Status Quo Ante Remedies under the Federal Service Labor-Management Relations Statute

Joseph William Bell
An important achievement of the Carter Administration was the enactment of the Civil Service Reform Act of 1978 (CSRA).\(^1\) Title VII of the CSRA, headed "Federal Service Labor-Management Relations" (Statute),\(^2\) governs collective bargaining in the federal sector. For more than two million federal employees,\(^3\) the Statute "establish[ed] for the first time a statutory framework for the relationship between employee representatives and Government managers with the opportunity for third-party resolution of disputes between the parties."\(^4\)

Before the Statute, labor relations in the federal sector were governed by Executive Order No. 11,491 (Executive Order),\(^5\) as amended.\(^6\) The major organizational change effected by the Statute was the creation of an independent agency called the Federal Labor Relations Authority (Authority).\(^7\) The Authority performs essentially the same functions that are performed by the National Labor Relations Board in the private sector, and has the power to "conduct hearings and resolve..."
complaints of unfair labor practices." The functions now performed by the Authority were performed under the Executive Order by the Assistant Secretary of Labor for Labor-Management Relations and the Federal Labor Relations Council (Council).

The Authority differs from its predecessor, the Council, in three important respects. First, its members, appointed by the President, are not permitted to hold another office or position in the federal government. Second, the Statute provides for a General Counsel of the Authority to investigate and prosecute complaints of unfair labor practices. Third, the Authority is vested with the power to seek enforcement of its orders in the United States Courts of Appeals. Moreover, the Authority is not bound by any precedent established by the Council.

The Authority's duty to resolve complaints of unfair labor practices includes a duty to grant appropriate relief upon determining that an unfair labor practice has been committed. Section 7118(a)(7) of the Statute requires the Authority to impose certain enumerated remedies or take "such other action as will carry out the purpose of this chapter." This Note focuses on the Authority's use of status quo ante rem-

8. Id. § 7105(a)(2)(G).
9. Section 6(a)(4) of Executive Order No. 11,491 provided for the resolution of unfair labor practice complaints by the Assistant Secretary. The Federal Labor Relations Council was established by § 4(a) and consisted of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget. Section 4(c)(1) empowered the Council to hear appeals from decisions of the Assistant Secretary. See 3 C.F.R. 861, 864-65 (1966-1970 Comp.).
11. Id. § 7104(f). No such position existed within the Council or the Department of Labor under the Executive Order.
12. Id. § 7123(b).
13. The legislative history makes this clear. In a discussion of the management rights provisions of the Statute, Representative William Ford of Michigan, one of the drafters of the legislation, stated:
Accepting the House's clear intention that [Council] decisions interpreting the Executive order's management rights provisions were to be ignored, even where the order's language is identical to that in title VII, was an essential threshold to resolution of the differences on this title and the entire bill. (This allowed the conferees to adopt language without the interpretive gloss added by the Council.) We were able to agree on inclusion of sometimes identical language because we fully intended that the new Authority will start its interpretation of that language with a clean slate.
124 CONG. REC. 38,715 (1978), reprinted in LEGISLATIVE HISTORY, supra note 4, at 993.
14. 5 U.S.C. § 7118(a)(7) (1982). See also 5 C.F.R. § 2423.29(b) (1983). The general power under subsection 7118(a)(7)(D) is comparable to that vested in the National Labor Relations Board under § 10(c) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1976). However, "remedies for employer violations under title VII . . . will not be limited by the caseload development under the National Labor Relations Act governing private employers." 124 CONG. REC. 38,714 (statement of Rep. Ford), reprinted in LEGISLATIVE HISTORY, supra note 4, at 993.
edies for violations of section 7116(a)(5), the provision making it an unfair labor practice for a government agency "to refuse to consult or negotiate in good faith with a labor organization" as required by the Statute.15

A status quo ante remedy takes the form of an order requiring a return to the situation that existed before the commission of the unfair labor practice.16 In the case of a refusal to bargain, the order rescinds changes in working conditions that were implemented unilaterally by management. The purpose of the order is to insure that meaningful bargaining occurs.17 A mere prospective bargaining order often proves to be an inadequate remedy, as management has a vested interest in the change it has already implemented. Genuine bargaining under such circumstances is unlikely.18 The status quo ante remedy takes on added importance in the federal sector, where the scope of bargaining is already severely curtailed.19

After a brief discussion of the cases involving status quo ante remedies decided by the Assistant Secretary and the Council under the Executive Order,20 this Note discusses the impact of the Statute on the duty to bargain and the availability of status quo ante remedies.21 The decisions of the Authority regarding the appropriateness of status quo ante remedies are then examined.22

The Note concludes that the Authority has failed to exercise its power to order a return to the status quo

---


16. See generally D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 207-10 (1976). With the exception of reinstatement with back pay, status quo ante remedies are not among those remedies enumerated in § 7118(a)(7).

17. The Supreme Court approved a status quo ante remedy for this reason in Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). In that case, the employer acted unilaterally in contracting out the maintenance work in its manufacturing plant without negotiating with the exclusive bargaining representative of the company's maintenance employees. Id. at 206. After finding "contracting out" to be a mandatory subject of collective bargaining, the NLRB ordered the company to resume its maintenance operations and to reinstate the employees with back pay. Id. at 215. Chief Justice Warren wrote for the Court:

There has been no showing that the Board's order restoring the status quo ante to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company.

Id. at 216.


19. In contrast to the private sector, the scope of bargaining in the federal sector does not include wages and benefits, which are matters provided for by statute. See infra note 42.

20. See infra notes 23-38 & accompanying text.

21. See infra notes 39-61 & accompanying text.

22. See infra notes 62-172 & accompanying text.
to the extent envisioned by Congress when agency managers fail to bargain in good faith. By disregarding congressional intent, the Authority is encouraging the unilateral agency decisionmaking that the Statute was designed to prevent.

Cases Decided by the Assistant Secretary and the Council Under the Executive Order

Section 11(a) of the Executive Order dealt with the obligation to bargain "with respect to personnel policies and practices and matters affecting working conditions." This obligation was limited by section 11(b), specifying subjects about which management was not required to bargain, and section 12(b), specifying subjects that were completely non-negotiable.

Under the Executive Order cases, if a right existed to negotiate the substance of a proposal under section 11(a), a status quo ante remedy generally would be appropriate if the agency refused to bargain. With mandatory bargaining subjects, the union had the right to negotiate the agency's decision whether or not to act. Thus, a finding that an agency's decision was unlawful generally required a return to the status quo ante as the only adequate remedy.

24. Id. at 868-69.
25. Id. at 869-70. All of the rights retained by agency managers under § 12(b) were carried forward into the Statute with one exception—the right "to maintain the efficiency of the Government operations entrusted to them." This provision of the Executive Order often acted as a bar to negotiations that now are proper under the Statute. See also infra notes 27, 31, 38.
26. See, e.g., United States Customs Serv., Region VI and National Treasury Employees Union and NTEU Chapter 143, A/SLMR No. 1161, 8 A/SLMR 1305 (Dec. 13, 1978); Louisiana Army Nat'l Guard and NFPE Locals 1708 and 1737, A/SLMR No. 1117, 8 A/SLMR 1019 (Sept. 6, 1978); IRS, Southwest Region and National Treasury Employees Union and NTEU Chapter 91, A/SLMR No. 858, 7 A/SLMR 524 (June 28, 1977). For a similar result in a case arising under the Statute, see United States Customs Serv., Region V and National Treasury Employees Union and NTEU Chapter 168, 9 FLRA No. 15, 9 FLRA 116 (June 16, 1982) (discussed infra at note 28 and text accompanying notes 121-31).
27. Under 5 U.S.C. § 7114(a)(4) (1982), [T]he duty to negotiate requires an agency to do more than merely consider what the union might present; also, the agency may not act unilaterally. After the agency has notified the union of a proposed change in conditions of employment, the agency must, upon request, meet with the union at reasonable times and convenient places, as frequently as is necessary, in an effort to reach a mutual, bilateral agreement.

H. ROBINSON, supra note 6, at 39 (footnote omitted). The description of the section 7114(a)(4) duty to negotiate is identical to the obligation that existed under [§ 11(a) of] Executive Order 11,491, as amended. Id. at 10 n.5.
28. See IRS, Southwest Region and National Treasury Employees Union and NTEU Chapter 91, A/SLMR No. 858, 7 A/SLMR 524 (June 28, 1977), in which the Assistant Secretary stated:
scinded the unilateral management action and in no way infringed on management rights because section 11(a) topics were fully negotiable.29

In contrast, management decisions not to negotiate on permissive subjects under section 11(b) of the Order as well as decisions to act or not to act on matters reserved under section 12(b) were absolutely non-negotiable.30 While section 11(b) did not preclude negotiation of the procedures and arrangements to be used in connection with certain management decisions, the Assistant Secretary took the position that a failure to negotiate procedures and arrangements did not require a status quo ante remedy.32

[Where, as here, there has been a unilateral change in terms and conditions of employment in violation of Section 19(a)(1) and (6) involving a subject matter within the purview of Section 11(a) of the Order, generally it will effectuate the purposes and policies of the Order to require that the Respondent re-establish the terms and conditions of employment in existence prior to the unilateral change and maintain such terms and conditions during the period in which the parties are engaged in bargaining with respect to the proposed change. Id. at 525 n.1. The same rationale applies in cases arising under the Statute. In United States Customs Service, Region V and National Treasury Employees Union and NTEU Chapter 168, 9 FLRA No. 15, 9 FLRA 116 (June 16, 1982), the Authority said:

Noting particularly that the Respondent failed to meet its duty under the Statute to bargain with NTEU concerning the decision to change the starting and quitting times of the first shift or tour of duty, the Authority finds that an order directing reinstatement of the previously existing starting and quitting times of the first shift, upon request of NTEU, and requiring the parties to negotiate concerning the starting and quitting times thereof, is necessary to effectuate the purposes and policies of the Statute. Id. at 119 (emphasis in original).

29. No infringement on management rights is possible in this situation because management had no right to act unilaterally.

30. "The emphasis is on the reservation of management authority to decide and act on these matters, and . . . no right accorded to the union under the [Executive] Order may be permitted to interfere with that authority." Veterans Admin. Indep. Serv. Employees Union and Veterans Admin. Research Hosp., FLRC No. 71A-31, 1 FLRC 227, 230 (Nov. 22, 1972).

31. The last sentence of § 11(b) provided that "this does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change." In contrast, under the Statute all management decisions are subject to the requirement of negotiating procedures and arrangements. See 5 U.S.C. §§ 7106(b)(2)-(3) (1982).

32. See IRS and National Treasury Employees Union and NTEU Chapter 49, A/SLMR No. 909, 7 A/SLMR 844 (Sept. 23, 1977). The Assistant Secretary found that the agency had committed an unfair labor practice by failing to provide the union an opportunity to bargain about the impact and implementation of an agency decision to reinstitute security restrictions in its Classification Section. Id. at 844. The administrative law judge would have rescinded the unilateral action, but the Assistant Secretary held this to be inappropriate when the decision was non-negotiable under § 11(b) of the Order:

[Where, as here, there has been an improper failure to meet and confer over the impact and implementation of a management decision which is not within the ambit of Section 11(a) of the Order, generally it will not effectuate the purposes and policies of the Order to require a return to the status quo ante as part of the remedial order.
The Council's approach was illustrated in *National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms*. The case involved the negotiability of a union proposal to stay disciplinary suspensions of employees pending completion of the parties' negotiated grievance and arbitration process. The Council ruled the proposal non-negotiable because it would so unreasonably delay the exercise of management's reserved right to discipline employees as to negate the right. The Council relied on two prior decisions that it said made clear that "management's authority under section 12(b)(2) includes the right to act in the matters reserved under that section without unreasonable delay."

The rationale of the Council cases regarding remedies can be summarized as follows. Granting a *status quo ante* remedy for failure to negotiate the impact and implementation of a management decision not within the scope of section 11(a) would delay an agency's exercise of its undisputed management rights. Undue delays would negate these rights and therefore were not permitted. Accordingly, a *status quo ante* remedy could not achieve the purposes and policies of the Executive Order.

**The Impact of the Statute**

Against this background, Congress enacted the Statute as title VII of the CSRA. The purposes and policies of the Statute differ from those of the Order in that the Statute, unlike the Order, explicitly encourages collective bargaining and is intended to ensure the use of

---

*Id.* at 845 n.2 (citing with approval IRS and National Treasury Employees Union and NTEU Chapter 47, A/SLMR No. 841, 7 A/SLMR 418 (May 16, 1977)).

33. FLRC No. 77A-58, 6 FLRC 176 (Jan. 27, 1978).

34. *Id.* at 177.

35. *Id.* at 180.


37. National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms, 6 FLRC at 180.

38. *See infra* notes 44-45 & accompanying text. The impact and implementation provisions of the Statute are similar to those found in § 11(b) of the Executive Order.

39. The difference is evident in their respective statements of policy. The Preamble to Executive Order 11,491 provides:

WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and

WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and
status quo ante remedies in a broader range of cases.

The Duty to Bargain Under the Statute

The Statute articulates the scope of the duty to bargain in some detail, and provides that an agency has a duty to bargain over "any condition of employment." This duty is limited by the management rights provisions, which specify those subjects about which the parties...
cannot bargain and those subjects negotiable only at the election of agency management. Substantive decisions not reserved to management are fully negotiable.

There is, however, an exception to the management rights exception. Even when a substantive decision is reserved to management, subsections (b)(2) and (b)(3) of section 7106 require that management negotiate the procedures to be used in implementing the decision and the impact of the decision on bargaining unit employees. This is known as impact and implementation bargaining. For example, a decision by agency management to lay off a number of employees would be non-negotiable under section 7106(a)(2)(A). However, the agency must negotiate with the employees' representative the procedures to be

42. Id. § 7106. The management rights section provides:
(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
   (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
   (2) in accordance with applicable laws—
      (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
      (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
      (C) with respect to filling positions, to make selections for appointments from—
         (i) among properly ranked and certified candidates for promotion; or
         (ii) any other appropriate source; and
      (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
   (1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
   (2) procedures which management officials of the agency will observe in exercising any authority under this section; or
   (3) appropriate arrangement for employees adversely affected by the exercise of any authority under this section by such management officials.

The area of mandatory bargaining is further limited by the definition of "conditions of employment" at § 7103(a)(14). The definition excludes wages and benefits, which are "matters specifically provided for by Federal Statute." See generally H. Robinson, supra note 6, at 11-38.

43. These are decisions that come within the duty to negotiate about "any condition of employment" that do not fall within any of the limiting provisions.


45. The nearest private sector equivalent is the concept of effects bargaining, as developed by the case law. See, e.g., Ozark Trailers, Inc., 161 N.L.R.B. 561 (1966) (requiring meaningful bargaining over the effects of a decision to close a plant).
used in informing employees of the layoff and in selecting the employees to be laid off. When management acts on its decision without negotiating impact and implementation, it violates section 7116(a)(5). It is in this situation that the appropriateness of a status quo ante remedy is unsettled.

Under both the Executive Order and the Statute, a status quo ante remedy has been deemed appropriate in almost every case involving a unilateral change in working conditions in which the union had the right to negotiate the substance of management's decision. However, in those cases arising under the Executive Order in which the right to bargain was limited to impact and implementation, the Assistant Secretary consistently rejected the unions' argument that only a status quo ante remedy could effectuate the purpose of the Executive Order. The Statute's legislative history, on the other hand, indicates that Congress intended that the status quo ante remedy be used in impact and implementation cases.

Legislative History of the Statute

The Statute represents a compromise between those members of Congress who wanted to provide greater flexibility for government managers and those who insisted on greater safeguards for the rights of employees and employee representatives.

In general, the Senate took the position that title VII should simply codify the approach that had developed under the Executive Order. In contrast, the House worked out a substitute amendment embodying a new approach to labor-management relations in the federal sector. The Conference Committee specifically rejected a provision of the Senate bill providing that negotiation on procedures should not unreasonably delay the exercise of management's reserved rights so as to negate those rights. Indeed, "[the] House conferees were able, after meetings even longer than nor-

46. See cases cited in notes 74, 83, 90, and 114.
47. See supra note 26.
48. See, e.g., IRS and National Treasury Employees Union and NTEU Chapter 49, A/SLMR No. 909, 7 A/SLMR 844 (Sept. 23, 1977); IRS and National Treasury Employees Union and NTEU Chapter 47, A/SLMR No. 841, 7 A/SLMR 418 (May 16, 1977). These cases are representative of the Assistant Secretary's views, although occasionally he found a status quo ante remedy to be appropriate "[u]nder the particular circumstances of [the] case." See IRS and National Treasury Employees Union and Chapter 6 NTEU, A/SLMR No. 995, 8 A/SLMR 243, 244 n.1 (Mar. 2, 1978).
49. "[T]his new labor-management program with expanded rights for employees and their representatives was an essential response to the expansion of management prerogatives in other titles of the bill." 124 CONG. REC. 38,713 (statement of Rep. Ford), reprinted in LEGISLATIVE HISTORY, supra note 4, at 990.
51. The "Udall Compromise" is discussed at 124 CONG. REC. 38,713 (statement of Rep. Ford), reprinted in LEGISLATIVE HISTORY, supra note 4, at 989-90.
52. Section 7218(b) of Senate bill 2640 had provided:
mal, to persuade the Senate that the new beginning for Federal labor relations mandated by the House bill was necessary, justified and fully appropriate.\textsuperscript{53}

The legislative history indicates the importance of impact and implementation negotiations and the role of the \textit{status quo ante} remedy when agencies refuse to negotiate procedures. The remarks of one of the Statute's authors, Congressman William Ford,\textsuperscript{54} concerning the management rights provisions are especially instructive:

\begin{quote}
[T]he entire structure of the management rights clause is markedly different from that in the [Executive Order]. By the clear language of the bill itself, any exercise of enumerated management rights is conditioned upon the full negotiation of arrangements regarding adverse effects and procedures. As is made clear by the absence of the phrase "at the election of the agency," procedures and arrangements are mandatory subjects of collective bargaining. Only after this obligation has been completely fulfilled is an agency allowed to assert that a retained management right bars negotiations over a particular proposal. This approach was dictated both by the [Council's] history of interpretive abuse of the order's management rights provisions and
\end{quote}

\begin{verbatim}
(b) Nothing in subsection (a) of this section shall preclude the parties from negotiating—
(1) procedures which management will observe in exercising its authority to decide or act in matters reserved under such subsection; or
(2) appropriate arrangements for employees adversely affected by the impact of management's exercising its authority to decide or act in matters reserved under such subsection, except that such negotiations shall not unreasonably delay the exercise of management of its authority to decide or act, and such procedures and arrangements shall be consistent with the provisions of any law or regulation described in 7215(c) of this title, and shall not have the effect of negating the authority reserved under subsection (a).
\end{verbatim}


However, as the Joint Explanatory Statement of the Committee on Conference in the Conference Report explained:

3. Senate section 7218(b) provides that negotiations on procedures governing the exercise of authority reserved to management shall not unreasonably delay the exercise by management of its authority to act on such matters. Any negotiations on procedures governing matters otherwise reserved to agency discretion by subsection (a) may not have the effect of actually negating the authority as reserved to the agency by subsection (a). There are no comparable House provisions.

The conference report deletes these provisions. However, the conferees wish to emphasize that negotiations on such procedures should not be conducted in a way that prevents the agency from acting at all, or in such a way that prevents the exclusive representative from negotiating fully on procedures . . . .


54. After Representative Ford introduced this legislation in the House, he served as a manager of the bill for the Conference Committee. His statement was made the day after President Carter signed the bill into law.
by logic itself.\textsuperscript{55} Indeed, the managers of the Conference Committee stated that, in negotiating impact and implementation, "the parties may indirectly do what the [management rights] section prohibits them from doing directly."\textsuperscript{56}

Further distinguishing the Statute from the Order, Representative Ford noted that "one of the agencies’ lawful prerogatives is no longer the right to declare a bargaining proposal non-negotiable because it is barred by the management right to maintain efficiency. The conference committee, by removing one barrier to effective collective bargaining, increases the likelihood that the Government’s efficiency will be enhanced."\textsuperscript{57}

Later in his statement, Mr. Ford discussed remedies:

Remedies, among others, which we fully expect will be applied as when they will carry out the purpose of Title VII include, tailored to the violation, status quo ante orders . . . ; make whole orders . . . ; and orders requiring, at the unions election, retroactive execution of an agreement . . . . In addition, the conference report specifically [allows], where Title VII’s purpose would be served, remedial orders like that banned under the National Labor Relations Act as interpreted by the Supreme Court in \textit{H. K. Porter Co. v. NLRB} . . . . \textsuperscript{58}

Moreover, Representative Ford emphasized that "[t]he mandatory nature of the remedial power in section 7118 on unfair labor practices is intentional and is in marked contrast to the general discretionary authority given the FLRA under section 7105(g)(3)."\textsuperscript{59}

These passages, taken in conjunction with the requirement of section 7118(a)(7) that the Authority issue a remedy appropriate to the violation,\textsuperscript{60} suggest that a status quo ante order should be the rule rather than the exception when an agency commits a section 7116(a)(5) violation, including a failure to bargain over impact and implementation. It is apparent that Congress was aware that a bargaining order, without a return to the status quo ante, merely reimposes the same obligation that has just been violated, leaving the agency with the advantage of having already implemented its decision unilaterally.

\textsuperscript{55} 124 CONG. REC. 38,715 (statement of Rep. Ford), \textit{reprinted in Legislative History, supra} note 4, at 993.


\textsuperscript{57} 124 CONG. REC. 38,713 (statement of Rep. Ford), \textit{reprinted in Legislative History, supra} note 4, at 990.

\textsuperscript{58} \textit{Id.} at 38,713-14 (statement of Rep. Ford), \textit{reprinted in Legislative History, supra} note 4, at 992-93 (citations omitted). \textit{See H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970)} (held that the NLRB lacked power to impose a substantive term on the parties or to compel agreement).

\textsuperscript{59} 124 CONG. REC. 38,714 (statement of Rep. Ford), \textit{reprinted in Legislative History, supra} note 4, at 992.

\textsuperscript{60} 5 U.S.C. § 7118(a)(7) (1982) provides for the authority to take "such . . . action as will carry out the purpose of this Chapter."
Bargaining under such circumstances will take place, but the agency has gained by its unfair labor practice insofar as union proposals are given short shrift because the procedures already in place would be costly to change. If such unilateral action is not rescinded, agencies will have an incentive to "implement now and bargain later." Congress intended to hold the federal government to a higher standard, calling on the Authority to vigorously enforce the Statute "by adopting remedies sufficiently strong and suitable to make real the promise of the title and the obligations of its provisions."#61

**Authority Decisions Concerning the Duty to Bargain and the Appropriateness of Status Quo Ante Remedies**

**The Early Authority Cases**

In its early cases, the Authority explicitly rejected the Council's reasoning regarding bargaining#62 and liberally granted *status quo ante* orders.

In *American Federation of Government Employees Local 1999 and Army-Air Force Exchange Service, Dix-McGuire Exchange*,#63 the Authority was presented with precisely the same issue faced by the Council in *Bureau of Alcohol, Tobacco and Firearms*#64: the negotiability of a union proposal to stay disciplinary suspensions of employees pending completion of the grievance process. Whereas the Council ruled the proposal non-negotiable because it would unreasonably delay the exercise of management's rights, the Authority in *Dix-McGuire Exchange* reached the opposite conclusion, holding the proposal to be negotiable under section 7106(b)(2) of the Statute.#65 The Authority relied on the Statute's legislative history,#66 concluding:

>Congress did not intend subsection (b)(2) to preclude negotiation on a proposal merely because it may impose on management a requirement which would delay implementation of a particular action involving the exercise of a specified management right. Rather, as the Conference Report indicates, subsection (b)(2) is intended to author-

---

#61. 124 CONG. REC. 38,714 (statement of Rep. Ford), reprinted in LEGISLATIVE HISTORY, supra note 4, at 992. Representative Ford went on to call attention to the irony inherent in employer violations "where the employer is always an official violating the policy of his employer—the Government—against unfair labor practices." *Id.* at 38,715, reprinted in LEGISLATIVE HISTORY, supra note 4, at 993.


#63. 2 FLRA No. 16, 2 FLRA 152 (Nov. 29, 1979).

#64. See supra note 33 & accompanying text.


#66. *Id.* at 154-58.
ize an exclusive representative to negotiate fully on procedures, except to the extent that such negotiations would prevent agency management from acting at all. That is, insofar as it is consistent with the right of management ultimately to act, Congress intended the parties to work out their differences with regard to procedures in negotiations.\(^6\)

In *Defense Logistics Agency and American Federation of Government Employees*,\(^6\)\(^8\) the agency refused to honor its employees' valid authorizations to have union dues automatically withheld from their pay checks and forwarded to the union.\(^6\)\(^9\) The administrative law judge\(^7\)\(^0\) believed that a reimbursement order, requiring the agency to reimburse the union in an amount equal to the dues the union would have received, would be a reasonable way of restoring the *status quo ante*.\(^7\)\(^1\) The judge concluded, however, that he lacked the power to grant such a remedy.\(^7\)\(^2\) Yet the Authority included the remedy in its final order, agreeing with the administrative law judge that “such remedy would be compensatory rather than punitive. Moreover, such remedy would be an effective deterrent to similar violations by agencies in the future.”\(^7\)\(^3\)

\(^6\) Id. at 155-56 (emphasis added). The reasoning in this case was followed in National Treasury Employees Union and United States Customs Serv., Region VIII, 2 FLRA No. 30, 2 FLRA 254 (Dec. 13, 1979).

\(^6\)\(^8\) 5 FLRA No. 21, 5 FLRA 126 (Feb. 12, 1981).

\(^6\)\(^9\) Id. at 128-29. Such withholdings are allowed by § 7115. The agency's failure to comply with this provision was found to violate § 7116(a)(1)(5) and (8). Id. at 128-29.

\(^7\)\(^0\) Under the Statute, the role of the administrative law judge is “to determine whether any person has engaged in or is engaging in an unfair labor practice.” 5 U.S.C. § 7105(e)(2) (1982). Any person may file a charge alleging that an agency or a union has committed an unfair labor practice. The General Counsel initially determines whether the charge has merit, and, if so, issues a complaint. A hearing is then held before an administrative law judge, who issues a recommended decision and order. That decision becomes the final decision of the Authority unless review is granted, in which case the Authority issues its own opinion.

\(^7\)\(^1\) Defense Logistics Agency and American Fed'n Gov't Employees, 5 FLRA at 131-32.

\(^7\)\(^2\) The judge believed that he was “bound by the decisions of the Assistant Secretary until such time as those decisions are overruled by the Authority or found to be distinguishable, for some persuasive reason.” Id. at 163. Section 7135(b) provides that decisions issued under the Executive Order “shall remain in full force and effect . . . unless superseded by . . . decisions issued pursuant to this chapter.” 5 U.S.C. § 7135(b) (1982). Here the Authority chose to factually distinguish the early cases cited by the administrative law judge. In both United States Dep't of Defense, Dep't of the Navy, Naval Air Reserve Training Unit and Local 1347, AFGÉ, A/SLMR No. 106, 1 A/SLMR 490 (Nov. 3, 1971), and The Adjutant General-Georgia, Georgia Nat'l Guard, Dep't of Defense and Georgia Ass'n of Civilian Technicians, ACT, Inc., 2 FLRA No. 92, 2 FLRA 711 (Feb. 29, 1980), changed circumstances in the bargaining unit justified cancellation of employees' valid dues deduction authorizations. As the Authority found no such changed circumstances in *Defense Logistics Agency*, the reimbursement order was an appropriate remedy. 5 FLRA at 133. Accord United States Army Materiel Dev. and Readiness Command, and Local 1658, American Fed'n Gov't Employees, 7 FLRA No. 30, 7 FLRA 194 (Nov. 12, 1981).

\(^7\)\(^3\) Defense Logistics Agency and American Fed'n Gov't Employees, 5 FLRA at 163.
In *San Antonio Air Logistics Center (AFLC) and American Federation of Government Employees, AFL-CIO, Local 1617*, the union alleged that the agency unilaterally changed its performance appraisal system by implementing a 1979 Appraisal/Evaluation Guide without affording the union an opportunity to bargain concerning its impact and implementation. A second complaint alleged that the agency unilaterally cancelled and established job positions without bargaining on the impact and implementation of its decisions.

After finding that unfair labor practices had been committed, the administrative law judge recommended a *status quo ante* remedy. He ordered the agency "to rescind and withdraw all evaluations of employees which were made under the 1979 Appraisal/Evaluation Guide and to rescind and revoke the cancellation and the reestablishment of the jobs in question." The agency's exceptions to this recommended order contended that the order "would create hardship on the part of the Activity and constitute a potential disruption of the [Activity's] operation."

The Authority affirmed the proposed order, finding the *status quo ante* remedy appropriate because it "would not create a serious disruption of the Activity's operation." The source of this "serious disruption" standard is unclear, and the standard is inconsistent with the legislative history and earlier Authority decisions holding that agency management must negotiate impact and implementation unless to do so would prevent it from "acting at all." Nevertheless, the rule formulated here was that a *status quo ante* remedy is appropriate for violations of section 7116(a)(5) unless it would cause a serious disruption of operations. While some disruption of operations may be the result of the remedy's effectiveness as a deterrent, the serious disruption standard is nevertheless a reasonable safety valve for those situations in which little would be gained, at great cost, by a return to the *status quo ante*.

---

74. 5 FLRA No. 22, 5 FLRA 173 (Feb. 17, 1981).
75. *Id.* at 179.
76. *Id.* The administrative law judge found the allegations to be true. He held, and the Authority agreed, that the agency had violated § 7116(a)(1) and (5) of the Statute. *Id.* at 173.
77. *Id.* at 174.
78. In the federal bureaucracy, an “activity” is a subdivision of an “agency.”
79. *Id.* at 174.
80. *Id.*
81. See supra note 67 & accompanying text. Perhaps the standard is derived from the Supreme Court’s opinion in *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964), in which the Court indicated that a *status quo ante* remedy might not be appropriate if it "impose[d] an undue or unfair burden on the Company." *Id.* at 216.
82. See IRS and National Treasury Employees Union and NTEV Chapter 95, 9 FLRA No. 73, 9 FLRA 648 (July 21, 1982), enforcement denied, 717 F.2d 1174 (7th Cir. 1983), discussed infra text accompanying notes 156-60.
A few months later, in *Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council*, the Authority granted another *status quo ante* remedy for a failure to bargain on impact and implementation. The case concerned new duties imposed upon crane operators. The administrative law judge found that "by unilaterally requiring mobile crane operators to lubricate mobile cranes and maintain lubrication log books in mobile cranes," the agency had violated section 7116(a)(1) and (5) of the Statute. Management had the right under section 7106(a)(2)(B) "to assign work," but the exercise of that right was contingent upon the full negotiation of impact and implementation.

In determining the appropriate remedy, the Authority found merit in the General Counsel's exception to the failure of the administrative law judge to include a *status quo ante* remedy in his recommended order. The Authority was influenced by the fact that safety factors were involved, and it noted that "there is nothing in the record to indicate that a *status quo ante* remedy would create a serious disruption of the [Agency's] operations." The Authority's final order rescinded the oral and departmental instructions that imposed the additional duties.

These cases strongly implied that a *status quo ante* remedy should be awarded when agency management unilaterally implements a decision without fulfilling its duty to bargain. The Authority appeared to recognize that unless the unilateral action is rescinded, meaningful bargaining cannot be expected to occur since the union would be bargaining over implementation after the fact. Qualified by the reasonable exception for "serious disruption" of operations, the *status quo ante* remedy appeared to be presumptively appropriate under the early Authority cases to effectuate the purposes and policies of the Statute.

**Federal Correctional Institution and its Progeny**

The Authority repudiated the logic of its early cases in its landmark decision, *Federal Correctional Institution and American Federation of Government Employees Local 2052*. The administrative law judge concluded, and the Authority agreed, that the respondent had made unilateral changes in working conditions without bargaining on
impact and implementation, and had thus violated section 7116(a)(1) and (5). The changes involved

the relocation of a correctional officer from a guard tower to a mobile patrolman position; the assignment of one correctional officer at the dormitories to work at two dormitories in lieu of assigning one correctional officer to each separate dormitory; and the addition of a position to the Receiving and Discharge Unit. \(^9\)

The administrative law judge believed that a status quo ante remedy was not appropriate because "[d]ecisional law enunciated by the Authority holds that such a remedial order is not appropriate where an employer is not obligated to bargain as to the decision to take particular action involving its employees." \(^9\) Not yet having the benefit of the decisions in San Antonio Air Logistics Center \(^9\) and Norfolk Naval Shipyard, \(^9\) the judge relied on section 7135 of the Statute\(^9\) and on The Adjutant General’s Office, Puerto Rico Air National Guard, \(^9\) a case arising under the Executive Order.

The Authority disagreed, holding that "status quo ante remedies may be issued in certain refusal to bargain cases even where the agency’s decision itself was not negotiable." \(^9\) However, the Authority then stated that "the appropriateness of a status quo ante remedy must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy." \(^9\) Thus, the earlier Authority rule that only a serious disruption of operations would preclude a status quo ante remedy had evolved into a formal balancing test.

The Authority named five factors that it would consider “in determining whether a status quo ante remedy would be appropriate in any specific case involving a violation of the duty to bargain over impact

---

91. Id. at 605.
92. Id. at 604-05.
93. Id. at 620 n.11.
94. See supra notes 74-82 & accompanying text.
95. See supra notes 83-89 & accompanying text.
96. The judge stated:
Under Section 7135 of the [Statute] all policies, regulations and procedures established under Executive Order 11,491, as amended, continue in force and effect unless revoked by the President or the [Statute]. Thus, although this case arose under the Order, the principle set forth in the cited case controls since there had been no revocation thereof.

Federal Correctional Inst. and American Fed’n Gov’t Employees Local 2052, 8 FLRA at 620 n.11.
97. 3 FLRA No. 55, 3 FLRA 342 (June 3, 1980).
98. Federal Correctional Inst. and American Fed’n Gov’t Employees Local 2052, 8 FLRA at 605.
99. Id. at 606.
and implementation"\textsuperscript{100}: 1) whether the union received timely and adequate notice of the proposed change; 2) whether the union made a timely request to bargain on procedures and arrangements; 3) the willfulness of the agency’s failure to bargain; 4) the impact experienced by adversely affected employees; and 5) whether, and to what degree, a \textit{status quo ante} remedy would disrupt or impair the efficiency and effectiveness of the agency’s operations.\textsuperscript{101} Specifically applying only the fourth factor to the facts of Federal Correctional Institution, the Authority concluded that no \textit{status quo ante} remedy was required or necessary to effectuate the purposes and policies of the Statute,\textsuperscript{102} because the impact experienced by adversely affected employees was minimal.\textsuperscript{103}

This result is inconsistent with the Authority’s prior decisions, and even with its own test. First, the unilateral changes in Federal Correctional Institution raised safety concerns as weighty as those deemed controlling in Norfolk Naval Shipyard.\textsuperscript{104} Rescinding the unilateral changes would have ensured that those concerns were resolved through the negotiation process, as Congress intended.\textsuperscript{105}

Second, the Authority made no finding that a \textit{status quo ante} remedy would disrupt or impair the efficiency and effectiveness of the agency’s operations. Absent serious disruption, such a remedy would be appropriate under the reasoning of Norfolk Naval Shipyard and San Antonio Air Logistics Center.

Finally, the Authority’s sole application of the fourth factor of its five factor test presents another inconsistency. The Authority decided that because “only a few of the approximately 110 correctional officers at the facility were directly affected by the changes . . . the impact on employees within the bargaining unit is minimal.”\textsuperscript{106} Surely the impact experienced by the individual employees who were adversely affected was not minimal. Instead of looking to “the nature and extent of the impact experienced by adversely affected employees,”\textsuperscript{107} the Authority considered the impact on the bargaining unit as a whole, thereby misconstruing the purpose of adverse effects negotiations.\textsuperscript{108} In any event, a rule that \textit{status quo ante} remedies are inappropriate if the

\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} See supra note 87. In fact, assigning one guard to two prison dormitories, see supra text accompanying note 92, was probably more dangerous than the imposition of additional duties on crane operators in Norfolk Naval Shipyard.
\textsuperscript{105} See supra text accompanying note 67.
\textsuperscript{106} Federal Correctional Inst. and American Fed’n Gov’t Employees Local 2052, 8 FLRA at 606.
\textsuperscript{107} Id.
\textsuperscript{108} It is not the impact on the bargaining unit but the impact on adversely affected employees that is at issue. See supra notes 44-45 & accompanying text.
adverse effects sought to be negotiated are "de minimus" is contrary to congressional intent. 109

The new test could lead to the result that status quo ante remedies are never awarded in impact and implementation cases. The Authority in Federal Correctional Institution correctly noted Congress' intent that the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." 110 Yet while section 7101(b) supports a "serious disruption of operations" exception to the general rule that status quo ante remedies are appropriate in refusal to bargain cases, it does not contemplate a wide-open balancing test. The Authority's new test is easily abused in that balancing will often allow management to violate the Statute with impunity, a result reminiscent of the Council's rigid "unreasonable delay" standard under the Executive Order. 111

It is noteworthy that the right of agency managers "to maintain the efficiency of the Government operations entrusted to them" under section 12(b)(4) of the Executive Order was not carried forward into the management rights provisions of the Statute. Given Congress' concern about abuse of the management rights provisions under the Executive Order, 112 it is unlikely that Congress intended more stringent criteria for awarding status quo ante remedies.

Ultimately, however, the reasonableness of the Authority's formulation will depend on how it applies the new test under the case-by-case approach. 113 It is therefore instructive that in at least five cases 114 in-

109. Representative's Ford's remarks are again instructive:
Because of the increased stature for "adverse effect" negotiations, and for other reasons, neither the conference report nor the statement of managers includes a de minimus proviso allowing an agency to escape from its bargaining obligation. It is fully the expectation that where the adverse effects are "de minimus" negotiations will occur but that both parties will see that they proceed with appropriate dispatch.


110. Federal Correctional Inst. and American Fed'n Gov't Employees, 8 FLRA at 606 n.3 (citing 5 U.S.C. § 7101(b)).

111. See supra notes 33-38 & accompanying text.

112. See supra text accompanying note 55.

113. See supra text accompanying note 99.

114. United States Dep't of Defense, Dep't of the Army, Headquarters, Fort Sam Houston and American Fed'n Gov't Employees, AFL-CIO, Local 2154, 8 FLRA No. 112, 8 FLRA 623 (May 13, 1982); United States Customs Serv., Region V and National Treasury Employees Union and NTEU Chapter 168, 9 FLRA No. 15, 9 FLRA 116 (June 16, 1982); Headquarters, 77th U.S. Army Command and American Fed'n Gov't Employees, AFL-CIO, Local 2739, 9 FLRA No. 95, 9 FLRA 762 (Aug. 4, 1982); IRS and National Treasury Employees Union, 10 FLRA No. 37, 10 FLRA 182 (Sept. 30, 1982); United States Dep't of Justice, Immigration and Naturalization Serv. and American Fed'n Gov't Employees, AFL-
volving a refusal to bargain on impact and implementation decided since Federal Correctional Institution, the Authority has declined to order a return to the status quo ante.

The Demise of the Status Quo Ante Remedy

In United States Department of Defense, Department of the Army, Headquarters, Fort Sam Houston and American Federation of Government Employees, AFL-CIO, Local 2154,115 a case decided the same day as Federal Correctional Institution, the agency committed an unfair labor practice by taking away certain duties from three payroll clerks and establishing a new position without notifying the union and affording it an opportunity to bargain over impact and implementation.116 In rejecting the General Counsel's request for a status quo ante remedy, the Authority noted that "the changes in job duties implemented by the Respondent have not resulted in and are not intended by the Respondent to create a loss of grade or pay for any affected employee. Thus, the impact on employees within the bargaining unit is minimal."117

This decision may represent a further narrowing of the circumstances that justify a status quo ante remedy. It would now seem that in order for a status quo ante remedy to be deemed appropriate in an impact and implementation case, not only must a significant portion of the bargaining unit be affected by management's unilateral action,118 but the employees' pocketbooks must also be affected.

As in Federal Correctional Institution, the conclusion in Headquarters, Fort Sam Houston that a status quo ante remedy was not required to effectuate the purposes and policies of the Statute did not hinge on a specific finding that such a remedy would cause any disruption in government operations.119 Rather than providing the basis for an exception to the general rule, as in San Antonio Air Logistics Center and Norfolk Naval Shipyard,120 disruption of operations now seems to be merely one of a number of factors that can cause the denial of a status quo ante remedy.

In United States Customs Service, Region V and National Treasury

115. 8 FLRA No. 112, 8 FLRA 623 (May 13, 1982).
116. Id. at 625.
117. Id.
118. See supra text accompanying note 106.
119. United States Dep’t of Defense, Dep’t of Army, Headquarters, Fort Sam Houston and American Fed’n Gov’t Employees, AFL-CIO, Local 2154, 8 FLRA at 625. Apparently, after deciding that the impact on employees was minimal, the Authority felt no need to consider whether a status quo ante remedy would disrupt the agency’s operations.
120. See San Antonio Air Logistics Center (AFLC) and American Fed’n of Gov’t Employees, AFL-CIO, Local 1617, 5 FLRA at 174; Norfolk Naval Shipyard and Tidewater Va. Fed. Employees Metal Trades Council, 6 FLRA at 77.
Employees Union and NTEU Chapter 168, a case involving a failure to bargain on a decisional matter as well as a failure to bargain on impact and implementation, the Authority fashioned a remedy in keeping with the spirit of Federal Correctional Institution. Management had unilaterally established a second shift and, at the same time, changed the starting and quitting times of the existing shift for most pilots and air officers. The Authority found that the decision to establish a second shift was non-negotiable under section 7106(b)(1). On the other hand, the Authority found that the agency had violated section 7116(a)(1) and (5) by failing to afford the union an opportunity to negotiate impact and implementation. The decision to change the hours of the existing shift was held to be outside the scope of section 7106(b)(1), and hence a mandatory subject of bargaining. The agency also committed an unfair labor practice by failing to negotiate the substance of its decision.

To the extent the decision itself was a mandatory subject of bargaining, the Authority ordered a return to the status quo ante, finding "that an order directing reinstatement of the previously existing starting and quitting times of the first shift, upon request of NTEU, and requiring the parties to negotiate the starting and quitting times thereof, is necessary to effectuate the purposes and policies of the Statute." The remedy was necessary "in order to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning changes in conditions of employment." In contrast, to the extent the duty to bargain was limited to impact and implementation, the Authority summarily found a status quo ante remedy to be unwarranted.

Employing reasoning reminiscent of the

121. 9 FLRA No. 15, 9 FLRA 116 (June 16, 1982).
122. Id. at 117.
123. Id. at 118.
124. Id.
125. Id.
126. Id.
127. Id. at 119.
128. Id.
129. According to the Authority, balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy, and taking into consideration the various factors set forth in Federal Correctional Institution, the Authority concludes that an order requiring the Respondent to bargain upon request about impact and implementation will best effectuate the purposes and policies of the Statute.

Id. (citation omitted). To understand the Authority's rationale, see United States Customs Serv., Region VIII and NTEU, 9 FLRA No. 68, 9 FLRA 606 (July 21, 1982), a later case involving identical issues. The Authority reasoned that management enjoyed an unquestioned right to unilaterally establish additional shifts, and that since there were no pre-existing starting and quitting times or lunch periods to reinstate, no status quo ante remedy was warranted. Id. at 607.
Council cases, the Authority noted that the agency had acted within its reserved rights under section 7106(b)(1). Even so, it would seem that a status quo ante remedy was necessary "to avoid rendering meaningless the mutual obligation under the Statute to negotiate concerning" impact and implementation.

The Authority has established other restrictions on the use of the status quo ante remedy. In past refusal-to-bargain cases, the burden of persuasion was on the agency to show why a status quo ante should not be granted. Today the burden seems to be on the aggrieved party to show why such a remedy should be required. In Headquarters, 77th U.S. Army Command and American Federation of Government Employees, AFL-CIO Local 2739, the Authority denied the General Counsel's request for a status quo ante remedy because the request was "unsupported by any reasons why such a remedy should be granted in the circumstances presented herein." Section 7(c) of the Administrative Procedure Act provides that the proponent of an order should have the burden of proof. However, the Supreme Court has interpreted this to mean only the burden of going forward, not the burden of persuasion. Once it has been established that a section 7116(a)(5) violation has occurred, the burden of persuasion should be on the employer to show why a status quo ante remedy is unwarranted. In other words, if a status quo ante order is presumptively appropriate under the reasoning of San Antonio Air Logistics Center and Norfolk Naval Shipyard, then the burden should shift to the employer to show that the "serious disruption" exception applies.

The Authority further limited the range of cases in which a status quo ante remedy will be deemed appropriate by announcing an apparent "good faith" exception in Internal Revenue Service and National Treasury Employees Union. The case involved the nationwide implementation of a new Collection Quality Review System (CQRS). A large number of IRS employees experienced the impact of the restructuring, which was so major that the agency previewed the new sys-

130. United States Customs Serv., Region V and National Treasury Employees Union and NTEU Chapter 168, 9 FLRA at 119-20.
131. See supra text accompanying note 128.
132. In San Antonio Air Logistics Center, the agency argued that a status quo ante remedy should not be required because "such order would create hardship on the part of the Activity and constitute a potential disruption of the Respondent's operation." 5 FLRA No. 22, 5 FLRA 173, 174 (Feb. 17, 1981). The Authority found that this contention was not sustained by the evidence. Id. In other words, the remedy was appropriate because the Agency did not meet its burden of persuasion.
133. 9 FLRA No. 95, 9 FLRA 762 (Aug. 4, 1982).
134. Id. at 764.
137. 10 FLRA No. 37, 10 FLRA 182 (Sept. 30, 1982).
138. Id. at 182.
tem by implementing a pilot program. The pilot program was the subject of good faith negotiations between IRS and NTEU that resulted in a memorandum of understanding. At the time of the nationwide implementation, the agency took the position that NTEU was limited to bargaining on revisions made by IRS in the pilot program or matters that had been explicitly reserved for future negotiations. It then rejected NTEU's proposals as not within these categories.

The Authority found that the original memorandum of understanding contained no clear and unmistakable waiver of NTEU's right to propose changes in procedures and appropriate arrangements for employees who would be adversely affected by the new system based upon its own experience in dealing with the CQRS during the pilot program, and that it would be inconsistent with the purposes and policies of the Statute to limit the Respondent's bargaining obligation strictly to the proposed changes in the CQRS initiated by management.

Thus, the agency had violated section 7116(a)(1) and (5). Yet, calling the agency’s position “an arguable but mistaken belief that its obligation . . . was so limited,” the Authority determined that “balancing the nature and circumstances of the violation against the degree of disruption in government operations that would be caused by such a remedy, and taking into consideration the various factors set forth in Federal Correctional Institution,” no status quo ante remedy was warranted.

Such an exception for good faith should have no place in the federal sector scheme, where the scope of bargaining is already narrowly circumscribed. Indeed, in NLRB v. Katz, the Supreme Court held that good faith is no excuse even under the NLRA. The Statute protects management rights, yet limits the exercise of those rights by requiring the “full negotiation of arrangements regarding adverse effects and procedures.” Admittedly, the degree of disruption that would have been caused by a status quo ante remedy after the nationwide program had already been implemented was substantial. Yet, the degree of impact experienced by adversely affected employees was no less sub-

139. Id.
140. Id.
141. Id. at 183.
142. Id.
143. Id. at 184.
144. Id.
145. Id.
146. Id. The Authority also noted that a status quo ante remedy would cause a substantial disruption of government operations. Both this factor and the agency's good faith persuaded the Authority to deny such a remedy.
147. 369 U.S. 736 (1962).
148. Id. at 743.
149. See supra note 55 & accompanying text.
The purposes and policies of the Statute would have been better served by a remedy that would have given agencies a clear message to negotiate when in doubt about their obligation.\footnote{150}

The potential for abuse of the Federal Correctional Institution standard is illustrated by the decision and dissent in United States Department of Justice, Immigration and Naturalization Service, Southern Region and American Federation of Government Employees, AFL-CIO, Immigration and Naturalization Service Council, Southern Region.\footnote{151} The case involved a unilateral change in the processing of dangerous aliens.\footnote{152} Applying the test of Federal Correctional Institution, the majority held that a prospective bargaining order would be an adequate remedy "in light of the likelihood that a return to the \textit{status quo ante} would disrupt or impair the efficiency and effectiveness of the Respondent's operations."\footnote{153} Chairman Ronald W. Haughton filed a separate dissenting opinion,\footnote{154} concluding that

weighing the substantial impact of the unilateral change on unit employees against the relatively minimal degree of disruption in the Center's operations that would be caused by requiring a return to the pre-existing practice regarding the detention or transfer of dangerous aliens, pending negotiations with the exclusive bargaining representative . . . a \textit{status quo ante} remedy is appropriate in order to effectuate the purposes and policies of the Statute.\footnote{155}

This case demonstrates that the tests of Federal Correctional Institution and its progeny can be applied to reach whatever result is desired. Recently, the Authority has generally desired to avoid inconveniencing agency management.

Carried one step further, extending the new standards into the area of decisional bargaining could preclude \textit{status quo ante} remedies except for the most flagrant violations of the duty to bargain. For example, in Internal Revenue Service and National Treasury Employees Union and NTEU Chapter 95,\footnote{156} the agency had made unilateral changes in its office space design. Although the Authority held that management had not acted within its reserved rights under section 7106(b)(1) and ordered the agency to bargain on the union's proposals,\footnote{157} it noted that "no apparent purpose would be served by requiring

\begin{thebibliography}{99}
\item[150] "It is the intention of the conference committee that agencies and employee representatives should spend their efforts resolving mutual problems and improving performance instead of litigating over barriers to negotiation." 124 CONG. REC. 38,713 (statement of Rep. Ford), \textit{reprinted in} Legislative History, supra note 4, at 990.
\item[151] 11 FLRA No. 27, 11 FLRA 90 (Jan. 20, 1983).
\item[152] Id. at 90.
\item[153] Id. at 92.
\item[154] Id. at 94.
\item[155] Id. (citing Norfolk Naval Shipyard and San Antonio Air Logistics Center).
\item[156] 9 FLRA No. 73, 9 FLRA 648 (July 21, 1982), enforcement denied, 717 F.2d 1174 (7th Cir. 1983).
\item[157] Id. at 651.
\end{thebibliography}
the Respondent to dismantle the reorganized office structure, thereby causing substantial disruption in the Chicago Regional Office's operations, before the parties have had an opportunity to agree upon an arrangement.\textsuperscript{158} To reach this result, the Authority applied the \textit{Federal Correctional Institution} balancing test, developed for impact and implementation cases, to a situation in which management's decision itself was determined by the Authority to be a mandatory subject of bargaining.\textsuperscript{159} That determination was reversed on appeal, causing the Authority's bargaining order to be denied enforcement.\textsuperscript{160} Nevertheless, the case is instructive regarding the Authority's current predilections.

**Federal Service Bargaining and the Future of the \textit{Status Quo Ante} Remedy**

The Authority's reluctance to grant meaningful relief in the form of a \textit{status quo ante} remedy in impact and implementation cases is symptomatic of its excessive deference to management rights. The Authority's failure to place the Statute's management rights provisions in proper perspective was recently taken to task by the District of Columbia Circuit Court of Appeals in \textit{American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority}.\textsuperscript{161} A union proposal concerning repromotion rights for employees demoted through no fault of their own was deemed non-negotiable by the Authority because it would

\begin{quote}
directly interfere with the exercise of management's rights under section 7106(a)(2)(c) to choose among candidates from appropriate sources in filling a vacancy and, consequently, cannot be deemed an 'appropriate arrangement for employees adversely affected' by management's exercise of its statutory rights, within the meaning of section 7106(b)(3) of the Statute.\textsuperscript{162}
\end{quote}

The Court found it impossible to sustain this reading of the Statute,\textsuperscript{163} concluding that paragraph (b)(3) was intended as "an exception to the otherwise governing management prerogative requirements of subsection (a)."\textsuperscript{164} Thus, negotiation of arrangements for adversely affected employees would be inappropriate only if they impinged upon management rights "to an excessive degree."\textsuperscript{165}

In the wake of \textit{Federal Correctional Institution}, many federal sector unions must have wondered if they would ever again see a \textit{status quo

\begin{footnotes}
\item[158] Id.
\item[159] Id.
\item[160] IRS v. Federal Labor Relations Auth., 717 F.2d at 1177.
\item[161] 702 F.2d 1183 (D.C. Cir. 1983).
\item[163] American Fed'n Gov't Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Auth., 702 F.2d at 1185.
\item[164] \textit{Id}. at 1187 (emphasis in original).
\item[165] \textit{Id}. at 1188 (emphasis in original).
\end{footnotes}
The remedy is probably still available in most cases when the matter about which the agency failed to bargain does not involve the exercise of a reserved management right.\textsuperscript{166} Also, in impact and implementation cases, when the impact experienced by bargaining unit employees involves a loss of grade or pay, a status quo ante remedy is still available. A good example is Internal Revenue Service and National Treasury Employees Union.\textsuperscript{167} In that case, the agency failed to give adequate notice to the union in order to afford it the opportunity to bargain about the impact and implementation of its decision to terminate the Accounting Training Program (ATP) for certain bargaining unit employees.\textsuperscript{168} Even though the decision itself was non-negotiable under section 7106(a)(2)(B), the Authority found a status quo ante remedy to be warranted because the employees lost a training opportunity intended to qualify them for the Revenue Agent series\textsuperscript{169} and were thus significantly affected. Because the ATP was retained for other employees, there was no significant disruption of operations due to the award of a status quo ante remedy.\textsuperscript{170}

It should be noted, however, that one member of the Authority\textsuperscript{171} concurred in the finding that an unfair labor practice had been committed but dissented from the granting of a status quo ante remedy. In his view, the ATP was merely a "fringe benefit," the termination of which was a less serious problem than the disruption in operations resulting from the status quo ante remedy.\textsuperscript{172} Hopefully, the District of Columbia Circuit's decision will remind the Authority of the mandatory nature of the obligation to bargain about impact and implementation, an obligation that requires a sufficiently strong remedy when it is violated.

**Conclusion**

The Statute expanded the scope of collective bargaining that existed under the Executive Order and held out the promise of more meaningful negotiations with "remedies sufficiently strong and suitable to make real the promise of the title and the obligations of its provisions."\textsuperscript{173} The increased stature of impact and implementation negotiations was key to the passage of the bill, and Congress realized that for those negotiations to be meaningful, the Authority must grant appro-
priate relief when the obligation to bargain is violated.174

When agency management avoids its obligation to bargain by claiming its traditional right to maintain efficiency, it is the Authority’s task to enforce the obligation to bargain about any condition of employment. The management rights provisions of section 7106 constitute a limited exception to the duty to bargain. The impact and implementation provisions are exceptions to the exception. The Authority has often focused narrowly on management rights and ignored this larger picture. When the Authority fails to grant meaningful relief, it reinforces the belief of many agency managers that greater efficiency comes not from collective bargaining, as Congress intended,175 but from unilateral action.

Absent extraordinary circumstances, the *status quo ante* remedy achieves the policy goals of the Statute by advancing collective bargaining without negating management’s right “ultimately to act.”176 The remedy is necessary to maintain the bargaining power of federal sector unions and was intended by Congress for this very purpose. If the Authority is to provide an effective deterrent to the commission of unfair labor practices pursuant to section 7118,177 it should routinely order a return to the *status quo ante* in section 7116(a)(5) cases.

Yet *Federal Correctional Institution* and its progeny place unreasonable restrictions on the availability of *status quo ante* remedies. The Authority has failed to provide the vigorous enforcement of the Statute that Congress envisioned. The trend toward denial of *status quo ante* remedies except in extreme cases should be reversed. The Statute’s purposes and policies would be better served by a return to the rule of *San Antonio Air Logistics Center* and *Norfolk Naval Shipyard*. The remedy should be presumptively appropriate for violations of section 7116(a)(5).

*Joseph William Bell*

---

174. *See supra* 60-61 & accompanying text.
175. *See supra* note 109.
176. *See supra* text accompanying note 67.
177. *See supra* note 14 & accompanying text.

* Member, Third Year Class.