

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

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WASHINGTON, D.C. 20540

CAPTION: FORT STEWART SCHOOLS, Petitioner V.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

CASE NO: 89-65

PLACE: Washington, D.C.

DATE: January 10, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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FORT STEWART SCHOOLS, :  
Petitioner :  
V. : No. 89-65  
FEDERAL LABOR RELATIONS :  
AUTHORITY, ET AL. :

Washington, D.C.  
Wednesday, January 10, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:07 a.m.

APPEARANCES:

CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
on behalf of the Petitioner.  
WILLIAM E. PERSINA, ESQ., Solicitor, FLRA, Washington,  
D.C.; on behalf of the Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

CHRISTOPHER J. WRIGHT, ESQ.

On behalf of the Petitioner

3

WILLIAM E. PERSINA, ESQ.

On behalf of the Respondents

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REBUTTAL ARGUMENT OF

CHRISTOPHER J. WRIGHT, ESQ.

On behalf of the Petitioner

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning No. 89-65, Fort Stewart Schools v.  
5 Federal Labor Relations Authority.

6 Mr. Wright.

7 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

8 ON BEHALF OF THE PETITIONER

9 MR. WRIGHT: Mr. Chief Justice, and may it  
10 please the Court:

11 The Army operates schools for the dependents of  
12 personnel stationed at Fort Stewart, Georgia. This case  
13 arose when the union that represents the teachers at those  
14 schools made a number of proposals relating to wages and  
15 fringe benefits, including a proposal to increase wages  
16 across the board by 13.5 percent.

17 The Army refused to negotiate, relying on  
18 various provisions of the Federal Labor Management  
19 Relations statute and on a statute and a regulation  
20 specifically directed to the dependents' schools. The  
21 FLRA held that the proposals are negotiable in a divided  
22 opinion, and the court of appeals affirmed.

23 We believe that the Army's refusal to bargain is  
24 justified for three reasons. First, Congress did not make  
25 wages negotiable in the Federal sector. Second, it

1       instead gave agency management control of agency budgets.  
2       And third, the salaries of teachers at the dependents'  
3       schools are to be set by comparison with the salaries of  
4       teachers at the local public schools.

5               Before I discuss those three reasons, I'd like  
6       to emphasize that it is undisputed that the vast majority  
7       of Federal employees may not bargain about pay. The pay  
8       of most Federal employees is set by the general schedule  
9       and such employees, about a million and a half in all, are  
10      paid what Congress says in the general schedule they are  
11      paid.

12              The FLRA has changed its position with respect  
13      to another large group of employees --

14              QUESTION: Mr. Wright, with respect to that  
15      first category of employees, is bargaining over their  
16      wages specifically excluded by the act, by the FLRA?

17              MR. WRIGHT: It -- it works that way. We -- we  
18      -- it is undisputed we think for three reasons. A --  
19      there is nothing in the act that says general schedule  
20      employees cannot bargain about wages in so many words.

21              However, the portion of the act that makes --  
22      that mandates bargaining, says that bargaining is not  
23      permitted where a matter is specifically provided by  
24      Federal statute. That is Section 7109(a)(14)(c).

25              In addition, Section 7117 provides that a

1 proposal cannot be in conflict with a Federal law, and a  
2 -- and a proposal to pay someone differently than what  
3 Congress has set in the Federal schedule would be contrary  
4 to law.

5 Both the union and the FLRA would agree with  
6 that I believe. They would not agree with our third point  
7 that the management rights provision which gives  
8 management control of the agency budget also means that --  
9 that the pay of general schedule employees can't be set by  
10 statute.

11 QUESTION: Mr. Wright, the -- the employees  
12 whose wages are at issue here are not employees where  
13 Federal law sets their wage, as I understand it.

14 MR. WRIGHT: That's correct. We -- we think  
15 that they are in many ways similar to prevailing rate  
16 employees.

17 QUESTION: And before this statute was enacted,  
18 there was an executive order that provided substantially  
19 similar provisions?

20 MR. WRIGHT: It was similar in some ways. The  
21 language was not identical. It did provide -- it provided  
22 for bargaining over working conditions.

23 QUESTION: And under the former executive order,  
24 would the bargaining proposal here have been upheld?

25 MR. WRIGHT: The FLRC, the FLRA's predecessor,

1 did hold in two cases that pay was negotiable. And you've  
2 gone to the strongest point in their case, so let me --  
3 let me address it right now.

4 As the D.C. Circuit stated in its excellent  
5 opinion in the overseas schools case, we believe that the  
6 practice under the FLRC and the executive order regime has  
7 been superseded by the FLRA, for the reasons the D.C.  
8 Circuit gave and the reasons I will give in the bulk of my  
9 argument.

10 Namely, that the language Congress used, the  
11 statements it made in the legislative history, and its  
12 reservation to management of control of the budget confirm  
13 that Congress did not want bargaining over wages under the  
14 Federal Service Labor Management Relations statute.

15 I'd like to make two other points with respect  
16 to the FLRC decisions. First, whether wages were working  
17 conditions was not raised in either of those cases. The  
18 FLRC never specifically decided that issue.

19 Second, it's clear that Congress was not aware  
20 of those two decisions. In fact, Senator Sasser told the  
21 Senate that, under the FLRC -- the FLRC had held that  
22 under the executive order regime that wages are not  
23 negotiable.

24 Now, normally Congress does intend to carry  
25 forward prior practice. But we think that it intends to

1 carry forward the prior practice as it understands it.

2 QUESTION: Well, don't we assume they  
3 understand? When have we gone around examining whether  
4 the congressmen have the read cases?

5 MR. WRIGHT: I don't -- I don't know any example  
6 of a case quite like this one where a senator specifically  
7 said that pay is not negotiable under the FLRC cases.

8 QUESTION: But that comment could reflect the  
9 generality of the fact that most Federal employees are --  
10 are -- their salaries are set by law.

11 MR. WRIGHT: It's possible. Our primary answer  
12 would be, as the D.C. Circuit stated, that we think for  
13 the majority of the reasons I will try to give that  
14 Congress didn't want wages to be negotiable under the --  
15 under the --

16 QUESTION: In what respect was the governing  
17 language here different from the language of the executive  
18 order, the FLRC --

19 MR. WRIGHT: It did not specifically refer to  
20 conditions of employment. The Act now says that  
21 conditions of employment are negotiable. It -- it defines  
22 it to include personnel policies, practices and matters  
23 affecting working conditions. But -- but it -- but the  
24 executive order simply referred to working conditions.

25 Now, conditions of employment, we think are --



1 are important because in the -- in the NLRA Congress made  
2 wages, hours and other terms and conditions of employment  
3 negotiable. It specifically said wages are negotiable.

4 QUESTION: You think conditions of employment,  
5 which is used in the statute, is a narrower term than  
6 working conditions?

7 MR WRIGHT: Well, we think the different term --

8 QUESTION: Do you think conditions of employment  
9 is less likely to include wages than working conditions?

10 MR. WRIGHT: Well, they are obviously very  
11 similar. My point in mentioning it --

12 QUESTION: I don't think so. I think a -- a  
13 condition of employment might well be what you get paid  
14 for the employment, but I don't think that what you get  
15 paid for employment would normally be called a working  
16 condition.

17 MR. WRIGHT: Well, in this case, of course, it's  
18 -- conditions of employment are defined to include matters  
19 affecting working conditions. So Congress has used  
20 somewhat a different language here.

21 What we think is most important is looking at  
22 both the NLRA and the Postal Reorganization Act. The two  
23 times Congress has made wages negotiable, it has said so  
24 specifically.

25 The Postal Reorganization Act to our mind is

1 actually the most analogous statute because it also  
2 affects Federal employees and because the committees here  
3 that drafted the bill -- the House committee was the  
4 Committee on the Postal Service and the Civil Service.

5 In the Postal Reorganization Act in 1971  
6 Congress made wages, hours and conditions of employment --  
7 I'm sorry -- wages, hours and working conditions  
8 negotiable. It specifically said, as it said in the -- in  
9 the NLRA, that wages are negotiable.

10 QUESTION: Well, Mr. Wright, on conditions of  
11 employment, does it include, in your view, more than  
12 physical working conditions?

13 MR. WRIGHT: Yes, we agree, as we tried to  
14 explain in our reply brief, that basically our position  
15 would be in accord with Justice Stewart's statements in  
16 his concurring opinion in the Fibreboard case.

17 QUESTION: Why do you think that a condition of  
18 employment might not be the wage that's paid?

19 MR. WRIGHT: Well, as Justice Stewart explained,  
20 and as the D.C. Circuit explained, the -- the first  
21 impression you would get from that language is that  
22 Congress was talking about the physical conditions of  
23 work. Safety --

24 QUESTION: Well it isn't -- the term isn't self-  
25 explanatory.

1 MR. WRIGHT: That's true. We think that --

2 QUESTION: Then why wouldn't we defer to the  
3 agency's interpretation of it, the FLRA?

4 MR. WRIGHT: Well, because we think that after  
5 this Court uses the traditional tools of statutory  
6 construction, as this Court said was appropriate in the  
7 Chevron case involving deference, that the Court will be  
8 left with the impression, like four courts of appeals,  
9 that the statute -- clearly that Congress in the statute  
10 clearly did not mean to wait -- to make wages negotiable.

11 As I have said --

12 QUESTION: Well, there -- do you feel that the  
13 FLRA's conclusion is unreasonable under the Chevron  
14 principle?

15 MR. WRIGHT: Yes. Once one looks at what  
16 Congress has done in other statutes, what the Congressmen  
17 said on the floor of the House and what Congress did in  
18 the budget right in the statute --

19 QUESTION: It seems to me that that is a great  
20 big mountain for you to get across.

21 MR. WRIGHT: Well, Your Honor, I am sorry to  
22 hear that.

23 (Laughter.)

24 MR. WRIGHT: But as I say, the majority of the  
25 courts of appeals have agreed with our position, even

1     though they've recognized that the FLRA is entitled to  
2     deference.

3             I might add that the FLRA is entitled to  
4     deference with respect to its interpretation of the  
5     Federal Labor Management law. It is not entitled to  
6     deference with respect to its interpretation of the  
7     dependents' school statute.

8             QUESTION: How -- how much weight would we  
9     ordinarily give to the action of Congress in 1935 says  
10    wages are to be bargained about under the NLRA? Congress  
11    in 1971 says they are to be bargained about in the Postal  
12    Service Act. Then Congress comes along seven years after  
13    in '78 and says conditions of employment.

14            It seems to me that inference is not as strong,  
15    or as if you are talking about the same statute where  
16    Congress says one thing in one section and uses a  
17    different phrase in another section.

18            MR. WRIGHT: It would be a better case for us  
19    were that the case. But those are the three situations  
20    where Congress has made matters bargainable. The two times  
21    it has made wages bargainable, it has said wages. The  
22    Postal Reorganization Act was very much on Congress' mind  
23    in -- in enacting this statute.

24            Congressman Udall, who authored the compromise  
25    that was enacted, specifically contrasted the practice

1 under the Postal Reorganization Act to what -- the  
2 practice under his bill. And he assured his colleagues  
3 that pay would not be negotiable under this statute,  
4 saying that the bargainability of wages for the Postal  
5 Employees had been very troublesome.

6 In addition, two proposals were made to Congress  
7 to make wages negotiable. Congressman Ford proposed a  
8 bill that would have made wages generally negotiable, and  
9 Congressman Heftel introduced a more limited proposal that  
10 would have made pay negotiable so far as consonant with  
11 the law and regulation.

12 Neither of these proposals were enacted. They  
13 were both rejected, and we think that that is significant.  
14 Another ---

15 QUESTION: Is any part of your case that  
16 bargaining would be inconsistent with the statute that  
17 controls or organizes these dependent schools?

18 MR. WRIGHT: Yes. Yes. That's -- we -- we  
19 think that in that statute, in a nutshell, Section 241 and  
20 Subsection (a) says that these schools are to be  
21 comparable to schools in the states where they are  
22 located. Subsection (e) says that the per-pupil costs of  
23 the dependents' schools shall not exceed, so far as  
24 practicable, the per-pupil costs at the local public  
25 schools.

1           Now, the Army has interpreted that reasonably,  
2           in our view, to mean that if you are going to offer  
3           comparable education at a comparable per-pupil cost, you  
4           have to pay teachers comparably. Teachers are, after all,  
5           the most important component in many educational --

6           QUESTION: So if the Army has that authority  
7           under -- to interpret its statute that way, you would say  
8           that -- that bargaining would be inconsistent with some of  
9           the law.

10          MR. WRIGHT: Yes. That that's our third  
11          argument in this case. It's independent ground for  
12          overturning the decisions below. We think it's --

13          QUESTION: Were the unions --

14          QUESTION: Do you think it's your weakest  
15          argument? Is that it?

16          MR. WRIGHT: I don't believe so, Your Honor.

17          (Laughter.)

18          MR. WRIGHT: It's -- it's our narrowest  
19          argument.

20          (Laughter.)

21          QUESTION: Were the teachers here, the unions,  
22          asserting that -- that they were entitled to wages that  
23          were not comparable? I mean, comparable wages doesn't  
24          seem to me a very precise term and then there's -- there's  
25          a lot of room for bargaining while still remaining within

1 the -- the playpen of comparability, it seems to me.

2 MR. WRIGHT: Well, in fact, the proposals do not  
3 purport to be comparable. They are not comparable.

4 The --

5 QUESTION: Are they admitted not to be  
6 comparable?

7 MR. WRIGHT: The -- I don't know if they would  
8 admit that they are not, but --

9 QUESTION: All right.

10 MR. WRIGHT: The salary schedules at these  
11 schools are actually set quite specifically. There's a  
12 sheet of paper and across the top there are four  
13 categories: bachelor's degree, master's degree, special  
14 ed degree, and doctorate.

15 Then down the other side there's years of  
16 experience. And so, if you have a special ed decree --  
17 degree and 11 years of experience, you find out that you  
18 get a certain amount of money and that's -- that's the way  
19 these things are done. So they're --

20 QUESTION: Still in all, comparable isn't  
21 identical and you might say a couple of hundred dollars  
22 more in light of greater distance to travel to get to this  
23 school as opposed to those schools or some other things,  
24 wouldn't that be considered --

25 MR. WRIGHT: Yes.

1 QUESTION: -- still comparable?

2 MR. WRIGHT: Yes, and -- and --

3 QUESTION: So why can't you bargain over it  
4 under this statute?

5 MR. WRIGHT: Well, it seems to us that that sort  
6 of throws Congress' commands out the window. The -- the  
7 couple of hundred dollars here and there would still be  
8 comparable. Simply untying the wages at the dependents'  
9 schools from the wages at the local schools --

10 QUESTION: Well, Congress should have said  
11 precisely then, you know, shall not comparable to -- shall  
12 be -- shall be those prescribed by. It didn't say that.  
13 It said comparable to.

14 MR. WRIGHT: And they need to be comparable. We  
15 -- we think the Army has -- in fact, per-pupil costs have  
16 to be comparable and -- and Congress recognized that you  
17 couldn't have identical per-pupil costs. The Army would  
18 have to make sure that it had, you know, so many teachers  
19 with doctorates and five years of experience if all costs  
20 were to be --

21 QUESTION: Well, you are talking about  
22 regulations not the statute now, aren't you? The statute  
23 just says that the education has to comparable.

24 MR. WRIGHT: The statute says that the education  
25 has to be comparable and that the per-public costs have to



1 be comparable. It is the regulation that says that  
2 salaries schedules have to be comparable.

3 I'd like to make one other point with respect to  
4 our -- our primary contention, our contention that wages  
5 are not negotiable.

6 This statute is different from the private  
7 sector in that, if a matter is negotiable, the Federal  
8 Service Impasses Panel can impose a proposal on an agency  
9 over its objection. So, in this case, if the FLRA  
10 prevails, the salaries of dependents' school's teachers  
11 could ultimately be set by arbitrators rather than by the  
12 agency.

13 We think, especially in that circumstance, if  
14 Congress wanted not only to make wages negotiable but to  
15 allow a system where they might ultimately be set by --  
16 outside the agency, it surely would have said so in the  
17 statute.

18 QUESTION: How is the Federal Services Impasses  
19 Panel appointed? I'm not familiar with the manner of its  
20 appointment.

21 MR. WRIGHT: It's an agency within the FLRA, and  
22 it is my understanding that the FLRA has a semi-permanent  
23 panel of members of the Impasses Panel, but that they also  
24 -- that the Impasses Panel itself relies very heavily on  
25 the Federal Mediation Service. And it in turn sends many

1 matters to arbitrators under the Federal Mediation  
2 Service.

3 QUESTION: Is there any review authorized of a  
4 decision of the Impasse Panel?

5 MR. WRIGHT: Not that I know of. The FLRA  
6 reviews grievance decisions by arbitrators, but I do not  
7 understand that they review Impasse Panel decisions.

8 QUESTION: Those decisions can be arbitrary and  
9 capricious, as far as we --

10 MR. WRIGHT: They certainly can.

11 Let me make one other point with respect to our  
12 argument that wages aren't conditions of employment, and  
13 -- and that is that after the Ford and Heftel proposals  
14 were rejected, congressman after congressman got up on the  
15 floor of the House and assured their colleagues that wages  
16 weren't negotiable. And -- and we think that that  
17 reinforces our conclusion.

18 In addition, on our second argument that the  
19 budget right gives agencies control of the budget, the  
20 first thing I would like to say with respect to that is  
21 that the -- the budget right, which says that nothing in  
22 the -- in the Civil Service Reform Act shall affect the  
23 authority of agency management to determine the budget of  
24 the agency reinforces our first position.

25 We think that it would be contradictory for

1 Congress to state simultaneously that management has  
2 control of the budget but wages are on the bargaining  
3 table. Since wages could ultimately be set by  
4 arbitration --

5 QUESTION: But, Mr. Wright, it is -- it is not  
6 your position, is it, that all proposals must be cost-  
7 free?

8 MR. WRIGHT: No, it is not our position.

9 QUESTION: Okay.

10 MR. WRIGHT: We -- we would certainly allow that  
11 something that had a relatively de minimis impact on the  
12 budget would -- would not be negotiable. The FLRA has  
13 gone to the other extreme.

14 QUESTION: Excuse me. Is it your position that  
15 any proposal over a matter that is otherwise bargainable,  
16 becomes nonbargainable if it would cost a lot of money?

17 MR. WRIGHT: Yes. If it would -- if it would be  
18 so large as to interfere with the agency's budget, yes, it  
19 is our position that it becomes nonbargainable.

20 QUESTION: More than de minimis in other words?

21 MR. WRIGHT: Well, it would be for the FLRA to  
22 determine ultimately what that standard might be. Whether  
23 it would be more than de minimis or would have to  
24 substantial has simply not been litigated to this point.

25 QUESTION: And who has the burden on the issue

1 on the budget?

2 MR. WRIGHT: Well, the FLRA has --

3 QUESTION: Says you do.

4 MR. WRIGHT: -- placed the burden on -- on  
5 management --

6 QUESTION: Right.

7 MR. WRIGHT: -- not only to show the costs of  
8 the proposal -- and here it seems to us a cost of a 13.5  
9 percent pay increase seeks -- speaks for itself.

10 QUESTION: Well, it doesn't really because  
11 what's really at issue is the difference between 13.5 and  
12 what you were prepared to give anyway.

13 MR. WRIGHT: Which, of course, we're not  
14 prepared -- we're not about to announce before a  
15 negotiations --

16 QUESTION: Well, there is something in the  
17 papers that suggests you -- you did indicate a willingness  
18 to give something like 10 or 11 percent, didn't you?

19 MR. WRIGHT: The -- the -- in this particular  
20 school year the agency gave the teachers a 6 percent pay  
21 raise and then in the middle of the year gave them -- I  
22 think it was a 6.8 percent pay raise -- and then in the  
23 middle of the year gave them another 4 percent.

24 QUESTION: So the difference between 13.5 and  
25 10.8 or whatever it is, is really what is the impact on

1 the budget that would otherwise have been --

2 MR. WRIGHT: In this particular year. But we  
3 think that this proposal here calls in -- calls into  
4 question the entire agency budget, the largest item in the  
5 agency's budget. And it obviously, therefore, deprives  
6 the agency of control over its budget.

7 QUESTION: Well, but as I understood the FLRA,  
8 they took the position that you had the burden of  
9 explaining just to what extent it impacted on the budget.  
10 And if was -- if it looked substantial, they were prepared  
11 to listen to you.

12 MR. WRIGHT: Well, they also wanted us to prove  
13 that the benefits that flowed from the union proposal  
14 wouldn't outweigh the costs. In other words, they put the  
15 burden on management of proving the benefits that would  
16 flow from the union proposal. Now, we don't know what  
17 benefits might flow from this proposal.

18 QUESTION: Well, sometimes you might. I mean --  
19 I don't know. But is it -- but is it perfectly clear that  
20 in every case it's unreasonable to ask management to  
21 explain its understanding of what impact this would have  
22 on the budget?

23 MR. WRIGHT: No. No. Certainly not in every  
24 case. If -- if it were totally unclear, if it weren't  
25 something like a 13.5 percent increase, it might well be

1 reasonable.

2 QUESTION: Is it your understanding that when  
3 they asked you to -- to show that no benefits would come  
4 from it, they were talking about non-economic benefits?

5 MR. WRIGHT: Yes, I believe so because what they  
6 -- near as we can tell, they seemed to think that an  
7 across the board pay increase would improve employee  
8 morale and that would be the compensating benefit here  
9 that would outweigh the costs of the 13.5 percent  
10 proposal.

11 Now, I suppose employee morale improving might  
12 cut down on turnover and ultimately lead to some monetary  
13 saving.

14 QUESTION: You are in control of your budget so  
15 long as you have high employee morale? Is that the -- is  
16 that the theory of that?

17 MR. WRIGHT: Well, I think that's the other  
18 side's position.

19 The heart of the problem with the FLRA's test on  
20 the budget, I'd like to say, is made clear on page 15 of  
21 its brief where it says cost doesn't matter. More  
22 specifically, it says that the cost of a proposal alone is  
23 an insufficient basis to find interference with the  
24 statute's budget right.

25 In the NRC case, which this Court -- which is

1 pending before the Court right now, a 20 percent pay raise  
2 was proposed, which would cost the agency \$32 million  
3 annually. The cost of that proposal alone doesn't rule it  
4 out under FLRA's agency -- under the FLRA's budget test.

5 If there are no further questions at this time,  
6 I would like to reserve the remainder of my time.

7 QUESTION: Thank you, Mr. Wright.

8 Mr. Persina.

9 ORAL ARGUMENT OF WILLIAM E. PERSINA

10 ON BEHALF OF THE RESPONDENTS

11 MR. PERSINA: Thank you, Mr. Chief Justice, and  
12 may it please the Court:

13 The Authority's holding in this case, affirmed  
14 by a unanimous court of appeals, stands on three eminently  
15 reasonable points.

16 First, that the compensation paid to a Federal  
17 employee for work performed constitutes an aspect of that  
18 employee's work relationship with his or her employer.  
19 Indeed, compensation is probably the primary condition  
20 upon which the employment relationship is initiated and  
21 maintained.

22 So for the relative handful of Federal  
23 employees, such as those in this case, whose compensation  
24 is not established in statute, compensation is a mandatory  
25 bargaining subject under the Federal Sector Labor law.

1           The authorities second point is that simply  
2 because a bargaining proposal entails an initial or facial  
3 cost, that is not enough of a reason in itself to conclude  
4 that implementation of the proposal will interfere with  
5 the agency's budget right.

6           Rather, that agency employer must show that the  
7 real cost impact of that proposal, after its compensating  
8 benefits are taken into account, will require the agency  
9 to seek more money through the budget process to conduct  
10 its affairs than it had originally determined was  
11 necessary. And that is a showing that the employer agency  
12 in this case has not made.

13           QUESTION: Is it -- would that showing have to  
14 discount not only the economic benefit of -- but the  
15 tangible economic benefit for the agency but also the kind  
16 of intangible, such as employee morale factor?

17           MR. PERSINA: Well, as Mr. Wright indicated,  
18 some of the intangibles will very frequently be able to be  
19 converted into tangibles. Really, the analysis is little  
20 more than the familiar cost/benefit analysis that is a  
21 commonly used tool both inside and outside the government  
22 for management planning.

23           QUESTION: Now, cost/benefit analysis takes  
24 account of intangibles.

25           MR. PERSINA: Yes, it does.



1 QUESTION: The word "budget" does not.

2 MR. PERSINA: Well, but the point here is  
3 whether or not the cost impact of the proposals will be  
4 sufficient to offset. Now, certainly some of these  
5 intangibles, we think, for instance -- and morale I think  
6 is a good example. If employee morale is good, that can  
7 logically --

8 QUESTION: You need fewer teachers and therefore  
9 wouldn't have to spend as much.

10 MR. PERSINA: Well, that's a possibility.

11 QUESTION: It's conceivable.

12 MR. PERSINA: There would be -- there would be  
13 reduced turnover.

14 QUESTION: Is it -- is it only the intangibles  
15 that have that economic effect that the Authority is -- is  
16 willing to take into account?

17 MR. PERSINA: Well, I think it would be a mix of  
18 intangibles and -- and best estimates as to how those  
19 intangibles would convert into monetary figures. But, no,  
20 even --

21 QUESTION: But, if an intangible has no economic  
22 effect, then it's irrelevant. Is that right?

23 MR. PERSINA: No. I think an intangible may be  
24 taken into account by the Authority in its compensating  
25 benefits analysis.

1 QUESTION: How so?

2 MR. PERSINA: I don't think it has to --

3 QUESTION: How -- how can an intangible that has  
4 no economic effect have any impact on whether the agency's  
5 budget is going to be affected or not?

6 MR. PERSINA: Well, I think is an intangible  
7 that may not be reducible to a specific dollar and cent  
8 term. But there can be some general basis, such as  
9 morale, and think that is a good example, as to whether or  
10 not there is bad morale.

11 For instance, if this employer and come in and  
12 say --

13 QUESTION: You didn't answer my question. Tell  
14 me how -- how it can affect whether the agency's budget is  
15 going to have to go up or not, if it does not have a  
16 demonstrable economic impact.

17 MR. PERSINA: Well, again, I think that it would  
18 be largely a question of how those intangibles --

19 QUESTION: Let me -- let me ask it as a  
20 question.

21 Can it possibly have any effect on whether the  
22 budget goes up or down if it has no economic impact?

23 MR. PERSINA: If the proposal does or the  
24 benefit does?

25 QUESTION: The benefit. If it's a benefit that

1 has no economic impact, can it possibly affect whether the  
2 budget goes up or down?

3 MR. PERSINA: I think that would be an aspect of  
4 the employer's compensating benefits analysis --

5 QUESTION: I think you can answer the question  
6 yes or no. You think it can?

7 MR. PERSINA: I think it is possible that taking  
8 the collection of tangibles and intangibles together, it  
9 can be assessed whether this proposal --

10 QUESTION: I'm just -- just talking about the  
11 intangibles. Can an intangible affect the budget if it  
12 has no economic impact?

13 MR. PERSINA: That would be very difficult to  
14 say that it did.

15 QUESTION: I think so.

16 MR. PERSINA: But I think that there --

17 QUESTION: But the Authority is saying,  
18 nonetheless, as I understand your argument, that you  
19 somehow must weigh those non-economic intangibles and  
20 offset them against this budget provision here.

21 MR. PERSINA: Well, I think it would probably be  
22 very much like the cost/benefit analysis that's called for  
23 in Executive Order 12221 which places on regulatory  
24 agencies of the government the requirement to engage in  
25 cost/benefit analysis when they regulate an industry, and

1 that specifically identifies --

2 QUESTION: But that -- but that executive order  
3 is not dealing with a statute that uses the word budget.  
4 This agency is said to have to be in control of its  
5 budget. Not in control of the general good done by the  
6 agency, but in control of its budget in particular.  
7 That's talking about money.

8 MR. PERSINA: Well, Your Honor, I think that it  
9 really is more of a question to be worked out as agencies  
10 make the showing that is required here. And habit -- I  
11 think it is a case for another day to see how it is the  
12 Authority treats those issues. What we have here is  
13 the --

14 QUESTION: It's a case for another day if -- if  
15 the way the Authority is defending its -- its position on  
16 this budget point is by saying the agency has to take into  
17 account non-economic factors.

18 I think that's a question for today. That's --  
19 that's the theory the Authority is using, as I understand  
20 it.

21 MR. PERSINA: Well, Your Honor, we think that  
22 the test is reasonable as an implementation of the  
23 competing interests of the statute. On the one hand it  
24 does recognize the employers' allegations, or the ability  
25 of an employer to allege that the real cost impact of the

1 proposal, after the compensating benefits are considered,  
2 may require the agency to seek more money to run its  
3 operations than it had originally determine was necessary.

4 But on the other hand it recognizes that cost  
5 alone, or a cost consequence alone, cannot be said to  
6 require that agency to go to the budget process and -- and  
7 seek more money. It really requires a consideration of  
8 all of those benefits and debits of the proposal.

9 And I think that's a reasonable --

10 QUESTION: But I don't understand what you just  
11 said, that cost alone cannot require it to go to the  
12 budget process and ask for more money.

13 MR. PERSINA: Well, for instance, let's take the  
14 proposals in this case --

15 QUESTION: I mean, cost alone, it has to -- it  
16 has to spend another million dollars for teachers'  
17 salaries --

18 MR. PERSINA: But --

19 QUESTION: -- and you're telling me that alone  
20 will not require it go to the budget process unless there  
21 is an offsetting economic benefit.

22 MR. PERSINA: Well, no. That is correct, Your  
23 Honor. I'm not saying that because what I am saying is  
24 that it's not known whether that step is necessary until  
25 it is know whether a pay increase will reduce the turnover

1 problem that this agency has, will reduce recruitment  
2 costs, will reduce new employee training, things like  
3 that. And there are also grievance --

4 QUESTION: They are all economic benefits.  
5 Those are all --

6 MR. PERSINA: Well, Your Honor, I would think --

7 QUESTION: -- economic benefits.

8 MR. PERSINA: I would think -- well, all I'm  
9 trying to get across here, I think, is that I think  
10 primarily the economic issues are going to be the primary  
11 issues in compensating benefits analysis. But the  
12 Authority has not ruled out the showing or the ability of  
13 an agency employer to show intangibles as well. But I  
14 think that --

15 QUESTION: More than -- more than not ruled out.  
16 You've required the employer to show that no offsetting  
17 benefits, including non-economic benefits, justify the  
18 act.

19 MR. PERSINA: Well, I think what -- as I  
20 remember in the Wright-Patterson test, the types of  
21 compensating benefits in Volume 2 of FLRA deal with such  
22 things as grievance filing rates, productivity, and I  
23 believe morale may be mentioned as one of the compensating  
24 benefits factors.

25 But I think the state of the law right now is

1 the Authority has not ruled it out. It would take that  
2 showing, if -- if the employer suggested it. I don't  
3 think the offset need be a dollar and cent exact figure as  
4 far as requiring the agency to show that.

5 An agency that shows that there's enough of a  
6 chance, that there is a substantial amount of money that  
7 will be needed or a significant amount of money that would  
8 be needed to be obtained in addition to what they thought  
9 they need to run the schools, I would think would win  
10 their compensating benefits analysis.

11 But we don't even have an employer here who is  
12 attempting to make any showing on that issue. And I think  
13 what we really have here is the reasonableness of the  
14 test.

15 And how the Authority treats things like  
16 intangible benefits of a proposal as opposed to tangible,  
17 I think really remains to be seen over time when some  
18 agency employers start trying to meet the test on its  
19 terms rather than attacking it.

20 We think it's a reasonable test that's entitled  
21 to a chance, and no agency employer has done that yet.  
22 So, I think that's where the state of the law is on the  
23 issue now.

24 QUESTION: Mr. Persina, what's your answer to  
25 the Solicitor General's contention that in the Postal

1 Service Reorganization Act in '71 the statute dealing with  
2 what was bargainable specifically said wages; the NLRA  
3 specifically said wages. This statute just says  
4 conditions of employment?

5 MR. PERSINA: Well, Your Honor, I think in those  
6 laws, the Postal Reorganization Act and the NLRA, Congress  
7 manifestly wanted to make pay negotiable for all employees  
8 who were covered under that law.

9 Under the Federal Sector statute, the situation  
10 is very different. Congress manifestly wanted to make pay  
11 non-negotiable for the overwhelming majority of Federal  
12 employees but had no concern with the relatively few  
13 pockets of Federal employees who are free to negotiate  
14 their wages because Congress has not -- has chosen not to  
15 set them through legislation.

16 Really, for this sort of reason, we think it  
17 highly inappropriate to be considering these other laws  
18 with their different purposes, their different policies,  
19 their different employee coverage and particularly their  
20 different policies as to the negotiability of --

21 QUESTION: Maybe they left wages out  
22 deliberately? Is that it?

23 MR. PERSINA: Well, Your Honor, I think that a  
24 Congress that was looking to make wages non-negotiable for  
25 97 percent of the Federal work force would not normally



1 include wages as something that could be bargained and  
2 then take it out through 7103(a)(14)(C) by saying that  
3 matters specifically established in statute are  
4 nonnegotiable.

5 I think if I were a Congress that wanted to make  
6 pay non-negotiable for 97 percent of the employees to be  
7 covered under the statute, but didn't have a concern with  
8 the few small groups of employees who could negotiate  
9 their wages because the Congress chooses not to set them,  
10 I would write the law in just the way that the statute is  
11 written to allow --

12 QUESTION: You mean the conditions of employment  
13 just doesn't include wages for 97 percent of the people?

14 MR. PERSINA: Well, it does not include wages  
15 because of the operation of the statutory exclusion from  
16 the substantive definition. It does not exclude wages  
17 because of the substantive definition itself. And that is  
18 a large part of our point here.

19 Yes, indeed, Congress did seek to make pay non-  
20 negotiable for the great majority of Federal employees,  
21 but it did it in 7103(a)(14)(C), not in the substantive  
22 definition.

23 The term personnel policies, practices and  
24 matters affecting working conditions clearly fits wages.  
25 All three of those categories, we think, eminently cover

1 wages.

2           Indeed, we think a claim that the main quid for  
3 working -- the quo for working, is compensation. And we  
4 think that is plain in terms of just looking at an  
5 employee who is dissatisfied with his or her pay. That  
6 employee will seek to sever that employment relationship.  
7 So pay can go to the very existence of the employment  
8 relationship itself.

9           And, indeed, we think it's a major failing of  
10 the schools' case here, that they have offered us no  
11 workable theory whatsoever for why it is that compensation  
12 does not constitute personnel policies, practices and  
13 matters affecting working conditions.

14           But the strength of that point, that  
15 compensation is a condition of employment in this case for  
16 these employees, is supported not just by the plain  
17 language of the definition itself. It is also supported  
18 by the executive order practice that took place prior to  
19 the statute.

20           Both Executive Orders 10988 and 11491 delineated  
21 the scope of bargain subjects by saying that personnel  
22 policies and practices and matters affecting working  
23 conditions were within the scope of the bargaining  
24 obligation. And that language is obviously virtually  
25 identical in all significant respects to the definition of

1 conditions of employment here.

2 And really, contrary to my brother Wright's  
3 remarks earlier in the argument that the executive orders  
4 did not reference conditions of employment, in the  
5 preambles to both those executive orders, Congress did  
6 just that. It said that employees should be able to work  
7 -- to negotiate on the conditions of their employment.

8 In Section 11(a) of the executive orders it then  
9 said that personnel policies and practices and matters  
10 affecting working conditions were proper bargaining  
11 subjects. So we think it plain that Congress was looking  
12 in the statute to carry over that executive order  
13 practice.

14 And I would also indicate that in the Federal  
15 Labor Relations Council's Merchant Marine decision, which  
16 we've cited in our brief, Congress did explicitly say that  
17 compensation -- or the Council, rather, said that  
18 compensation is a personnel policy and practice and matter  
19 affecting working conditions.

20 And the only way under the executive orders that  
21 compensation was made non-negotiable, was through its  
22 being established in legislation and that is precisely the  
23 system that Congress carried over under the statute.

24 So the situation in Federal sector labor  
25 relations at the time that Congress considered the statute

1 was clear. Compensation did constitute personnel  
2 policies, practices and matters affecting working  
3 conditions and was only non-negotiable if it was  
4 established through legislation. And there is nothing in  
5 the legislative history of the statute which shows that  
6 Congress wanted to change that situation.

7 In fact, there are a number of indicators that  
8 Congress wanted to maintain just that state of affairs  
9 under the statute, both in its language -- in its choice  
10 of language in the statute and the debates that took  
11 place.

12 As to the language, we've already seen.  
13 Congress adopted the same substantive parameters for the  
14 bargaining relationship and it made pay non-negotiable for  
15 most employees by -- by inserting the proviso that matters  
16 specifically established in Federal statute are non-  
17 negotiable. That's just the way it was done under the  
18 executive orders.

19 And I would also point to Section 7135(b) of the  
20 statute where Congress said that it wanted, among other  
21 things, the decisions of the Federal Labor Relations  
22 Council to continue in effect or until changed by the  
23 statute itself or through decisions of the FLRA. And  
24 neither of those events have occurred.

25 So we think it plain that Congress' treatment of

1 the executive order practice makes it clear that it  
2 intended to carry that practice over. But the debates  
3 among the key legislators in the bill also support that  
4 conclusion.

5 The legislators -- and among them I am speaking  
6 of Congressmen Clay, Ford, Udall and Collins, who are  
7 among some of the most important figures in the enactment  
8 of the statute -- all said and made clear their  
9 understanding that compensation would not be negotiable  
10 under the statute because it would be set by legislation  
11 of the Congress. And we have cited these passages on  
12 pages 28 and 29 of our brief.

13 And these remarks must form our backdrop for the  
14 selected excerpts from the legislative history that the  
15 schools rely on so heavily here, where legislators would  
16 simply say that pay would be non-negotiable without  
17 specifying how that result would be achieved.

18 And yet that is the key inquiry for the  
19 legislative history. How is that result to be achieved?  
20 And as I've indicated, we think it plain that the only  
21 intent for those remarks can be to make it non-negotiable  
22 through operation of legislation.

23 And I can state this conclusion with a very  
24 sound foundation, and that is the language of the statute  
25 itself. Because if Congress really meant by those remarks

1 that it wanted to pay -- make pay non-negotiable as a  
2 subject matter per se, it would have said so in the  
3 statute. And yet we will look long and hard in that law  
4 before we will find an express exclusion of pay matters.

5 Rather, what we see is, well, the Authority's  
6 view of the legislative history and that is that pay is  
7 made non-negotiable to the extent, considerable as it is,  
8 that Congress wanted to control that matter through  
9 legislation.

10 So it is the Authority's view of the legislative  
11 history that finds voice in the language of the statute  
12 and not the schools'. And for that reason we think the  
13 Authority's view should be affirmed.

14 QUESTION: Mr. Persina, could you satisfy my  
15 curiosity as to who the Impasse Panel is. Who appoints  
16 them?

17 MR. PERSINA: The President of the United  
18 States.

19 QUESTION: The President does.

20 MR. PERSINA: They are appointed by the  
21 President. They are not, as I understand it, confirmed by  
22 the Senate, but they are Presidential appointees. And it  
23 is required that they be expert in the field of labor  
24 relations and Federal sector labor relations. And I would  
25 point out --

1 QUESTION: Is it a full-time job? It's --

2 MR. PERSINA: No, it is not.

3 QUESTION: It is not.

4 MR. PERSINA: Panel members, as I understand it,  
5 meet approximately once a month to resolve impasses, but  
6 they are part-time Federal employees and officials.

7 QUESTION: Is it -- is it correct that their  
8 decisions are nonreviewable?

9 MR. PERSINA: That is not correct, Your Honor.  
10 Panel decisions are reviewable indirectly for sufficiency  
11 with law. And the D.C. Circuit has so held, among other  
12 circuits I believe.

13 If an agency employer believes their panel  
14 decision is contrary to law, it can refuse to comply with  
15 that panel decision, take an unfair labor practice which  
16 the Authority would resolve, and the Authority's unfair  
17 labor practice ruling would be reviewed in an appropriate  
18 circuit court of appeals.

19 So there is indirect review. Counsel Prison  
20 Locals v. Brewer is the primary case which talks about  
21 that. That is in volume 735 F.2d, although the page  
22 number is forgotten to me at the moment.

23 But we would also note, while we are talking  
24 about the panel, there is at least one case that I know of  
25 where, for Merchant Marine Academy instructors, the panel

1 had a bargaining pay -- an impasse in bargaining that  
2 dealt with setting pay. And the -- this is a Merchant  
3 Marine case where the panel went with the employer's point  
4 of view.

5 That is the one we know of where salary rates  
6 themselves were the primary focus of the impasse. Again,  
7 these don't come up very often for the panel, because pay  
8 is non-negotiable for so many employees. But they ruled  
9 for the employer in that case. And we think that the  
10 notion that the panel is some rogue body that is off doing  
11 irrational things and can't be reviewed is simply wrong.

12 They have demonstrated responsible conduct in  
13 this area, and their decisions are subject to review. So  
14 the --

15 QUESTION: Are those decisions -- is it like  
16 baseball free agency where the panel has to pick either  
17 one proposal or the other, or can it come up with a -- can  
18 it say -- can it say either your proposal is -- has to be  
19 accepted or your proposal can be rejected? Or can it have  
20 some sort of a compromise?

21 MR. PERSINA: Well, Your Honor, under the plain  
22 language of Section 7119 it can take any action it deems  
23 necessary to resolve an impasse and that could include --  
24 and the panel has frequently not adopted either the  
25 employer or the union, but has developed some third



1 course.

2 In concluding on the conditions of employment  
3 point, I would just like to note briefly concerning these  
4 -- this battle over the outside statutes that we seem to  
5 be engaged in here, inappropriate as it is, we think.  
6 Nonetheless, we think these outside laws are very much  
7 supportive of our case. The National Labor Relations Act  
8 expressly equates wages with conditions of employment.

9 We would also prefer to look closer to home for  
10 the statute. That is, the Senior Executive Service Act,  
11 which again expressly equates compensation with conditions  
12 of employments, as we've pointed out in our brief.

13 The Senior Executive Service law is another  
14 title of the Civil Service Reform Act, Title IV, the  
15 Authority is under Title VII. And here in the Reform Act  
16 itself is Congress' recognition that compensation is a  
17 form of a condition of employment.

18 So if we are to engage in this -- this debate  
19 about what do outside law show, we think, if anything,  
20 it's supportive.

21 But the real point, we think, on conditions of  
22 employment, is to look at our statute. That's the statute  
23 that's before us and that statute defines the very term  
24 that we are seeking to construe and apply here. And it  
25 does it in a way that clearly encompasses compensation.

1 And that should be the end of the matter.

2 I would just like to conclude on the condition  
3 of employment point by being so presumptuous, I think, as  
4 to suggest to this Court what kind of opinion it would  
5 have to write in order to grant the schools' position  
6 here.

7 First of all, it would have to explain why it is  
8 that compensation is not a personnel policy, practice or  
9 matter affecting working conditions. Failing that, it  
10 would have to engraft under the statute an exception for  
11 pay which is not in the law.

12 It would also have to explain why it is that the  
13 key legislators in the statute kept saying that pay would  
14 be non-negotiable because it would be regulated through  
15 legislation. And the Court would also have to identify  
16 exactly where it is in the legislative history that the --  
17 that the Congress decided that it did not want to carry  
18 over the executive order practice. That is a very  
19 (inaudible) task, I would suggest.

20 We think that it is a task that need not be  
21 confronted because the --

22 QUESTION: (Inaudible).

23 MR. PERSINA: It would be very interesting,  
24 challenging, and I would enjoy reading it --

25 (Laughter.)

1 MR. PERSINA: -- very much, needless to say,  
2 Your Honor.

3 QUESTION: I bet you would.

4 (Laughter.)

5 MR. PERSINA: Certainly. But the task need not  
6 be faced because the right view of this case on this issue  
7 is the Authority's point.

8 I'd like to now turn to the budget issue and  
9 that test that we consider here, whether the union's  
10 proposals constitute or entail significant and unavoidable  
11 costs that are not offset by compensating benefits. And  
12 this analysis is called for under the Authority's long-  
13 established budget test for determining when a proposal  
14 interferes with the budget right.

15 I do want to stress again the reasonableness of  
16 this test is an accommodation. Many of the bargaining  
17 proposals entail a facial or initial cost, and that reason  
18 is -- cannot be enough in itself to find that proposal to  
19 be non-negotiable. And indeed, we think it --

20 QUESTION: Well, it is difficult to think that  
21 you place an economic value on some of the intangibles,  
22 such as morale, to try to see whether in fact the agency  
23 has to increase its budget to pay for the cost. I  
24 think --

25 MR. PERSINA: Your Honor --

1 QUESTION: I think the FLRA position on that  
2 requires a little more explanation than you've given.

3 MR. PERSINA: Well, Your Honor, I can think of  
4 little to add beyond what I already have.

5 But I do think that many of the intangibles have  
6 a tangible outlet and that we cannot separate the  
7 intangible from the tangible because so often they will  
8 relate. And, again, I would stress that the Authority has  
9 at no time indicated that it is seeking an exact dollar  
10 and cent offset as an accounting certainty in order to  
11 satisfy the test.

12 But I do think that the particulars of the  
13 administration of the test, as far as how intangibles and  
14 tangibles are married up by the Authority, is -- is one  
15 that the Authority is entitled to develop through case law  
16 as agency employers seek to comply with the test, which  
17 this one and others have not done.

18 But the test -- to do otherwise, we think -- to  
19 do otherwise in a compensating benefits analysis would  
20 restrict the scope of bargaining so severely under the  
21 statute that Congress could not have intended that.

22 QUESTION: Mr. Persina, as I understand it, the  
23 Authority puts the burden on the Federal employer to --

24 MR. PERSINA: Yes, sir.

25 QUESTION: -- to negate any benefits. Is that

1 -- is that --

2 MR. PERSINA: Well, to negate -- to negate the  
3 costs --

4 QUESTION: Not -- not for the union to show that  
5 there will be benefits that will compensate against the  
6 increase -- taxing on the budget, but for the employer to  
7 prove that there aren't. Is that right?

8 MR. PERSINA: Well, yes, Your Honor. The burden  
9 is placed on the employer, and I think its properly  
10 placed, at least as an initial matter, for two very good  
11 reasons. Number one, it is the employer who is asserting  
12 the right.

13 Number two, it is the employer who knows best  
14 what its operation is all about and what sort of effects a  
15 particular bargaining proposal will have on that operation  
16 as a cost matter. And again, I come back to this sort of  
17 analysis as being something that is not at all, or should  
18 not be at all, alien to -- to agency employers.

19 So we don't think that the burden is  
20 inappropriately placed. What the -- what the employer  
21 must show is that the benefits do not offset the costs.  
22 And again, that is a matter that is -- we think should be  
23 within the ability of agency managers to do. I would  
24 assume they do it in the absence of a compensating  
25 benefits test for a particular course of action they may

1 have under consideration.

2 QUESTION: I would -- I would stop hectoring you  
3 on this if --if you would say that when the agency says  
4 the employer must show the benefits do not offset cost,  
5 the agency means economic benefits do not offset the cost.  
6 But you -- you cannot say that, can you?

7 MR. PERSINA: Well, Your Honor, I cannot say  
8 that the Authority has ever addressed whether it will look  
9 at only economic benefits, or it will look at economic and  
10 intangible benefits.

11 I would really refer -- the Authority's spoken  
12 word on this is in the Wright-Patterson test where it  
13 gives examples of compensating benefits.

14 QUESTION: Could I ask -- I probably should  
15 know, but here we've got two -- two different  
16 representatives for the United States Government. Do you  
17 have -- how is that?

18 (Laughter.)

19 MR. PERSINA: It's not the first time the  
20 question's been asked, Your Honor.

21 QUESTION: Well, I'm sure it isn't and -- and  
22 I'm not sure I've ever had an answer.

23 MR. PERSINA: Well, Congress, when it decided to  
24 regulate labor relations affairs in the Federal  
25 government, set up an independent establishment in the

1 Executive Branch --

2 QUESTION: Right.

3 MR. PERSINA: -- the Authority, to adjudicate  
4 matters between the private party, unions --

5 QUESTION: Right.

6 MR. PERSINA: -- and a governmental agency in its  
7 capacity as an employer.

8 QUESTION: Humphries Executor v. United States  
9 is the answer, right?

10 MR. PERSINA: Excuse me, Your Honor?

11 QUESTION: Humphries Executor v. United States.

12 MR. PERSINA: Well, I believe that is the case.  
13 I -- there is a -- there is a Supreme Court case and I do  
14 not have the cite at my fingertips --

15 QUESTION: But some --

16 MR. PERSINA: -- which says so long as there is  
17 a private party in the litigation, then all of the  
18 elements of -- of --

19 QUESTION: Well, sometimes statutes give some  
20 agencies specific authority to represent itself.

21 MR. PERSINA: Well, the Authority does have  
22 specific authority to represent itself in the district  
23 courts and the courts of appeals.

24 QUESTION: Right.

25 MR. PERSINA: We do not have that authority to

1 represent ourselves in this Court by statute, although  
2 when the interests of the Solicitor General's office and  
3 those of the Authority are at odds, the Solicitor  
4 General's office has delegated to the Authority that  
5 responsibility and it is as a --

6 QUESTION: Is that in a sort of a regulation or  
7 a writing or a --

8 MR. PERSINA: It is --

9 QUESTION: -- or is it just case-by-case giving  
10 consent?

11 MR. PERSINA: Case-by-case giving consent is the  
12 practice that has developed. The Authority by letter,  
13 requests, delegation --

14 QUESTION: Right.

15 MR. PERSINA: -- from the Solicitor General's  
16 office, and that delegation is given in writing.

17 QUESTION: Which was true in this case?

18 MR. PERSINA: Which was true in this case.

19 QUESTION: Yes.

20 MR. PERSINA: As a final matter, I would like to  
21 turn to the issue of Section 241 and the agency regulation  
22 which purports to implement that statutory section. And  
23 here we deal with the Authority's compelling need  
24 criterion as to whether the regulation is a  
25 nondiscretionary implementation of a statutory mandate.



1           In other words, is this regulation the only  
2 regulation that can be written to be consistent with the  
3 statute? And we submit that it clearly is not, that the  
4 regulation is an exercise of discretion by this agency and  
5 therefore cannot bar bargaining under the Federal Sector  
6 Labor Statute.

7           Even a cursory examination of Section 241  
8 reveals that it does not require identity of compensation  
9 between Section 6 schools and local schools. Rather,  
10 Section 241 sets two goals. The first is of comparable  
11 education quality to local schools, and the second is that  
12 that education be provided at a comparable cost or  
13 equivalent cost to local schools. Overall per-pupil  
14 costs, I would stress.

15           But it is clear that this section does not  
16 restrict the discretion of how the agency goes about  
17 meeting those bottom-line statutory goals. Under Section  
18 241 these schools have the discretion to bargain on these  
19 pay proposals and still to meet those goals.

20           Schools can configure their costs over the  
21 various aspects of providing an education in a variety of  
22 different ways, and no one way can be said to provide a  
23 better education than any other way. It would simply be a  
24 different approach to the problem of providing a quality  
25 education to students.

1           For example in this case, Section 6 schools  
2 could seek to teach math through -- in order to implement  
3 these proposals, could teach math by hiring more master's  
4 degree teachers. And because, if they -- if there were  
5 salary increases in the schools, then they would be  
6 attracting more highly-qualified people to teach in the  
7 schools.

8           And therefore, they could teach with higher  
9 quality people but be teaching may be with pencil and  
10 paper instead of having bachelor's degree teachers, which  
11 would teach with electronic calculators. Those choices  
12 under --

13           I notice that my time has expired.

14           QUESTION: Thank you, Mr. Persina.

15           Mr. Wright, you have five minutes remaining.

16           REBUTTAL ARGUMENT OF CHRISTOPHER J. WRIGHT

17                           ON BEHALF OF THE PETITIONER

18           MR. WRIGHT: I'd like to make just a few points.

19           First, with respect to the first issue as to  
20 whether wages are negotiable conditions of employment, I  
21 believe Justice White pointed out that it appears that the  
22 FLRA's position is that Congress deliberately left wages  
23 out of the -- out of the statute. It knew that 97 percent  
24 of the employees couldn't bargain about wages, and so it  
25 took wages out of the statute.

1           We think that rather than -- that this Court  
2 would have to engraft wages into the statute to -- to  
3 write an opinion going the other way.

4           With respect to the legislative history on that  
5 issue, no one ever said on the floor of Congress that  
6 employees, like these teachers, could bargain about pay.

7           With respect to the other statutes that have  
8 been mentioned, not one of those makes wages negotiable  
9 without saying wages are negotiable.

10          On the budget point, as I understand the  
11 discussion that went on, the FLRA's position is not only  
12 that intangibles might outweigh the costs but that --

13          QUESTION: May I interrupt there, Mr. Wright?  
14 It's true that is what they have argued today, but I'm not  
15 sure their opinion in this case relies on the possibility  
16 of intangible benefits.

17          I think one can say that in this case they said  
18 that you failed in two respects. One, that you don't show  
19 tangible benefits and, two, that you didn't even show the  
20 impact on the budget itself.

21          MR. WRIGHT: Well, of course, our primary  
22 argument is that weighing costs and benefits is the heart  
23 of the budget-making process.

24          QUESTION: Well, that may be but --

25          MR. WRIGHT: That Congress has reserved the

1 budget-making process --

2 QUESTION: -- but don't you have to respond to  
3 the argument that at least you've got to show that it has  
4 a 50 cent impact on the budget? And you didn't even show  
5 that.

6 And we don't know it to be true simply because  
7 its 13.5 percent because you might have prepared a budget  
8 that considered the contingency of a 20 percent increase.  
9 We don't know what your budget was.

10 MR. WRIGHT: We -- we think that any -- any  
11 proposal that calls into account the salaries of  
12 (inaudible) schools --

13 QUESTION: But what if you had previously  
14 determined in your own budget that you'd sent to the  
15 Commander-in-Chief of the Army, or whoever it would go to,  
16 that you -- you think the union is going make an  
17 outrageous demand because all the local schools have gone  
18 up 20 percent, so we'd better budget for 20 percent, even  
19 though we may not have to pay it?

20 MR. WRIGHT: Well, our position is that salaries  
21 are just -- are just off the negotiating table. That --

22 QUESTION: Well, I understand, but your -- and  
23 your budget argument -- just confining it to the budget  
24 argument, how can you could say on that hypothetical there  
25 would be any impact on the budget?

1           MR. WRIGHT: Well, in your example, Justice  
2 Stevens, we've already -- the Army has already lost  
3 control of the budget process. It's taken into account  
4 the negotiability, a demand that would be made --

5           QUESTION: But what if -- no, say that it's not  
6 negotiable. Suppose they just decided as a matter of  
7 policy they think these teachers ought to be increased  
8 even more than the union later demanded, and they budgeted  
9 that amount? That's not impossible.

10          MR. WRIGHT: It's not impossible. Our position  
11 is that opening the wages of teachers at schools to  
12 negotiation, will -- will deprive the management of  
13 control of the -- of the school's budget.

14          QUESTION: Even if they ask for less than you  
15 had budgeted?

16          MR. WRIGHT: Even in that unlikely event, which  
17 is not presented here.

18                 If there are no further questions --

19          CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.  
20 The case is submitted.

21                 (Whereupon, at 11:05 a.m., the case in the  
22 above-entitled matter was submitted.)

23  
24  
25

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#89-65 - FORT STEWART SCHOOLS, Petitioner V. FEDERAL LABOR RELATIONS

AUTHORITY, ET AL.

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY Judy Freilicher

(REPORTER)

