

Member Beck, Dissenting:

The heart of the Majority's reasoning is its conclusion that, when it comes to a party's right to raise the "covered by" defense, "the Statute does not vest such a right in parties by 'unambiguous implication[.]'" Majority at 4 (citation omitted). It is this conclusion that ultimately permits the Majority to hold that the Union's proposals do not affect a "unilateral right" * and that they are therefore within the duty to bargain.

In support of this conclusion, the Majority cites the D.C. Circuit's statement in *Marine Corps Logistics Base* that, "implicit in the statutory purpose is the need to provide the parties to [a collective bargaining] agreement with stability and repose with respect to matters reduced to writing in the agreement." 962 F.2d at 59. The Majority further explains that the "covered by" defense is "rooted in the policies of" promoting collective bargaining and enabling the parties to rely on agreements once they are reached. *Supra* at 5. In other words, the Majority perceives — correctly — that the "covered by" defense is necessary to serve the goals of stability, repose and reliability that are inherent in our statutory scheme. Up to this point, the Majority's reasoning would seem to lead inexorably to the conclusion that the right to raise the "covered by" defense *is* unambiguously implied by the Statute. However, the Majority then pivots, and asserts that the aforementioned considerations "involve the parties' mutual obligation to bargain, not unilateral rights." *Supra* at 5.

What the Majority fails to do is offer any explanation as to how it concludes that the goals of stability, repose and reliability are somehow tantamount to "the mutual obligation to bargain." The "mutual obligation

to bargain" to which the Majority refers arises long before stability, repose and reliability are achieved in the form of a completed collective bargaining agreement. The *obligation* to bargain that our Statute imposes is functionally and conceptually distinct from notions of stability, repose and reliability, which are among the *goals* of collective bargaining.

As the Majority recognizes, the "covered by" defense serves the important statutory goals of stability, repose and reliability. Each party to a collective bargaining relationship possesses the right to exercise this defense unilaterally in response to claims or demands by the counterparty. Consequently, I must conclude that the right to assert the "covered by" defense is a unilateral right unambiguously implied by our Statute, and proposals that would affect a party's ability to raise the defense are therefore outside the duty to bargain.

Accordingly, I dissent.

*. The phrase "unilateral right," as it has been used in some past decisions, is unfortunate terminology that is too easily subject to misunderstanding and misconstruction. As the Majority correctly notes, Majority at 5n.8, a "unilateral right" is not necessarily a right that is enjoyed by only one party and withheld from the counterparty. Rather, a unilateral right is one that a party may exercise unilaterally, even if it is a right that is allocated by our Statute to both parties. For example, in *United States Food and Drug Administration*, 53 FLRA 1269 (1998) (FDA), the Authority determined that a party may insist on negotiating only one collective bargaining agreement, even if the counterparty wishes to negotiate multiple agreements covering multiple locations. *Id.* at 1276. Although this right to insist on negotiating only one CBA is enjoyed by both parties, it was characterized by the Authority as a "unilateral right[.]" *Id.* at 1275. The Authority also referred to the "unilateral right to refuse to tape record bargaining sessions" -- a right that is possessed by both parties but one that may be exercised unilaterally by either party. *Id.* (citing *Sport Air Traffic Controllers Org.*, 52 FLRA 339, 345-46 (1996)). Given how the phrase "unilateral right" was applied in FDA, it plainly refers to the sort of right that is bestowed on both parties but may be exercised by one party acting unilaterally.