

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

Nos. 05-5436, 05-5437

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,

Appellees/Cross-Appellants,

v.

MICHAEL CHERTOFF, SECRETARY, UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, ET AL.,

Appellants/Cross-Appellees.

Appeal of Decision Issued by the United States District Court
for the District of Columbia

**UNIONS' OPPOSITION TO GOVERNMENT'S MOTION
FOR EXPEDITED BRIEFING AND ARGUMENT**

The government has filed a motion for expedited briefing and argument of the above-captioned appeal. This Court grants expedited consideration "very rarely." Handbook of Practice and Internal Procedures, United States Court of Appeals for the D.C. Circuit (as amended through Dec. 1, 2002) ("Handbook"), at 34. A party requesting expeditious treatment must demonstrate (1) "that the delay will cause irreparable injury and that the decision under review is subject to substantial challenge" (emphasis added); or (2) that the case is one where "the public generally, or . . . persons not before the Court, have an

unusual interest in prompt disposition." Id. The reasons for expeditious treatment must be "strongly compelling." Id.

The government's motion fails to identify any irreparable injury, does not show that the decision under review is subject to substantial challenge, and provides no basis for the Court to conclude that there is any unusual public interest in the prompt disposition of its appeal. Its motion should be denied.

BACKGROUND

This case concerns a lawsuit filed by five federal sector labor unions (the "Unions") challenging new regulations promulgated jointly by the Secretary of the Department of Homeland Security ("DHS") and the Director of the Office of Personnel Management ("OPM") (collectively, the "government") pursuant to the Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2230 (2002). The regulations establish a new human resources management system for DHS. They were promulgated in proposed form on February 24, 2004, and then issued in final form one year later on February 28, 2005.

In a decision issued on August 12, 2005, United States District Court Judge Rosemary Collyer granted the Unions' summary judgment motion in part, enjoining the subpart of the regulations addressing labor relations (Subpart E) and a regulation establishing a new standard for DHS employees seeking

mitigation of agency-imposed penalties (5 C.F.R. § 9701.706(k)(6)).

The government did not seek a stay of the district court's decision; nor did it file an appeal. Instead, two weeks after the district court issued its decision, the government filed a motion to alter or amend the judgment, seeking a narrowing of the injunction that would allow DHS to implement parts of its labor relations scheme. The court denied the government's motion in a decision issued on October 7, 2005.

On November 10, 2005, more than a month later, the government filed a two-page notice of appeal covering both the August 12 and October 7, 2005 decisions.¹ Nearly two weeks later, on November 23, 2005, the government filed a motion requesting expedited treatment of its appeal. This motion comes more than three months after the district court's decision to enjoin the labor relations regulations and more than six weeks after it reaffirmed that decision. For the reasons stated below, the Unions oppose the government's motion.

ARGUMENT

The government offers three purported justifications for expedition. None of these satisfies the Court's demanding standards.

¹ The Unions filed a cross-appeal on November 14, 2005.

1. First, the government asserts that as a result of the district court's ruling, "the Department's effectiveness in rolling out uniform policies to achieve its mission" has been "diminish[ed]." Gov't Mot. at 6. This assertion is completely unsupported by any facts or examples showing that DHS has been hampered in the performance of its mission in any material way by the delay in the implementation of the new human resources system.

Further, the government's assertion is belied by its own sluggish approach to this litigation, as well as its decidedly unhurried pace for implementing the new human resources system. As detailed above, the government could have appealed the district court's decision over three months ago. It could have simultaneously sought a stay of the district court's decision to enable it to move forward with implementation of the new regulations, pending the outcome of its appeal. For whatever reasons, the government chose not to pursue these remedies.

Indeed, even the district court's second decision, issued on October 7, 2005, was five weeks old by the time the government filed its notice of appeal. Then, the government waited an additional 13 days before filing its expedition request with the Court. If the district court's ruling were truly impeding the execution of the Department's mission, it is

inconceivable that the government would not have pursued its legal remedies more promptly.

The fact is that--until it requested that this Court expedite the appeal--the government has never displayed any sense of urgency in implementing the new regulations. Under the HSA, Congress gave DHS the authority to implement its new human resources management system, including a new labor relations regime, shortly after the law was enacted on November 25, 2002. See 5 U.S.C. § 9701(e) (providing that Secretary and Director can implement new system once they have given 30 days' notice to employee representatives to review and make recommendations concerning the new system and, after receiving recommendations, met and conferred for not less than 30 calendar days with employee representatives). DHS and OPM did not promulgate final regulations, however, until February 28, 2005. Moreover, they chose to delay the implementation of the labor relations portion of those regulations another five months, until August 1, 2005.

In short, the government's behavior since the HSA was enacted, and since the district's court's decision, completely undermines the urgent rhetoric in its motion regarding the impact of the district court's decision on DHS' execution of its mission. It has presented no reason, much less a compelling one, for this Court to expedite the briefing and argument of this appeal.

2. The government next contends that the district court's order enjoining the labor relations subpart of the regulations has ramifications that extend to other parts of the regulations not challenged in the litigation. It points specifically to the so-called "pay-for-performance" provisions whose implementation it claims is, in some undefined way, "impaired by the unavailability of the provisions that were struck down." Gov't Mot. at 6.

These vague assertions are extremely unpersuasive. In fact, the Department had already announced in September that it would be delaying initial implementation of its new "pay-for-performance" system until January 2007. This delay is not tied to the litigation in any way. Indeed, when the announcement was made, the government's motion seeking to narrow the injunction was still pending before the district court. Further, it is a realistic possibility that, if the case is heard pursuant to the Court's normal schedule, the appeals will be resolved by the January 2007 target for initial implementation of the new pay system.

3. The third basis for expedition--the statutory five-year sunset provision on the Department's authority to adjust the regulations--fares no better than the first two. As noted above, the government chose to take an extra two years to promulgate final regulations and then adopted a one-sided system

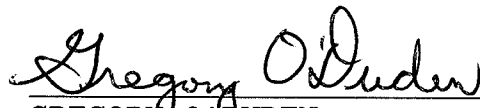
that the district court found inconsistent with the statute. Thereafter, the government delayed the exercise of its own legal rights to secure review of the district court's decision for another three months.

Equally important, the Department still has more than two years to adjust the system before the sunset period is over (through February 2008). Indeed, it could begin the process of adjusting the system now, while the case is on appeal, by initiating the statutorily required collaboration process with the Unions. See 5 U.S.C. §9701(e). Thus, once again, the government's justifications for expedition ring hollow, and must be rejected.

CONCLUSION

The government's motion should be denied.

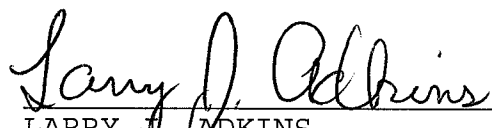
Respectfully submitted,



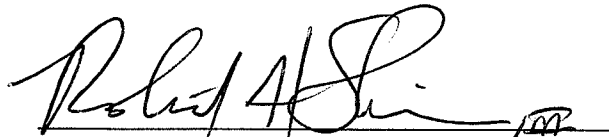
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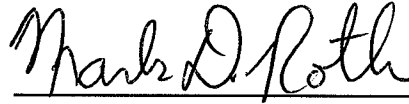


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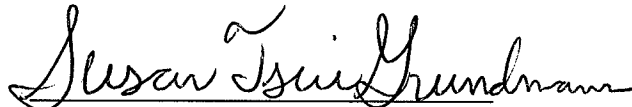
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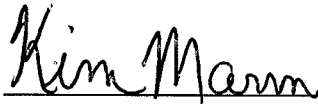
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November 2005, I caused the foregoing Unions' Opposition to Government's Motion for Expedited Briefing and Argument to be served on the following:

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A handwritten signature in black ink, appearing to read "Robert H. Shriver, III". The signature is written in a cursive style and is positioned above a horizontal line.

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