No. 04-72237

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

and

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Intervenor

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (AAuthority@ or AFLRA@) on April 12, 2004. The Authority's decision is published at 59 F.L.R.A. (No. 148) 815. A copy of the decision is included in the Excerpts of Record (ER) filed with petitioner's brief at

ER 8-12. The Authority exercised jurisdiction over the case pursuant to ' 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. '' 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to ' 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority properly held that a union collective bargaining proposal concerning compensation for bargaining unit employees was outside the employer agency's obligation to bargain because the Comptroller of the Currency has sole and exclusive discretion to determine the compensation of the agency's employees.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding under ' 7117 of the Statute. The National Treasury Employees Union ("union" or "NTEU"), the exclusive representative of a unit of employees of the United States Department of the Treasury, Office of the Comptroller of the Currency, Washington, D.C., (AOCC@or Aagency@) submitted a collective bargaining proposal concerning compensation levels of certain employees. The agency declared the proposal to be outside its obligation to bargain. In response, NTEU appealed the declaration of nonnegotiability to the Authority pursuant to § 7117(c) of the Statute.

[1] Pertinent statutory provisions are set forth in the attached Addendum (Add.) A to this brief.

The Authority (Member Pope, dissenting) held the proposal to be outside the agency's obligation to bargain because the applicable statute provides the Comptroller of the Currency (Comptroller) with sole and exclusive discretion to determine the compensation of OCC employees. Pursuant to ' 7123(a), NTEU now seeks review in this Court of the Authority=s decision and order.

STATEMENT OF THE FACTS

A. Background

NTEU is the exclusive representative of a unit of employees of the OCC. During collective bargaining, the union submitted the following proposal:

> All affected employees who relocate pursuant to the District Restructuring will continue to receive the geo rate of their current location, if that rate is higher than that of the location to which they will move, for three (3) years from [the] date of relocation, in order to mitigate the adverse impact of the relocation.

The agency pays its employees geographically-based pay differentials ("geo-pay") to offset higher costs of living in certain locales. Under the union's proposal, where an employee is transferred from a higher geo-pay locale to one with a lower

pay rate, the agency would be required to continue to pay the higher rate for a period of three years. ER 8.

OCC refused to bargain over the proposal, contending that the proposal was outside its statutory obligation to bargain. According to the agency, the applicable statutory provisions, 12 U.S.C. §§ 481 and 482, grant the Comptroller sole and exclusive discretion to determine the compensation of the OCC's employees. Pursuant to § 7117(c) of the Statute, NTEU petitioned the Authority for review of the agency's determination. ER 8.

B. The Authority=s Decision

The Authority, in agreement with the OCC, held that the proposal was outside the agency's obligation to bargain. Initially the Authority reiterated the controlling legal principle, namely, that if a law indicates that an agency's discretion over a matter affecting employees' conditions of employment is intended to be sole and exclusive, *i.e.*, that it is intended to be exercised only by the agency, then the agency is not obligated under the Statute to exercise that discretion through collective bargaining (citing *United States Dep't of the Interior, Bureau of Indian Affairs, S.W. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 F.L.R.A. 246, 248 (2002)). ER 9.

In determining whether a law grants an agency sole and exclusive discretion the Authority first looks at the plain wording of the relevant statute. Section 481 of Title 12 of the United States Code provides that certain groups of OCC employees, including those affected by this proposal, "shall be employed by the Comptroller of the Currency with the approval of the Secretary of the Treasury[,]" and that "the employment and compensation" of the employees "shall be without regard to the provisions of other laws applicable to officers or employees of the United States." 12 U.S.C. § 481. Citing *AFGE, Local 3295*, 47 F.L.R.A. 884, 894-99 (1993), *aff'd* 46 F.3d 73 (D.C. Cir. 1995), the Authority stated that where a statute grants an agency the authority to compensate employees "without regard to the provisions of other laws applicable to officers or employees of the United States[,]" such wording grants the agency sole and exclusive discretion to establish compensation. The Authority concluded that the wording of §481, when considered by itself, grants the Comptroller sole and exclusive discretion to establish compensation. ER 9

The Authority noted, however, that Congress enacted §481 in 1933, and in 1989 Congress amended 12 U.S.C. § 482 as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183 (1989). According to the Authority, one of the purposes of FIRREA

was to make certain that each federal banking regulatory agency could attract and retain qualified staff to ensure the safe and sound operation of federally insured depository institutions (citing H.R. Conf. Rep. No. 101-222 at 457 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 496). As relevant here, § 482 grants the Comptroller authority to hire staff and set their compensation without the requirement that such actions be approved by the Secretary of the Treasury. According to the Authority, § 482 merely confirms that the Comptroller exercises sole and exclusive discretion to appoint staff and set their compensation. ER 9-10.

The Authority next looked to the legislative history of the relevant statutes. According to the Authority, the purpose of § 482 was to provide the Comptroller independence from the Secretary of the Treasury with respect to personnel matters. The Authority stated further that there was nothing in the legislative history to indicate that Congress ever intended to remove the Comptroller's exemption from civil service laws governing federal employees. ER 10-11.

Accordingly, the Authority concluded that the Comptroller has sole and exclusive discretion to determine the compensation of the agency's employees. The Authority held, therefore, that the union's proposal is outside the agency's obligation to bargain. ER 11.

STANDARD OF REVIEW

Authority decisions are reviewed in accordance with the Administrative Procedure Act, and may be set aside only if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983) (*BATF*). In ruling on negotiability issues, the Authority "exercise[s] its 'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations. Its determination therefore deserves considerable deference." *Defense Language Inst. v. FLRA*, 767 F.2d 1398, 1401 (9th Cir. 1985), quoting *BATF*, 464 U.S. at 97 (internal citations omitted). The Authority's interpretation of statutes other than its enabling act, while not entitled to deference, should be followed so long as the Authority's reasoning is "sound." *Nat'l Ass'n of Gov't Employees v. FLRA*, 179 F.3d 946, 950 (D.C. Cir. 1999) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

SUMMARY OF ARGUMENT

The Authority properly held that Congress intended to provide the Comptroller of the Currency with sole and exclusive discretion to determine all aspects of OCC employee compensation; therefore, union proposals seeking to establish certain compensation matters are outside the agency's obligation to

bargain. Both the plain wording and the legislative history of 12 U.S.C. §§ 481 and 482 support the Authority's conclusions.

1. It is undisputed that, considered by itself, the plain language of § 481, exempting the Comptroller from other laws applicable to federal employees in making compensation determinations, grants the Comptroller sole and exclusive discretion. Further, nothing in the 1989 amendments to § 482 negates that conclusion.

Because Congress resolved in 1989 not to modify the language of § 481, §§ 481 and 482 must be read together in order to preserve the meaning of both sections so that they "make sense" in combination. The Authority's interpretation, rejecting the union's erroneous view that the sections are incompatible and instead recognizing that the exemption language in § 482 can be reconciled with the broader exemption provisions of § 481, gives meaning to all parts of the statute and should be preferred.

2. In addition, the Authority's conclusion that important parts of § 481 should not be nullified is supported by the legislative history of the 1989 amendments to § 482. As an initial matter, there is no direct evidence in the legislative history that Congress's purpose in amending § 482 was to narrow the

scope of the Comptroller's discretion in general or, more specifically, to subject the Comptroller's compensation determinations to collective bargaining.

Nor is there indirect evidence to support the union's view that Congress intended to limit the Comptroller's pay-setting discretion. The union relies heavily on the fact that, as originally drafted, the amendments to § 482 exempted the Comptroller's pay-setting authority from civil service laws generally, but as enacted, § 482 mentions only two specific provisions of federal civil service law. The union asks the Court to infer from this change that Congress intended to subject the Comptroller to all civil service laws not specifically referenced in § 482. The union's reasoning is unsound.

First, as noted above, such an argument ignores Congress's determination to leave intact the Comptroller's broad exemption from civil service laws found in § 481. Second, the union's objection overlooks clear indications in the legislative history that Congress intended the specific exemptions found in § 482 not to repeal the Comptroller's historically broad discretion in compensation matters under § 481, but rather simply to confirm and emphasize the agency's specific discretion to deal with the classification and salary aspects of OCC employee compensation without being constrained by the system applicable to federal employees in

general. Further, the union mistakenly relies on a flawed analogy between the OCC's pay-setting authority and that of the Federal Deposit Insurance Corporation.

3. Finally, the union's attack on the Authority's purported reliance on D.C. Circuit precedent (the *AFGE v. FLRA* case) misconstrues the Authority's decision. Although the Authority discussed the case, the Authority reached its decision based on an independent analysis of the language and legislative history of §§ 481 and 482. As discussed above, based on this analysis, the Authority correctly determined that Congress intended to leave intact the Comptroller's sole and exclusive discretion to determine all aspects of OCC employee compensation. Accordingly, because the Authority properly determined that the union's proposals are outside the agency's obligation to bargain, the union's petition for review should be denied.

ARGUMENT

THE AUTHORITY PROPERLY HELD THAT A UNION COLLECTIVE BARGAINING PROPOSAL CONCERNING COMPENSATION FOR BARGAINING UNIT EMPLOYEES WAS OUTSIDE THE EMPLOYER AGENCY'S OBLIGATION TO BARGAIN BECAUSE THE COMPTROLLER OF THE CURRENCY HAS SOLE AND EXCLUSIVE DISCRETION TO DETERMINE THE COMPENSATION OF THE AGENCY'S EMPLOYEES

Relying on both the plain wording and the legislative history of the relevant statutory provisions, the Authority correctly held that the Comptroller was granted

sole and exclusive discretion to determine the compensation of the agency's employees. Under well-established and unchallenged precedent, where agency management is granted such unfettered discretion over the conditions of employment of its employees, these conditions of employment are outside the agency's obligation to bargain. Accordingly, the OCC was not obligated to bargain over the union's proposals concerning the continuation of geo-pay.

A. Applicable Legal Principles

Under the Statute, an agency employer is obligated to bargain over "conditions of employment." 5 U.S.C. § 7114(b); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644 (1990) (*Fort Stewart Schools*); *Defense Language Inst. v. FLRA*, 767 F.2d 1398, 1399 (9th Cir. 1985). As a general rule, agencies are obligated to bargain over matters affecting conditions of employment, including compensation, to the extent the agencies have discretion over the matters.[2] *Dep't of the Treasury, United States Customs Serv. v. FLRA*, 836 F.2d 1381, 1384-86 (D.C. Cir. 1988), *see also Fort Stewart Schools*, 495 U.S. at 645-50. However, the presumption that an agency must bargain over conditions of employment can be overcome by indications that Congress intended the agency in question to enjoy complete and unfettered discretion over the matter. *AFGE, Local 3295 v. FLRA*, 46 F.3d 73, 74

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[2] Compensation for the vast majority of federal employees is not within the employing agency's discretion, but rather is set by statute. Accordingly, with respect to those employees, compensation is not a negotiable matter. *Fort Stewart Schools*, 495 U.S. at 649.

(D.C. Cir. 1995) (*AFGE v. FLRA*); *see also Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402-03 (D.C. Cir. 1988). In determining whether a matter is committed to an agency's unfettered or "sole and exclusive" discretion, the Authority first examines the language of the statutory provisions granting the agency discretion and, if such language is unclear, looks to the legislative history to determine congressional intent. *AFGE, Local 3295*, 47 F.L.R.A. at 893-95.

The Comptroller's authority to determine the compensation of OCC employees is set forth at 12 U.S.C. §§ 481 and 482. As will be demonstrated below, both the language and the legislative history of these provisions establish that Congress intended the Comptroller to have sole and exclusive discretion to set the compensation of the agency's employees. Accordingly, the Authority properly held that the OCC was not obligated to bargain over compensation-related matters.

B. Statutory Language

The authority of the Comptroller to establish the compensation of the agency's employees is found at 12 U.S.C. §§ 481 and 482. As the Authority properly held, those provisions clearly reflect Congress's intent that the agency is to have sole and exclusive discretion to set compensation for its employees.

1. Section 481

Section 481 provides that the Comptroller, with the approval of the Secretary of the Treasury, may set the compensation of OCC's employees "without regard to the provisions of other laws applicable to officers or employees of the United States." 12 U.S.C. § 481. It is well established that where Congress grants an agency discretion, and in so doing expressly exempts the exercise of that discretion from other applicable laws, an intent to grant the agency sole and exclusive discretion is rightfully inferred. *See United States Dep't of Defense, Nat'l Imagery and Mapping Agency*, 57 F.L.R.A. 837, 843 n.10 (2002) (citing *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1401 (D.C. Cir. 1988) and *Colo. Nurses Ass'n v. FLRA*, 851 F.2d 1488 (D.C. Cir. 1988)); *see also AFGE v. FLRA*, 46 F.3d at 73. Accordingly, the Authority properly found that the language of § 481, considered by itself, grants the agency sole and exclusive discretion.

NTEU concedes (Brief (Br.) at 16) that statutory provisions granting agency discretion "without regard to" or "notwithstanding" other laws create a presumption that such discretion is considered sole and exclusive. The union contends, however, that the discretion granted the Comptroller in § 481 is not sole and exclusive because the exercise of this discretion was made subject to the approval of the Secretary of the Treasury. The union's contention is mistaken.

While § 481 may make the Comptroller's exercise of pay-setting discretion subject to a superior officer, it cannot be denied that the intent of § 481 was to make the *agency's* decisions exempt from any *external* constraints, regardless of which agency official has the final say. In the instant context, *i.e.*, whether the exercise of agency discretion is free from any collective bargaining obligation, the question of which agency official makes the final decision with respect to that discretion is irrelevant. Accordingly, NTEU provides no reason to challenge the Authority's determination that the language of § 481 creates a presumption that the agency's authority to set compensation is free from any collective bargaining obligation.

2. Section 482

NTEU also contends (Br. at 16) that, "[i]n any event, the degree of discretion afforded by § 481 became a moot point" after Congress amended 12 U.S.C § 482 as part of the FIRREA. However, as the Authority held, nothing in § 482 affects the unfettered discretion to set employee compensation granted the agency by § 481.

With specific reference to the Comptroller's pay-setting authority, § 482 provides that "[r]ates of basic pay for all employees of the [OCC] may be set and adjusted by the Comptroller without regard to the provisions of chapter 51 or subchapter III of chapter 53 of title 5." According to NTEU, this language serves

to narrow the exemption from external constraints in setting compensation granted the agency in § 481. The union contends that under § 482, the Comptroller's authority is exempt from the specific provisions of Title 5 expressly referenced therein, but is subject to all other statutory constraints, including the bargaining obligations provided in the chapter 71 of Title 5, *i.e.*, the Statute. The union further argues that to the extent this "narrow" exemption is in conflict with the broader exemption found in § 481, the language of § 482 prevails because § 482 grants the Comptroller authority to determine compensation "notwithstanding any of the provisions of section 481 of this title."

The Authority properly rejected NTEU's contention that § 482 conclusively indicates Congress's intent to make the Comptroller's compensation determinations subject to collective bargaining. It is axiomatic that a court must, if possible, give effect to all parts of a statute. *Schwarder v. United States*, 974 F.2d 1118, 1124 (9th Cir. 1992). Further, and as the Supreme Court has noted, it is a "classic judicial task" to reconcile various statutory provisions enacted over time and get them to "make sense in combination." *United States v. Fausto*, 484 U.S. 439, 453 (1988). NTEU's preferred interpretation of §§ 481 and 482 neither gives effect to all parts of the law, nor "make[s] sense in combination."

NTEU's interpretation of the relevant provisions does not give effect to, and would effectively repeal, the unfettered discretion granted the agency in § 481. It is significant that in enacting FIRREA and amending § 482, Congress chose to leave § 481 as it stood. If Congress had intended to eliminate the discretion provided the agency in § 481, it could have done so expressly. *See Chao v. Bremerton Metal Trades Council, AFL-CIO*, 294 F.3d 1114, 1119 (9th Cir. 2002) (repeals by implication are disfavored). Because Congress chose to leave § 481 intact, § 482 should be read in a manner to preserve the intent of § 481.

Additionally, and contrary to NTEU's suggestions (Br. at 18-19), § 482's introductory language -- "notwithstanding any of the provisions of [§] 481"-- does not indicate Congress's intent to repeal the unfettered discretion provided in § 481. Applying that language in a manner so as to give effect to all parts of the statute and to read the sections together so they make sense, provisions of § 481 should be negated only where they are truly inconsistent with provisions of § 482. Contrary to the union's suggestions, the pay-setting provisions of § 482 are not inconsistent with those of § 481.

First, the narrow exemption from specific portions of Title 5 found in § 482 is not inconsistent with the broader exemption found in § 481. Rather, the narrow § 482 exemption is included within the broader § 481 exemption. Hence

specifically noting in § 482 that the agency's pay-setting authority is exempt from chapter 51 or subchapter III of chapter 53 of Title 5 may be redundant with respect to § 481, but it is not inconsistent. Section 482 would be inconsistent if it provided that the agency was exempt from *only* those specific provisions. However, given § 481's broad exemption, there is no reason to infer such meaning.

Second, and in any event, the scope of the § 482 exemption is distinct from those in § 481. The narrow exemption provided in § 482 does not, as the broader exemption in § 481 does, extend to all forms of employee compensation. Rather, it applies only to setting the "rates of basic pay." Chapter 51 of Title 5 establishes the position classification system that applies to the majority of federal employees. subchapter III of chapter 53 specifically provides for the basic rates of pay that attach to the classification levels established in chapter 51, *i.e.,* the "General Schedule." Accordingly, § 482 is reasonably read only to emphasize that in setting basic rates of pay, the agency is exempt from the General Schedule.[3] There is nothing in the language of § 482 to suggest that the Comptroller's unfettered

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[3] Not only does such a reading "make sense," it is consistent with § 482's legislative history. *See* below at section C.

discretion with respect to compensation in general (including geo pay) provided in § 481 is, in any way, diminished.[4]

In sum, interpreted so as to give effect to all parts of the statute and to make sense, §§ 481 and 482 provide the agency with sole and exclusive discretion to set the compensation of its employees. Contrary to NTEU's suggestions, nothing in § 482 diminishes the unfettered pay-setting authority clearly and unambiguously provided by § 481.

C. The Legislative History of § 482

The Authority properly relied upon the legislative history of the 1989 amendments to § 482 to support its conclusion that §§ 481 and 482 provide the Comptroller with "the exclusive authority" to determine the compensation of the OCC's employees. *See* H.R. Conf. Rep. No. 101-222 at 457 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 496 (Conference Report). As the Authority stated, nothing in the legislative history provides any indication that the purpose of the amendments was to diminish the pay-setting authority of the agency.

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[4] *NTEU*, 47 F.L.R.A. 980, 993 n.5 (1993), cited by the union (Br. at 18), is inapposite. There the Authority held that a provision granting exemption from some, but not all, provisions of Title 5 was insufficient to confer sole and exclusive discretion. What sets the instant case apart is that here such language must be read in combination with language, in § 481, granting the agency an unqualified exemption from all of Title 5.

The overriding purpose of the FIRREA was to reform and enhance the regulatory and enforcement powers of the federal agencies charged with oversight of financial institutions. *See* Conference Report at 393, *reprinted in* 1989 U.S.C.C.A.N. at 432. As relevant here, one aspect of this reform was to provide these agencies, including the OCC, with the flexibility in employing and compensating personnel required to attract and retain qualified staff to ensure the safe and sound operation of federally insured depository institutions. The compensation provisions also sought to avoid competition among the agencies for experienced and competent staff with specialized expertise by encouraging the federal bank regulatory agencies to consult and seek to maintain comparability in compensation paid to their employees. Conference Report at 457, *reprinted in* 1989 U.S.C.C.A.N. at 496.

With these goals in mind, Congress amended § 482. As noted in the Conference Report, the principal purpose of the amendment was to remove the requirement that the Secretary of the Treasury approve the compensation determinations of the Comptroller. Conference Report at 457, *reprinted in* 1989 U.S.C.C.A.N. at 496. The Conference Report also parenthetically noted that the exemption from specific portions of Title 5 "confirms OCC's current exclusion from these provisions." *Id.* Nothing in the conference report or any other portion

of the legislative history indicates that Congress intended to diminish the unfettered nature of the agency's authority to set compensation. Rather, as the report stated, the references to 5 U.S.C. Chap. 51 and Chap. 53, Subchap. III were provided not to establish new standards for compensation, but rather to confirm the agency's existing authority.[5]

NTEU can point to no statements in the legislative history that assert that § 482 was intended to diminish the Comptroller's existing pay-setting authority. Rather, NTEU finds indirect evidence of such an intent. NTEU notes (Br. at 20-22) that during deliberations over FIRREA, Congress first considered a version of § 482 that included language functionally equivalent to that found in § 481.[6] The union argues that since the enacted version exempted the Comptroller's authority from only two specific provisions of Title 5, Congress must have intended to limit

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[5] The specific confirmation of the OCC's exemption from the General Schedule may have been a response to the testimony of the Comptroller. The Comptroller testified that under the authority of § 481, the Secretary of the Treasury consistently restricted pay increases for OCC employees to those granted other federal employees subject to the General Schedule. See Testimony of Robert L. Clarke, Comptroller of the Currency, before the House Committee on Banking, Finance and Urban Affairs, March 22, 1989. The relevant testimony is provided as Add. B to this brief.

[6] This earlier version would have permitted the Comptroller to set compensation "without regard to the provisions of any law or regulation (including title 5, United States Code) relating to Federal employee and officer compensation." H.R. 1278, 101st Cong., § 1203 (1989); *see also AFGE v. FLRA*, 46 F.3d at 81 (Wald, J., dissenting)

the Comptroller's exemptions to only those two provisions. The union cites *NAGE Local R5-136*, 56 F.L.R.A. 346, 349 n.7 (2000) (*NAGE*) in support of the proposition that by replacing an unqualified exemption from federal statutes with a narrower clause, Congress indicates that discretion is not intended to be sole and exclusive.

The fallacy of NTEU's argument is that it ignores the fact that, while amending § 482, Congress chose to leave the broad preemption language of § 481 intact. By contrast, in *NAGE*, Congress had modified the only relevant statutory clause affecting the agency's discretion. As noted above, if Congress intended to narrow the Comptroller's discretion, it could have done so unambiguously by striking the relevant parts of § 481. A more reasonable explanation is that discussed above, namely that Congress intended to confirm the Comptroller's existing authority, emphasizing the OCC's exemption from the General Schedule. Such an explanation accounts for Congress's decision to leave § 481 intact and also specify the exemption from the General Schedule in § 482.

NTEU also notes (Br. at 23) that the Conference Report states that the Comptroller is given the same authority as the Federal Reserve System and the Federal Deposit Insurance Corporation (FDIC). According to NTEU, it is undisputed that at the time § 482 was enacted, FDIC was required to bargain over

compensation and benefits. (citing *NTEU, Chapter 207*, 28 F.L.R.A 625, 627-28 (1987)). Contending that Congress was presumptively aware of "FDIC's established duty to negotiate pay," NTEU concludes that Congress intended that the Comptroller must exercise pay-setting discretion through collective bargaining.

NTEU's arguments are without merit. In the first instance, it is clear from context that the comparability to be achieved with the Federal Reserve System and the FDIC concerned comparability with the substantive compensation and benefits to be provided employees, not the procedures through which those determinations are made. *See* Conference Report at 457, *reprinted in* 1989 U.S.C.C.A.N. at 496. Moreover, and contrary to the union's contention (Br. at 23), it was hardly "undisputed that, at the time § 482 was enacted, FDIC was required to bargain over pay." The union is correct in asserting that, at the time FIRREA was being considered, the Authority had held that where agencies such as the FDIC have discretion over compensation, those agencies were obligated to bargain over the exercise of that discretion. *See*, *e.g.*, *NTEU, Chapter 207*, 28 F.L.R.A at 627-28. However, the Authority's position on the negotiability of pay and fringe benefits was the subject of protracted litigation during that period and a split among the circuit courts existed. *See e.g.*, *Fort Stewart Schools v. FLRA*, 860 F.2d 396 (11th Cir. 1988), *aff'd* 495 U.S. 641 (1990) (holding compensation negotiable); *West*

Point Elementary School Teachers Ass'n v. FLRA, 855 F.2d 936 (2d Cir. 1988) (same); *Dep't of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409 (3d Cir. 1988) (holding compensation nonnegotiable); *Nuclear Regulatory Comm. v. FLRA*, 879 F.2d 1225 (4th Cir. 1989) (*en banc*) (same). The split in the circuits was ultimately resolved by the Supreme Court in 1990. *Fort Stewart Schools*, 495 U.S. at 649-50 (holding that federal employee compensation is a negotiable condition of employment where compensation is not specifically provided for by law). Accordingly, NTEU misstated the case when it contended that Congress was presumably aware of FDIC's "established duty to negotiate pay" when it amended § 482.

D. The Authority did not rely on *AFGE v. FLRA*

Contrary to the union's statement (Br. at 25), the Authority did not "heav[ily]" rely on the D.C. Circuit's decision in *AFGE v. FLRA*. In fact, the Authority did not rely on *AFGE v. FLRA* at all for its ultimate conclusion. Although the OCC contended before the Authority that *AFGE v. FLRA* was "controlling" (ER 8), the Authority never adopted this line of reasoning. To the contrary, the Authority acknowledged that the key piece of legislative history relied upon by the court to conclude that the Comptroller had sole and exclusive

discretion did not refer to § 482 as enacted, but rather concerned an earlier, rejected, version of § 482. ER 10

Accordingly, the Authority's decision was based on an independent analysis of the language and legislative history of §§ 481 and 482.[7] As discussed in detail in sections B and C above, the Authority properly concluded that those provisions granted the Comptroller sole and exclusive discretion to set the compensation of the OCC's employees.

CONCLUSION

The union=s petition for review should be denied.

[7] The Authority's independent analysis is, nonetheless, consistent with the D.C. Circuit's view that the legislative history of FIRREA, considered as a whole, supports the view that the banking regulatory agencies were to be given maximum flexibility in determining the compensation of its employees. *See AFGE v. FLRA*, 46 F.3d at 77-78

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September 2004

STATEMENT OF RELATED CASES

Counsel for the Authority hereby certify that they are aware of no related cases currently pending in this Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, Petitioner	)	
v.	)	No. 04-72237
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	
and	)	
OFFICE OF THE COMPTROLLER OF THE CURRENCY, Intervenor	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relation Authority have been served this day, by mail, upon the following:

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