NTEU Contests FLRA Decision Narrowing Bargaining Over Conditions of Employment

The Federal Labor Relations Authority (FLRA) has reversed long-standing precedent and narrowed what NTEU and other unions can bargain over in the workplace. This latest reversal is yet another anti-union decision in a string of bad decisions issued by the Authority. In September 2019, NTEU will submit a brief to the D.C. Circuit explaining why the FLRA’s recent decision reducing the scope of negotiable topics is unreasonable as well as arbitrary and capricious.

This particular dispute arose when U.S. Customs and Border Protection (CBP) changed how border agents would inspect vehicles at the border. Under the labor statute, if an agency changes the “conditions of employment” for employees represented by a union, it must bargain over that change prior to implementing the change. Such bargaining is not only legally required but makes good sense. It enables affected employees to have a say on the wisdom of the change and how and when it might be implemented.

An arbitrator found that CBP’s change affected the discretion that border agents had regarding which vehicles would be subjected to more intensive searches and gave the agents additional duties. Such a change, according to the arbitrator, affected the agents’ conditions of employment. Accordingly, the arbitrator concluded that CBP was required to bargain over the change with the union before implementing it.

The agency appealed the arbitrator’s decision to the FLRA. In a 2-1 decision, the FLRA reversed its own precedent to conclude that CBP’s change did not affect “conditions of employment” and thus the agency had no duty to bargain with the union. U.S. Dept of Homeland Security, Customs and Border Protection, 70 F.L.R.A. 501 (Apr. 30, 2018).

As a starting point, the labor statute defines “conditions of employment as “personnel policies, practices, and matters… affecting working conditions.” For decades, the terms “conditions of employment” and “working conditions” have been interpreted to mean substantially the same thing. Indeed, as recently as 2014, the FLRA held that there was no significant distinction between the terms. Eastern Distribution Center, Burlington, N.J. (GSA), 68 F.L.R.A. 70 (2014). In that same decision, the FLRA recognized — correctly — that any distinction between these terms which narrows the parties’ bargaining obligations directly conflicts with congressional intent.

Now the FLRA has done an abrupt about-face, stating that “conditions of employment” and “working conditions” do not mean the same thing. With no real analysis, the Authority summarily concluded that, while CBP’s change in policy about vehicle inspections may have affected employees’ “working conditions,” this change did not affect “conditions of employment.” The agency therefore did not have to bargain over the change. This is a nonsensical result and inconsistent with the plain meaning of these words. But more fundamentally, the FLRA’s decision narrows what agencies will have to bargain over in the future.

It is unsettling for the Authority to reverse its own precedent time and time again without legal justification. See, e.g., Dep’t of Defense, Def. Logistics Agency, 70 F.L.R.A. 182 (Oct. 31, 2018) (overruling 40 years of precedent concerning telework and management rights); Dep’t of Energy, W. Area Power Admin., 71 F.L.R.A. 111 (April 26, 2019) (overruling its own precedent concerning when a union can challenge holiday pay rates for certain dispatchers); Dep’t of Defense, Domestic Dependent Elem. and Secondary Sch., 71 F.L.R.A. 127 (May 22, 2019) (overruling its own precedent regarding what must be pled in an unfair labor practice complaint).

Unions, agencies and practitioners rely on FLRA rulings in bargaining and pursuing grievances. It undermines stability in collective bargaining and civil service law generally when the FLRA overrules precedent on important legal questions without a reasoned basis. NTEU will file a “friend of the court” brief with the D.C. Circuit later this year explaining why, in this recent case, the FLRA’s reversal is contrary to law. And we will continue to monitor other cases in which the Authority has deviated from long-established precedent.
NTEU Files Grievance for Overtime Pay for Officers Muster and Traveling Near the Border

Because of the influx of migrants at the southern border, many U.S. Custom and Border Protection (CBP) officers from around the country have been deployed on temporary duty assignments (TDY) to the border. Approximately 125 officers were temporarily assigned to the ports of San Ysidro and Otay Mesa, California between November 25, 2018 and December 4, 2018. These officers were not housed at the ports, however. They were housed, instead, more than 60 miles north of the ports at Marine Corps Base Camp Pendleton. While housed at Camp Pendleton, CBP officers were required to muster as much as two hours in advance of their shifts and to travel the long distance to and from the ports. CBP did not compensate the officers for all of the officers’ muster and travel time.

CBP’s failure to compensate these officers fully is unlawful. On March 20, 2019, NTEU filed a lawsuit in the U.S. Court of Federal Claims alleging that CBP violated two pay statutes—the Customs Officer Pay Reform Act (COPRA) and the Fair Labor Standards Act (FLSA). This lawsuit is in the early stages, but NTEU will press for full and prompt relief for affected officers.

News Briefs

Appellate Court Upholds Dismissal of OPM Data Breach Suit. After the extensive and damaging data breaches at the Office of Personnel Management (OPM) in 2015, NTEU filed litigation. NTEU requested a federal district court to award lifetime credit protection for affected employees and order OPM to improve its woefully deficient security systems. The court dismissed that suit on September 19, 2017, based on several threshold arguments raised by the government. NTEU immediately appealed. On June 21, 2019, the appellate court issued its decision.

The appellate court reversed the lower court and held that NTEU had standing, which is a legal prerequisite to being able to sue. The court held that the ongoing and substantial threat to NTEU members’ privacy interests from the data breaches constituted concrete and imminent injury, such that NTEU and its named plaintiffs had standing. NTEU welcomes this positive standing ruling which sets favorable precedent for future data breach suits. The appellate court also held, however, that NTEU had failed to plead a cognizable constitutional violation. NTEU is evaluating its next steps.

NTEU Resists Government Efforts to Dismiss Shutdown Litigation. NTEU is vigorously contesting two motions to dismiss filed by the government in our shutdown-related lawsuits. One of NTEU’s suits alleges that government shutdowns, such as the recent 35-day partial shutdown, are unconstitutional. The government has argued this suit should be dismissed as moot because the shutdown is over. In response, NTEU explained to the court that such shutdowns have become increasingly common in recent years and are likely to reoccur, possibly as soon as this fall. The case, NTEU argues, is not moot and the Court should proceed to consider the merits NTEU’s claim.

NTEU’s second suit seeks compensation under the FLSA for NTEU-represented employees who worked during the shutdown but who were not paid on time. The government seeks to have this case dismissed because it eventually paid back pay to affected employees. NTEU argues that, even if employees were eventually paid back wages, the plain language of the FLSA requires matching liquidated damages to compensate employees for the delay in this payment.

NTEU anticipates that oral argument may be held on one or both of the government’s motions before any rulings are made. NTEU looks forward to defending its position in court.

NTEU Challenges Overtime Classification of Consumer Safety Officers. NTEU filed a grievance in May 2019, regarding whether Consumer Safety Officers (CSOs) in the Food and Drug Administration (FDA) are properly classified under the FLSA. Currently, CSOs are exempt from the overtime protections of the FLSA, which means that they do not get the full time and half overtime rate when they have to work extra hours. These CSOs do vitally important work investigating injuries caused by FDA-regulated products and initiating actions against violators. They should receive the statutory overtime protection they are due.