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Must a federal agency negotiate with its employees' union over grievance procedures relating to contracting out work?

by Jay E. Grenig

**Department of the Treasury,
Internal Revenue Service**
v.
**Federal Labor Relations Authority and
National Treasury Employees Union**
(Docket No. 88-2123)
Argument Date: Jan. 8, 1990

This case continues an unresolved conflict between labor and management throughout the federal government over a document first issued by the Office of Management and Budget in 1966 and known as Circular No. A-76. Circular No. A-76 declares it to be the "general policy" of the government to rely on "commercial sources" to supply products and services necessary to its operation. It admonishes that agencies are not to "start or carry on" any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source.

A supplement to Circular No. A-76 prescribes methods for calculating the differential between "in-house" and "contract-out" procurements and directs each agency to establish an administrative appeals procedure to resolve questions from directly affected parties relating to cost comparisons.

ISSUE

The Supreme Court is asked to determine whether the Federal Service Labor-Management Relations Statute authorizes negotiated grievance procedures for resolving employee allegations that agency officials did not comply with Office of Management and Budget Circular No. A-76 when deciding to "contract-out" bargaining unit employees' jobs.

FACTS

During negotiations with the Internal Revenue Service, the National Treasury Employees Union submitted the following bargaining proposal: "The Internal Appeals Procedure [for challenging determinations made pursuant to

OMB Circular No. A-76] shall be the parties' grievance and arbitration provisions" of the collective bargaining agreement. The Union also proposed that no outside contract be awarded until all grievance procedures, up to and including arbitration, had been exhausted.

The IRS declined to bargain over the proposal, asserting that the proposal was exempt from the bargaining obligation by virtue of the Federal Service Labor-Management Statute's management rights provision. The Union brought a negotiability appeal before the Federal Labor Relations Authority and the FLRA ruled that the proposal was negotiable. *National Treasury Employees Union and Department of the Treasury, Internal Revenue Service*, 27 FLRA 976 (1987).

The IRS appealed to the U.S. Court of Appeals for the District of Columbia Circuit, which held that the proposal to prohibit the awarding of an outside contract until all grievance procedures including arbitration had been exhausted was not negotiable. The court explained that it did not matter whether the arbitrator ultimately approved or disapproved management's decision to contract-out; the delay alone could compromise the managerial judgment involved in producing products or services necessary to the agency's mission when they are needed.

However, the court of appeals did uphold the FLRA's determination that the Union's proposal to submit contracting-out disputes to arbitration was negotiable. *Department of the Treasury, Internal Revenue Service v. Federal Labor Relations Authority*, 862 F.2d 880 (D.C. Cir. 1988). The IRS petitioned the Supreme Court for a writ of certiorari.

BACKGROUND AND SIGNIFICANCE

The Supreme Court has agreed to hear two cases this term involving the scope of the duty to bargain under the Federal Service Labor-Management Statute. (See also *Fort Stewart Schools v. FLRA*, Docket No. 89-65.) The Federal Service Labor-Management Statute governs labor relations between federal agencies and their employees. The statute requires management officials of federal agencies to bargain with their employees' unions regarding conditions of employment. However, it also exempts certain enumerated management rights from this duty to negotiate. The reserved management rights specifically include management's "authority... in accordance with applicable laws... to make determinations with respect to contracting out."

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In addition to setting forth a duty to bargain, the statute requires that all collective bargaining agreements in the federal sector provide procedures for the settlement of grievances. These collective bargaining agreements must provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration, which may be invoked by either the union or the federal agency.

In 1982 the FLRA held that a union proposal requiring the EEOC to comply with Circular No. A-76 was subject to the statutory duty to bargain. This decision was upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *EEOC v. FLRA*, 744 F.2d 842 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986). The court of appeals held that the proposal would not impair management's statutorily reserved right to contract out; it would merely render the grievance procedure the mechanism by which union members could make known their displeasure with a contracting-out decision and ask for relief.

Two other circuits have concluded that the D.C. Circuit's decision in *EEOC* was incorrect. *U.S. Department of Health & Human Services v. FLRA*, 844 F.2d 1087 (4th Cir. 1987); *Defense Language Institute v. FLRA*, 767 F.2d 1398 (9th Cir. 1985), *cert. dismissed*, 476 U.S. 1110 (1986).

The Supreme Court is now asked to consider whether Circular No. A-76 is an "applicable law" that qualifies management's reserved right to contract out. The Court is also asked to determine whether a complaint alleging a failure to adhere to Circular No. A-76 is within the meaning of the statute's definition of "grievance" as "any claim violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment."

ARGUMENTS

For the Department of the Treasury, Internal Revenue Service (Counsel of Record, Harriet S. Shapiro, Assistant to the Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 633-2217):

1. The court of appeals' decision that the Union's proposals were negotiable is inconsistent with the management rights provisions of the Federal Service Labor-Management Statute.
2. Circular No. A-76 is not an "applicable law" under the statute, but simply a management tool—a statement of Executive Branch policy that does not have the force and effect of law.
3. The application of Circular No. A-76 turns largely on the exercise of managerial judgment and discretion so that the courts have consistently recognized that the Circular provides no judicially enforceable rights.
4. Subjecting agency contracting-out decisions under Circular No. A-76 to arbitral review would improperly intrude upon management's reserved right and would increase delays and uncertainty.
5. Both the context of the statutory provisions and the policy behind them demand that, if Circular No. A-76

is not an "applicable law" that qualifies management's reserved authority under the statute, the Circular is not a "law, rule, or regulation" within the statute's definition of "grievance."

For the Federal Labor Relations Authority (Counsel of Record, William E. Persina, Acting Solicitor, Federal Labor Relations Authority, 500 C Street, SW, Washington, DC 20424; telephone (202) 382-0781):

1. The Federal Service Labor-Management Relations Statute requires the parties to have a negotiated grievance procedure to resolve alleged violations of a "law, rule, or regulation affecting conditions of employment."
2. Although nonbargainable, management's discretion to contract out must be exercised within the parameters of applicable legal requirements and is subject to the obligation to bargain over procedures and appropriate arrangements.
3. Arbitrators are authorized to consider only grievances challenging a decision to contract out on the basis that the agency failed to comply with mandatory and non-discretionary provisions.
4. Circular No. A-76 is a "law, rule, or regulation" within the meaning of the statute, such that grievances concerning its alleged violation fall within the statutorily authorized scope of the negotiated grievance procedure.

For the National Treasury Employees Union (Counsel of Record, Gregory O'Duden, Director of Litigation, 1730 K Street, NW, #1100, Washington, DC 20006; telephone (202) 785-4411):

1. The government's arguments are inconsistent with the Federal Service Labor-Management Statute, because they undermine the statutorily prescribed grievance procedure and create a destructive tension between that procedure and the management rights clause.
2. Disputes concerning an agency's compliance with Circular No. A-76 are included in the statutorily prescribed grievance procedure, since contracting out decisions have a direct impact upon the continued employment of federal employees, and since the Circular is an "applicable law" within the meaning of the Federal Service Labor-Management Statute.
3. Rules that are issued for purposes of internal executive branch management are not exempt from the grievance procedure.
4. The statute's management rights clause does not preclude employees from challenging violations of the Circular through the statutorily prescribed grievance procedure.

AMICUS BRIEFS

In Support of the Federal Labor Relations Authority and the National Treasury Employees Union

The AFL-CIO.