

irs Vs. Flra

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SooperKanoon Citation : sooperkanoon.com/106970

Court : US Supreme Court

Decided On : Apr-17-1990

Appeal No. : 494 U.S. 922

Appellant : irs

Respondent : Flra

Judgement :

IRS v. FLRA - 494 U.S. 922 (1990)

U.S. Supreme Court IRS v. FLRA, 494 U.S. 922 (1990)

Department of Treasury, Internal Revenue Service

v. Federal Labor Relations Authority

No. 88-2123

Argued Jan. 8, 1990

Decided April 17, 1990

494 U.S. 922

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

SYLLABUS

During collective bargaining negotiations, respondent National Treasury Employees Union (NTEU) proposed that contractual grievance and arbitration provisions be designated as the "internal appeals procedure" required for employee complaints by an Office of Management and Budget (OMB) Circular relating to the "contracting out" of work. Petitioner Internal Revenue Service (IRS) refused to bargain over the proposal, claiming that its subject matter was nonnegotiable under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.* The Federal Labor Relations Authority (FLRA), which is charged with administering the Act, held that the IRS was required to negotiate over the NTEU proposal by 7114, which requires agency management and employee unions to bargain in good faith to reach an agreement, and by 7121, which specifies that such agreements must contain grievance-settlement procedures.

Held: The FLRA erred in holding that the Act requires the IRS to bargain over the NTEU proposal. Pp. [494 U. S. 926](#) -934.

(a) The plain text of 7106(a) -- which provides that

" *nothing in this [Act]* shall affect the authority of [agency management officials] in accordance with applicable laws . . . to make [contracting-out] determinations"

-- demonstrates that the section supersedes 7121. P. [494 U. S. 928](#) .

(b) The arguments presented by the FLRA to overcome 7106(a)'s plain meaning lack merit. First, 7121(c), which exempts certain appointment, suspension, and removal decisions from the grievance requirements, is not rendered superfluous if such decisions are already insulated from those requirements by 7106(a), subsection (2)(A) of which refers to those same decisions as protected management rights. Although the two provisions sometimes overlap, each also has a distinct effect on such decisions: 7121(c) removes them from the coverage of *only* the grievance provisions regardless of whether they are made in

accordance with applicable laws, while 7106 removes them from the coverage of the *entire Act*, but only if they are made in accordance with such laws. Second, agency management cannot be subjected to grievance procedures over the exercise of reserved rights on the theory that 7121

Page 494 U. S. 923

is among the "applicable laws" referred to in 7106(a), since that phrase clearly refers to laws *outside the Act*. Third, 7106(a) is applicable even though the NTEU proposal would not establish any substantive limitation on management's contracting-out decisions, but would only provide for the enforcement of "external limitations" on those decisions contained in the OMB Circular's mandatory and nondiscretionary provisions. Insofar as union rights are concerned, it is entirely up to the IRS whether it will comply *at all* with the Circular's requirements, except to the extent that such compliance is required by an "applicable law." Fourth, it is not reasonable to interpret the latter phrase as being synonymous with the term "any law, rule, or regulation" in 7103(a)(9)(C)(ii), which defines "grievance" as a claimed "violation, misinterpretation, or misapplication of *any law, rule, or regulation* affecting conditions of employment." Thus, it cannot be said that all agency contracting decisions that violate rules or regulations are, by definition, "not in accordance with applicable laws." Pp. [494 U. S. 928](#) -932.

(c) This Court will not decide in the first instance whether the OMB Circular is an "applicable law" under 7106(a). Pp. [494 U. S. 932](#) -933.

(d) The question whether 7117(a) -- which provides that the "duty to bargain . . . shall, *to the extent not inconsistent with . . . any Government-wide rule or regulation*, extend to matters which are the subject of any [non-Government-wide] rule or regulation" -- renders the FLRA proposal nonnegotiable as inconsistent with "no arbitration" language in the OMB Circular is not properly presented, since it was not raised or considered by the court below. Nor will this Court consider whether the FLRA properly held the Circular to be a "rule" or "regulation" within 7103(a)(9)'s meaning, since the IRS did not argue that question here. P. [494 U. S. 934](#) .

274 U.S.App.D.C. 135, 862 F.2d 880, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. [494 U. S. 934](#) . STEVENS, J., filed a dissenting opinion, *post*, p. [494 U. S. 937](#) .

Page 494 U. S. 924

Justice SCALIA delivered the opinion of the Court.

In this case, we review the determination of the Federal Labor Relations Authority (FLRA) that, under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, the Internal Revenue Service (IRS) must bargain with the National Treasury Employees Union (NTEU) over a proposed contract provision subjecting to grievance and arbitration procedures claims that the IRS had failed to comply with an Office of Management and Budget (OMB) Circular relating to the "contracting out" of work.

I

Title VII of the Civil Service Reform Act establishes a collective bargaining system for federal agencies and their employees, under the administration of the FLRA. The Act recognizes the right of federal employees to form and join unions, 5 U.S.C. 7102, and imposes upon management officials and employee unions the duty to "negotiate in good faith for the purposes of arriving at a collective bargaining agreement." 5 U.S.C. 7114(a)(4). A collective bargaining agreement must provide procedures "for the settlement of grievances," 5 U.S.C. 7121(a)(1), which are defined as

"complaint[s] . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment,"

5 U.S.C. 7103(a)(9)(C)(ii), and the agreement must

"provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration"

which may be invoked by either party.

Page 494 U. S. 925

7121(b)(3)(C). The agency's duty to bargain is qualified, however, in one pertinent respect. The Act reserves to management officials the authority "in accordance with applicable laws . . . to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).

Office of Management and Budget Circular A-76 generally directs federal agencies to "contract out" to the private sector their non-"governmental" activities (e.g., data processing) unless certain specified cost comparisons indicate that the activities can be performed more economically "in house." Executive Office of the President, OMB Circular A-76 (revised, Aug. 4, 1983). The Circular also requires agencies to establish an administrative appeals procedure to resolve complaints by employees or private bidders relating to "determinations resulting from cost comparisons performed in compliance with [the] Circular," or relating to decisions to contract out where no cost comparison is required. OMB Circular A76, Supp. I-14, I-15 (1983).

During the course of contract negotiations with the IRS, respondent NTEU put forward a proposal that, with respect to contracting-out decisions employees wished to contest, the "grievance and arbitration" provisions of the collective bargaining agreement would constitute the "internal appeals procedure" required by the Circular. [[Footnote 1](#)] The IRS refused to bargain over this proposal, taking the position that its subject matter was nonnegotiable under the Act. The union then petitioned for review by the Authority, which is empowered

Page 494 U. S. 926

by the Act to "resolv[e] issues relating to the duty to bargain." 5 U.S.C. 7105(a)(2)(E), 7117(c).

The FLRA held that the IRS was required by 7114 and 7121 of the Act to negotiate over the proposal. In its view, the IRS's failure to comply with Circular A-76 would be a "violation . . . of [a] law, rule, or regulation" affecting "conditions of employment," so that an employee complaint on the matter would qualify as a "grievance" for which procedures must be specified in the collective bargaining agreement. 27 F.L.R.A. 976, 978-979 (1987). The FLRA found that the union's proposal was not precluded by 7106(a)'s reservation of management authority over contracting-out determinations, because it "would only contractually recognize external limitations on management's right." 27 F.L.R.A., at 978. [[Footnote 2](#)]

The Court of Appeals for the District of Columbia affirmed the Authority's decision. 274 U.S.App.D.C. 135, 862 F.2d 880 (1988). We granted certiorari. 493 U.S. 807 (1989).

II

The management rights provision of the Act provides, in pertinent part:

"(a) [N]othing in this chapter [*i.e.*, the Act] shall affect the authority of any management official of any agency -- "

" * * * *"

" (2) *in accordance with applicable laws* -- "

" (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in

Page 494 U. S. 927

grade or pay, or take other disciplinary action against such employees;"

" (B) to assign work, *to make determinations with respect to contracting out*, and to determine the personnel by which agency operations shall be conducted;"

" (C) with respect to filling positions, to make selections for appointments from -- "

" (i) among properly ranked and certified candidates for promotion; or"

"(ii) any other appropriate source. . . ."

5 U.S.C. 7106 (emphasis added).

In the proceedings below and again before this Court, the IRS has argued that, even when an agency's decision to contract out violates OMB Circular A-76, it is still a decision "in accordance with applicable laws," and is thus immunized by the foregoing provisions from contractually imposed substantive controls -- rendering the proposal here nonbargainable. [[Footnote 3](#)] According to the IRS, the Circular is not a law, but an internal executive branch directive to agency officials regarding matters of office management.

The FLRA's position is that the management rights provisions of 7106 do not trump 7121, which entitles the union to negotiate and enforce procedures for resolving any "grievance" as defined in 7103 of the Act -- that is, any claimed "violation, misinterpretation, or misapplication of *any law, rule, or regulation* affecting conditions of employment." 5 U.S.C. 7103(a)(9)(C)(ii) (emphasis added). Thus, according to the

Page 494 U. S. 928

FLRA, it makes no difference whether OMB Circular A-76 is an "applicable law"; so long as it is a "law, rule, or regulation" within the meaning of 7103(a)(9), 7106(a) does not bar mandatory negotiation over NTEU's proposal. This, it appears, has been the FLRA's consistent position. *See, e.g., AFSCME Local 3097 v. Department of Justice*, 31 F.L.R.A. 322, 338 (1988) (7106(a) reserves to management the right to make contracting-out decisions only when they are "in accordance with all applicable laws and regulations"); *General Services Administration v. AFGE, AFL-CIO Natl. Council 236*, 27 F.L.R.A. 3, 6 (1987) (7106(a) does not preclude union from compelling agency compliance with any "applicable law, rule, or regulation").

A

We do not lightly overturn the FLRA's construction of the Act it is charged with administering. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, [464 U. S. 89](#) , [464 U. S. 97](#) (1983). We must accept that construction if it is a reasonable one, even though it is not the one we ourselves would arrive at. See [Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.](#), [467 U. S. 837](#) , [467 U. S. 842-843](#) (1984); *NLRB v. Food & Commercial Workers*, [484 U. S. 112](#) , [484 U. S. 123](#) . For the reasons that follow, however, we conclude that the FLRA's construction is not reasonable.

The FLRA's position is flatly contradicted by the language of 7106(a)'s command that " *nothing in this chapter* " -- *i.e.*, nothing in the entire Act -- shall affect the authority of agency officials to make contracting-out determinations in accordance with applicable laws. Section 7121 is among the provisions covered by that italicized language.

The FLRA presents four arguments to overcome this plain text. First, it contends that reading 7106(a) to supersede

Page 494 U. S. 929

the grievance requirements of 7121 would render certain portions of 7121 superfluous. [[Footnote 4](#)] Subsection 7121(c) exempts from the grievance requirements, among other things, decisions concerning appointments and certain decisions concerning suspension and removal -- decisions that are also referred to as protected management rights in 7106(a). *Compare* 7106(a)(2)(A) and (C)(i) *with* 7121(c)(3) and (4). The suggestion is that these 7121(c) exclusions would have been unnecessary if the decisions in question were already insulated from the grievance requirements by 7106(a). We disagree. Subsection 7121(c) removes these agency decisions from the coverage of *only* 7121(a)'s negotiated grievance provisions, yet does so whether or not the decisions are made in accordance with applicable laws; 7106(a) removes the decisions from the coverage of the *entire* Act, but only to the extent the decisions are in accordance with applicable laws. Thus, although 7106(a) and 7121(c) sometimes overlap in their treatment of these enumerated agency decisions (each removes the

decisions from the coverage of 7121(a) when

Page 494 U. S. 930

they are made in accordance with applicable laws), each provision has quite a distinct effect on them as well. [[Footnote 5](#)]

Second, the FLRA argues that 7121 is among the "applicable laws" referred to in 7106(a) -- so that 7106(a) never excuses agency management from negotiating, and submitting to, grievance procedures over the exercise of reserved management rights. This cannot be the case. If the negotiation and grievance provisions of the Act, 7114 and 7121, are "applicable laws" under this section, then presumably so is all the rest of the Act, there being no basis for treating those provisions specially. Thus, under the FLRA view, 7106(a) in effect says that "nothing in this chapter shall affect the authority of management to make contracting-out decisions in accordance with this chapter" -- a pointless tautology. It is clear that the term "applicable laws" refers to laws *outside* the Act.

Third, the FLRA argues that the NTEU proposal is not barred by 7106(a) because, in the words of the FLRA's opinion, its incorporation into the collective bargaining agreement would "not itself establish any particular substantive limitation on management in the exercise of its right to make contracting-out decisions;" rather, it "would only contractually recognize and provide for the enforcement of external limitations on management's right." 27 F.L.R.A. at 980. Referring to one of its earlier decisions, the FLRA emphasizes that, in a negotiated grievance proceeding, the arbitrator would not second-guess the IRS on discretionary aspects of the contracting-out determination, but would only review claims "that the agency failed to comply with mandatory and

Page 494 U. S. 931

nondiscretionary provisions" of the Circular. *Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Ark. v. AFGE, AFL-CIO, Local 2840*, 22 F.L.R.A. 656, 661-662 (1986). He could, for example, order the agency to "reconstruct" the cost data it relied on in making a contracting decision, *ibid.*, and,

if the decision was not cost-justified as required by the Circular, he could order the agency to reconsider it; but he would impose no "substantive limitation" on the contracting-out decision (other than those imposed by the "law, rule, or regulation" invoked by the aggrieved employee). 27 F.L.R.A. at 980. The trouble with this argument is that it is entirely disconnected from the text of the statute. The Act does not empower unions to enforce all "external limitations" on management rights, but only limitations contained in "applicable laws." Or to put the point differently, there are no "external limitations" on management rights, insofar as union powers under 7106(a) are concerned, other than the limitations imposed by "applicable laws." It makes no difference that, as a remedial matter, the arbitrator would at most order the IRS to redo its cost comparisons, and would not actually order a particular contract to be awarded or set aside. Section 7106(a) says that, insofar as union rights are concerned, it is entirely up to the IRS whether it will comply *at all* with Circular A-76's cost-comparison requirements, except to the extent that such compliance is required by an "applicable law" outside the Act.

Finally, the FLRA suggests that the term "applicable laws" in 7106(a) is coextensive with the phrase "any law, rule, or regulation" in 7103(a)(9)(C)(ii), so that any agency contracting decision that gives rise to a grievance is, by definition, not "in accordance with applicable laws." The FLRA did not explicitly use this reasoning in its decision here, but it seems to have done so in other cases. See, *e.g.*, *AFSCME Local 3097 v. Department of Justice Management*

Page 494 U. S. 932

Div., 31 F.L.R.A. at 333, 338-339. This argument is simply contrary to any reasonable interpretation of the text. A statute that in one section refers to "law, rule or regulation," and in another section to only "laws" cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places. Nor can the modifier "applicable" make the difference -- not only because its meaning has nothing to do with extending the coverage in the fashion, but also because the Act in several places employs the terms "rule" and "regulation" *in conjunction* with the term "applicable law." See, *e.g.*, 5 U.S.C. 7114(c)(2) (agency head shall approve collective bargaining agreement "if the

agreement is *in accordance with* the provisions of this chapter and *any other applicable law, rule, or regulation* ") (emphasis added); 5 U.S.C. 7122(a) ("If upon review [of an arbitrator's decision] the Authority finds that the award is deficient -- (1) because it is *contrary to any law, rule, or regulation* . . . the authority may take such action and make such recommendations concerning the award as it considers necessary, *consistent with applicable laws, rules, or regulations* ") (emphasis added). There is, in short, no justification for saying that all "rules" and "regulations" are encompassed by the term "applicable laws." It cannot be true, therefore, that *all* actions not in accordance with a "law, rule, or regulation" under 7103(a)(9) are, by definition, also actions not "in accordance with applicable laws" in 7106(a).

B

At oral argument, counsel for NTEU urged that we could sustain the FLRA's decision on the ground that the term "applicable laws" includes at least those regulations that carry the "force of law," and that OMB Circular A-76 is such a regulation. Tr. of Oral Arg. 36. We cannot, however, adopt this ground. While we think it a permissible (though not an inevitable) construction of the statute that the term "applicable laws" in 7106(a) extends to some, but not all,

Page 494 U. S. 933

rules and regulations, [[Footnote 6](#)] that extension should be made, and its precise scope described, in the first instance by the FLRA -- which has been proceeding until now on the mistaken assumption that 7106(a) is irrelevant, or that "applicable laws" in 7106(a) and "any law, rule or regulation" in 7103(a)(9) are entirely synonymous. As we emphasized in *Chevron*, when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities. 467 U.S. at [467 U. S. 843](#) -844. That is a task infused with judgment and discretion, requiring the "*accommodation of conflicting policies that were committed to the agency's care.*" *Chevron, supra*, at [467 U. S. 845](#) , quoting *United States v. Shimer*, [367 U. S. 374](#) , [367 U. S. 383](#) (1961). It is not a task we ought to undertake on the

agency's behalf in reviewing its orders. Cf. *SEC v. Chenery Corp.*, [318 U. S. 80](#) , [318 U. S. 88](#) , 95 (1943); *Burlington Truck Lines, Inc. v. United States*, [371 U. S. 156](#) , [371 U. S. 169](#) (1962).

The IRS contends that, even though the term "applicable laws" includes some rules and regulations, under no reasonable construction could it include internal directives like OMB Circular A-76. We are poorly situated to evaluate that argument, since the Court of Appeals did not consider it, neither of the respondents briefed it, and counsel for respondents addressed it in only the most cursory fashion at oral argument. It is, moreover, an argument that calls for a very difficult abstract conclusion, to-wit, that no conceivable reasonable interpretation of "applicable laws" could include this Circular. The Court of Appeals, on remand, may wish to enter into that inquiry, or may prefer to await the FLRA's specification, on remand, of the particular permissible interpretation of "applicable laws" (if any) it believes embraces the Circular. In any event, we decline to consider the point at this stage in the proceedings.

Page 494 U. S. 934

C

Finally, the IRS argues that the decision below should be reversed outright on the ground that the union's proposal is inconsistent with the "no arbitration" language in OMB Circular A-76, and is therefore nonnegotiable under 7117 of the Act, which provides that

"the duty to bargain in good faith shall, *to the extent not inconsistent with any Federal law or any Government-wide rule or regulation*, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation."

5 U.S.C. 7117(a)(1) (emphasis added). As this argument was not raised or considered in the Court of Appeals, we do not reach it. See *EEOC v. FLRA*, [476 U. S. 19](#) , [476 U. S. 24](#) (1986) (per curiam). [[Footnote 7](#)] Nor do we decide

whether the FLRA properly held Circular A-76 to be a "rule" or "regulation" within the meaning of 7103(a)(9); although the IRS raised this question as a separate ground for reversal in its petition for certiorari, it has relied only on the "management rights" clause of 7106(a) in its argument before this Court.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

It is so ordered.

[[Footnote 1](#)]

The proposed contract term read: "The Internal Appeals Procedure shall be the parties' grievance and arbitration provisions of the Master Agreements." 27 F.L.R.A. 976 (1987). The Court of Appeals characterized the proposal as

"establish[ing] the 'grievance and arbitration' provisions of the master labor agreement between them as the internal 'administrative appeals procedure' mandated by the Supplement to the Circular for disputed 'contracting-out' cases."

274 U.S.App.D.C. 135, 136, 862 F.2d 880, 881 (1988). We follow the Court of Appeals' interpretation of the proposed term.

[[Footnote 2](#)]

The FLRA also held that, although Circular A-76 was a "government-wide rule or regulation" within the meaning of 7117(a), that section of the statute did not render the union's proposal nonnegotiable, because the proposal was "not inconsistent" with the Circular. 27 F.L.R.A. at 977. For reasons explained below in Part II-C, that issue is not properly before us.

[[Footnote 3](#)]

A qualification to 7106 permits contract negotiations regarding "procedures which management officials of the agency will observe in exercising" the reserved management rights. 5 U.S.C. 7106(b)(2). Although they call our attention to this

qualification, NTEU and the FLRA rightly refrain from asserting that it governs this case. The proposal at issue would enable the grievance examiner to compel the IRS to follow the cost-comparison requirements of the OMB Circular, thereby dictating the substantive criteria for the contracting-out decision. See *infra* at [494 U. S. 931](#) .

[[Footnote 4](#)]

The relevant language of 7121 is the following:

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. . . . "

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement."

" * * * *"

"(c) The preceding subsections of this section shall not apply with respect to any grievance concerning -- "

"(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);"

"(2) retirement, life insurance, or health insurance;"

"(3) a suspension or removal under section 7532 of this title;"

"(4) any examination, certification, or appointment; or"

"(5) the classification of any position which does not result in the reduction in grade or pay of an employee."

5 U.S.C. 7121(c).

[[Footnote 5](#)]

The FLRA's position gets no support from, 7121(a)'s language providing that

" *Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances. . . .*"

If that italicized language were construed to create the Act's only exception to the requirements of 7121(a), then even the specific exclusions in subsection (c) of the provision would disappear.

[[Footnote 6](#)]

The IRS concedes this point. See Reply Brief for Petitioner 7; Tr. of Oral Arg. 14.

[[Footnote 7](#)]

Justice STEVENS contends that 7117(a)(1) bars negotiation over the Union's proposal for yet another reason, namely that the proposal covers a matter that is "the subject" of a "Government-wide rule or regulation." *Post* at [494 U. S. 938](#) (STEVENS, J., dissenting). This argument not only was not raised or considered below, but has not even been raised by the IRS here. We decline to address it.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Because the Court remands for further proceedings I believe are unnecessary, I respectfully dissent. As I read the opinion below, the agency found OMB Circular A-76 to be an "applicable law" within the meaning of the Civil Service Reform Act of 1978's management rights provision, 5 U.S.C.

Page 494 U. S. 935

7106(a)(2), and therefore determined that the union's proposal would not infringe management's reserved rights. [[Footnote 2/1](#)] Since the Federal Labor Relations Authority (FLRA or Authority) could permissibly interpret the statutory term to include regulations having the "force of law" and could permissibly find that the Circular is such a regulation, as the Court acknowledges, see *ante* at [494 U. S. 932](#) , I would affirm the judgment below. [[Footnote 2/2](#)] The FLRA's decision

that the Circular is an "applicable law" is entirely reasonable. The Circular was promulgated as a formal regulation, with notice published in the Federal Register and public comment invited. See Office of Management and Budget Circular A-76, 44 Fed.Reg. 20556 (1979), *as amended*, 48 Fed. Reg. 37110 (1983), 50 Fed.Reg. 32812 (1985). It is referenced by and its terms generally restated in the Federal Acquisition Regulations, *codified at* 48 CFR pt. 7, subpt. 7.3 (1988). By its terms, agency compliance is mandatory and enforced. OMB Circular A-76, Supp.Intro. and I-14, I-15 (revised Aug. 8, 1983). Hence, I would uphold the FLRA's conclusion that the Circular is an "applicable law" within the meaning of 7106(a)(2). [[Footnote 2/3](#)]

Page 494 U. S. 936

The Court finds the FLRA's interpretation of "applicable laws" unreasonable, not because it is an implausible reading in itself, but because it is indistinguishable from the Authority's interpretation of the phrase "law, rule, or regulation" which is contained in a different section of the Civil Service Reform Act of 1978. See *ante* at [494 U. S. 931](#) -932. I suspect the Court reads too much into the difference in language between "applicable laws" in 7106 and "law, rule, or regulation" in 7103(a)(9)(C)(ii). But, in any event, I understand the Court's decision to say only that the two phrases are not synonymous. *Ibid.* If the FLRA, in fact, has employed the same definition for the two phrases, which is arguable, the Authority's error most likely was to embrace too restrictive a view of the scope of "law, rule, or regulation." [[Footnote 2/4](#)] Thus, on remand, the FLRA is free to interpret "applicable laws"

Page 494 U. S. 937

to cover not only statutes, but also regulations and rules that are binding on the agency exercising its reserved rights. See n. 2, *supra*. The Authority is also free to interpret "law, rule, or regulation" to cover these and more -- for instance, nonbinding policy statements and unpublished internal agency guidelines.

Finally, I take issue with the Court's expansive view of the management rights provision as abrogating any union rights *vis-a-vis* decisions such as contracting out, so long as agency decisions are made consistently with applicable laws. See *ante* at [494 U. S. 931](#) . Section 7106(a) does not purport to make other provisions of the Act *wholly inapplicable* to the enumerated subject areas. It says only that nothing in the statute " *shall affect* the authority of any management official of any agency" to make certain types of decisions. An exercise of union rights that does not *affect* management's existing authority is fully consistent with this provision. 5 U.S.C. 7106(a) (emphasis added). Insofar as the union proposal would require merely what is already required by OMB Circular A-76, it would not affect the Internal Revenue Service's authority to make contracting-out decisions. Therefore it would not infringe the agency's reserved rights. Because I do not read the Authority's decision as clearly relying on this ground, I do not think it necessary for the Court to have reached it.

[[Footnote 2/1](#)]

See 27 F.L.R.A. 976, 979 (1987) (the union proposal "require[s] nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made *in accordance with applicable laws*").

[[Footnote 2/2](#)]

I am inclined to agree with the position taken by the Deputy Solicitor General at oral argument, see Tr. of Oral Arg. 14, that "applicable laws" include not only statutes but also regulations having the force of law, and that the Administrative Procedure Act (APA) provides the relevant measure. See *id.* at 47 ("[I]f a private party could bring an APA action, that would be very strong, if not conclusive, evidence that . . . you are dealing with an applicable law"). Under the APA, an agency action inconsistent with any valid and binding rule or regulation is actionable by anyone "aggrieved" by it. See 5 U.S.C. 702, 706(2)(A); *Center For Auto Safety v. Dole*, 264 U.S.App.D.C. 219, 223, 235, 828 F.2d 799, 803, 815 (1987); *Padula v. Webster*, 261 U.S.App.D.C. 365, 368, 822 F.2d 97, 100 (1987).

[[Footnote 2/3](#)]

I do not agree with Justice STEVENS that, even if OMB Circular A-76 is an applicable law, 7117(a)(1) precludes bargaining over the union proposal because the Circular is also a " *Government-wide rule or regulation.*" See post at [494 U. S. 938](#) . Section 7117(a)(1) provides:

"[T]he duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation."

I agree with Justice STEVENS that the Circular is a Government-wide rule or regulation, but I do not read the provision to bar a union proposal that asks only that an existing rule or regulation be incorporated in its entirety into the union's collective bargaining agreement. The function of 7117(a)(1) appears to be to insulate from the bargaining process union efforts to change anything that has already been settled by those with authority over the agency -- e.g., Congress, the President, or OMB. The two clauses in 7117(a)(1) explain that a union proposal in direct conflict with, or covering the same ground as, a Government-wide rule or regulation is not bargainable. They establish a kind of preemption by which agencies may not adopt rules where those with greater authority have adopted a contrary rule or occupied the field. Thus, no purpose is served by including the rule or regulation itself within "matters which are the subject of" any Government-wide rule or regulation. Incorporating a Government-wide rule into a collective bargaining agreement does not place the agency at odds with any greater authority.

[[Footnote 2/4](#)]

That the Authority found below that OMB Circular A-76 is a "law, rule, or regulation" under 7103(a)(9), see 27 F.L.R.A. at 978, does not undermine the validity of its decision, even if its definition of "law, rule, or regulation" was too narrow. If the Circular fit within an overly restrictive definition of the phrase, a

fortiori, it must fit within an appropriately broad definition. Moreover, the FLRA's finding that the union's proposal did not interfere with reserved management rights because OMB Circular A-76 is encompassed by the term "applicable laws" is sufficient ground in itself for the decision, and was relied on as such by the Authority. See 27 F.L.R.A. at 979.

Justice STEVENS, dissenting.

If OMB Circular A-76 (revised, Aug. 4, 1983) is not an "applicable law" within the meaning of 5 U.S.C. 7106(a)(2), the plain language of that section requires an outright reversal of

Page 494 U. S. 938

the Court of Appeals' decision. I have previously endorsed the view that the Circular is not an applicable law, and I still think that conclusion is correct. *EEOC v. FLRA*, [476 U. S. 19](#) , [476 U. S. 27](#) (1986) (dissenting opinion); see also *U.S. Dept. of Health and Human Services v. Federal Labor Relations Authority*, 844 F.2d 1087 (CA4 1988) (en banc). But even if the Circular were an "applicable law," it would then certainly also be "a Government-wide rule or regulation" within the meaning of 7117(a)(1). Under the plain language of that section, the duty to bargain does not extend to matters which are the subject of such a regulation. By seeking to bargain about enforcement of the Circular, the Union seeks to bargain about matters subject to the Circular. Cf. 844 F.2d at 1099. I am therefore persuaded that, whether or not one interprets Circular A-76 as an applicable law, either 7106(a)(2) or 7117(a)(1) requires reversal. To the extent that the Court instead leaves the issue open on remand, I respectfully dissent.