

**71 FLRA No. 190**FEDERAL LABOR RELATIONS AUTHORITY  
WASHINGTON, D.C.

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 UNITED STATES DEPARTMENT OF EDUCATION  
(Petitioner)

and

 UNITED STATES DEPARTMENT OF  
AGRICULTURE  
(Petitioner)

0-PS-44

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 DECISION ON REQUEST FOR GENERAL  
STATEMENT OF POLICY  
OR GUIDANCE

September 30, 2020

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

Pursuant to § 2427.2 of the Authority's Regulations,<sup>1</sup> the Petitioners request that the Authority issue a general statement of policy or guidance regarding the standard that the Authority should use for deciding whether a management-initiated change triggers an agency's duty to bargain under the Federal Service Labor-Management Relations Statute (the Statute).<sup>2</sup> Specifically,

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<sup>1</sup> 5 C.F.R. § 2427.2.

<sup>2</sup> Petitioners' Request (Request) at 1.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> 5 U.S.C. § 7106(a).

<sup>6</sup> *Id.* § 7103(a)(14).

<sup>7</sup> Although the de minimis standard arises most frequently in the context of impact-and-implementation bargaining, we note the Authority formally extended the de minimis exception to changes in matters considered to be substantively negotiable in *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 653-54 (2004) (Member Armendariz concurring; Member Pope dissenting) (adopting the de minimis exception to bargaining obligations where the agency's change does not involve the exercise of a management right), *pet. den. sub nom. Ass'n of Admin. Law Judges v. FLRA*, 397 F.3d 957 (D.C. Cir 2005) (AALJ).

the Petitioners ask the Authority to return to the "clear and meaningful" substantial change standard,<sup>3</sup> because arbitrators, judges, and the Authority have been "inconsist[ent] and ambig[u]ous" in their application of the current "de minimis" standard.<sup>4</sup>

**II. Background**

Agencies are not excused from all bargaining obligations when they exercise management's rights under § 7106(a) of the Statute.<sup>5</sup> For example, when an agency makes a change to a condition of employment, it may be required to bargain over either procedures or appropriate arrangements (sometimes referred to as "impact and implementation bargaining") under § 7106(b). The term, "conditions of employment", is defined by the Statute as "personnel policies, practices, and matters . . . affecting working conditions."<sup>6</sup>

However, not all changes that impact a condition of employment require an agency to bargain. Changes must be of a certain significance to trigger a bargaining obligation.<sup>7</sup> Over the course of its history, the Authority has applied two different standards to determine whether the impact of a change triggers bargaining. At its inception, the Authority applied the standard that had been followed under Executive Order (EO) 11,491.<sup>8</sup> Under that standard, § 7106(b) bargaining was required only when a change had a "substantial impact" on conditions of employment.<sup>9</sup>

In 1985, the Authority adopted a new approach, under which bargaining was required whenever a change to a condition of employment was "more than de

<sup>8</sup> Exec. Order 11,491, *Labor-Management Relations in the Federal Service*, 34 Fed. Reg. 17,605 (Oct. 29, 1969).

<sup>9</sup> See *SSA, Bureau of Hearings and Appeals*, 2 FLRA 238, 239 (1979) ("[The change] did not have any substantial impact on personnel policies, practices, or general working conditions."); *Office of Program Operations, Field Operations, SSA, S.F. Region*, 5 FLRA 333, 333-37 (1981) (*SSA, S.F.*) (Authority adopting ALJ's conclusion that "there should be no doubt that management should not be compelled to negotiate where the exercise of its rights results in an insubstantial impact on bargaining[-]unit employees").

minimis.”<sup>10</sup> While both Members in *Department of HHS, SSA, Region V Chicago, Illinois (SSA Reg. V)* acceded to the new approach, each viewed the standard differently, but neither gave any rationale for why the new approach was required. Member McGinnis embraced the new standard only to the extent that “de minimis change” was defined as a “change which does not have a *substantive* adverse effect upon unit employees” and only when it would not impact management’s ability “to carry out [its] *day-to-day operations*.”<sup>11</sup> He also stated that the bargaining obligations imposed by § 7106(b)(2) and (3) were “*limited* in [their] scope and purpose,” should not be used to “*unduly impede* the exercise of a management right under the Statute,” and cautioned that “[d]ecisions are made daily by every level of management, and *if bargaining were required* on each and every decision, Government would grind to a halt.”<sup>12</sup>

Despite the *limited* scope of the de minimis test anticipated by Member McGinnis (and central to his agreement to adopt it), its application throughout the years has resulted in “vast differences of opinion among arbitrators, judges, and the Authority” as to what matters affect conditions of employment sufficiently to require

bargaining.<sup>13</sup> As a consequence, the answers to this question have been unpredictable.<sup>14</sup> As the Petitioners argue, this unpredictability has created uncertainty that has “negatively impacted labor-management relations.”<sup>15</sup>

### III. Discussion

Because the Authority has effectively extended the bargaining obligation under the de minimis test to conclude that a matter triggers an agency’s duty to bargain whenever management has made any decision, no matter how small or trivial,<sup>16</sup> we agree with Petitioners that the application of the de minimis test has “negatively impacted labor-management relations.”<sup>17</sup> In our view, because the de minimis test has been drained of any determinative meaning, it is now incumbent on us to reexamine and clarify when management-initiated changes have a

<sup>10</sup> *Dep’t of HHS, SSA Region V, Chi., Ill.*, 19 FLRA 827, 829-30 (1985) (*SSA Reg. V*) (Member McGinnis Concurring). The Authority had previously “rejected the ‘substantial impact’ test” and held that “no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining[-]unit employees which is no more than de minimis.” *Dep’t of HHS, SSA, Chi. Region*, 15 FLRA 922, 924 (1984) (*SSA, Chicago*). Importantly, however, *SSA Reg. V* is the decision in which the Authority first discussed “de minimis” as a standard by, for example, setting forth five criteria for assessing whether the impact of a change in employees’ conditions of employment was de minimis. In this two-Member decision, Member McGinnis issued a lengthy concurrence clarifying that he joined Acting Chairman Frazier only to the extent that a “de minimis change” is defined as “a change which does not have a substantive adverse effect upon unit employees.” *SSA Reg. V*, 19 FLRA at 834 (Concurring Opinion of Member McGinnis). Member McGinnis stressed that management was under no obligation to bargain over routine decisions made by management. *Id.*; see also *Dep’t of HHS, SSA*, 24 FLRA 403, 407-08 (1986) (*HHS, SSA*) (reassessing the de minimis criteria set forth in *SSA Reg. V*, rejecting certain criteria, and clarifying that the Authority would “place principal emphasis on . . . the nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment or bargaining[-]unit employees”). We note that even in this 1986, Volume 24 decision, the Authority wrestled with discharging its responsibilities in a manner that would promote meaningful bilateral negotiations, observing that “[i]nterpreting the Statute to require bargaining over every single management action, no matter how slight the impact of that action, does not serve those aims.” *HHS, SSA*, 24 FLRA at 406.

<sup>11</sup> *SSA Reg. V*, 19 FLRA at 834 (Concurring Opinion of Member McGinnis) (emphasis added).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> Request at 3.

<sup>14</sup> Rearranging seating configuration within a single office held to be more than de minimis, *U.S. Dep’t of HHS, SSA, Balt., Md.*, 36 FLRA 655, 688 (1990), but moving an employee to an entirely different work location held not to be more than de minimis. *GSA, Region 9, S.F., Cal.*, 52 FLRA 1107, 1111-12 (1997) (Chairman Segal dissenting). Requiring employee to give up a “second” office while keeping primary office held to be more than de minimis, *U.S. Dep’t of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173-74 (2009), but moving an employee permanently to a vacant office held not to be more than de minimis, *NTEU, Chapter 26*, 66 FLRA 650, 653 (2012). Increasing “supervisory” duties for “lead” guards already performing supervisory duties held to be more than de minimis, *U.S. Dep’t of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002), but reassigning and giving new position description and responsibilities held not to be more than de minimis *U.S. DOL*, 70 FLRA 27, 30-31 (2016) (Member Pizzella dissenting). Requiring employees on travel to itemize length of cell phone calls to be reimbursed held to be more than de minimis, *U.S., DOJ Fed. BOP*, 68 FLRA 728, 732-33 (2015), but changing agency survey to measure “employee engagement” rather than “employee satisfaction” held to be not more than de minimis. *U.S. Dep’t of the Treasury, IRS*, 64 FLRA 972, 977 (2010).

<sup>15</sup> Request at 3.

<sup>16</sup> See *supra* note 14.

<sup>17</sup> Request at 3; see *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 589-90 (2016) (Member Pizzella concurring in part, dissenting in part) (stating that de minimis is equivalent to a “more significant” change while also finding that an agency had a duty to bargain because the change had “the potential to significantly impact the hours worked by” the employees (emphasis added)).

sufficiently significant impact on conditions of employment to require bargaining.<sup>18</sup>

In our view, two questions must be addressed *before* determining whether a change is significant enough to require bargaining. Based on the definition of “conditions of employment” in § 7103(a)(14) of the Statute, the first question is whether there has been an *actual, agency-initiated change* to a “personnel polic[y], practice[], and matter[], whether established by rule, regulation, or otherwise.”<sup>19</sup> Second, the change must “affect[] working conditions.”<sup>20</sup>

Any standard that is used by the Authority (and concomitantly by arbitrators and judges) to determine whether a change is significant enough to warrant bargaining must draw a line that is meaningful and determinative. As noted above, cases adjudicated under the Statute’s predecessor (EO 11,491) applied a substantial impact standard and that standard was originally followed by the Authority.<sup>21</sup> Neither *SSA Reg. V* nor *Department of HHS, SSA* gave any explanation or rationale to support the change.<sup>22</sup> Rather, despite precedent to the contrary,<sup>23</sup> the Authority puzzlingly rejected the substantial impact

standard in *IRS (Dist., Region, Nat’l Office Unit)* by merely stating that it “ha[d] not adopted” the substantial impact standard.<sup>24</sup> Thus, it is difficult to determine whether the change was necessary, let alone based on reasoned decision-making.

We agree with our dissenting colleague that the Statute “encourage[s] collective bargaining between federal employees and [federal agencies].”<sup>25</sup> However, it is equally true that the Statute recognized that collective bargaining in the public sector must be narrower—“to meet the special requirements and needs of the Government” and to be “consistent with the requirement of an effective and efficient Government”<sup>26</sup>—than that permitted in the private sector.<sup>27</sup> It is incongruous, therefore, that the Authority should adopt a standard more lenient than the test applied by the National Labor Relations Board (NLRB), both now and when the Statute was promulgated,<sup>28</sup> to determine whether a change requires bargaining. The NLRB requires bargaining only when a purported change has a “material or substantial impact”<sup>29</sup> on bargaining-unit employees.<sup>30</sup>

<sup>18</sup> We have chosen to forgo solicitation for public comments, as provided by 5 C.F.R. § 2427.4, because we are well aware of the confusion sown by nearly thirty-five years of our caselaw, and we are well equipped to research our bargaining-obligation precedent. Further, we find that it is appropriate to issue this requested general statement of policy because such a pronouncement would immediately promote the purposes of the Statute. See 5 C.F.R. § 2427.5(f).

<sup>19</sup> 5 U.S.C. § 7103(a)(14) (defining “conditions of employment” as: (1) “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise” that (2) “affect[] working conditions”).

<sup>20</sup> *Id.*

<sup>21</sup> See *supra* note 9.

<sup>22</sup> See *HHS, SSA*, 24 FLRA at 407 (“reassess[ing] and modif[y]ing] the recent de minimis standard”).

<sup>23</sup> *SSA, S.F.*, 5 FLRA at 337.

<sup>24</sup> 13 FLRA 366, 366 n.1 (1983) (*IRS*) (internal quotation mark omitted); see also *SSA, Chicago*, 15 FLRA at 924 (adopting the de minimis standard while noting that the Authority rejected the substantial impact standard in *IRS*). While the dissent asserts that “the majority is simply incorrect in suggesting that the Authority has not previously provided a ‘rationale’ for adopting the de minimis standard,” Dissent at 8, we reiterate that the Authority’s prior rejection of the substantial impact standard is specious and did not provide any rationale as to why the substantial impact standard was incorrect. See *SSA, Chicago*, 15 FLRA at 924.

<sup>25</sup> Dissent at 14 (emphasis omitted).

<sup>26</sup> 5 U.S.C. § 7101(b).

<sup>27</sup> See, e.g., *Library of Cong. v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983) (*Library*) (noting that “[t]he scope of collective bargaining is far broader in the private sector” than under the Statute).

<sup>28</sup> See, e.g., *Peerless Food Products, Inc.*, 236 NLRB 161, 161 (1978) (“[N]ot every unilateral change in work, or in this case access, rules constitutes a breach of the bargaining obligation. The change unilaterally imposed must, initially, amount to ‘a material, substantial, and a significant’ one.” (quoting *Rust Craft Broad. of N.Y., Inc.*, 225 NLRB 327, 326 (1976) (citing *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970))).

<sup>29</sup> *YP Adver. & Publ’g LLC*, 366 NLRB No. 89 (2018) (“An employer must bargain with the union over the effects of a management decision . . . unless the decision has no material or substantial impact on the unit employees . . . . Thus, the reduced compensation plan created a ‘material, substantial, and significant’ change” (citing *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986))).

<sup>30</sup> Moreover, we note that both the Authority and the dissent have recently looked to the NLRB’s precedent for guidance on a variety of issues. E.g., *U.S. Dep’t of VA, VA Med. Ctr., Martinsburg, W. Va.*, 67 FLRA 400, 402 (2014) (“Further, both the Authority and the NLRB have held that determining whether employees actually suffered a loss as a result of a ULP is a matter that may be resolved in compliance proceedings.”); *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 225 (2014) (“The [NLRB’s] reasoning . . . is both persuasive and relevant to the question of whether the Authority should make electronic-notice posting a standard remedy for ULPs.”); *U.S. Dep’t of the Treasury, IRS*, 64 FLRA 934, 938 (2010) (“Here, the circumstances of the NLRB precedents discussed above and the instant case are similar because they both involve an employer’s insistence that a union engage in piecemeal bargaining regarding a mandatory subject of bargaining.”). The D.C. Circuit too has “recognized that the structure, role, and functions of the Authority were closely patterned after those of the NLRB and that relevant precedent developed under the [National Labor Relations Act] is therefore due serious consideration.” *Library*, 699 F.2d at 1287 (citations omitted).

Based on the foregoing discussion, we conclude that a “more than de minimis” test is not the appropriate standard to apply to determine whether a purported agency-initiated change is significant enough to impose upon an agency a statutory duty to bargain. By definition, “de minimis” signals triviality. Therefore, it is incongruous to impose a statutory duty to bargain on matters that are barely more than trivial, *but even more so*, when the matters have no substantial impact on conditions of employment. Accordingly, the Authority will not use “more than de minimis” as a test to determine whether an agency has a duty to bargain over changes to conditions of employment.

Because the Authority never provided a rationale for departing from the substantial impact standard (which was applied under EO 11,491) and because the de minimis standard is inconsistent with the purposes of the Statute, the Authority finds that a substantial-impact test is the appropriate means for determining whether a change to a condition of employment is significant enough to trigger a duty to bargain. Specifically, an agency will not be required to bargain over a change to a condition of employment unless the change is determined to have a substantial impact on a condition of employment.<sup>31</sup>

The dissent contends that judicial precedent constrains the Authority to evaluate the significance of management-initiated changes using a de minimis standard, rather than substantial impact.<sup>32</sup> But we think the dissent reads too much into judicial acceptance of the Authority’s previous choice to employ a de minimis standard.<sup>33</sup> As with other areas of the Statute, the Authority is free to change its views, within the bounds of reasonableness. And the Authority’s decision to change its view here finds support in countless judicial decisions affirming the use of standards other than a de minimis exception to determine when matters were of too little importance to merit the law’s notice.<sup>34</sup> Further, the dissent contends that the Authority’s adoption of a substantial-impact test contravenes the judicial teaching

that any changes with an “*appreciable effect* on working conditions” must trigger an agency’s duty to bargain.<sup>35</sup> That contention, however, is surprising because a common synonym for “appreciable” is “substantial.”<sup>36</sup> Thus, our adoption of the substantial-impact test is consistent with relevant judicial teachings and plain language.

As discussed above, however, two questions must be addressed *before* deciding whether a purported change to a condition of employment requires bargaining. First, it must be shown that there is a management-initiated change to a personnel policy, practice, or matter, whether established by rule, regulation, or otherwise. Second, it must then be shown that the change affects working conditions.

To the extent Authority decisions since *SSA Reg. V* have applied a different standard or test, they will no longer be followed.

The Petitioner’s request to issue a general statement of policy or guidance is granted. Our policy and guidance is discussed above.

<sup>31</sup> Consistent with our approach under the now-rejected de minimis standard, we will apply the substantial-impact test where the change at issue concerns matters that are substantively negotiable, as well as in the impact-and-implementation bargaining context. *See supra* note 7.

<sup>32</sup> Dissent at 8-9.

<sup>33</sup> As the Court of Appeals for the District of Columbia Circuit noted in upholding the Authority’s application of a de minimis exception to substantively negotiable matters, the Authority’s rationale relied, in part, on the use of a “substantial impact” exception to bargaining over changes to substantively negotiable matters under EO 11,491. *AALJ*, 397 F.3d at 960. And the court did not fault the Authority’s reliance on the EO-era precedent by insisting, as the dissent does, that the only acceptable way to express that a change lacked the significance necessary to trigger an agency’s duty to bargain was to call it “de minimis.” *See id.*

<sup>34</sup> *E.g.*, *United States v. Thomas*, 612 F.3d 1107, 1128–29 (9th Cir. 2010) (finding implicit requirement of materiality for criminal conviction); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1034 (9th Cir. 2010) (finding implicit requirement of material falsity for an actionable claim under Fair Debt Collection Practices Act); *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) (finding implicit requirement of materiality for claim under False Claims Act).

<sup>35</sup> Dissent at 9-10 (quoting *AFGE, Nat’l Border Patrol Council, AFL-CIO v. FLRA*, 446 F.3d 162, 165 (D.C. Cir. 2006)).

<sup>36</sup> *Substantial*, Theasaurus.com, <https://thesaurus.com/browse/appreciable> (last visited Sept. 10, 2020).

### Member DuBester dissenting:

In § 7105(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), Congress charged the Authority with providing “leadership in establishing policies and guidance related to matters” under the Statute.<sup>1</sup> Today’s decision – in which the majority unjustifiably and significantly narrows the contours of collective bargaining that have guided our parties for decades without so much as a request for their views on the matter – represents the antithesis of that principle.

The majority’s analysis is flawed at every step. It concludes that the de minimis doctrine has “negatively impacted labor-management relations” based solely upon conclusory assertions made by the two agencies that requested the policy statement.<sup>2</sup> It misconstrues precedent setting forth the Authority’s rationale for adopting the de minimis standard. It ignores federal court decisions explaining the basis for the de minimis doctrine and defining the permissible limits of its application. And rather than providing our parties with a “meaningful and determinative” standard to replace the de minimis standard,<sup>3</sup> the majority’s decision will generate confusion and litigation over what this new standard actually means.

At the outset, the majority is simply incorrect in suggesting that the Authority has not previously provided a “rationale” for adopting the de minimis standard.<sup>4</sup> In *Department of HHS, SSA*,<sup>5</sup> the Authority explained that application of a de minimis standard was appropriate to ensure that its “adjudicative processes not be unnecessarily burdened with cases that do not serve to bring meaning and purpose to the Federal labor-management relations program.”<sup>6</sup>

Relying upon the legal basis of the de minimis doctrine – namely, that “the law does not concern itself about trifles”<sup>7</sup> – the Authority justified its application on grounds that “[i]nterpreting the Statute to require bargaining over every single management action, *no matter how slight the impact of that action*,” does not serve the aim of “promot[ing] meaningful bilateral

negotiations.”<sup>8</sup> But even in applying the exception, the Authority cautioned that “[t]he limited scope of Federal sector bargaining caused by external laws, rules, and regulations also demands that the Authority *not impose further limitations* unless they are based on *clear statutory authority* and are buttressed by *sound policy considerations*.”<sup>9</sup>

The Authority’s adoption of the de minimis doctrine was later affirmed by the U.S. Circuit Court of Appeals for the District of Columbia (D.C. Circuit) in *Ass’n of Administrative Law Judges v. FLRA (AALJ)*.<sup>10</sup> In *AALJ*, the court concluded that the Authority, like other administrative agencies, was authorized to apply a de minimis exception “not [as] an ability to depart from the statute [they are charged with enforcing], but rather [as] a tool to be used in implementing the legislative design.”<sup>11</sup> As the court previously explained in a decision favorably cited in *AALJ*, the de minimis doctrine arises from the principle that “[c]ourts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort.”<sup>12</sup>

But because the de minimis exception is derived from implied statutory authority, courts also place significant limits on how agencies may apply it. For instance, in *AALJ*, the court explained that the exception is only properly applied “when the burdens of regulation yield a gain of *trivial or no value*.”<sup>13</sup> In another case interpreting the de minimis exception, the court cautioned that an agency’s authority to apply it “does *not* extend to ‘a situation where the regulatory function does provide benefits, in the sense of furthering the regulatory objectives, *but the agency concludes that the acknowledged benefits are exceeded by the costs*.’”<sup>14</sup> As the court noted, “the reason for this limitation should be clear”:

While agencies may safely be assumed to have discretion to create exceptions at the margins of a regulatory field, they are not thereby empowered to weigh the costs and benefits of regulation at every turn; agencies surely do not have

<sup>1</sup> 5 U.S.C. § 7105(a)(1).

<sup>2</sup> Majority at 4 & n.15 (citing Request at 3).

<sup>3</sup> *Id.* at 5.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> 24 FLRA 403 (1986).

<sup>6</sup> *Id.* at 406.

<sup>7</sup> *Id.* at 407 n.2 (quoting Black’s Law Dictionary 388 (5th Ed. 1979)).

<sup>8</sup> *Id.* at 406 (emphasis added).

<sup>9</sup> *Id.* at 406-07 (emphasis added).

<sup>10</sup> 397 F.3d 957 (D.C. Cir. 2005).

<sup>11</sup> *Id.* at 962 (quoting *Env’tl. Def. Fund, Inc. v. EPA*, 82 F.3d 451, 466 (D.C. Cir. 1996) (*EDF*)).

<sup>12</sup> *Ala. Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1979).

<sup>13</sup> *AALJ*, 397 F.3d at 962 (emphasis added) (quoting *EDF*, 82 F.3d at 466). In *EDF*, the court explained that application of the exception would be appropriate where enforcement of a statute pursuant to its literal terms would “lead to absurd or futile results, or where failure to allow a de minimis exception is contrary to the primary legislative goal.” *EDF*, 82 F.3d at 466 (quoting *State of Ohio v. EPA*, 997 F.2d 1520, 1535 (D.C. Cir. 1993)).

<sup>14</sup> *Pub. Citizen v. Fed. Trade Comm’n*, 869 F.2d 1541, 1557 (D.C. Cir. 1989) (quoting *Ala. Power Co.*, 636 F.2d at 360-61) (emphasis in original).

inherent authority to second-guess Congress' calculations.<sup>15</sup>

Consistent with these principles, the court concluded in *AALJ* that the Authority could find that a “de minimis change is not a proper subject of bargaining” if the change “*has no appreciable effect* upon working conditions.”<sup>16</sup> Applying this standard, the court concluded that the agency was not required to bargain over the matter in question because it involved “a truly insignificant change” to the employees’ conditions of employment.<sup>17</sup> And, on this basis, it affirmed “the Authority’s interpretation of the Statute not to require bargaining over trivia.”<sup>18</sup>

But even while affirming the Authority’s application of the de minimis exception under these circumstances, the court emphasized that the exception has “narrow limits.”<sup>19</sup> And it specifically cautioned that the Authority “will bear the burden before this court of showing that any particular application of the de minimis exception is reasonable.”<sup>20</sup>

In a subsequent decision *rejecting* the Authority’s application of the exception, the court reiterated that “any policy change having an *appreciable effect* on working conditions cannot find shelter in the de minimis exception.”<sup>21</sup> Notably, in reaching this conclusion, the court reiterated that the de minimis exception should only be applied to exclude trivial changes in conditions of employment from the duty to bargain.<sup>22</sup> The court also emphasized that these “[a]ppreciable effects may surface not only through actual past effects but also through *likely future effects*.”<sup>23</sup>

With little apparent concern for this clear judicial guidance, the majority’s decision jettisons the Authority’s long-standing de minimis standard in favor of a standard that will relieve agencies from bargaining over a unilateral change to conditions of employment unless the change is determined to have a “substantial impact” on those

conditions of employment.<sup>24</sup> The majority does not further define the contours of this new standard. And because its decision was issued outside the context of an actual case or controversy, it is difficult to determine the degree to which the new standard will absolve agencies of their statutory duty to bargain.

It is clear, however, that if applied according to its terms, this new standard will far exceed the permissible boundaries of the de minimis exception. The word “substantial” is commonly defined to mean “considerable in quantity; significantly great.”<sup>25</sup> On the other hand, the word “appreciable” – the term used by the court in construing the limits of the de minimis exception – is commonly defined as “capable of being perceived or measured.”<sup>26</sup> Under any plausible interpretation of these terms, the majority’s expansion of our existing de minimis exception falls well outside the “narrow limits” within which the Authority may legitimately apply the de minimis doctrine.<sup>27</sup>

Despite this obvious conflict, the majority has failed to set forth a single credible basis for reversing our long-standing precedent on this matter. As noted, its conclusion that the existing de minimis standard has “negatively impacted” labor-management relations is based solely upon conclusory assertions made by the agencies that *requested* the policy guidance. And as a direct consequence of its decision to “forgo solicitation for public comments,”<sup>28</sup> these assumptions were untested by the labor-relations community.

Undeterred, the majority opines that revision of the de minimis standard is necessary because it has resulted in “unpredictable” applications.<sup>29</sup> In support of this assertion, the majority cites a number of decisions in which the Authority – unlike in today’s decision – applied the standard to an actual dispute. But the cases cited by the majority simply reflect the inherently fact-dependent nature of the de minimis exception. The majority fails to

<sup>15</sup> *Id.*

<sup>16</sup> *AALJ*, 397 F.3d at 962 (emphasis added).

<sup>17</sup> *Id.* at 959.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 963.

<sup>20</sup> *Id.*

<sup>21</sup> *AFGE, Nat’l Border Patrol Council, AFL-CIO v. FLRA*, 446 F.3d 162, 165 (D.C. Cir. 2006) (*AFGE*) (emphasis added).

<sup>22</sup> *Id.* at 166 (rejecting the Authority’s application of the exception because it “would fundamentally change the nature” of the exception “which heretofore relieved the employer over any duty to bargain over ‘trivia’” (quoting *AALJ*, 397 F.3d at 959)); *see also id.* at 167 (concluding that the de minimis exception did not apply because the change “almost certainly rises above the level of trivia”).

<sup>23</sup> *Id.* at 165 (emphasis added). Although not entirely clear, the majority’s revision of the de minimis standard does not appear to adopt this principle.

<sup>24</sup> Majority at 6. The majority indicates that it will apply this new standard “where the change at issue concerns matters that are substantively negotiable, as well as in the impact-and-implementation bargaining context.” *Id.* at 6 n.31.

<sup>25</sup> *Substantial*, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/substantial> (last visited September 29, 2020).

<sup>26</sup> *Appreciable*, Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/appreciable> (last visited September 29, 2020); *see also Appreciable*, Black’s Law Dictionary (11th ed. 2019) (defining “appreciable” to mean “[c]apable of being measured or perceived”).

<sup>27</sup> *AALJ*, 397 F.3d at 963.

<sup>28</sup> Majority at 4 n.18.

<sup>29</sup> *Id.* at 4 & n.14.

explain how adoption of its new standard will produce decisions that are any less fact-dependent than those applying the current standard. In reality, adopting the majority's standard will not reduce the complexity of litigation concerning what constitutes a sufficiently significant change to trigger bargaining.

And on this point, it is worth noting that the *AALJ* decision found "little indication" that the de minimis exception as applied to "impact bargaining" had resulted in "significant confusion."<sup>30</sup> In fact, the court expressed confidence that if the Authority ever found that its administration of the de minimis exception became "more burdensome than would be the alternative of bargaining over trivia," the Authority would "conclude the interests of 'effective and efficient Government'" would be "better served by *dispensing* with the exception."<sup>31</sup> Of course, that is the opposite of what the majority has done today.

And rather than attempting to harmonize its expansion of the de minimis standard with the court decisions that have directly addressed its inherent limits, the majority simply concludes that the dissent is "read[ing] too much" into these decisions.<sup>32</sup> It then blithely asserts that its adoption of a substantial impact test "is consistent with relevant judicial teaching and [the] plain language" of those decisions.<sup>33</sup> Neither assertion is true.

Regarding the first assertion, the majority claims that its decision "finds support in countless judicial decisions affirming the use of standards other than a de minimis exception to determine when matters were of too little importance to merit the law's notice."<sup>34</sup> In support of this claim, it cites two decisions in which courts have found that "materiality" is an element of proving violations of statutes prohibiting false statements, and a third decision which found that "materiality" was a required element for conviction under a statute governing criminal obstruction.<sup>35</sup>

These decisions, which are based upon the particular language and legislative purpose of the statutes they are construing, are certainly relevant to the resolution of claims arising under those statutes. But they have

*nothing whatsoever* to do with the judicial recognition and application of the de minimis doctrine, which – as explained – is specifically premised upon the principle that administrative agencies are not required to enforce the literal terms of a statute if doing so would only yield a gain of "trivial or no value."<sup>36</sup>

Regarding the second assertion, the majority concludes that its "substantial impact" standard falls within the limits of the de minimis doctrine as defined by the D.C. Circuit because "a common synonym for 'appreciable' is 'substantial.'"<sup>37</sup> There are several problems with this conclusion.

First, as one court has explained, "a thesaurus is not a dictionary" because "[i]t does not purport to define words but instead suggests synonyms and antonyms."<sup>38</sup> And "[a] synonym is not a definition because words that are similar can, and often do, have distinct meanings."<sup>39</sup> But whatever interpretative value a thesaurus synonym might provide in this matter is diminished, if not eliminated, because the synonym for "appreciable" upon which the majority relies is squarely inconsistent with its *actual* definition – namely, "capable of being perceived or measured."<sup>40</sup> And any lingering doubt on this question is surely resolved by the D.C. Circuit's repeated explanations that the de minimis exception should only be applied to excuse bargaining over trivial matters.<sup>41</sup>

Moreover, the majority's suggestion that a return to the "substantial impact" standard is necessary because it was "the standard that had been followed under Executive Order 11,491" (EO 11,491) is also unfounded.<sup>42</sup> The legislative history of the Statute "makes clear" that Congress intended the Statute to "expand the scope of bargaining that had existed" under EO 11,491 and Federal Labor Relations Council precedent interpreting that order.<sup>43</sup> Indeed, EO 11,491 "did not require 'collective bargaining' at all," and, instead, "merely required agencies and unions to 'meet . . . and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate.'"<sup>44</sup>

<sup>30</sup> *AALJ*, 397 F.3d at 963.

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> Majority at 6.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 7 n.34.

<sup>36</sup> *AALJ*, 397 F.3d at 962 (quoting *EDF*, 82 F.3d at 466).

<sup>37</sup> Majority at 7.

<sup>38</sup> *Price v. Time, Inc.*, 416 F.3d 1327, 1336-37 (11th Cir. 2005).

<sup>39</sup> *Id.* at 1337.

<sup>40</sup> *Supra* note 26.

<sup>41</sup> *See, e.g., AFGE*, 446 F.3d at 166; *id.* at 167; *AALJ*, 397 F.3d at 959; *id.* at 963.

<sup>42</sup> Majority at 2 (citing EO 11,491, *Labor-Management Relations in the Federal Service* 34 Fed. Reg. 17,605 (Oct. 29, 1969)).

<sup>43</sup> *N.Y. Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 508 (2d. Cir. 1985), *abrogated on other grounds FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (citing 124 Cong. Rec. 29,198 (1978) (remarks of Rep. Ford), *reprinted in* Subcommittee on Postal Personnel & Modernization of the Comm. on Post Office & Civil Serv., 96th Cong., 1st Sess., Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978, at 954).

<sup>44</sup> *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 657 (2004) (*SSA, OHA*) (Dissenting Opinion of Member Pope) (quoting EO 11,491 § 11).

The majority's reliance upon the National Labor Relations Board's (Board or NLRB) adoption of a "substantial impact" standard is similarly defective. While decisions interpreting the National Labor Relations Act (NLRA) may be relevant to our interpretation of the Statute, "the degree of relevance of private case law to public sector labor relations [varies] greatly depending upon the particular statutory provisions and legal concepts at issue."<sup>45</sup>

Here, the Board's adoption of a "substantial impact" standard bears no relevance to the Authority's de minimis standard because the standards are governed "by different statutory provisions and by different policy considerations."<sup>46</sup> This follows from the fact that the NLRA does not set forth the precise scope of collective bargaining. And in the "absence of a precise statutory definition of the subjects [of bargaining,] the Board very early assumed the role of defining compulsory bargaining subjects."<sup>47</sup> This, in turn, afforded the Board "significant discretion to define the scope of bargaining."<sup>48</sup>

The same simply cannot be said for the Authority, which is required to adhere to specific statutory definitions in determining the scope of federal-sector collective bargaining. Indeed, it is precisely *because* the Statute limits the scope of bargaining in ways not found in the private sector that the Authority should not hew to the Board's "substantial impact" standard.

As explained by the D.C. Circuit, the Statute "extends the scope of [the] duty to bargain to include all 'conditions of employment,'" while it expressly excludes "several conditions of employment from this bargaining obligation," including matters related to reserved management rights.<sup>49</sup> Thus, the court explained, "[t]he statutory framework . . . may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject *only* to the express statutory exceptions."<sup>50</sup> In other words, "apart from the *express* exceptions, Congress intended the bargaining obligation to be construed broadly."<sup>51</sup>

It is therefore not "incongruous," as the majority asserts, for the Authority to "adopt a standard more lenient than the test applied by the [NLRB] . . . to determine whether a change requires bargaining."<sup>52</sup> To the contrary, the distinct differences between our Statute and the NLRA require precisely this outcome.

Perhaps the most troubling aspect of today's decision, however, is the majority's assertion that its broad expansion of the de minimis exception is necessitated by Congress's direction that the Statute be interpreted in a manner "consistent with the requirement of an effective and efficient Government."<sup>53</sup> The Authority has been cautioned that, in providing an underlying rationale for its decisions, "[i]t is not enough to refer in Delphic tones to inherent authority, or to rely vaguely on [its] general duty to interpret the [S]tatute with government efficiency in mind."<sup>54</sup>

But more importantly, in the same statutory provision upon which the majority relies for this assertion, Congress *also* found that the statutory protection of the right of employees to collectively bargain "safeguards the public interest, contributes to the effective conduct of public business, and facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment."<sup>55</sup> And based upon these findings, Congress explicitly concluded that "collective bargaining in the civil service [is] in the public interest."<sup>56</sup>

Courts have routinely applied these Congressional findings to conclude that the statutory right to collectively bargain should be broadly interpreted. Indeed, in one of the earliest judicial decisions construing our Statute, the D.C. Circuit relied upon "Congress' clear, unequivocal statement that 'collective bargaining in the civil service is in the public interest'" to conclude that "Congress intended the [Statute's] bargaining obligation to be construed broadly."<sup>57</sup> And the court explicitly *rejected* the argument that broadly defining the duty to bargain is "fundamentally" inconsistent with "the requirement of an effective and efficient Government."<sup>58</sup>

<sup>45</sup> *Library of Cong. v. FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983) (*Library*).

<sup>46</sup> *Id.*

<sup>47</sup> *SSA, OHA*, 59 FLRA at 657 (Dissenting Opinion of Member Pope) (quoting Patrick Hardin & John E. Higgins, Jr., *The Developing Labor Law*, Ch. 13.I.B.3 (4th ed. 2001)).

<sup>48</sup> *Id.* at 657-58 (citing *Peerless Food Prods., Inc.*, 236 NLRB 161, 162 (1978) (Concurring Opinion of Member Penello)).

<sup>49</sup> *Library*, 699 F.2d at 1285 (citing 5 U.S.C. §§ 7114(b)(2), 7103(a)(14)).

<sup>50</sup> *Id.* (emphasis added).

<sup>51</sup> *Id.* at 1286 (emphasis added).

<sup>52</sup> Majority at 5-6.

<sup>53</sup> *Id.* at 5 (quoting 5 U.S.C. § 7101(b)).

<sup>54</sup> *AFGE, Local 32, AFL-CIO v. FLRA*, 853 F.2d 986, 993 (D.C. Cir. 1988).

<sup>55</sup> 5 U.S.C. § 7101(a)(1).

<sup>56</sup> *Id.* at § 7101(a).

<sup>57</sup> *Library*, 699 F.2d at 1286 (quoting 5 U.S.C. § 7101(a)); *see also id.* at 1285 (finding that the "statutory framework" imposes "a broadly defined duty to bargain over conditions of employment").

<sup>58</sup> *Id.* at 1289; *see also id.* at 1289-90 ("Frankly, it would seem far more likely to breed frustration, and thus disharmony in the federal sector, were the employees to be completely precluded from negotiating about their employment conditions.").

Subsequently, the court relied upon the same Congressional findings to conclude that “Congress passed the [Statute] to *encourage* collective bargaining between federal employees and their employers.”<sup>59</sup> And it further concluded that “erect[ing] barriers to collective bargaining that are inconsistent with the text and purposes of the [S]tatute” are not “in the public interest” because they “hamper realization of the benefits that such bargaining produces.”<sup>60</sup>

Stated succinctly, Congress premised our Statute upon a finding that collective bargaining promotes the public interest because it *contributes* to the efficient accomplishment of government operations. The majority’s decision not only ignores these findings, but essentially casts collective bargaining as a potential *threat* to an “effective and efficient Government.”<sup>61</sup> And based upon this fundamentally flawed premise, it jettisons decades of carefully-reasoned precedent in favor of a standard that, by any reading, far exceeds the permissible boundaries of the *de minimis* exception.<sup>62</sup>

Given the absence of any plausible rationale for today’s policy statement – and the disingenuous manner in which it was decided – I can only conclude that the majority’s decision is driven solely by its disdain for the role of collective bargaining under our Statute and its relentless effort to marginalize the role of unions in the federal sector.

Accordingly, I dissent.

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<sup>59</sup> *NFFE, FD-1, IAMAW, Local 1442 v. FLRA*, 369 F.3d 548, 554 (D.C. Cir. 2004) (emphasis added).

<sup>60</sup> *Id.* (internal quotation marks omitted).

<sup>61</sup> Majority at 5 (quoting 5 U.S.C. § 7101(b)).

<sup>62</sup> Tellingly, while the court in *AALJ* recognized Congress’s direction that the Statute “be interpreted in a manner consistent with the requirement of an effective and efficient Government,” it never suggested that this provided the Authority the discretion to broadly define the *de minimis* exception. *AALJ*, 397 F.3d at 962 (quoting 5 U.S.C. § 7101(b)) (internal quotation marks omitted). To the contrary, the court indicated that “[e]ffectiveness and efficiency in government can hardly be thought to require bargaining over *truly insignificant* conditions of employment.” *Id.* (emphasis added).