

**66 FLRA No. 40**

NATIONAL AIR TRAFFIC  
CONTROLLERS ASSOCIATION  
(Union)

and

UNITED STATES  
DEPARTMENT OF TRANSPORTATION  
FEDERAL AVIATION ADMINISTRATION  
(Agency)

0-NG-2934

DECISION AND ORDER  
ON NEGOTIABILITY ISSUES

September 29, 2011

Before the Authority: Carol Waller Pope, Chairman, and  
Thomas M. Beck and Ernest DuBester, Members

**I. Statement of the Case**

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of six proposals. The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

For the reasons that follow, we find that Proposals 1 through 5 are within the duty to bargain, and we dismiss the petition for review as to Proposal 6.

**II. Background**

The Agency revised an Agency regulation to provide for the use of a random audit system (random audits) and playback capabilities for recording tools (radar replays) to identify operational errors (OEs) or operational deviations (ODs) in the air traffic control system after their occurrence.<sup>1</sup> SOP at 1. In order to address the impact and implementation of the change, the Union submitted the disputed proposals in this case. Petition for Review (Petition) at 1. The proposals

<sup>1</sup>At the post-petition conference, the parties agreed that an "OE" is an error that involves the space between two planes and that an "OD" is an error that involves the space between a plane and restricted airspace. Record of Post-Petition Conference at 2.

concern the Agency's use of the data obtained from random audits and radar replays. Record of Post-Petition Conference (Record) at 2.

**III. Preliminary Issues**

- A. The proposals are sufficiently clear to permit the Authority to determine whether they are negotiable.

The Agency contends that the Authority should dismiss the petition in its entirety because the proposals are not sufficiently clear to permit the Authority to make a negotiability determination. SOP at 2. Specifically, the Agency maintains that the word "egregious" appears throughout the proposals, but that the Union fails to define its meaning. The Union contends that it made it clear during the post-petition conference that the term "egregious violation" means "those OEs or ODs that are not merely of a 'technical' nature or that do not constitute simply 'proximity' events." Response at 2.

The Authority dismisses petitions for review when it is unable to determine from the wording of the proposal and the union's explanation how the proposal would work so as to be able to assess its negotiability. *E.g., NATCA, AFL-CIO*, 62 FLRA 174, 175 (2007) (Chairman Cabaniss concurring as to another matter) (*NATCA, AFL-CIO*). Here, the wording of some of the proposals provides that an employee will not be charged with an error or deviation unless it is "egregious," and the Union explained the meaning of "egregious" during the post-petition conference. Accordingly, we find that the proposals are sufficiently clear to permit the Authority to determine whether they are negotiable. *See id.*

- B. The Union's objections to the allegation of nonnegotiability provide no basis for finding the Agency's filings deficient.

The Union asserts that the Agency's allegation of nonnegotiability is "ambiguous" and "non-specific." Petition at 3. The Union also asserts that the Agency stated at the post-petition conference that it was not alleging that Proposal 6 was nonnegotiable. *See* Response at 6. However, neither the Statute nor the Authority's Regulations require that an allegation of nonnegotiability be made with any particular degree of specificity. Instead, an agency is required in the statement of position to specify its arguments and authorities that it wants the Authority to consider in reaching its decision. 5 C.F.R. § 2424.24(c); *see PASS*, 61 FLRA 97, 98 (2005). As the Agency's SOP has specifically set forth the Agency's arguments, including a

claim that Proposal 6 is nonnegotiable, the Union's assertions provide no basis for finding the Agency's filings deficient.

- C. The Union has not sufficiently supported its request for severance.

The Union states, without explanation, that it seeks to "sever the proposals." Response at 1. The Authority's Regulations require a union to support a request for severance "with an explanation of how each severed portion of the proposal . . . may stand alone, and how such severed portion would operate." 5 C.F.R. §§ 2424.22(c) & 2424.25(d). Where a union fails to do so, the Authority denies the severance request. *See, e.g., IMAW*, 59 FLRA 830, 831 n.3 (2004).

Here, the Union neither states which proposals it wishes to sever nor addresses how any severed portions would stand alone or operate. Therefore, the request for severance fails to comply with the regulatory requirements, and we deny the request. *See, e.g., id.*

#### IV. Proposals 1, 2, 3, 4, and 5

- A. Wording

##### Proposal 1

Section 1. The FAA does not have a system that ensures accurate OE/OD reporting at all Terminal/TRACON Air Traffic Control facilities. Therefore an OE/OD discovered during the Audit Process outlined in Chapter 8 of the Quality Assurance office shall be considered a system error. The Agency retains the right to train bargaining Unit Employees for identified deficiencies. No bargaining Unit Employee can be adversely affected in compensation or benefits, or be forced on any type of leave as a result of a system error or performance related to a system error identified during the audit process.

##### Proposal 2

Section 2. It is the responsibility of the Agency to continuously assess an employees' technical proficiency through both direct and indirect methods. Radar replay tools may be used to accomplish indirect assessments of performance. If an OE/OD is discovered during a radar replay, and the error occurred under direct supervision, that error shall be considered a system error. The Agency retains the right

to train Bargaining Unit Employees for identified deficiencies. No Bargaining Unit Employees can be adversely affected in compensation or benefits, or be forced on any type of leave as a result of a system error or performance related to a system error identified during a radar replay performance review.

##### Proposal 3

Section 3. No bargaining unit employee will be decertified or identified as either primary or contributory to an operational error/deviation discovered during a random audit if the operational error/deviation has not been determined to be egregious in nature. Additionally, any knowledge, records, notes, or other data maintained by the Agency on system errors which are determined not to be egregious discovered during a random audit shall not be used in preparation or application of any future return to operational duty or performance skills-checks prescribed by FAA Order.

##### Proposal 4

Section 4. No bargaining unit employee will be identified as either primary or contributory to an operational error/deviation discovered during a random audit prior to the signing of this agreement if the operational error/deviation has not been determined to be egregious in nature. Additionally, any knowledge, records, notes, or other data maintained by the Agency on system errors which have been determined not to be egregious discovered during a random audit prior to the signing of this agreement shall not be used in preparation or application of any future return to operational duty or performance skills-checks prescribed by any FAA Order.

##### Proposal 5

Section 5. If an operational error/deviation is initially determined to be egregious in nature, no Bargaining Unit Employee can be adversely affected in compensation or benefits, or be forced on any type of leave based solely upon a review of a radar replay alone.

Petition at 5-6.

## B. Meaning

The Union explains that Proposal 1 would prohibit the Agency from taking any remedial, performance, or disciplinary actions against an employee for an OE or OD identified in data obtained from a random audit, unless the Agency determines that the error constitutes an egregious violation. Record at 2. The Union states that an OE or OD discovered by the audit process would be charged to the facility, and not to a specific employee, unless the Agency determines that the error constitutes an egregious violation. *Id.* The Agency does not dispute the Union's explanation.

The Union explains that Proposal 2 would prohibit the Agency from taking any remedial, performance, or disciplinary actions against an employee for an OE or OD identified in data obtained from a radar replay, unless the Agency determines that the error constitutes an egregious violation. *Id.* at 3. The Union states that such an OE or OD discovered by a radar replay would be charged to the facility, and not to a specific employee, unless the Agency determines the error constitutes an egregious violation. *Id.* The Agency does not dispute the Union's explanation.

The Union further explains, and the Agency does not dispute, that Proposal 3 would prohibit the Agency from "decertifying" an employee as the "primary or contributory" cause of an OE or OD identified in data from a random audit, unless the Agency determines that the error constitutes an egregious violation. *Id.*

As to Proposal 4, the Union explains, and the Agency does not dispute, that it is intended to retroactively apply the terms of Proposal 3 to the date of a settlement agreement between the parties. *Id.*

Finally, the Union explains, and the Agency does not dispute, that, under Proposal 5, if the Agency determines that an employee has committed an egregious error or deviation on the basis of a radar replay, then the Agency is prohibited from taking any actions until the information is separately verified. *Id.*

## C. Positions of the Parties

### 1. Agency

The Agency contends that Proposals 1 through 5 are contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute. SOP at 4-5, 6-8. The Agency also contends that Proposals 1, 2, and 5 are contrary to management's right to discipline under § 7106(a)(2)(A). *Id.* at 5-8. In addition, the Agency contends that it has no obligation to bargain over Proposals 3 and 4 because the subject matter of these

proposals is covered by Article 80 of the parties' collective bargaining agreement (CBA). *Id.* at 7-8. In support of this contention, the Agency submits an attachment that it contends constitutes Article 80 of the CBA.<sup>2</sup> Although the Agency concedes that Article 80 "does not refer to random audits in particular," the Agency argues that "the policies and contractual entitlements regarding recertification resulting from these audits are no different in those cases than in other decertifications." *Id.* at 7.

### 2. Union

The Union contends that Proposals 1 through 5 constitute appropriate arrangements under § 7106(b)(3) of the Statute. Response at 4, 9-11. With regard to Proposals 1, 2, and 5, the Union argues that the proposals are arrangements because they mitigate the potentially adverse effects of management taking actions against employees as a result of the implementation of random audits and radar replays. *Id.* at 4-6, 11-12. The Union also argues that the arrangements are appropriate because they do not prevent the Agency from acting at all on disciplinary issues and place no limits on management's right to train employees. *Id.*

With regard to Proposals 3 and 4, the Union argues that the proposals are arrangements because they are intended to provide immunity for any employee who is adversely affected by management's implementation of random audits and radar replays in those instances that are beyond an employee's ability to perceive because of the "limitations of the human eye and current [Agency] technology." *Id.* at 7, 10. The Union argues that the arrangements are appropriate because they do not preclude management from taking any actions for disciplinary reasons and assigning training to an employee. *Id.* at 7-8, 10-11.

In response to the Agency's contentions pertaining to the Authority's "covered by" doctrine, the Union contends that, under the parties' CBA,<sup>3</sup> only prong 1 of that doctrine applies in this case. *Id.* at 8-9. The Union argues that Proposals 3 and 4 are not covered by Article 80 because the Agency concedes that Article 80 does not address random audits. *Id.* at 9. In so arguing, the Union assumes that Article 80, as submitted by the Agency, applies. *Id.* at 8.

<sup>2</sup> Article 80, as submitted by the Agency, is set forth in the appendix to this decision, and the Authority's "covered by" test is set forth below.

<sup>3</sup> The Union notes that the parties disagree over which document constitutes their current agreement. Response at 8. However, the Union claims, and there is no dispute, that the disagreement is irrelevant, as both documents limit the "covered by" analysis to prong 1. *Id.* at 9.

D. Analysis and Conclusions

1. Proposals 1 through 5 are appropriate arrangements.

Where appropriate, the Authority deems a party's failure to respond to an argument or assertion raised by the other party to be a concession to such argument or assertion. *E.g.*, *AFGE, Local 1164*, 65 FLRA 924, 926 (2011) (citing 5 C.F.R. § 2424.32(c)(ii)(2) (§ 2424.32(c)(ii)(2))). Consistent with § 2424.32(c)(ii)(2), when a union does not dispute that a proposal affects the exercise of management's rights, the Authority will find that the union concedes that the proposal affects the asserted rights. *E.g.*, *AFGE, Local 1367*, 64 FLRA 869, 873 (2010) (Member Beck dissenting as to another matter). As the Union does not dispute that Proposals 1 through 5 affect management's rights to assign work and discipline employees, we find that the proposals affect those rights.

With regard to the Union's claims that the proposals are appropriate arrangements under § 7106(b)(3), to determine whether a proposal constitutes an appropriate arrangement, the Authority first considers whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *E.g.*, *NATCA, Local ZHU*, 65 FLRA 738, 739-40 (2011) (*Local ZHU*). The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *Id.* at 740. If the Authority finds the proposal to be an arrangement, then the Authority determines whether it is appropriate or whether it is inappropriate because it excessively interferes with management's rights. *Id.* In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights. *Id.*

When an agency does not dispute that a proposal is an arrangement, the Authority will find that the agency concedes that the proposal constitutes an arrangement. *Id.* at 739-40. Consistent with this precedent, as the Agency does not dispute that the Proposals 1 through 5 are arrangements, we find that the proposals constitute arrangements. *See id.* at 740 (citing § 2424.32(c)(ii)(2)).

With regard to whether the arrangements are appropriate, when an agency does not contest that a proposal is "appropriate," the Authority has weighed a proposal's demonstrated benefits "against the absence of asserted or demonstrated burdens" to find that the proposal was an appropriate arrangement under § 7106(b)(3). *Id.* Here, the Union asserts that the proposals would benefit employees by mitigating the

potential adverse effect on employees as a result of the implementation of the random audits process in those instances that are beyond an employee's ability to perceive. By contrast, the Agency does not contest that the proposals are "appropriate." Consistent with *Local ZHU*, weighing the demonstrated benefits to employees against the absence of asserted or demonstrated burdens on management's rights, we find that Proposals 1 through 5 are appropriate arrangements under § 7106(b)(3) of the Statute. *See id.* Based on the foregoing, as the Agency argues that Proposals 1, 2, and 5 are outside the duty to bargain solely on management rights grounds, we find that Proposals 1, 2, and 5 are within the duty to bargain.

2. The subject matter of Proposals 3 and 4 is not "expressly contained in," and thus is not "covered by," the parties' CBA.

The Agency argues that Proposals 3 and 4 are outside the duty to bargain because they are covered by Article 80 of the CBA. Under the Authority's "covered by" doctrine, a party is not required to bargain over conditions of employment that have already been resolved by bargaining. *E.g.*, *NATCA, AFL-CIO*, 62 FLRA at 176. To assess whether a particular proposal is covered by the parties' CBA, the Authority applies a two-prong test. *Id.* Under the first prong, the Authority examines whether the subject matter is expressly contained in the agreement. *Id.* The Authority does not require an exact congruence of language. Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute. *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*SSA*). In this regard, the Authority has found the subject matter of proposals not to be contained in a contractual provision when the proposals did not modify or conflict with the express terms of the provision even when the proposals concerned the same general range of matters addressed in the contractual provision. *NATCA*, 61 FLRA 437, 441-42 (2006). If the subject matter in dispute is not expressly contained in the agreement, then, under the second prong of the "covered by" analysis, the Authority determines whether the matter is "inseparably bound up with, and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the [agreement]." *Id.* (quoting *SSA*, 47 FLRA at 1018).

As stated previously, the Union asserts that, under the parties' CBA, only prong 1 of the Authority's "covered by" analysis applies in this case. Response at 8-9 (citing "Memorandum of Understanding on Page 179 of the CBA" and Agency's "2006 . . . imposed work rules"). When a union argues that, under the

parties' CBA, only prong 1 of the "covered by" doctrine applies, and the agency does not dispute the union's assertion, the Authority applies only prong 1. *See NATCA, AFL-CIO*, 62 FLRA at 176. As the Agency does not dispute the Union's assertion that only prong 1 of the "covered by" doctrine applies, we analyze only prong 1 of that doctrine.

Applying prong 1, the question is whether the subject matter of Proposals 3 and 4 is expressly contained in Article 80 of the CBA. *See id.* Proposals 3 and 4 would prohibit the Agency from decertifying an employee as the primary or contributory cause of an OE or OD identified in data from a random audit, unless the Agency determines that the error constitutes an egregious violation. Article 80 is entitled "Employee Recertification" and addresses the recertification process that the Agency will follow after it decides to decertify an employee. *See infra*, Appendix. Article 80 does not mention the reasons for which an employee may be decertified. Consequently, a reasonable reader would not conclude that Article 80 settles the matter of the basis on which the Agency may decertify an employee. *See SSA*, 47 FLRA at 1018. Moreover, the Agency does not claim, and the record does not indicate, that these proposals would modify or conflict with Article 80. *See NATCA*, 61 FLRA at 441-42. Accordingly, we find that the subject matter of Proposals 3 and 4 is not "expressly contained in," and thus is not "covered by," Article 80.

Based on the foregoing, we find that Proposals 3 and 4 are within the duty to bargain.

## V. Proposal 6

### A. Wording

Section 6. The Agency shall provide the Union with written notice on the local level of any errors or deviations that the Agency determines to be of an egregious nature that are discovered during a random audit or by the use of radar replay tools. Any such notice shall be provided to the Union at a minimum twenty four (24) hours prior to the Agency initiating any disciplinary or other action against employees identified as primary or contributory to the allegedly egregious operational error/deviation.<sup>4</sup>

Record at 4; *see also* Petition at 6-7.

<sup>4</sup> Proposal 6 is set forth here as modified at the post-petition conference. Record at 4.

### B. Meaning

Proposal 6 concerns the Agency's use of data from both random audits and radar replays to address employee performance deficiencies. The Union explains that Proposal 6 would require the Agency to notify the Union prior to taking any action, other than training, against an employee for an egregious OE or OD identified by data obtained from a random audit or a radar replay. Record at 4. The Union states that such notice is not required to contain the name of the employee or any other personal identifiers of the employee. *Id.* The Agency does not dispute the Union's explanation.

### C. Positions of the Parties

#### 1. Agency

The Agency contends that Proposal 6 conflicts with the Privacy Act, 5 U.S.C. § 552a, because it requires the Agency to disclose to the Union its intent to discipline an employee or the employee's disciplinary records, regardless of the employee's wishes. SOP at 8-9. The Agency also contends that it is not obligated to bargain over Proposal 6 because the subject matter of the proposal is covered by Article 64 of the CBA. *Id.* at 8. In support of this contention, the Agency submits an attachment that it contends constitutes Article 64 of the CBA.<sup>5</sup> In this connection, the Agency argues that Article 64 expressly sets forth the Union's institutional rights with respect to the detection of an OE or OD. *Id.*

#### 2. Union

The Union contends that the proposal does not violate the Privacy Act because it requires the Agency to notify the Union of any OE or OD that the Agency considered an egregious violation only if such violation is discovered by a random audit or the use of a radar replay, and does not require the Agency to provide the Union with an employee's disciplinary records. Response at 13. The Union also contends that the subject matter of Proposal 6 is not covered by Article 64. *Id.* at 12-13. The Union again assumes that Article 64, as submitted by the Agency, applies. *Id.* at 12. Although the Union concedes that Article 64 addresses "in great detail the representative role of facility representatives during OE or OD investigations," the Union argues that Article 64 does not contain wording pertaining to providing written notice to the Union of any OE or OD that is discovered through the use of a random audit or a radar replay. *Id.* at 12-13.

<sup>5</sup> Article 64, as submitted by the Agency, is set forth in the appendix to this decision.

#### D. Analysis and Conclusions

For the reasons discussed in connection with Proposals 3 and 4, we analyze Proposal 6 only under prong 1 of the “covered by” doctrine. Applying prong 1, the question is whether the subject matter of proposal 6 is expressly contained in Article 64 of the CBA. *See NATCA, AFL-CIO*, 62 FLRA at 176.

Proposal 6 would require the Agency to notify the Union prior to taking an action against an employee for an egregious OE or OD identified by data obtained from a random audit or a radar replay. Article 64 addresses in great detail the role of Union representatives during OE and OD investigations and specifically provides, in Section 4: “In the event of any operational error/deviation, the Principal Union Representative . . . shall be notified promptly.” SOP, Attach. C. In this regard, the Union concedes that Article 64 addresses “in great detail the representative role of facility representatives during OE or OD investigations.” Response at 12-13. Because Article 64 addresses in great detail the role of Union representatives during OE or OD investigations and expressly obligates the Agency to notify the Union in the event of an OE or OD, a reasonable reader would conclude that Article 64 settles the matter of notification to the Union concerning OEs and ODs. Accordingly, we find that the subject matter of Proposal 6 is “expressly contained in,” and thus is “covered by,” Article 64. *See NATCA, AFL-CIO*, 62 FLRA at 177.

Based on the foregoing, we find that Proposal 6 is covered by the CBA and that the Agency is therefore not obligated to bargain over the proposal.<sup>6</sup> Accordingly, we dismiss the petition for review as to Proposal 6.

#### VI. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over Proposals 1 through 5. The petition for review is dismissed as to Proposal 6.

<sup>6</sup> Because Proposal 6 is covered by the CBA and, therefore, outside the duty to bargain, we do not address the Agency’s contentions as to its nonnegotiability. *See NATCA, AFL-CIO*, 62 FLRA at 179 n.7.

#### APPENDIX

Article 80 is entitled “Employee Recertification” and provides:

Section 1. Performance and non-performance recertifications will be conducted in accordance with FAA Order 3120.4 and FAA Order 7210.56.

Section 2. Whenever a decision has been made by the Agency to decertify an individual, the employee will be notified of the specific reasons for this action in writing within five (5) administrative workdays of the decertification. This notification shall include the reason(s) for the decertification. Decertification may encompass all certified positions or be limited to individual position(s).

Section 3. A remedial training plan shall be developed for all performance related recertifications. Included in the remedial training plan shall be the specific reasons for the action. Remedial training shall normally begin within three (3) administrative workdays of the notice of decertification. The employee will be provided with a copy of his/her remedial training plan.

Section 4. Upon request, an employee shall have the opportunity to review the information used in making the determination to place him/her in a recertification program, and to discuss the reasons for making the determination with his/her immediate supervisor, or designee.

Section 5. An employee who has been decertified may have his/her schedule modified to align with the days and times that other duties are assigned, including changing regular days off and adhering to the tour of duty of the organizational segment to which they are assigned. An employee who is undergoing performance related training may have his/her schedule adjusted to ensure closer supervision.

Section 6. Recertification may be accomplished by individual position or a single action covering multiple positions.

Section 7. If further action is necessary, performance deficiencies will be addressed

in accordance with Article 20 of this Agreement.

SOP, Attach. B.

Article 64 is entitled "Operational Error/Deviation Investigation Reporting and Review Board" and provides:

Section 1. Operational error/deviation investigation; reporting and review board will be administered in accordance with FAA Order 7210.56.

Section 2. In order to maintain an effective Air Traffic System, it is imperative that we identify all deficiencies within our system and take appropriate corrective actions necessary to fix any associated problems. Operational errors and deviations are reported for just that reason, so those problems (either systemic or individual) can be corrected to enhance system integrity. The identification of operational errors and deviations without fear of reprisal is an absolute requirement and is the responsibility of all of us who work within our system. Accordingly, it remains Air Traffic Policy that any employee who is aware of any occurrence that may be an operational error, deviation, or air traffic incident, immediately report the occurrence to any available supervisor, controller-in-charge (CIC) or management official.

Section 3. When it is known or suspected that an employee has been involved in an operational error/deviation, the employee shall be relieved from all operational duties as promptly as operational and staffing conditions permit. This action is intended to allow employees an opportunity to review the voice recordings and prepare draft statements while the circumstances are fresh in their minds. The relief of an employee from operational duty also provides the employee the opportunity to participate in the preliminary investigation.

Section 4. If the Agency determines that an operational error/deviation (OE/OD) may have occurred and any unit employee is to be interviewed by the Investigator-In-Charge (IIC) or any agent of the Agency, the Union representative or his/her designee may be present if the employee so requests. In the event of any operational

error/deviation, the Principal Union Representative or his/her designee shall be notified promptly.

Section 5. Initial Evaluation – Employees shall verbally provide the preliminary information, of which they have knowledge, when requested by the supervisor, controller-in-charge (CIC) or management official to make an initial determination as to whether an investigation is warranted. This phase is meant only to determine the need of an investigation and is not investigatory. Therefore, Union representation is not required at this time.

Section 6. Interim Written Statement - Employees are required to make an interim written statement as soon as possible after an operational error/deviation. The employee shall be permitted to listen to relevant tape recordings available within the facility prior to making this statement. Union representation of the employee, at the election of the employee, shall be granted at this and later phases of the investigatory process.

Section 7. Final Written Statement - Employees and their representatives shall be permitted to review any data utilized in the related investigation by the Agency or, if convened, the review board, prior to making a final written statement. An employee may elect to use the interim written statement for this purpose. The final written statement shall supersede any previous oral or written statements.

Section 8. The employee and his/her Union representative, if the employee so elects, shall be permitted to review relevant recordings available within the facility before being interviewed by the IIC or any agent of the Agency.

Section 9. The determination that an employee has been identified as the primary cause of the operational error ("Controller A") shall be in accordance with FAA Order 7210.56. When an employee is involved in an operational error/deviation, a determination to decertify the employee must be in accordance with FAA Order 7210.56.

Section 10. The employee and the Principal Union Representative shall be given an entire copy of the facility investigation report when such a report is required by FAA Order 7210.56 concurrently with its submission to the facility manager. If the employee or his/her Union representative do not feel the findings of the facility investigation are correct, they may submit their comments, in writing, to the facility manager within five (5) days of receipt. The facility manager shall consider these comments in his/her deliberations and shall append them to the facility final report.

Section 11. At the request of both the employee and the Union, or the IIC, an operational error/ deviation review board may be convened by the Air Traffic Manager. If the request is denied by the Air Traffic Manager, the requesting Party(s) will be advised of the reason(s) in writing. The purpose of the board shall be to provide an effective method for investigating and analyzing causal factors so that deficiencies in human, procedural and equipment elements of the air traffic system can be identified and corrected.

Section 12. The operational error/deviation review board shall consist of equal representation by bargaining unit employees and the Agency, including a chairman who shall be the IIC. Bargaining unit participants will be designated by the Union. The board shall prepare a facility review board report. The facility manager shall append the facility review board report to the facility final report. Any dissenting opinions shall be attached to the report.

Section 13. An employee, with his/her requested Union representative, shall be permitted to review all data available to the board prior to appearing before the board.

Section 14. Employees, Union representatives and/or their designee(s) shall be on duty time during the review board proceedings. Union representatives will be on official time for all other purposes of this Article if otherwise in a duty status.

Section 15. The employee and the Principal Union Representative shall be given an entire copy of the review board report concurrently with its submission to the

facility manager. If the employee or the Union representative does not feel the findings of the review board are correct, they may submit their comments, in writing to the facility manager within five (5) days of receipt. The facility manager shall consider these comments in his/her deliberations prior to making a final decision and shall append them to the review board report. If the Agency does not concur with the findings of the OE/OD board, the reasons for non-concurrence will be submitted to the Union representative and employee in writing.

*Id.*, Attach. C.