power to determine its jurisdiction in *Interpretation and Guidance*, 11 F.L.R.A. 626, 628-629 (1983).

Rejecting a claim that the Panel's authority pursuant to § 7119 of the Statute to resolve impasses under the Statute is "virtually limitless," the Authority held that the Congress had not granted the Panel the power to resolve underlying duty to bargain questions. *Interpretation and Guidance*, 11 F.L.R.A. at 626-28. Rather, the Authority ruled, these questions must be resolved by the Authority in the first instance. *Id.* at 629. As the Authority discussed, questions concerning the "obligation to bargain" include not only disputes over whether the obligation extends to the matter proposed to be bargained (negotiability disputes), but also whether the agency has an obligation to bargain in the particular circumstances of the case. *Id.* at 628. The former class of disputes are subject to resolution in negotiability appeals to the Authority under § 7117(c) of the Statute. *Id.* The latter class are resolved under the Authority's ULP procedures set forth in § 7118 of the Statute. *Id.*

In *AFGE*, this Court affirmed that the Panel could not resolve questions regarding a party's obligation to bargain and noted the Panel's practice of declining to assert jurisdiction when Athreshold questions exist concerning a party's obligation to bargain over a proposal." 778 F.2d at 854. In addition, the Authority

has furthered clarified the Panel's role in disputes over bargaining obligations. In *Commander, Carswell Air Force Base, Tex.*, 31 F.L.R.A. 620, 624-25 (1988) (*Carswell AFB*), the Authority held that although the Panel cannot resolve legitimate duty to bargain questions, the Panel can assert jurisdiction where a bargaining proposal before it was substantially identical to one found by the Authority to be within the obligation to bargain. Significantly, the Authority noted that the approach adopted in *Carswell AFB*, "preserves the Panel's discretion as to whether or not to assert jurisdiction." *Id.* at 625.

Contrary to suggestions by the unions (Br. 21-22), the Panel in the instant case was being asked to resolve questions concerning the FAA's obligation to bargain. Under the Statute, impasse resolution procedures are simply one aspect of the collective bargaining process. *Interpretation and Guidance*, 11 F.L.R.A. at 628 n. 5. The question raised by the FAA was whether its obligation to bargain under the Statute and other applicable laws extended to participation in the Panel's impasse resolution procedures. Applying the rule first set forth in the *Interpretation and Guidance*, the Panel properly declined to resolve the underlying obligation to bargain questions and, therefore, declined to assert jurisdiction over the case.

Accordingly, for these reasons as well, the circumstances of the instant case do not meet the stringent standards for *Leedom* jurisdiction.

C. The unions have failed to demonstrate that an appropriate forum is unavailable

The unions seek, erroneously, to support their claim to *Leedom* jurisdiction in the district court by arguing that there is no other forum available to vindicate their rights. Contrary to their contentions (Br. 21-23), the unions have failed to demonstrate that Authority review is unavailable to address the matter at issue here.[8] Further, and in any event, the lack of a forum does not establish *Leedom* jurisdiction in the absence of a violation of a clear and mandatory statutory directive.

Initially, the unions incorrectly assert (JA 13) that the district court was an "appropriate forum" to determine whether the bargaining impasses here involved

[8] The district court properly dismissed the concern that the Authority may lack the expertise to interpret the applicable sections of Title 49. As this Court has recognized, the Authority routinely considers the effect of statutes other then its own enabling act when resolving questions concerning the obligation to bargain. *See, e.g.*, *Colo. Nurses Association v. FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988) (*Colorado Nurses*) (Authority required to reconcile provisions of the Statute with those of Title 38 of the United States Code concerning employment of Veterans Administration health care professionals.); *NFFE v. FLRA*, 852 F.2d 1349, 1353 (D.C. Cir. 1988) (Authority considered the "combined effect" of the Statute and the National Guard Technicians Act, 32 U.S.C. § 709, on the employees' right to bargain). This Court has noted, of course, that the Authority does not receive deference when it interprets other statutes. *Colorado Nurses*, 851 F.2d at 1488.

were subject to FSIP procedures. This Court has stressed that claims arising under the Statute must first be raised before the Authority. *Steadman v. Governor, United States Soldiers' and Airmen's Home*, 918 F.2d 963, 966 (D.C. Cir. 1990) (*Steadman*) (holding that district court erred by asserting equitable jurisdiction over dispute arising under the Statute). As the *Steadman* Court stated, seeking relief in the district court prior to attempting to exhaust administrative remedies would "improperly interject[] the federal judiciary, at a premature stage into the [Statute]'s carefully developed system of administrative review." *Id.* It is well settled that "the [Authority] shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *EEOC v. FLRA*, 476 U.S. 19, 23 (1986). The district court, then, properly declined to decide the issues relating to the FAA's duty to bargain.[9]

The unions' failure to seek an administrative remedy is thus a defect in their case. Contrary to the unions' contentions, at least two potential avenues of redress exist. The first potential avenue of redress would be a claim filed under the

[9] An additional factor bears on whether the district court suit was an appropriate forum to resolve the substantive duty to bargain issues. The suit named the Panel and the Authority as defendants, neither of whom had addressed the substantive issue. As noted above (p. 9), the Panel took no position on the statutory interpretation dispute. Conversely, the FAA, which had asserted that the applicable statutes, properly construed, deprived the Panel of jurisdiction, was not a party to the district court suit.

Statute's ULP procedures alleging that the FAA failed to bargain in good faith under the Statute. Section 7116(a)(5) of the Statute makes it a ULP for an agency Ato refuse to consult or negotiate in good faith with a labor organization *as required by* [*the Statute*]." (emphasis added). In that regard, insofar as impasse resolution procedures before the Panel are simply one aspect of the collective bargaining process, the obligation to bargain under the Statute arguably includes participation in such proceedings.

Similarly, the unfair labor practice forum may also be open to the unions were the FAA to implement its proposals. *See, e.g., Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 F.L.R.A. 848, 852 (1999) (concerning an alleged unilateral change in conditions of employment, also a violation of § 7116(a)(5) of the Statute).[10] *Id.* In both of the potential ULP scenarios, the FAA would be free to argue as a defense that it is not legally obligated to submit the impasse to the Panel, citing 49 U.S.C. §§ 106(l) and 40122.

Of course, the discussion of these matters, above, is not intended as a prediction of how the Authority's General Counsel would exercise his/her independent prosecutorial discretion to issue or withhold issuance of a ULP

[10] Indeed, as discussed above (p. 10), NATCA has recently filed a ULP charge in response to the FAA's announced plan to implement the proposals submitted to Congress in 2004.

complaint in any particular future case. The General Counsel's determinations in this regard are not reviewable by either the Authority or the courts. *E.g.*, *Patent Office Pro'l Ass'n v. FLRA*, 128 F.3d 751, 753 (D.C. Cir. 1997). However, the possibility that pursuit of administrative remedies might be unsuccessful does not equate to the absence of a forum for seeking such remedies.

Alternatively, the unions could have submitted a request to resolve the statutory interplay directly to the Authority as a request for the issuance of a General Statement of Policy or Guidance. *See* 5 C.F.R. pt. 2427. Although issuance of such statements is discretionary with the Authority, a factor considered is the availability of other means to address the question presented. 5 C.F.R. § 2427.5 (a).

Finally, even if it could be demonstrated that Authority review of the underlying question concerning the FAA's obligations was not available, *Leedom* jurisdiction remains foreclosed. As this Court has stressed, "it is not the unavailability of a remedy which triggers the [*Leedom*] exception, but the violation of a clear statutory demand." *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 499 (D.C. Cir. 1980). Since there has been no such violation in this case, the district court is without jurisdiction, even in the possible absence of an alternative forum for seeking a remedy.

CONCLUSION

The ruling of the district court should be affirmed.

Respectfully submitted,

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October 2005

CERTIFICATION PURSUANT TO FRAP 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 5989 words.

_____

James F. Blandford

October 3, 2005

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

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO	)	
and	)	
PROFESSIONAL AIRWAYS SYSTEMS SPECIALISTS, AFL-CIO,	)	
Appellants	)	
v.	)	No. 05-5076
FEDERAL SERVICE IMPASSES PANEL	)	
and	)	
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Appellees	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Service Impasses Panel and the Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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