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Homeland Security and Labor-Management Relations: *NTEU v. Chertoff*

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Summary

The Homeland Security Act of 2002 provides the Secretary of Homeland Security and the Director of the Office of Personnel Management ("OPM") with the authority to develop a separate human resources management system for the employees of the Department of Homeland Security ("DHS"). On February 1, 2005, final regulations to define and implement the new system were published in the *Federal Register*. Shortly after the regulations were issued, the National Treasury Employees Union ("NTEU") and several other labor organizations filed a lawsuit, alleging that DHS and OPM exceeded the authority granted to the agencies under the Homeland Security Act. On August 12, 2005, a U.S. District Court for the District of Columbia enjoined parts of the new regulations involving labor-management relations and the Merit Systems Protection Board in *NTEU v. Chertoff*. The district court on October 7, 2005, denied a motion by DHS and OPM to modify its injunction of labor-management relations regulations. On June 27, 2006, the U.S. Court of Appeals for the District of Columbia Circuit affirmed some conclusions of the district court, reversed others, and remanded the case to the district court for further proceedings consistent with its opinion. This report examines the opinions of the district court and court of appeals.

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The Homeland Security Act of 2002[1] provides the Secretary of Homeland Security and the Director of the Office of Personnel Management ("OPM") with the authority to develop a separate human resources management system for the employees of the Department of Homeland Security ("DHS"). On February 1, 2005, final regulations to define and implement the new system were published in the *Federal Register*.[2] Shortly after the regulations were issued, the National Treasury Employees Union ("NTEU") and several other labor organizations filed a lawsuit, alleging that DHS and OPM exceeded the authority granted to the agencies under the Homeland Security Act. On August 12, 2005, a U.S. District Court for the District of Columbia enjoined parts of the new regulations in *NTEU v. Chertoff*.[3] The district court on October 7, 2005, denied a motion from DHS and OPM to modify its injunction relating to labor-management relations.[4] The U.S. Court of Appeals for the District of Columbia Circuit on June 27, 2006, affirmed some holdings of the district court and reversed others.[5] This report examines the opinions of the district court and court of appeals.

At issue in *NTEU* were those sections of the new regulations that involve labor-management relations and the role of the Merit Systems Protection Board ("MSPB"), the agency that hears and adjudicates appeals by federal employees who have been subject to adverse personnel actions. Other sections of the new regulations, including those concerned with pay administration and performance management, were not challenged.

In its initial decision, the district court concluded that subpart E of the new regulations, which includes all of the labor-management sections, and section 9701.706(k)(6), which restricts the MSPB's ability to modify penalties imposed by DHS, must be enjoined. The court maintained:

> As currently proposed, those provisions would violate certain specific requirements established by Congress in the [Homeland Security Act]. They would not 'ensure collective bargaining,' would fundamentally alter [Federal

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[1] P.L. 107-296, 116 Stat. 2135 (2002) (codified in relevant part at 5 U.S.C. §§ 9701 *et seq.*).

[2] Department of Homeland Security Human Resources Management System, 70 Fed. Reg. 5272 (Feb. 1, 2005) (to be codified at 5 C.F.R. pt. 9701).

[3] 385 F.Supp.2d 1 (D.D.C. 2005).

[4] *NTEU v. Chertoff*, 394 F.Supp.2d 137 (D.D.C. 2005) ("*NTEU II*").

[5] *NTEU v. Chertoff*, 452 F.3d 839 (D.C. Cir. 2006).

> Labor Relations Authority] jurisdiction . . . and would create an appeal process at MSPB that is not 'fair.'[6]

The remaining sections of this report review the decisions of the district court and the D.C. Circuit in greater detail.

Collective Bargaining

Although the Homeland Security Act grants the Secretary of Homeland Security and the Director of OPM broad authority to develop a new personnel system, it indicates that the system must meet certain conditions. For example, the new system has to be "flexible," "contemporary," and may "not waive, modify, or otherwise affect" various provisions of law.[7] The Act identifies specific chapters of title 5, U.S. Code, that may not be waived by the new system.[8] While chapter 71 of such title, which governs collective bargaining and labor-management relations for most federal employees, is not identified and thus can be waived by the new system, the Act includes other language that preserves some form of collective bargaining for DHS employees:

> [The new system] shall . . . ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them, subject to any exclusion from coverage or limitation on negotiability established by law.[9]

Congress did not define the term "collective bargaining" for purposes of the Act, and the unions maintained that the personnel system established by the agencies lacked the core elements of collective bargaining.[10]

The new regulations recognize that "each employee has the right to form, join, or assist any labor organization."[11] At the same time, however, the regulations limit the subjects that may be negotiated by the parties, restrict the powers and duties of the Federal Labor Relations Authority ("FLRA"), and create a Homeland Security Labor Relations Board ("HSLRB") that will assume many of the FLRA's functions.[12]

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[6] *NTEU*, 385 F.Supp.2d at 38.

[7] *See* 5 U.S.C. § 9701(b)(1)-(3).

[8] *See* 5 U.S.C. § 9701(c)(2).

[9] 5 U.S.C. § 9701(b)(4).

[10] *See NTEU*, 385 F.Supp.2d at 25 ("The Plaintiff Unions argue that every system of collective bargaining ever established by Congress has had three critical components: (1) a requirement that labor and management bargain in good faith over conditions of employment for purposes of reaching an agreement; (2) a provision that the agreements reached as a result of bargaining are binding on both parties equally; and (3) the establishment of a neutral forum for resolving disputes.").

[11] 5 C.F.R. § 9701.507.

[12] *See* CRS Report RL32255, Homeland Security: Final Regulations for the Department of Homeland Security Human Resources Management System (Subpart E) Compared With

(continued...)

In addition, the regulations allow DHS to issue binding agency-wide opinions without regard to the terms of a collective bargaining agreement, and permit DHS managers to "take whatever other actions may be necessary to carry out the Department's mission."[13] In their complaint, the unions argued: "[U]nder the new regime, management possesses an unlimited unilateral right to issue agency-wide directives to take what few matters remain negotiable off the bargaining table, and/or to invalidate provisions of existing collective bargaining agreements."[14] Nevertheless, in response to the unions' concerns, DHS and OPM insisted that the regulations are necessary to ensure "maximum flexibility and accountability."[15]

The Administrative Procedure Act permits a reviewing court to set aside formal agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[16] In general, a court will review such action in accordance with a two-part test established by the U.S. Supreme Court in *Chevron U.S.A. v. N.R.D.C.*[17] First, the court will consider whether Congress has spoken directly to the precise question at issue. If Congress has spoken directly to the question at issue, the court "must give effect to the unambiguously expressed intent of Congress."[18] Second, the court will analyze the reasonableness of the agency's interpretation.

If Congress has failed to speak directly to the question at issue, and the statute is silent or ambiguous, the court will attempt to determine if the agency's actions are based on a permissible construction of the statute.[19] If the agency's interpretation is reasonable, the court may not substitute its own construction of the statutory provision. However, deference is not owed to the agency's actions if they construe a statute in a way that is contrary to congressional intent or that frustrates congressional policy.[20]

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[12] (...continued)
Current Law (comparing the final regulations with existing law).

[13] 5 C.F.R. §§ 9701.509(b), 9701.511(a)(2).

[14] Complaint for Declaratory and Injunctive Relief at 3, *NTEU v. Chertoff*, 385 F.Supp.2d 1 (D.D.C. 2005).

[15] 70 Fed. Reg. at 5273.

[16] 5 U.S.C. § 706(2)(A).

[17] 467 U.S. 837 (1984).

[18] *Id*. at 843.

[19] *Chevron*, 467 U.S. at 842-43.

[20] *See Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

Citing congressional understanding of what constitutes "collective bargaining," as evidenced by the Federal Sector Labor Management Relations Act,[21] and general contract principles, the district court determined that the absence of an unmistakably enforceable contract rendered the regulations impermissible:

> The *sine qua non* of good-faith bargaining is an enforceable contract once the parties reach agreement. The HR System does not lead to enforceable contracts and thus fails to comply with the directions of Congress to ensure employee collective-bargaining rights.
>
> The Regulations fail because any collective bargaining negotiations pursuant to its terms are illusory: the Secretary retains numerous avenues by which s/he can unilaterally declare contract terms null and void, without prior notice to the Unions or employees and without bargaining or recourse.[22]

The district court concluded that a system of "collective bargaining" that permits the unilateral repudiation of agreements by one party is not collective bargaining at all.[23] Consequently, the district court maintained that no *Chevron* deference was due to DHS and OPM because Congress spoke directly to the issue of collective bargaining and directed the agencies to ensure collective bargaining for DHS employees.

The D.C. Circuit, citing the definition of "collective bargaining" in the Federal Sector Labor Management Relations Act, affirmed the district court's holding that the regulations failed to comply with the mandate in the Homeland Security Act, codified at 5 U.S.C. § 9701(b)(4), that the new personnel system must "ensure that employees may . . . bargain collectively."[24] It agreed with the district court that the Department's attempt to reserve to itself the right unilaterally to abrogate lawfully negotiated and executed agreements was plainly unlawful because abrogating them would nullify the Act's specific guarantee of collective bargaining rights.[25] The D.C. Circuit emphasized that its holding related only to the power of DHS to abrogate collectively bargained contracts that were executed pursuant to the human resources management system; its holding did "nothing to undercut the Department's authority to . . . supersede labor contracts inherited from the previously independent agencies that now constitute DHS."[26]

Although the district court found that the new regulations failed to adequately allow collective bargaining, it nevertheless maintained that limitations on the subjects that could be bargained were permissible. Acknowledging the broad authority granted to DHS and OPM by the Homeland Security Act, the court reasoned that the

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[21] 5 U.S.C. §§ 7101 *et seq.*

[22] *NTEU*, 385 F.Supp.2d at 25.

[23] *Id.* at 30.

[24] *NTEU*, 452 F.3d at 844.

[25] *Id. See also* 452 F.3d at 858-60.

[26] *NTEU*, 452 F.3d at 860.

agencies were entitled to *Chevron* deference for their decisions that identified subjects for collective bargaining.[27]

The D.C. Circuit reversed this holding insofar as it limited the scope of bargaining to employee-specific personnel matters such as those that affect discipline, discharge, and promotion.[28] The district court erred, the D.C. Circuit maintained, by giving precedence to the Department's authority granted in the Homeland Security Act to modify the provisions of chapter 71 of title 5 of the U.S. Code, which relates to labor-management relations, over the command in another provision of the Act codified in 5 U.S.C. § 9701(b)(4), which ensures the right of employees to bargain collectively.[29] Because the final regulations render meaningless "collective bargaining," which the Homeland Security Act mandates that the Department must observe, the appeals court held that they are not entitled to deference.[30]

Homeland Security Labor Relations Board

The new regulations provide for the creation of a new entity, the HSLRB, that will adjudicate disputes concerning the scope of bargaining and the duty to bargain in good faith; conduct hearings and resolve complaints of specified unfair labor practices; resolve exceptions to arbitration awards; and resolve negotiation impasses.[31] The unions argued that the HSLRB was "inconsistent with the traditional concept of 'collective bargaining.'"[32] In particular, the unions questioned the independence of the HSLRB, whose members are to be selected by the Secretary of Homeland Security.

The district court concluded that the unions' concerns with the HSLRB were based on policy choices made by DHS and OPM, rather than the agencies' failure to appropriately implement the Homeland Security Act. The district court deferred to the agencies and their ability to establish a new personnel system that includes a new labor relations entity:

> [B]y deliberately and clearly giving the Agencies the authority to establish an HR system for DHS without reference to the FLRA or any other adjudicative system for labor-management disputes, Congress left it to the Executive Branch to formulate that system.[33]

Unlike the district court, the D.C. Circuit did not defer to the judgment of DHS and OPM, but ruled that adjudicating the matter of the HSLRB at this time would be

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[27] *NTEU*, 385 F.Supp.2d at 29.

[28] *NTEU*, 452 F.3d at 844, 861.

[29] *Id.* at 861.

[30] *Id.* at 864-65.

[31] *See* 5 C.F.R. § 9701.509.

[32] *NTEU*, 385 F.Supp.2d at 29.

[33] *Id.*

premature. It said that a decision on the Board's role would have to wait until DHS revises its Board regulation in light of the decisions of the district court and the court of appeals relating to the role of the FLRA.[34]

Role of the Federal Labor Relations Authority

The new regulations provide that the FLRA may conduct hearings and resolve complaints of specified unfair labor practices.[35] In addition, the regulations require the FLRA to review HSLRB decisions and issue final decisions.[36] Under the regulations, the FLRA must defer to the findings of fact and interpretations made by the HSLRB and sustain the HSLRB's decision unless the party requesting review shows that the decision was either (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) based on error in applying the HSLRB's procedures; or (3) unsupported by substantial evidence.[37]

The unions argued that DHS and OPM exceeded their statutory authority by dictating to the FLRA, an independent agency, the "kinds of disputes it will or will not adjudicate and how it will do so."[38] The unions emphasized that the FLRA's jurisdiction is established by statute, and that its role and functions are not subject to the control of other executive branch agencies. Moreover, Congress did not confer additional jurisdiction upon the FLRA in the Homeland Security Act.

Although the district court acknowledged that DHS and OPM could have waived the application of chapter 71 of title 5, U.S. Code, and were not required to use the FLRA, it concluded that the agencies could not "commandeer the resources of an independent agency" and "fundamentally" transform its functions absent a clearer indication of congressional intent.[39] The district court found that the regulations impose an appellate role that is foreign to the FLRA, and require a deferential standard of review that is at odds with the FLRA's status as an independent agency.[40] The district court noted that an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear.[41] Here, the district court maintained that the regulations imposed changes to the FLRA that exceeded the agencies' statutory authority under the Homeland Security Act to "modify" or "affect" chapter 71 of title 5, U.S. Code.

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[34] *NTEU*, 452 F.3d at 865.

[35] 70 Fed. Reg. at 5335 (§ 9701.510). The FLRA may conduct hearings and resolve complaints of unfair labor practices under 5 C.F.R. § 9701.517(a)(1)-(4), (b)(1)-(4).

[36] *Id.*

[37] 5 C.F.R. § 9701.508(h)(1).

[38] Complaint, *supra* note 14 at 14.

[39] *NTEU*, 385 F.Supp.2d at 32.

[40] *Id.*

[41] *Id.*

The D.C. Circuit affirmed this holding, saying that nothing in the Homeland Security Act authorizes the Department to regulate the jurisdiction and activities of an independent agency.[42]

Merit Systems Protection Board Mitigation of Penalties

The unions challenged the authority of DHS and OPM in jointly issuing final DHS regulations to change the standard by which the MSPB might mitigate the penalty for employee misconduct. One of those regulations, codified at 5 C.F.R. § 9701.706(k)(6), provides that the Board may not modify a penalty imposed by DHS unless it is "so disproportionate to the basis for the action as to be wholly without justification" and that when a penalty is mitigated "the maximum justifiable penalty must be applied."

The unions asserted that this regulation violates 5 U.S.C. § 9701(f)(2)(C), a provision of the Homeland Security Act, which provides that any regulations issued pursuant to section 9701 "shall modify procedures under chapter 77 [of title 5 of the U.S. Code entitled "Appeals"] only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department."[43]

DHS and OPM countered that they were not constrained by the requirement in section 9701(f)(2) because, they alleged, the mitigation standard is not derived from chapter 77 of title 5, U.S. Code, which relates to appeals, but instead from chapter 75 "Adverse Actions," which states that "an agency may take an adverse action against an employee 'only for such cause as will promote the efficiency of the [civil] service.'"[44] They argued in the alternative that modifying the mitigation authority of the Board fully comports with statutory requirements as interpreted by the court that reviews MSPB decisions, the Court of Appeals for the Federal Circuit.[45]

The district court rejected both contentions. The district court found that the mitigation standard is derived from chapter 77, the appeals chapter of title 5, not chapter 75, the adverse actions chapter, and, consequently, that any modification of chapter 77 procedures, to comply with section 9701(f)(2)(C) of title 5, had to be "fair, efficient, and expeditious." The district court also observed that the contention by DHS and OPM that the modification of the Board's mitigation authority fully meets statutory requirements as interpreted by the Court of Appeals for the Federal Circuit was seriously flawed and that the cases cited by these agencies did not support this contention.

The district court said that the mitigation standard in the final regulation violates the congressional requirement in 5 U.S.C. § 9701(f)(2)(C) because that standard modifies chapter 77 procedures in a manner that is not fair. The district court

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[42] *NTEU,* 452 F.3d at 865-66.

[43] *NTEU,* 385 F.Supp.2d at 32.

[44] *Id.* at 32-33.

[45] *Id.* at 33-34.

indicated that when Congress insisted on fairness, it did not intend that DHS could discipline or discharge employees without effective recourse. The mitigation standard in the DHS-OPM regulation that limits the ability of MSPB to mitigate a penalty only found to be "so disproportionate" as to be "wholly without justification" would render MSPB review "almost a nullity."[46] Because the decision of the MSPB rather than the decision of the employing agency is subject to judicial review, the court maintained that this mitigation standard "could effectively insulate DHS adverse actions from review."[47]

The district court said that this standard "fails to measure up to the sense of Congress that 'employees of the Department are entitled to fair treatment in any appeals,' 5 U.S.C. § 9701(f)(1)(A), or Congress's express requirement that any [modifications to chapter 77] procedures 'further the fair . . . resolution of matters involving the employees of the Department.'"[48] The district court concluded that because the agencies failed to apply the plain meaning of section 9701(f) of title 5, U.S. Code, section 9701.706 of their regulations was not entitled to *Chevron* deference and enjoined it.[49]

This holding was reversed by the D.C. Circuit. Adjudicating the fairness of the Board's penalty mitigation procedures would be premature at this time, *i.e.*, the matter was not ripe for review. A better time to review the fairness of these procedures would be after the DHS has disciplined an employee and the penalty has been appealed.[50]

Merit Systems Protection Board Procedures

The unions alleged that DHS and OPM exceeded authority granted by the Homeland Security Act at section 9701(f)(2) of title 5, U.S. Code, when they modified the Board's procedural regulations for DHS employees. They challenged, specifically, the following regulations: section 9701.706(k)(1), which shortens the time for appeal to the Board; section 9701(k)(3), which limits discovery in MSPB appeals; and section 9701.706(k)(5), which authorizes a summary judgment procedure when there are no facts in dispute.

The district court found that Congress in section 9701(f)(2) of title 5, U.S. Code, clearly authorized DHS and OPM to waive or modify provisions "within the purview of chapter 77"of title 5 "Appeals," and that there could be no doubt that the agencies acted within their authority when they adopted these procedural regulations. Their interpretation of the section was found to be reasonable and consistent with the statutory purpose and, consequently, was entitled to deference under step two of the *Chevron* case.

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[46] *Id.* at 35.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *NTEU,* 452 F.3d at 855.

The unions also asserted that DHS and OPM exceeded authority granted in the Homeland Security Act when they assigned an appellate role to MSPB to review decisions of the Mandatory Review Panel in 5 C.F.R. § 9701.707(c). This regulation provides that an employee who is discharged for a Mandatory Removal Offense will receive advance notice, an opportunity to respond, and a written decision from DHS.[51] The DHS decision would be subject to review by the Mandatory Review Panel, which would conduct a hearing and issue a written decision binding on DHS.

Appeals from Panel decisions could be reviewed by the Board, whose decision would be based on the record without a second hearing, and would be appealable to the Court of Appeals for the Federal Circuit pursuant to section 7703 of title 5, U.S. Code.[52] Under 5 C.F.R. § 9701.707(c)(1)(I), the Board would sustain a Panel decision unless the Board finds it to be "arbitrary and capricious." The Board is more likely to sustain a Panel decision under the arbitrary and capricious standard than under the one that the Board uses in a typical removal case in which an agency must establish its case by a "preponderance of evidence."[53] The district court concluded that DHS and OPM were entitled to *Chevron* deference in their interpretation of the broad authority granted by the Homeland Security Act to issue this regulation. The district court granted the motion by the agencies to dismiss the count relating to MSPB procedures and denied the plaintiff's motion for summary judgment on it.[54]

The D.C. Circuit affirmed this holding; it found that the Homeland Security Act clearly authorizes DHS to modify procedures of the MSPB.[55]

Scope of the Injunction

The district court in August of 2005 enjoined in its entirety subpart E of the final regulations, which relate to labor-management relations. The court found that they failed to ensure that employees may bargain collectively and improperly assigned an intermediate role of administrative appellate review to the Federal Labor Relations Authority.[56] The district court also enjoined a regulation in another subpart which limited the authority of the MSPB to mitigate penalties on the ground that this limitation did not comply with a provision of the Homeland Security Act which required that procedures must be fair.[57] The district court invited DHS and OPM, the agencies that issued the regulations, to propose a revised order that would enjoin some portions of subpart E without enjoining the entire subpart.[58]

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[51] *See* 5 C.F.R. § 9701.607(b).

[52] *See* 5 C.F.R. § 9701.707(c).

[53] *See* 5 U.S.C. § 7701.

[54] *NTEU*, 385 F. Supp.2d at 37.

[55] *NTEU*, 452 F.3d at 27.

[56] *NTEU*, 385 F.Supp.2d at 30, 32, 38.

[57] *Id.* at 35, 38.

[58] *Id.* at 38.

Responding to this invitation, the agencies subsequently filed a motion in the district court to alter or amend the court's judgment and asked the court to limit its injunction of subsection E to five discrete sections of the subpart. They did not request modification of the injunction relating to the other subpart. The district court declined to alter or amend its injunction of all of subpart E, finding that the provisions that the agencies proposed to separate were too closely intertwined with those that were not.[59]

DHS and OPM appealed the district court's denial of their motion to modify the injunction; they asserted that enjoining subpart E, the labor-management subpart, in its entirety swept too broadly. The D.C. Circuit rejected this assertion because its decision invalidated a broader portion of subpart E than did the district court. The district court had upheld limitations on the subjects of collective bargaining, but the D.C. Circuit reversed that holding on the ground that the Homeland Security Act does not authorize limiting them. The appeals court said that fashioning the scope of the injunction should be left to the parties and the district court when the case is remanded.

[59] *NTEU II*, 394 F.Supp.2d at 145.