

NATIONAL TREASURY EMPLOYEES UNION v. CHERTOFF

United States Court of Appeals for the D.C. Circuit, 2006

452 F.3d 839

EDWARDS, Senior Circuit Judge.

When Congress enacted the Homeland Security Act of 2002 ("HSA" or the "Act") and established the Department of Homeland Security ("DHS" or the "Department"), it provided that "the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system." 5 U.S.C. § 9701(a). Congress made it clear, however, that any such system "shall--(1) be flexible; (2) be contemporary; (3) not waive, modify, or otherwise affect [certain existing statutory provisions relating to, *inter alia*, merit hiring, equal pay, whistleblowing, and prohibited personnel practices, and] (4) 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." *Id.* § 9701(b)(1)-(4). The Act also mandated that DHS employees receive "fair treatment in any appeals that they bring in decisions relating to their employment." Section 9701 does not mention "Chapter 71," which codifies the Federal Services Labor-Management Statute ("FSLMS"), 5 U.S.C. §§ 7101-7106, 7111-7123, 7131-7135 (2000), and delineates the framework for collective bargaining for most federal sector employees.

In February 2005, the Department and Office of Personnel Management ("OPM") issued regulations establishing a human resources management system (codified at 5 C.F.R. Chapter XCVII and Part 9701) ("Final Rule" or "HR system"). The Final Rule, *inter alia*, defines the scope and process of collective bargaining for affected DHS employees, channels certain disputes through the Federal Labor Relations Authority ("FLRA" or the "Authority"), creates an in-house Homeland Security Labor Relations Board ("HSLRB"), and assigns an appellate role to the Merit Systems Protection Board ("MSPB") in cases involving penalties imposed on DHS employees.

Unions representing many DHS employees (the "Unions") [challenged] aspects of the Final Rule. In a detailed and thoughtful opinion, *Nat'l Treasury Employees Union v. Chertoff*, 385 F.Supp.2d 1 (D.D.C.2005), the District Court found that the regulations would not ensure collective bargaining, would fundamentally and impermissibly alter FLRA jurisdiction, and would create an appeal process at MSPB that is not fair. * * * However, the District Court rejected the Unions' claims that the regulations impermissibly restricted the scope of bargaining and that DHS lacked authority to give MSPB an intermediate appellate function in cases involving mandatory removal offenses. * * * We affirm in part and reverse in part.

We hold that the regulations fail in two important respects to "ensure that employees may * * * bargain collectively," as the HSA requires. First, we agree with the District Court that the Department's attempt to reserve to itself the right to unilaterally abrogate lawfully negotiated and executed agreements is plainly unlawful. If the Department could unilaterally abrogate lawful contracts, this would nullify the Act's specific guarantee of collective bargaining rights, because the agency cannot "ensure" collective bargaining without affording employees the right to negotiate

binding agreements.

Second, we hold that the Final Rule violates the Act insofar as it limits the scope of bargaining to employee-specific personnel matters. The regulations effectively eliminate all meaningful bargaining over fundamental working conditions (including even negotiations over procedural protections), thereby committing the bulk of decisions concerning conditions of employment to the Department's exclusive discretion. In no sense can such a limited scope of bargaining be viewed as consistent with the Act's mandate that DHS "ensure" collective bargaining rights for its employees. The Government argues that the HSA does not require the Department to adhere to the terms of Chapter 71 and points out that the Act states that the HR system must be "flexible," and from this concludes that a drastically limited scope of bargaining is fully justified. This contention is specious. Although the HSA does not compel the Government to adopt the terms of Chapter 71 as such, Congress did not say that Chapter 71 is irrelevant to an understanding of how DHS is to comply with its obligations under the Act. "Collective bargaining" is a term of art and Chapter 71 gives guidance to its meaning. It is also noteworthy that the HSA requires that the HR system be "contemporary" as well as flexible. We know of no contemporary system of *collective bargaining* that limits the scope of bargaining to employee-specific personnel matters, as does the HR system, and the Government cites to none. We therefore reverse the District Court on this point.

We affirm the District Court's judgment that the Department exceeded its authority in attempting to conscript FLRA into the HR system. The Authority is an independent administrative agency, operating pursuant to its own organic statute and long-established procedures. Although the Department was free to avoid FLRA altogether, it chose instead to impose upon the Authority a completely novel appellate function, defining FLRA's jurisdiction and dictating standards of review to be applied by the Authority. In essence, the Final Rule attempts to co-opt FLRA's administrative machinery, prescribing new practices in an exercise of putative authority that only Congress possesses. Nothing in the HSA allows DHS to disturb the operations of FLRA.

Finally, we reverse without prejudice the District Court's finding that DHS was without authority to change the standard by which the MSPB might mitigate a penalty for employee misconduct. This matter is not ripe for review. * * *

I. BACKGROUND

A. The Homeland Security Act

The Homeland Security Act was enacted in November 2002. It established the Department, a cabinet-level agency whose mission is to "prevent and deter terrorist attacks[,] protect against and respond to threats and hazards to the nation[,] * * * ensure safe and secure borders, welcome lawful immigrants and visitors, and promote the free-flow of commerce." The Act merged 22 existing agencies from across the federal government, integrating 170,000 employees, 17 unions, 7 payroll systems, 77 collective bargaining units, and 80 personnel systems.

As noted above, HSA authorizes the Secretary of Homeland Security, with the Director of the Office of Personnel Management, to promulgate regulations establishing a HR system.

The Act reads in pertinent part as follows:

- (a) IN GENERAL.— * * * the Secretary of Homeland Security may, in regulations prescribed jointly with the Director of the Office of Personnel Management, establish, and from time to time adjust, a human resources management system for some or all of the organizational units of the Department of Homeland Security.
- (b) SYSTEM REQUIREMENTS.--Any system established under subsection (a) shall--
- (1) be flexible;
 - (2) be contemporary; . . .
 - (4) 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; . . .

As may be seen from the text of the Act, § 9701 says little about the substantive terms of the HR system. Notably, however, the Act mandates that any HR system "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." § 9701(b)(4)

On February 1, 2005, DHS and OPM promulgated the Final Rule establishing the new HR system. * * *

1. *Collective Bargaining*

As the District Court noted, the Final Rule "contain[s] an expansive management rights provision and severely restrict[s] collective bargaining to issues that affect individual employees." Collective bargaining under the new HR system is defined to mean "the performance of the mutual obligation of a management representative of the Department and an exclusive representative of employees * * * to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees." Most "conditions of employment," however, are placed off-limits for bargaining. Thus, the Final Rule states:

nothing in this subpart may affect the authority of any management official or supervisor of the Department--

- (1) To determine the mission, budget, organization, number of employees, and internal security practices of the Department;
- (2) To hire, assign, and direct employees in the Department; to assign work, make determinations with respect to contracting out, and to determine the personnel by which Departmental operations may be conducted; to determine the numbers, types, grades, or occupational clusters and bands of employees or positions assigned to any organizational subdivision, work project or tour of duty, and the technology, methods, and means of performing work; to assign and deploy employees to meet any operational demand; and to take whatever other actions may be necessary to carry out the Department's mission; and
- (3) To lay off and retain employees, or to suspend, remove, reduce in grade, band, or pay, or take other disciplinary action against such employees or, with respect to filling positions, to

make selections for appointments from properly ranked and certified candidates for promotion or from any other appropriate source.

In addition, management "is prohibited from bargaining over the exercise of any authority under paragraph (a) of this section or the procedures that it will observe in exercising the authorities set forth in paragraphs (a)(1) and (2) of this section."

The Final Rule states that management must bargain over

(1) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(3) of this section and procedures which management officials and supervisors will observe in exercising any authority under paragraph (a)(3) of this section; and

(2) (I) Appropriate arrangements for employees adversely affected by the exercise of any authority under paragraph (a)(1) or (2) of this section, provided that the effects of such exercise have a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed or have exceeded 60 days. Appropriate arrangements within the duty to bargain include proposals on matters such as--

(A) Personal hardships and safety measures; and

(B) Reimbursement for out-of-pocket expenses incurred by employees as the direct result of the exercise of authorities under this section.

However, "[a]ppropriate arrangements within the duty to bargain do not include proposals on such matters as--(A) [t]he routine assignment to specific duties, shifts, or work on a regular or overtime basis; and (B) [c]ompensation for expenses not actually incurred, or pay or credit for work not actually performed."

In analyzing the provisions of 5 C.F.R. § 9701.511, the District Court wryly commented:

"Translated into English, this Regulation would give management full discretion over all aspects of the Department except those that might be seen as personal employee grievances."

The new HR system also authorizes the Department to unilaterally abrogate lawfully negotiated and executed collective bargaining agreements. In addition to securing DHS's authority to override agreements that are in existence when the HR system takes effect, the Final Rule purports to authorize the Department to unilaterally set aside provisions in agreements that are negotiated and executed under the new HR system. An agreement may be invalidated by DHS's Secretary (or a designee) within 30 days of being executed if found to be inconsistent with Departmental rules or regulations. Even if not explicitly disapproved, an agreement takes effect "only if consistent with law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives and other policies and regulations, and Executive orders."

The Final Rule also gives DHS ongoing authority to abrogate agreements after they take effect:

Provisions in existing collective bargaining agreements are unenforceable if an authorized agency official determines that they are contrary to law, the regulations in this part, Governmentwide rules and regulations, Departmental implementing directives * * * and other policies and regulations, or Executive orders.

Moreover, as noted above, the "management rights" provision in the Final Rule authorizes the Department "to take whatever other actions may be necessary to carry out the Department's mission." Taken together, these regulations subordinate all collective bargaining agreements to the prerogatives of management. . . .

2. The Roles of the Homeland Security Labor Relations Board and the Federal Labor Relations Authority

The Federal Labor Relations Authority is an independent administrative federal agency that was created by Title VII of the Civil Service Reform Act of 1978, also known as the Federal Service Labor-Management Relations Statute and "FSLMRS." The FSLMRS allows certain non-postal federal employees to organize, bargain collectively, and participate through labor organizations of their choice in decisions affecting their working lives. The primary statutory responsibilities of FLRA include: (1) resolving complaints of unfair labor practices, (2) determining the appropriateness of units for labor organization representation, (3) adjudicating exceptions to arbitrator's awards, (4) adjudicating legal issues relating to duty to bargain/negotiability, and (5) resolving impasses during negotiations.

The HSA does not specify a role for FLRA under the HR system. . . . DHS and many of its employees are within the purview of the Authority's jurisdiction. . . . The Authority's jurisdiction to hear matters affecting DHS employees is limited, however, to the extent that the Final Rule supplants the substantive provisions of the FSLMRS pursuant to § 9701 of the HSA.

The Final Rule establishes the Homeland Security Labor Relations Board, composed of a rotating board of members--appointed by the Secretary of Homeland Security. * * * The regulations empower HSLRB to, *inter alia*, (1) resolve issues relating to the scope of bargaining under the regulations and the duty to bargain in good faith, (2) conduct hearings and resolve complaints of unfair labor practices, (3) resolve exceptions to arbitration awards involving the exercise of management rights and the duty to bargain, (4) resolve negotiation impasses, (5) conduct *de novo* review of legal conclusions involving all matters within its jurisdiction, and (6) assume jurisdiction over any matter concerning DHS employees that has been submitted to FLRA "if the HSLRB determines that the matter affects homeland security." The regulations also authorize HSLRB to "issue binding Department-wide opinions" * * * There is no doubt that the HSLRB was created to supplant FLRA with respect to many matters that would otherwise be within the Authority's jurisdiction.

Although the Final Rule obviously was adopted to replace many of the substantive provisions of the FSLMRS, the regulations nonetheless purport to create a limited role for FLRA *under the HR system*. The Final Rule provides that any party who wishes to obtain judicial review of a HSLRB decision must first seek FLRA review. But the Authority's role is tightly circumscribed:

The Authority must defer to findings of fact and interpretations of this part made by the HSLRB and sustain the HSLRB's decision unless the requesting party shows that the HSLRB's decision was--

- (I) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (ii) Based on error in applying the HSLRB's procedures that resulted in substantial prejudice to a party affecting the outcome; or
- (iii) Unsupported by substantial evidence.

The Final Rule also purports to give FLRA limited authority to determine the appropriateness of bargaining units within DHS, supervise or conduct elections, adjudicate some unfair labor practice disputes, and resolve some exceptions to arbitral awards. However, HSLRB "[a]ssume[s] jurisdiction over any matter concerning Department employees that has been submitted to FLRA * * * if the HSLRB determines that the matter affects homeland security." And the Final Rule confers sole authority on HSLRB to determine whether a particular matter "affects homeland security" or otherwise belongs on HSLRB's docket.

The Role of the Merit Systems Protection Board

Normally, Chapter 77 allows federal employees to appeal adverse actions to the MSPB. As noted above, the HSA states that DHS employees must receive due process in pursuing their appeals, and that * * * regulations * * * shall modify procedures under chapter 77 only insofar as such modifications are designed to further the fair, efficient, and expeditious resolution of matters involving the employees of the Department."

MSPB's role under the HR system is sharply limited. The regulations significantly diminish MSPB's ability to mitigate penalties imposed on employees. As DHS acknowledges, normally, when MSPB reviews an agency's penalty decision under Chapter 77, it seeks to determine "not only whether [the penalties] were too harsh or otherwise arbitrary but also whether they were unreasonable under all the circumstances." *See Douglas v. Veterans Admin.*, 5 MSPB 313, 5 M.S.P.R. 280 (1981). The Final Rule imposes a narrower role for MSPB, stating that "MSPB may not modify the penalty imposed by the Department unless such penalty is so disproportionate to the basis for the action as to be wholly without justification."

The Final Rule also defines a new class of "mandatory removal offenses" for DHS employees. A mandatory removal offense is "an offense that the Secretary determines in his or her sole, exclusive, and unreviewable discretion has a direct and substantial adverse impact on the Department's homeland security mission." Appeals of mandatory removal actions are heard by DHS's Mandatory Removal Panel ("MRP"). An employee may only obtain judicial review of a mandatory removal action after first seeking review before the MRP. When MSPB reviews an MRP decision, it "must accept the findings of fact and interpretations of this part made by the MRP and sustain the MRP's decision unless the employee shows" that the underlying decision was:

- (I) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (ii) Caused by harmful error in the application of the MRP's procedures in arriving at such decision; or

(iii) Unsupported by substantial evidence.

* * *

C. Litigation Before the District Court

The District Court [held] that the "*sine qua non* of good-faith collective bargaining is an enforceable contract once the parties reach an agreement." The court found that the Final Rule flouted this standard by allowing DHS to unilaterally abrogate agreements. The District Court tellingly noted:

A contract that is not mutually binding is not a contract. Negotiations that lead to a contract that is not mutually binding are not true negotiations. A system of "collective bargaining" that permits the unilateral repudiation of agreements by one party is not collective bargaining at all.

The court thus concluded that the Department was owed no deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), on this point.

The District Court declined to accept the Unions' argument that the Final Rule impermissibly restricted the scope of bargaining, however. Although the court agreed that the regulations' "eradication of virtually all bargaining over 'operational' issues will have a dramatic effect upon the work lives of the employees the [Unions] represent," it nonetheless found that "Congress gave the [Department] the authority to ignore the provisions of Chapter 71 and to establish new metes and bounds for collective bargaining at DHS." * * *

The District Court sustained the Unions' objections to the role assigned to FLRA by the Final Rule. On this point, the court held that DHS could not "commandeer the resources of an independent agency and thereby fundamentally transform its functions, absent a clearer indication of congressional intent."

The District Court also found that the Final Rule violated § 9701(f)(2) of the HSA, because the restrictions on MSPB review "result[] in a system that is not fair." The court found that, because the Final Rule specified that MSPB could modify penalties only when they are "so disproportionate as to be wholly without justification," review would become "almost a nullity."

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II. ANALYSIS

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B. Standard of Review

* * *

The question here is whether the disputed portions of the HR system adhere to the limitations imposed by § 9701. In particular, we must determine whether, in promulgating the Final Rule, DHS reasonably interpreted the controlling provisions of the HSA. In reviewing the Department's interpretations of the Act, we apply the familiar standards enunciated by the Supreme Court in *Chevron*. * * * "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the Agency, must give effect to the unambiguously expressed intent of Congress." However, where a statute is ambiguous and the agency has acted within its delegated authority, we will defer to the agency's interpretation only if it is reasonable. * * *

[T]he Unions do not question DHS's authority to promulgate regulations defining collective bargaining; they contend instead that the specific regulatory standards selected by the Department to narrow the scope of bargaining and allow for the unilateral abrogation of agreements do not give effect to the HSA's command to "ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them." Likewise, the Unions do not doubt that the Department could have opted to have disputes arising under the HR system be resolved by FLRA pursuant to the terms of the Federal Services Labor-Management Statute (Chapter 71); rather, they contend that DHS had no authority to conscript the Authority to function under the HR system on terms defined by the Department.

C. The Duty to Ensure Collective Bargaining

* * * When § 9701 is read in its entirety, it is absolutely clear that DHS does not have a free hand to construct a HR system entirely as it prefers. * * * Most importantly, at least with respect to the issues in this case, when Congress added the substantive requirement in the HSA guaranteeing DHS employees the right to bargain collectively, it obviously intended for this requirement to be construed reasonably and applied fully.

Although the HSA requires the Department to "ensure" that their employees may bargain collectively, the Act does not define collective bargaining. Fortunately, this is not a term without meaning. Indeed, "collective bargaining" is a term of art in the federal sector that has been defined by Congress in the FSLMS:

"[C]ollective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession. 5 U.S.C. § 7103(a)(12) (2000).

The Government's incantation of the truism that collective bargaining "is not a static concept with a fixed meaning in all circumstances," is thus beside the point. In the context of federal sector

labor-relations, collective bargaining is a term of art with a well-established statutory meaning. * * *

There is a presumption that Congress uses the same term consistently in different statutes. Given the parallel provisions in the FSLMS, [and] the HSA * * * it is clear that "collective bargaining" under the HSA gains meaning from the application of that same term under Chapter 71. * * *

[T]he HSA states explicitly that, in establishing a new HR system, the Department "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.

This statutory obligation is mandatory, not optional. And if, as shown above, "collective bargaining" means the same thing under both the HSA and the FSLMS, then application of the term under the latter statute cannot possibly be irrelevant to an understanding of how the term applies under the former.

* * * The obvious problem with the HR system is that very few "conditions of employment" are subject to meaningful bargaining, and the few conditions over which the parties can negotiate may be unilaterally abrogated by management. A system of this sort does not even give an illusion of collective bargaining.

1. DHS's Asserted Power to Unilaterally Abrogate Collective Bargaining Agreements

The most extraordinary feature of the Final Rule is that it reserves to the Department the right to unilaterally abrogate lawfully negotiated and executed agreements. This is plainly impermissible under the HSA. If the Department could unilaterally abrogate lawful contracts, this would nullify the statute's specific guarantee of collective bargaining rights, because DHS cannot "ensure" collective bargaining without affording employees the right to negotiate binding agreements. The District Court's decision on this point is exactly right:

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. * * *

In the Government's view, the provisions at issue represent a reasonable, and therefore permissible, understanding of "collective bargaining." Congress required DHS to craft a HR system that is "flexible" and "contemporary," and the Government insists that DHS deserves deference in weighing those objectives in its efforts to ensure collective bargaining. The Government's arguments on this point are completely unconvincing, because they ignore Congress' explicit command that any HR system "ensure that employees may * * * bargain collectively." A system that gives the Department a free hand to selectively vitiate collectively bargained agreements does not obey that command.

As noted above, "collective bargaining" is a term of art, defined in other statutory schemes, and DHS was not free to treat it as an empty linguistic vessel. None of the major statutory frameworks for collective bargaining allows a party to unilaterally abrogate a lawfully executed agreement. *See, e.g.*, 5 U.S.C. §§ 7102(2), 7103(a)(12) (2000) (federal sector bargaining); 29 U.S.C. § 158(a)(5), (b)(3) & (d) (2000) (private sector bargaining); 39 U.S.C. § 1206 (2000) (U.S. Postal Service); 45 U.S.C. § 152 (Fourth) (2000) (common carriers). Indeed, no statutorily mandated *collective bargaining* system that we are aware of dispenses with the premise that negotiated agreements bind both parties. * * * [W]hen pressed at oral argument, the Government could provide no counterexample.

The HR system embodied in the Final Rule has no antecedent, because it undermines the very idea of collective bargaining. Structuring collective bargaining so that labor and management meet to negotiate terms until they reach an accord or an impasse only makes sense on the assumption that each side's evolving bargaining position will reflect a series of tradeoffs that move the parties toward a mutually satisfactory end point. It is therefore dispositive that the HSA refers to *collective bargaining*--not merely "consultation" or "notification". * * * When Congress intended to *deny* collective bargaining rights and provide only advisory roles to employee representatives, it used different language. *Compare* 5 U.S.C. § 9701(b)(4) ("bargain collectively"), *with id.* § 9701(e) ("collaboration" or "consultation" through "meet and confer" process), *and* 5 U.S.C. § 7113 (2000) ("national consultation rights").

Finally, the Government's position not only defies the well-understood meaning of collective bargaining, it also defies common sense. As noted above, collective bargaining is a method of structuring the formation of labor contracts, and the notion of mutual obligation is inherent in contract law. *See Restatement (Second) of Contracts* § 3 (1979) ("* * * A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."). To imagine that a system might "ensure collective bargaining" without imposing mutual obligations is simply bizarre. * * *

2. The Scope of Bargaining

The right to negotiate collective bargaining agreements that are equally binding on both parties is of little moment if the parties have virtually nothing to negotiate over. That is the result of the Final Rule adopted by DHS. The scope of bargaining under the HR system is virtually nil, especially when measured against the meaning of collective bargaining under Chapter 71. And this is saying a lot, because the scope of bargaining under Chapter 71 is extraordinarily narrow * * *

Having reviewed the Final Rule with care, we find that the limited scope of bargaining under the proposed HR system violates the Act, and on this point we reverse the District Court. * * *

We cannot assume that Congress deployed a term of art, with a long history of legal usage, while contemplating that DHS could completely drain that term of significance.

* * * As the District Court found, "[t]he HR System essentially reduces collective bargaining to employee-specific terms affecting discipline, discharge and promotion." This is so far short of the

meaning of collective bargaining under Chapter 71 that we are constrained to hold that the Final Rule does not meet the HSA's requirement of bargaining in good faith over conditions of employment for purposes of reaching an agreement.

It is readily apparent that the Final Rule reflects a flagrant departure from the norms of "collective bargaining" underlying Chapter 71.* * * For example, "permissive" areas of bargaining under Chapter 71 are off limits for negotiation at DHS. This distinction is critical. Procedures for exercising rights affecting issues like work assignments and deployments are negotiable under Chapter 71, but not under the HR system. And, under the HR system, when management exercises one of its rights, it need not provide notice to labor representatives in advance. Moreover, the proposed HR system gives DHS broad new authority "to take whatever other actions may be necessary to carry out the Department's mission." Presumably, this provision empowers DHS to take any matter off the bargaining table at any time, regardless of what concessions have already been made by union representatives. No analogous power exists anywhere in Chapter 71. Most strikingly, DHS management is prohibited from negotiating over the "procedures it will observe in exercising" the authority laid out in subsections (a)(1) and (a)(2) of the management rights provision. Instead, management must merely "confer" with labor representatives about the procedures it will use. These provisions stand in sharp contrast to Chapter 71's obligation to bargain over the procedures used to exercise management rights.

Finally, Chapter 71 requires agencies to bargain over "appropriate arrangements" for employees adversely affected by the exercise of a management right. The HR system shrinks such bargaining considerably. For the "operational matters" committed to management discretion * * * DHS must negotiate appropriate arrangements only when "the effects of [management's exercise of a right] have a significant and substantial impact on the bargaining unit, or on those employees in that part of the bargaining unit affected by the action or event, and are expected to exceed or have exceeded 60 days." Even under these narrow circumstances, appropriate arrangement proposals must be limited to such matters as personal hardships and safety measures, or reimbursements for out-of-pocket expenses. The Final Rule thus effectively strips the term "collective bargaining" of any real meaning in limiting the scope of bargaining.* * *

Furthermore, it must be recalled that the duty to bargain does not require agreement, only a good faith effort by the parties to reach agreement. Additionally, employees in the federal sector are forbidden from striking, so they can add no economic leverage to their bargaining demands as can employees in the private sector. And, most importantly, employees covered by DHS's HR system will not have the advantage of an impasses panel--which can *impose* conditions of employment if the parties' negotiations reach an impasse as do employees who are covered by Chapter 71.* * *

3. The Final Rule Fails to Ensure Collective Bargaining for DHS Employees in Two Critical Respects--Therefore No Deference is Due the Department's Interpretation of the HSA

The foregoing discussion makes it clear that, insofar as the Final Rule permits the Department to abrogate final agreements and narrowly limits the scope of bargaining to employee-specific terms, the regulations fail to "ensure" collective bargaining for DHS employees. In these circumstances, we owe no deference to DHS's interpretation of the HSA. . . .

An agency construction of a statute cannot survive judicial review * * * if a contested regulation reflects an action that is inconsistent with the agency's authority. * * *

In this case, as we have shown, DHS's Final Rule defies the plain language of the Act, because it renders "collective bargaining" meaningless; and it is utterly unreasonable and thus impermissible, because it makes no sense on its own terms. * * *

D. The Role of the HSLRB

The Unions also argue that DHS's HR system impermissibly shrinks the collective bargaining requirement in a third way: by funneling bargaining disputes to HSLRB. The Unions object to HSLRB, because, in their view, the new board lacks sufficient independence to provide the neutral adjudication required of a collective bargaining regime. * * *

Our holding in Part E below, relating to the role of FLRA under the HR system, renders this issue unripe for resolution. The Final Rule is flawed insofar as it allows DHS to encroach on FLRA's operations without the statutory authority to do so. * * *

E. DHS's Attempt to Regulate FLRA

* * * The District Court was "convinced that [DHS] cannot commandeer the resources of an independent agency and thereby fundamentally transform its functions, absent a clearer indication of congressional intent." We agree.

As explained above, the Final Rule quite clearly intends to impose a novel procedural scheme on FLRA, even though nothing in the HSA authorizes DHS to regulate the work of the Authority or alter its statutory jurisdiction. The Authority is an independent agency operating pursuant to its organic statute under Chapter 71. Chapter 71 prescribes FLRA's functions and authority. * * * DHS's Final Rule attempts to conscript FLRA into reviewing a narrowly defined area of cases under an intensely deferential standard of review. Whereas FLRA's statutory function involves the exercise of judgment and significant authority, the Final Rule shrinks the Authority's role, using it only to guard against substantial adjudicative failures by HSLRB. Indeed, under the Final Rule, FLRA's role with respect to any matter relating to a DHS employee would evaporate if HSLRB "determines that the matter affects homeland security." The role of FLRA under the HR system bears no resemblance to its normal statutory role, and conforming to the regulations would therefore require FLRA to substantially change its operating functions.

The Government fruitlessly searches 5 U.S.C. § 9701 for the authority necessary to rearrange FLRA's operations. * * *

III. CONCLUSION

The allowance of unilateral contract abrogation and the limited scope of bargaining under DHS's Final Rule plainly violate the statutory command in the HSA that the Department "ensure" collective bargaining for its employees. We therefore vacate any provisions of the Final Rule that

betray this command. DHS's attempt to co-opt FLRA's administrative machinery constitutes an exercise of power far outside the Department's statutory authority. We therefore affirm the District Court's decision to vacate the provisions of the Final Rule that encroach on the Authority. We reverse the District Court's holding that MSPB's standard of review in penalty modification cases represents a failure to provide "fair" appellate procedures, because that issue is not yet ripe for review. And we express no view on the role of the HSLRB, because the matter cannot be addressed until DHS revises the Final Rule.

Notes

1. The District Court for the District of Columbia came to a similar conclusion about a somewhat similar statute authorizing a new personnel system for the even larger Department of Defense (DoD). However, on appeal, the D.C. Circuit reversed, in *American Federation of Government Employees v. Gates*, 486 F.3d 1316 (D.C.Cir. 2007). The court found the statute governing the DoD, the National Defense Authorization Act (NDAA), differed in at least one significant respect from the statute governing the DHS. While certain parts of the NDAA stated that collective bargaining would be generally available to DoD employees, the Court found that other sections of the NDAA temporarily overrode those provisions. Specifically, the NDAA provided for collective bargaining after November, 2009, but it set up an experimental period before then during which the DoD had broad discretion to fashion its labor relations system. Thus, the provisions of the NDAA that permit collective bargaining for civilian workers of the DoD will apply after November 2009.

2. Democrats in Congress opposed the weakening of collective bargaining and related civil service rights in the DHS and other federal agencies when the statute creating the DHS was being debated. The Bush administration insisted on such provisions, however. See Joseph Slater, *Homeland Security vs. Workers' Rights: What the Federal Government Should Learn From History and Experience, and Why*, 6 U. Pa. J. Of Lab. & Emp. Law 295 (2004). These battles continue in Congress. Should policy makers sharply limit or eliminate collective bargaining rights of employees of agencies such as the DoD or DHS, or other employees engaged in work related to security, defense, or public safety? Why or why not, and if so, how?