The Burger Court Opinion Writing Database

EEOC v. FLRA

476 U.S. 19 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 22, 1986

RE: 84-1728 - EEOC v. Federal Labor Relations Authority

Dear Sandra:

I join.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 27, 1986

No. 84-1728

EEOC v. Federal Labor Relations Authority, et al.

Dear Byron and Thurgood,

We three are in dissent in the above. Would you, Thurgood, take it on?

Sincerely,

Bill

Justice White

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 3, 1986

No. 84-1728

EEOC v. Federal Labor Relations Authority

Dear Sandra,

Please join me in your Per Curiam.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: APR 10 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

JUSTICE WHITE, dissenting.

Because I agree with JUSTICE STEVENS that the Court should decide the merits of this case, I cannot join the Court's opinion or judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 27, 1986

Re: No. 84-1728-EEOC v. Federal Labor Relations

Dear Bill:

I will be happy to do the dissent in this one.

Sincerely,

T.M.

Justice Brennan

Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 3, 1986

Re: No. 84-1728-EEOC v. FLRA

Dear Sandra:

I agree with your Per Curiam in this one.

Sincerely,

T.M.

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 7, 1986

Re: No. 84-1728, EEOC v. Federal Labor Relations Authority

Dear Sandra:

I go along with your proposed per curiam for this case.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

Supreme Court of the United States
Washington, D. C. 20543

April 2, 1986

84-1728 EEOC v. Federal Labor Relations Authority

Dear Sandra:

Please join me in your Per Curiam for the Court, in which the writ of certiorari would be dismissed as improvidently granted.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 3, 1986

Re: 85-1728 - EEOC v. FLRA

Dear Sandra:

I have read the exchange of correspondence between you and John regarding your proposed Per Curiam in this case. If you are right that the failure to preserve the point is "jurisdictional," that obviously makes the case different from Tuttle. But if you are wrong, I would hope we would follow the procedure we followed in Tuttle and decide the case on the merits. We will never know at the time we get a petition for certiorari and a response whether the points raised by the petition can be reached unless we rely upon the respondent to point out to us defaults such as the one in this case. At the certiorari stage, we frequently have only the opinion below and the petition, and we generally act on the basis of what we have before us.

I think John's observations make a lot of sense if the point here is not "jurisdictional." Having invested a great deal of time in reading briefs, hearing oral argument, and discussing the case at conference, it is genuinely regrettable to have to abandon the effort because of something the respondent might have called to our attention at the certiorari stage.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1986

Re: No. 84-1728 EEOC v. FLRA

Dear Sandra,

Please join me in your opinion.

This is a "close call" for me, because the places in the respondent's brief which discuss petitioner's failure to raise the claim below are footnotes which do not jump to one's attention. Nonetheless, I think this is a sufficient compliance with the Court's language in Tuttle as the Rules now stand. I am going to suggest that the language of Tuttle be incorporated into the Rules, and that points like this be given some prominence in a brief in opposition.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 2, 1986

Re: 84-1728 - Equal Employment Opportunity Commission v. Federal Labor Relations Authority

Dear Sandra:

Although I agree with you that 5 U.S.C. § 7123(c) ordinarily bars judicial consideration of objections not first presented to the Federal Labor Relations Authority, I am presently inclined to think that this provision--which appears to be designed to protect the Authority--can be waived by the Authority.[1] If the § 7123(c) protection can be waived by the Authority's failure to raise it, I would adhere to the practice announced in Oklahoma City v. Tuttle, ___ U.S. ___, ___ (1985) (slip op. 7), that "[n]onjurisdictional defects of this sort should be brought to our attention no later than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived."[2] As the Court

[1]Indeed, as a general matter procedural default to consideration of an issue is deemed waived if the "victim" of the default does not object. See, e.g., Ulster County Court v. Allen, 442 U.S. 140, 149 (1979) (procedural default in state trial court may be disregarded if state appellate court addresses the issue); Raley v. Ohio, 360 U.S. 423, 436-437 (1959) (same); On Lee v. United States, 343 U.S. 747, 750, n. 3 (1952) ("Though we think the Court of Appeals would have been within its discretion in refusing to consider the point, their having passed on it leads us to treat the merits also").

[2]Because § 7123(c) allows a court to excuse unilaterally "the failure or neglect to urge the objection" in "extraordinary circumstances," I do not
(Footnote continued)

pointed out in that case, "we do not think that judicial economy is served by invoking [a contemporaneous objection rule] at this point, after we have granted certiorari and the case has recieved plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition."

I may ultimately join your proposed per curiam, but I would like to study the waiver issue further.

Respectfully,

/s/

Justice O'Connor

Copies to the Conference

(Footnote 2 continued from previous page)
think that the bar is "jurisdictional" in the sense that it deprives the Court of subject matter jurisdiction.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 7, 1986

Re: 84-1728 - Equal Employment Opportunity Commission v. Federal Labor Relations Authority

Dear Sandra:

I will prepare a brief dissent.

Respectfully,

JPS

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

JUSTICE STEVENS, dissenting.

In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals.[1]

The Federal Labor Relations Authority (FLRA) is the agency designated by Congress to enforce the Civil Service Reform Act of 1978, 5 U. S. C. §§7101-7135. We must

[1] "[R]espondent's argument might have prevailed had it been made to the Court of Appeals. But we do not think that judicial economy is served by invoking [a contemporaneous objection rule] at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City* v. *Tuttle*, —— U. S. ——, —— - —— (1985) (slip op. 6-7).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

JUSTICE STEVENS, dissenting.

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[1] "[R]espondent's argument might have prevailed had it been made to the Court of Appeals. But we do not think that judicial economy is served by invoking [a contemporaneous objection rule] at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City* v. *Tuttle*, —— U. S. ——, —— – —— (1985) (slip op. 6–7).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

JUSTICE STEVENS, dissenting.

In my opinion the Court should decide the merits of this case. Two federal agencies disagree about the meaning of an important federal statute; it would serve the interests of both to have the disagreement resolved as promptly as possible. To this end, neither agency has suggested that the arguments advanced by the other are not properly before the Court. Since we are now fully advised about the merits, it would be most efficient for us to resolve the issue now rather than to postpone decision until another similar case works its way up through the agency and the Court of Appeals.[1]

The Federal Labor Relations Authority (FLRA) is the agency designated by Congress to enforce the Civil Service Reform Act of 1978, 5 U. S. C. §7101 *et seq.* We must

[1] "[R]espondent's argument might have prevailed had it been made to the Court of Appeals. But we do not think that judicial economy is served by invoking [a contemporaneous objection rule] at this point, *after* we have granted certiorari and the case has received plenary consideration on the merits. Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition. Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Oklahoma City* v. *Tuttle*, 471 U. S. ——, —— - —— (1985) (slip op. 6-7).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

PER CURIAM.

We granted certiorari to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A–76, which prescribes guidelines for contracting-out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. §§ 7101–7135.

In the course of contract negotiations with petitioner the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A–76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was non-negotiable under the Civil Service Reform Act (the Act) and declined to bargain over it. AFGE then petitioned for review by respondent the Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Before the FLRA, the EEOC's principal contention was that because the proposal concerned contracting out it was

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 1, 1986

No. 84-1728 Equal Employment Opportunity Commission
v. Federal Labor Relations Authority

MEMORANDUM TO THE CONFERENCE

The issue in this case is whether the FLRA was correct in ruling that a union proposal requiring the EEOC to comply with OMB Circular A-76, which prescribes guidelines for contracting-out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§7101-7135. At Conference I believe I indicated I was not sure I understood the case, but I voted to reverse the CADC, which enforced the FLRA's order, on the ground that OMB Circular A-76 is not an "applicable law" within the meaning of the Act's management rights clause, 5 U.S.C. §7106(a)(2)(B). As I recall our discussion at Conference, the others who voted to reverse also principally relied on this argument.

I continue to think that the Circular is not an "applicable law" and that, if this contention were properly before us, it could serve as a sound basis for reversal. However, my review of the record indicates that the EEOC completely failed to raise this issue--as well as some of its other principal contentions in this Court--before the FLRA or in the Court of Appeals. For the reasons that follow, I believe that we should not overlook the EEOC's procedural defaults, and under the circumstances I am inclined to think that our writ of certiorari should be dismissed as improvidently granted.

The Act expressly provides that when an aggrieved party seeks judicial review of a final order of the FLRA, "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. §7123(c). This language is virtually identical to

that found in §10(e) of the National Labor Relations Act, 29 U.S.C. §160(e), which provides that "[n]o objection that has not been urged before the Board ... shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." This Court has interpreted §10(e) to mean that a Court of Appeals lacks jurisdiction to review an issue not raised before the Board unless the default is excused by extraordinary circumstances. Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-666 (1982); Detroit Edison Co. v. NLRB, 440 U.S. 301, 311, n. 10 (1979). Similarly, the CADC has held that under §7123(c) "we cannot review issues that an agency never placed before the Authority." Dept. of Treasury v. FLRA, 707 F.2d 574, 579 (CADC 1983). See also FLRA v. Social Security Administration, 753 F.2d 156, 160-161 (CADC 1985).

It seems clear, then, that we should refuse to consider the EEOC's "objection[s]" to AFGE's proposal that it bargain over compliance with Circular A-76 unless those objections were urged before the FLRA. The EEOC's claim that the Circular is not an applicable law was not raised in its Statement of Position before the FLRA or in its request for reconsideration. It was not raised in the EEOC's brief, reply brief, or petition for rehearing before the CADC. Indeed, the EEOC's request for reconsideration by the FLRA presupposed that the Circular is an applicable law: the EEOC's principal contention at that time was that "OMB Circular A-76 and other applicable laws and regulations concerning contracting out contain procedures for the guidance of management ... which do not directly affect conditions of employment." Joint Appendix in the CADC, at 64 (emphasis added).

In its brief before the CADC, the EEOC again conveyed the impression that it viewed compliance with "OMB Circular No. A-76 and other laws and regulations concerning contracting-out" as non-negotiable solely because all of these legal constraints concerned management's reserved right to make contracting out determinations. Brief for the EEOC in the CADC 7-8. It is accordingly understandable that the CADC simply assumed that the Circular was an applicable law. See 744 F.2d 842, 848.

Similarly, the EEOC never raised before the FLRA its contention that the Circular is a government-wide rule or regulation, and hence outside the duty to bargain under 5 U.S.C. §7117(a)(1) as the EEOC reads that provision. This objection makes its first appearance in footnote 13 of the EEOC's brief in the CADC, and gradually takes on more prominence in its reply brief and petition for rehearing.

The EEOC's third main contention in this Court is that the Circular would not be grievable absent inclusion of AFGE's proposal in a collective bargaining agreement because the Circular is not a "law, rule, or regulation affecting conditions of employment" within the meaning of the Act's definition of "grievance," 5 U.S.C. §7103(a)(9)(C)(ii). The EEOC did argue before the FLRA that the Circular involved matters that did not "affect[] conditions of employment," but it did not urge, as it does now, that the Circular is not a "law, rule, or regulation." Since the issue of grievability appears to have been raised by the FLRA itself in the course of its decision, see 10 F. L. R. A. 3, 5 (1982), there might be reason to overlook this default (though the EEOC could have, and did not, raise this objection in its request for reconsideration). But the EEOC did not even discuss the Act's definition of grievance in its brief or reply brief in the CADC. Only in its petition for rehearing did the EEOC finally address §7103(a)(9)(C)(ii)--but its only contention was that decisions concerning contracting out should not be deemed "to affect the 'conditions of employment' within the meaning of the grievance provisions." Petition for Rehearing in the CADC 15, n. 9.

In my view, then, two of the three principal contentions the EEOC advances in this Court were inexcusably not urged before the FLRA, and the third was inexcusably not urged before the CADC. Our usual practice is to refrain from addressing issues not raised in the Court of Appeals, see, e.g., FTC v. Grolier, 462 U.S. 19, 23, n. 6 (1983); Rogers v. Lodge, 458 U.S. 613, 628, n. 10 (1982), and §7123(c) bars review of issues not raised before the FLRA. The EEOC does not acknowledge its procedural defaults, let alone attempt to excuse them. For its part, the FLRA does object to the EEOC's untimely assertions concerning "[t]he extent and the nature of the compliance obligation imposed by the Circular," Brief for the FLRA 18, n.14, though its objection is less clearly stated than it was at the petition stage. See Brief in Opp. for the FLRA 17, n. 17 (noting that the EEOC had not previously contended that the Circular is not an "applicable law"). As I read §7123(c), however, its provisions should be enforced whether or not the FLRA or an opposing party asserts them.

Little remains of the EEOC's brief if its procedurally defaulted claims are set to one side. The EEOC's principal contentions before the FLRA and the CADC were (1) that any non-procedural proposal concerning contracting out is barred by the management rights clause (even if the proposal concerns compliance with an applicable law), and (2) that the Circular itself renders the proposal

non-negotiable. I am inclined to think that deference to the agency would probably carry the day as to these two contentions, each of which was also rejected by the CADC. Beyond that, the former argument, which is in substance a claim that the words "in accordance with applicable laws" do not operate to limit the scope of reserved rights, is mentioned in the EEOC's petition for cert at 15-16, but seemingly abandoned in its brief.

Finally, the EEOC also argued (in the CADC only) that even a grievance that alleges a violation of a "law, rule or regulation affecting conditions of employment" is barred by the management rights clause if it concerns contracting out. The EEOC has continued to urge this contention in this Court, see Brief for Petitioner 38-39, but this argument makes sense only if the grievance is not based on a violation of an "applicable law[]". Since the EEOC's claim that the Circular is not an applicable law comes too late, this argument is unavailing even if the EEOC's failure to raise it before the FLRA is excusable.

I recognize that this Court and the parties have by now invested a good deal of time in this case. Nonetheless, it seems to me that we are now presented with a situation in which the EEOC's strongest claims are not properly before us. I therefore think we should consider dismissing the writ as improvidently granted. In view of the EEOC's complete inattention to §7123(c), and in view of the fact that this situation seems to be a recurring problem in FLRA cases, I think it would also be appropriate to dismiss with a per curiam opinion noting that the EEOC never raised its principal contentions before the FLRA. I am attaching a draft of such a per curiam, along with copies of the EEOC's Statement of Position and its request for reconsideration; these very sketchy statements appear to be the only submissions the EEOC placed before the FLRA.

Sincerely,

Sandra

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 3, 1986

No. 85-1728 EEOC v. FLRA

Dear Bill,

I believe the proposed Per Curiam will effectively alert the FLRA, the S.G., and other federal agencies that the arguments must be raised at the administrative level. I would be surprised to see a recurrence of the jurisdictional problem in this case. It surely has not been a problem under the NLRA.

I also think I should have been more alert at the cert granting stage to the potential problem in an FLRA case.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 3, 1986

No. 84-1728 EEOC v. FLRA

Dear John,

Thank you for your letter suggesting a possible solution to the procedural problems in this case. I have checked the cases under the comparable section of the NLRA and remain of the view that §7123(c)'s requirement that, absent extraordinary circumstances, "no objection that has not been considered before the Authority ... shall be considered by the court," is not waived simply because the FLRA does not call a party's procedural default to the attention of a reviewing court. The statute is directed to "the court," not to the party raising an objection, and as such it seems to me to operate as a limitation on judicial review that courts should ordinarily enforce sua sponte. At least in this sense, I would call the rule "jurisdictional," though you may well be right that it does not go to subject-matter jurisdiction.

This Court's cases construing §10(e) of the NLRA, in my view, provide a much closer analogy than does our treatment of Fed. Rule Civ. Proc. 51 in Oklahoma City v. Tuttle. Section 7123(c), after all, appears modeled on §10(e), and the FLRA is a rough counterpart in the federal sector to the NLRB in the private sector. In Woelke & Romero Framing, Inc., this Court said that because an issue "was not raised during the proceedings before the Board," it followed that "the Court of Appeals was without jurisdiction to consider that question," and that "judicial review is barred by §10(e) of the Act." 456 U.S., at 665. In May Department Stores Co. v. NLRB, 326 U.S. 376, 386, n. 5 (1945), the Court held that since, absent extraordinary circumstances, §10(e) "precludes the consideration by the Circuit Court" of objections not raised before the Board, "[t]his Court therefore is authorized, sua sponte, to appraise the record to determine the power of the Circuit

Court to review paragraph 1(b) of the Board's order." Of course, a failure to raise the objection in the Court of Appeals does not relieve a party of the effects of its failure to raise the objection before the Board. NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 350 (1953) ("No extraordinary circumstances are present such as would justify permitting the issue to be raised here for the first time"). I do not think that City of Oklahoma requires us to disregard these cases, which have uniformly held that absent extraordinary circumstances the failure to object before the Board "forecloses judicial consideration of the objection in enforcement proceedings." NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318, 322 (1961). I would interpret §7123(c) in line with this Court's cases interpreting §10(e), none of which, to my knowledge, have suggested that the Board, rather than the reviewing court, must raise the issue of noncompliance with the statute.

I also think there is good reason to treat §7123(c), like §10(e), as enforceable by the courts without regard to whether the FLRA or the Board objects to a procedural default in a particular case. The purpose of these rules is to ensure that the agency passes on issues as to which its expertise is likely to be useful. By enforcing such rules the courts ensure that the agency performs as Congress intended. In Department of the Treasury v. FLRA, 707 F.2d 574, 579 (CADC 1983), the court declined the employer's invitation that it "serve routinely in petitions challenging FLRA decisions more as a tribunal of first view than as a court of review." In my opinion, that invitation is inconsistent with §7123(c) whether it is extended by unions, employers, or by the FLRA itself.

Even if I agreed that the FLRA can waive enforcement of §7123(c), the situation here is quite dissimilar to the facts in City of Oklahoma, where the respondent did not object to the petitioner's procedural default in the Court of Appeals, where that court reached the merits of the defaulted claim, and where the respondent also did not "hint that the 'questions presented' might not be properly preserved." Slip op., at 6. Here, the CADC never reached the merits of the EEOC's claims because the EEOC did not raise them in that court (with the partial exception of its §7117(a)(1) claim), and thus the FLRA had no occasion to invoke §7123(c). Moreover, the FLRA noted at the cert petition stage that the EEOC's claims that the Circular is not an "applicable law[]" under §7106 or a "law, rule or regulation" under §7103(a)(9) were raised "for the first time in this case" in the EEOC's petition for cert. Brief in Opp. 17, n. 17; see also id., 11, n. 8. The FLRA did not expressly rely on §7123(c) in this footnote, but in

its brief on the merits the FLRA did raise §7123(c) in urging that the EEOC's claim that contracting out is different from other management rights for purposes of grievability is not properly before this Court. While this is hardly a creditable job of alerting the Court to the EEOC's procedural defaults, it is still a far cry from the situation in City of Oklahoma. In sum, I continue to think that certiorari should be dismissed as improvidently granted for the reasons stated in the draft per curiam.

Sincerely,

Justice Stevens

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pp. 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

PER CURIAM.

We granted certiorari to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A-76, which prescribes guidelines for contracting-out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. §§ 7101-7135.

In the course of contract negotiations with petitioner the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was non-negotiable under the Civil Service Reform Act (the Act) and declined to bargain over it. AFGE then petitioned for review by respondent the Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Before the FLRA, the EEOC's principal contention was that because the proposal concerned contracting out it was

pp. 4,5

To: The Chief Justice
Justice Brennan
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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

PER CURIAM.

We granted certiorari to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A-76, which prescribes guidelines for contracting-out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. §§ 7101-7135.

In the course of contract negotiations with petitioner the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was non-negotiable under the Civil Service Reform Act (the Act) and declined to bargain over it. AFGE then petitioned for review by respondent the Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Before the FLRA, the EEOC's principal contention was that because the proposal concerned contracting out it was

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: APR 18 1986

4th ~~3rd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1728

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[April ——, 1986]

PER CURIAM.

We granted certiorari, 472 U. S. —— (1985), to consider the question whether a union proposal that would require a federal agency to comply with OMB Circular A-76 (1983) Performance of Commercial Activities, which prescribes guidelines for contracting out by federal agencies, is negotiable under Title VII of the Civil Service Reform Act of 1978, 5 U. S. C. § 7101 *et seq.*

In the course of contract negotiations with petitioner, the Equal Employment Opportunity Commission (EEOC), respondent American Federation of Government Employees (AFGE) submitted the following proposal:

> "The EMPLOYER agrees to comply with OMB Circular A-76 and other applicable laws and regulations concerning contracting out."

The EEOC took the position that this proposal was nonnegotiable under the Civil Service Reform Act (Act) and declined to bargain over it. AFGE then petitioned for review by respondent Federal Labor Relations Authority (FLRA), which is empowered by the Act to "resolv[e] issues relating to the duty to bargain" in the federal sector. 5 U. S. C. § 7105(a)(2)(E).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 25, 1986

No. 84-1728 EEOC v. FLRA

Dear Chief,

This case is being handed down as a Per Curium so I assume you will be announcing the filing.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 29, 1986

MEMORANDUM TO THE CONFERENCE:

85-751 Motion Picture Laboratory Technicians v. NASA
(Case Held for 84-1728 EEOC v. FLRA)

In this case, a union representing employees of employers who had previously held contracts or subcontracts with NASA sought judicial review of NASA's decision to reassign work from the contracting employers to NASA's own in-house employees. The union claimed that NASA's reassignment was invalid because NASA had not performed a "comparative cost analysis" as required by OMB Circular No. A-76. In the District Court, NASA challenged the union's standing and also argued that issues of compliance with Circular A-76 are nonreviewable. The District Court did not reach the issue of reviewability because it concluded that the union and the employees were not within the "zone of interest" of Circular A-76 and hence lacked standing under Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970). The District Court examined not only Circular A-76 itself, but also the Office of Federal Procurement Policy Act of 1974 and subsequent reenactments of that Act, see 41 U.S.C. §§401-412 (1984 Supp.), because it believed that Circular A-76 "is issued pursuant to the various OFPP Acts." Pet. App. 6a. Largely on the basis of its reading of the purposes of the OFPP Acts, the District Court distinguished between the interests of contracting employers, which it viewed as falling within the zone of interest of Circular A-76, and the interests of their employees, which it held to be outside Circular A-76's zone of interest. The CA7 affirmed in a brief memorandum opinion adopting the reasoning of the District Court.

The petition for cert contends that the CA7 adopted an overly narrow view of the "zone of interest" te that conflicts with this Court's decision in Camp, but do not point to any decision involving Circular A-76 in wh federal court has held that the employees of contracto affected by an agency's decision to reassign work are the zone of interest of the Circular. Respondent NA