ORAL ARGUMENT NOT YET SCHEDULED
Nos. 12-1456 and 13-1066

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

UNITED STATES DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
OFFICE OF CHIEF COUNSEL, WASHINGTON, D.C.
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF A DECISION OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

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APRIL 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The petitioner is the United States Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, Washington, D.C., one of the parties in the negotiability appeal below. The other party to the proceeding was the National Treasury Employees Union (which has intervened in this appeal).

The respondent is the Federal Labor Relations Authority. Appearing as amicus curiae before this Court is the American Federation of Government Employees, AFL-CIO.

B. Ruling Under Review

The ruling under review is the Decision and Order on Negotiability Issues of the Federal Labor Relations Authority in *National Treasury Employees Union (Union) and United States Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, Washington, D.C. (Agency)*, Case No. 0-NG-3130, issued on July 20, 2012, reported at 66 FLRA (No. 150) 809. The Authority denied reconsideration in a decision issued on September 25, 2012, reported in 66 FLRA (No. 185) 1030.

C. Related Cases

Respondent is not aware of any related cases. However, virtually the identical issue was before the Court in *United States Dep't of the Treasury, Bureau of the Public Debt, Washington, D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012) (dismissed for lack of jurisdiction pursuant to 5 U.S.C. § 7123(c)).

/s/ Rosa M. Koppel
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MISCELLANEOUS

GLOSSARY

Agency	United States Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, Washington, D.C.
Authority	Federal Labor Relations Authority
EPA	*United States Environmental Protection Agency*, 65 FLRA 113 (2010)
FLRA	Federal Labor Relations Authority
IRS	Internal Revenue Service
JA	Joint Appendix
NTEU	National Treasury Employees Union
NTEU	*NTEU and United States Dep't of the Treasury, Bureau of the Public Debt, Washington, D.C.*, 65 FLRA 509 (2011), *petition for review dismissed for lack of jurisdiction, U.S. Dep't of the Treasury, Bureau of the Pub. Debt v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	National Treasury Employees Union

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BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on July 20, 2012. The

decision is included in the Joint Appendix ("JA"). JA 113. The Authority denied petitioner's motion for reconsideration on September 25, 2012. The Authority's decision denying reconsideration is published at 66 FLRA (No. 185) 1030. A copy of the decision denying reconsideration is also included in the Joint Appendix. JA 148. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1]

STATEMENT OF THE ISSUE

Whether the Authority acted reasonably in adopting the "abrogation" standard to assess whether agreed-upon contract provisions are "appropriate arrangements" within the meaning of § 7106(b)(3) of the Statute.

STATEMENT OF THE CASE

This is a federal sector labor-relations dispute arising under the Statute. Exercising authority granted by the Statute, a federal agency head disapproved a number of contract provisions to which agency and union negotiators previously agreed at the bargaining table. The agency head disapproved the provisions because he found them contrary to law. In an appeal to the Authority, the union challenged the agency head's contrary-to-law determinations concerning two

[1] Pertinent statutory provisions, regulations, and rules are set forth as an Addendum to this brief.

provisions. The Authority upheld one of the agency head's determinations, but overturned the other and ordered the agency to rescind its disapproval. The agency petitions this Court to reverse the Authority's rescission order. The agency also asks the Court to deny the Authority's cross-application for enforcement.

STATEMENT OF THE FACTS

A. Background

Petitioner Internal Revenue Service, Office of Chief Counsel ("IRS" or "agency") and intervenor National Treasury Employees Union ("NTEU" or "union") renegotiated a term collective-bargaining agreement, which they executed on July 11, 2011. JA 21. The parties met pursuant to § 7114(a)(4) of the Statute, which requires that "[an] agency and [an] exclusive representative . . . shall meet and negotiate in good faith for purposes of arriving at a collective-bargaining agreement."

Because "[a]n agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency," 5 U.S.C. § 7114(c)(1), the parties submitted their agreement to the head of the IRS for review. JA 21. The agency head conducted his review under § 7114(c)(2) of the Statute, which requires "approv[al of] the agreement . . . if the agreement is in accordance with [the Statute] and any other applicable law, rule, or regulation."

Exercising his authority under § 7114(c)(2), the agency head disapproved eight provisions as contrary to law, rule, or regulation. JA 21.

As relevant to this proceeding, in an appeal to the Authority, NTEU challenged the agency head's disapproval of an agreement provision dealing with sick leave usage, Article 10, Section 4(a). JA 12, 115-16. The contract provision that the parties agreed upon, but that the agency head disapproved provides:

> When the Office has reasonable grounds to question whether an employee is properly using sick leave including annual leave in lieu of sick leave (for example, when sick leave is used frequently or in unusual patterns or circumstances), the Office may inquire further into the matter and ask the employee to explain. Absent a reasonably acceptable explanation, the Office will counsel the employee that continued frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement to furnish administratively acceptable evidence for each subsequent absence due to illness or incapacitation regardless of duration.

JA 12, 115-16.

B. The Authority's Decision

The Authority overturned the agency head's disapproval. The Authority's decision included findings concerning the provision's meaning. And it included analysis of the parties' arguments addressing the provision's consistency with law.

1. The provision's meaning

Petitioner does not dispute what the Authority found the provision means.

JA 23, 116. The Authority found that the provision requires the agency to counsel an employee suspected of improperly using sick leave before the agency issues the employee a written sick-leave restriction. JA 116-17. But the Authority also found that the provision permits the agency to respond to a first offense of sick-leave abuse with any other form of discipline. *Id.*

2. The agency's management-rights claims

The agency claimed before the Authority that the provision is contrary to law because it "excessively interferes" with management's right to discipline employees. JA 40, 117. Alternatively, the agency claimed that the provision "abrogates" management's right to discipline because the provision precludes the agency from disciplining an employee when the agency first has reason to question the employee's use of sick leave. JA 40-41, 117.

3. The Authority's legal framework for resolving management rights claims

The legal framework the Authority uses to resolve an agency's management rights claims derives from its decision in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under *KANG* as the Authority originally applied it, the Authority inquires (1) whether a bargaining proposal or an agreed-upon contract provision is intended to be an "arrangement" for employees adversely affected by management's exercise of its rights, and if so, (2) whether the proposal or

provision is "appropriate," or whether it is "inappropriate" because it "excessively interferes" with the relevant management right. *See, e.g., AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 617 (2003); *KANG*, 21 FLRA at 31-33.

The Authority established the "excessive-interference" test to determine whether a bargaining proposal or contract provision is an "appropriate arrangement" under § 7106(b)(3) of the Statute, 5 U.S.C. § 7106(b)(3). Section 7106(b)(3) provides: "(b) Nothing in [the Statute] shall preclude any agency and any labor organization from negotiating. . . (3) appropriate arrangements for employees adversely affected by the exercise" of a management right. Under *KANG*, to determine whether a proposal or provision "excessively interferes" with a management right, the Authority balances the proposal's or provision's benefits to employees against its burdens on management. *E.g., AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA at 618.

The Authority recently revised the *KANG* framework as applied in contract-provision cases. *See NTEU*, 65 FLRA 509, 511-15 (2011), *pet. for rev. dismissed, U.S. Dep't of the Treasury, Bureau of the Pub. Debt v. FLRA,* 670 F.3d 1315 (D.C. Cir. 2012) (*NTEU*). In *NTEU*, the Authority modified the standard for determining whether an agreed-upon contract provision is an "appropriate arrangement" under § 7106(b)(3) of the Statute. *See NTEU*, 65 FLRA at 511-15.

Under *NTEU,* for provisions that are "arrangements," the Authority now assesses "whether the contract provision 'abrogates' – i.e., waives – the affected management right. . . . In determining whether a contract provision abrogates a management right, the Authority assesses whether the provision 'precludes the agency from exercising' the affected management right." JA 114 (citing *NTEU,* 65 FLRA at 515 (quoting *U.S. DOT, FAA,* 65 FLRA 171, 174 (2010)). Adopting the "abrogation" standard for contract-provision cases, the Authority made clear that the "excessive-interference" standard would continue to apply in cases involving duty-to-bargain questions about proposals to which the parties at the bargaining table have not yet agreed. *NTEU,* 65 FLRA at 512 n.4.

In *NTEU*, the Authority explained why different "appropriate-arrangement" tests should apply in different contexts. In particular, the Authority explained why an "abrogation" test should apply in cases where parties have actually reached agreements, while an "excessive-interference" test should apply in cases where parties are still bargaining and have not yet reached agreements.

The Authority based its decision on the Statute's plain language and the following two key principles: (1) in assessing whether a contract provision is contrary to law – the inquiry on agency-head review of parties' agreements – it does not matter whether the parties' duty to bargain *required* them to negotiate

over the proposal that they ultimately agreed to, and (2) deference should be given to the parties' assessments at the bargaining table of how an agreed-upon contract provision would benefit employees and burden management's rights. *Id.* at 512, 514.

Applying these principles, the Authority concluded that because the "excessive-interference" test focuses on a proposal's balance of benefits and burdens, it is essentially a duty-to-bargain standard that applies to the parties' actions at the bargaining table. As such, it does not apply during agency-head review, after the parties have reached agreement.

In other words, once the parties at the bargaining table have assessed a proposal's benefits to employees and burden on management rights, and have agreed to adopt the proposal and include it as a provision in their agreement, the agency head should not be able to invalidate that agreement simply because he or she assesses the benefits and burdens -- i.e., applies the "excessive-interference" standard -- differently. Instead, an agency head should be able to invalidate the parties' agreement only if that agreement is plainly contrary to law – i.e., because it "abrogates," or precludes the agency from exercising, a management right. Member Beck dissented from the Authority's adoption of the abrogation test.

4. The Authority's application of its legal framework to the agency's management rights claims

Applying its legal framework, the Authority held that the parties' sick leave provision is an "arrangement." JA 119-20. The Authority further held that the provision is not contrary to law because it does not "abrogate" the agency's right to discipline employees under § 7106(a)(2)(A) of the Statute. JA 120. The Authority therefore ordered the agency to rescind its disapproval of the provision. *Id.* Although Petitioner challenges the Authority's adoption of the abrogation test in agency-head review cases like this one, Petitioner does not challenge the Authority's application of the test in the particular circumstances of this case. Accordingly, the merits of the Authority's specific holding, applying the abrogation standard to the parties' sick-leave provision, will not be discussed further in this brief.

The Authority subsequently denied the agency's motion for reconsideration.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *BATF v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). This review is narrow, and courts "will

uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned." *AFGE, Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (quoting *Bowman Transp., Inc. v Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *Penick Corp., Inc. v. DEA*, 491 F.3d 483, 488 (D.C. Cir. 2007).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). As such, "the Authority is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *BATF v. FLRA*, 464 U.S. at 97 (citation omitted). Where the Statute is ambiguous, the matter is left to the Authority to determine within appropriate legal bounds. *NFFE, Local 1309 and FLRA v. Dep't of the Interior*, 526 U.S. 86, 98 (1999) (*NFFE*).

An Authority decision "will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). A court's task is to decide whether "given the existence of competing considerations that might justify either [the Authority's or the petitioner's] interpretation, the Authority's interpretation is

clearly contrary to statute or is an unreasonable one." *AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 861 (D.C. Cir. 1985)(citing *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984).

The Authority's reasoned decision to adopt the abrogation standard to assess whether agreed-upon contract provisions are "appropriate arrangements" under § 7106(b)(3) of the Statute, and thus not contrary to law, does not subject the Authority to a heightened standard of review. *See FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1810-11 (2009) (*FCC*); *Dillmon v. NTSB*, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (*Dillmon*). To the contrary, an agency "is free to alter its past rulings and practices even in an adjudicatory setting." *Dillmon*, 588 F.3d at 1089, *quoting Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985). Of course, an agency must display awareness that it is changing its position and provide an adequate explanation for its departure from its established precedent. *Id*. at 1090. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. *FCC*, 129 S. Ct. at 1811. Instead, it suffices "if the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id*. (emphasis omitted).

Finally, if the reason for a change in policy is clear both from the decision being challenged and from earlier decisions, then the change should be upheld as adequately explained. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003) (decision upheld where its rationale could be reasonably discerned from both the decision itself, and from decisions in other cases).

SUMMARY OF ARGUMENT

When the Authority adopted "abrogation" in *NTEU*, the Authority gave a reasonable explanation why an "abrogation" test should apply in cases where parties have actually reached agreements, while an "excessive-interference" test should apply in cases where parties are still bargaining and have not yet reached agreements.

The Authority's decision to adopt "abrogation" in contract review cases is based on two key principles. First, in assessing whether a contract provision is contrary to law – the inquiry on agency-head review of agreements – does not matter whether the parties' duty to bargain *required* them to negotiate over the proposal they ultimately agreed to. Second, deference should be given to the parties' assessments at the bargaining table of how an agreed-upon contract provision would benefit employees and burden management's rights.

The excessive interference test, focusing on a proposal's balance of benefits and burdens, is essentially a duty-to-bargain standard applicable to the parties' bargaining-table assessments. In contrast, the abrogation test is properly applied to agency-head contract review because, in deferring to the parties' assessments of benefits and burdens, the agency head's role is not to reweigh the parties' bargaining choices, but only to ensure that those choices do not preclude the exercise of a management right.

The Authority's decision in *NTEU* is consistent with the Statute's language, legislative history, and policies – particularly the policy of deferring to the choices the parties make at the bargaining table. A comparison of § 7117(c)(1) and § 7114(c)(2) of the Statute makes clear that whether a proposal at the bargaining table is outside the duty to bargain, and whether an agreed-upon contract provision is contrary to law, are distinct issues. Similarly, the Statute's legislative history indicates that Congress did not anticipate that an agency head reviewing agreed-upon contract provisions would act like an agency representative at the bargaining table, "second-guessing" the parties' bargaining choices and conducting his or her own analysis of the benefits and burdens of each proposal that could possibly affect the exercise of a management right.

Deference to the parties' choices at the bargaining table is also consistent with the Statute's policies, including the policy of promoting collective bargaining. Deference promotes this policy by assuring parties that the deals they strike will be honored, unless those deals are contrary to law.

In sum, because the Authority acted reasonably in adopting the "abrogation" standard, the Court should deny the petition for review and grant the Authority's cross-application for enforcement.

ARGUMENT

I. THE AUTHORITY ACTED REASONABLY WHEN IT ADOPTED THE "ABROGATION" STANDARD TO DETERMINE WHETHER AGREED-UPON CONTRACT PROVISIONS ARE "APPROPRIATE ARRANGEMENTS," AND THUS NOT CONTRARY TO LAW.

The Authority's decision in *NTEU* to adopt the abrogation standard when assessing whether an agreed-upon provision is an appropriate arrangement is consistent with the Statute's language, legislative history, and policy – particularly the policy of deferring to the choices that parties make at the bargaining table. The Authority's decision is also consistent with Authority precedent.

A. The Authority reasonably determined that in assessing whether a contract provision is contrary to law – the inquiry on agency-head review of parties' agreements – it does not matter whether the parties' duty to bargain *required* them to negotiate over the proposal that they ultimately agreed to.

1. The Authority's determination is consistent with the Statute's language.

As the Authority explained in *NTEU*, under the Statute, whether a proposal at the bargaining table is outside the duty to bargain, and whether an agreed-upon contract provision is contrary to law, are distinct issues. *NTEU*, 65 FLRA at 512. Regarding the duty to bargain, § 7117(c)(1) of the Statute provides that an exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that *the duty to bargain* . . . does not extend to any matter[.]" 5 U.S.C. § 7117(c)(1) (emphasis added).

This contrasts with the part of the Statute that sets forth the agency-head review process for agreed-upon contract provisions. That part of the Statute, § 7114(c), does not make the duty to bargain over a provision the issue on agency-head review. Rather, under § 7114(c), the issue is whether an agreed-upon contract provision is contrary to law. Section 7114(c)(2) provides in this regard that where the agency representative agrees to bargain over a proposal and it becomes a provision of the parties' agreement, "the head of the agency shall approve the agreement . . . if the agreement is *in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation*. 5 U.S.C. § 7114(c)(2) (emphasis added).

These statutory provisions highlight the distinct issues that arise at the bargaining table and during agency-head review of agreed-upon contract provisions. An agency representative *may*, at the bargaining table, opt to bargain over a proposal not within the duty to bargain. But once that proposal becomes a provision agreed upon by the parties, then the agency head *may disapprove it only* if it is contrary to law. As the Authority pointed out in *NTEU*, it is significant "[t]hat Congress did not state that an agency head may disapprove matters that are outside the 'duty to bargain'." 65 FLRA at 512. An agency head "is not given free reign to prune collective bargaining agreements where local negotiators have come to legally viable arrangements." *Ass'n of Civilian Technicians, Montana Air Chapter 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).

The Statute's language therefore supports the Authority's determination in *NTEU* that "an agreed-upon contract provision is not contrary to law. . . merely because, at the bargaining table, it was outside the duty to bargain." 65 FLRA at 512.

2. The Statute's legislative history supports the Authority's determination.

The Statute's legislative history offers further confirmation that the issues before an agency head reviewing agreed-upon contract provisions are distinct from the duty-to-bargain issues that the parties face at the bargaining table.

The agency-head-review provision first appeared in the Senate version of the Civil Service Reform Act of 1978 and was later added to the House version in conference. *See* 124 CONG. REC. H13,608 (daily ed. Oct. 14, 1978) (remarks by House manager, Rep. Ford), *reprinted in* Subcommittee on Postal Personnel and Modernization of the House Committee on Postal and Civil Service, *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. (1979) (*Legislative History*) at 2003; S.2640, 95th Cong., 2d Sess. § 7219 (1978), *reprinted in Legislative History*, *supra*, at 591; *see generally AFGE, AFL-CIO*, 778 F.2d at 858. (discussing legislative history of § 7114(c)(2)).

The Senate Committee explained that "a substantially identical provision is contained in Executive Order 11491,"[2] which the Statute superseded. S. Rep. No. 969, 95th Cong., 2d Sess. 109 (1978), *reprinted in Legislative History*, *supra*, at 743, 769. The original Executive Order regulating federal labor-management relations, Executive Order 10988[3], simply provided that any agreement "must be approved by the head of the agency." However, the broad scope of that review

[2] Executive Order 11491, 34 Fed. Reg. 17605 (1969), *reprinted in* 5 U.S.C. § 7101 pp. 43-48 (2006).

[3] Executive Order 10988, sec. 7, 27 Fed. Reg. 551, 554 (1962), *reprinted in Legislative History*, *supra*, at 1211, 1214.

was narrowed by Executive Order 11491 to the agreement's conformity with laws, rules, and regulations "in order to prevent 'second-guessing' on substantive issues [by the agency head]." Federal Labor Relations Council, Summary of Developments to 1977, *reprinted in Legislative History*, at 1167.

The legislative history reflects that the agency-head-review provision was designed to ensure high-level, but narrow, review of executed agreements in order to spare agency heads from "a continuous burden . . . to review each and every proposal as it arose in the course of day-to-day bargaining." *AFGE, AFL-CIO*, 778 F.2d at 858. Congress did not anticipate that an agency head would act like an agency representative at the bargaining table and conduct his or her own analysis of the benefits and burdens of each proposal that could possibly affect the exercise of a management right. Instead, both the plain language of the Statute and its legislative history make it clear that the scope of an agency head's authority under § 7114(c)(2) to disapprove an agreed-upon provision as contrary to law is narrower than the scope of the duty to bargain. Thus, the agency's contrary argument - that nothing in either 7117(c)(1) or §7114(c)(2) suggests that an agency head's review authority is of "less" scope than an agency representative's duty to bargain, PB 31, is without merit.

The Statute's legislative history therefore supports the Authority's reasonable determination to adopt a different standard for reviewing agency-head disapprovals of agreed-upon contract provisions from that which the Authority applies when it reviews the non-negotiability allegations of agency representatives at the bargaining table.

3. The Authority's determination is consistent with Authority precedent.

The Authority's determination in *NTEU* relies upon, and is consistent with, its decision in *EPA*, 65 FLRA 112 (2010). Based on analogous reasoning, in *EPA*, the Authority decided to apply a different standard – abrogation – when assessing whether a contract provision enforced in an arbitration award is an appropriate arrangement, from the standard – excessive interference – the Authority applies when assessing whether a proposal is within the duty to bargain. *See NTEU*, 65 FLRA at 513 (citing *EPA*, 65 FLRA at 118).

As the Authority explained in *NTEU* (*id.*), the pertinent wording in §7122(a)(1) of the Statute, concerning Authority review of arbitration awards, is substantively identical to the pertinent wording in §7114(c)(2), concerning agency-head review of collective-bargaining agreements. Under these sections of the Statute, respectively, the Authority may set aside an arbitration award, and an agency shall disapprove an agreement provision, if the award or provision is

contrary to law, rule or regulation. *Id.* The Authority's adoption of the same test – abrogation – to implement substantively similar statutory wording, is one more indication of the reasonableness of the Authority's decisions in *NTEU* and this case.

Petitioner's suggestion that *EPA* provides no support for the Authority's decision in *NTEU* (PB 25-26) is based on an incomplete reading of *EPA*. Petitioner argues that the Authority's adoption of the abrogation test in *EPA* "*depended* on the agency head having already reviewed the contract terms under the 'excessive interference' test." PB 26 (emphasis in original). But the Authority explicitly avoided making that assumption. Reserving that issue "for another day," 65 FLRA at 118 n.11, the Authority noted "that our analysis [adopting the abrogation test in arbitration cases] calls into question whether abrogation also should be the standard applied in negotiability cases involving contract provisions (where agreement has been reached and subsequently disapproved)." *Id.* The Court should therefore reject Petitioner's claim.

4. The Authority's decision in *NTEU* is consistent with the Authority's regulations.

The agency contends, erroneously, that the Authority's decision in *NTEU* is inconsistent with § 2424.24 of its regulations, 5 C.F.R. § 2424.24. PB 32-33. Part 2424 of the Authority's regulations sets forth the procedures unions and agencies

must follow in cases dealing with duty-to-bargain and agency-head contract-review issues. Section 2424.24 of the Authority's regulations sets forth the requirements that apply to an agency's "statement of position" in such cases. In the agency's view, this section of the Authority's regulations makes no distinction between proposals that an agency representative at the bargaining table asserts are not within the agency's duty to bargain and agreed-upon provisions that an agency head disapproves as contrary to law. The agency's contention is baseless.

Specifically, the first sentence of § 2424.24(a) distinguishes between proposals and provisions and the standard applicable to each. Section 2424.24(a) states: "The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a *proposal or provision is not within the duty to bargain or contrary to law, respectively*." 5 C.F.R. § 2424.24(a) (emphasis added).

In addition, the definition of "negotiability dispute" in the Authority's negotiability regulations distinguishes between disputes in which a union "disagrees with an agency contention that . . . a proposal is outside the duty to bargain" and a dispute in which a union "disagrees with an agency head's disapproval of a provision as contrary to law." 5 C.F.R. § 2424.2(c). And the

regulations contain separate definitions of "proposal" (5 C.F.R. § 2424.2(e)) and "provision" (5 C.F.R. § 2424.2(f)).

That the regulations refer to the party that files a statement of position regarding a provision (as well as a proposal) on behalf of management as the "agency" rather than the "agency head" simply reflects that agency heads, themselves, are not required to represent their agencies in proceedings before the Authority. Accordingly, the Court should reject the agency's claim that the Authority's decision in *NTEU* is inconsistent with the Authority's regulations.

B. The Authority reasonably determined that deference should be given to the parties' assessments at the bargaining table of how an agreed-upon provision would benefit employees and burden management's rights.

The Authority's decision to apply the abrogation standard in contract-review cases rests significantly on the policy of deferring to the choices that parties make at the bargaining table. But enabling an agency head to "second guess" the bargaining parties' choices would be incompatible with such deference. Because applying the "excessive-interference" test in contract-review cases would require agency heads to "second guess" the bargaining parties' choices, and ultimately require the Authority to reweigh a provision's benefits and burdens, the Authority rejected use of that test in such cases. The Authority's adoption of the policy of deference is reasonable and should be upheld.

The Statute supports the Authority's adoption of the policy of deference. The Statute anticipates that the parties' bargaining representatives will be fully prepared to assess a proposal's benefits to employees and burdens on management rights. As the Authority pointed out in *NTEU* (65 FLRA at 514), § 7114(b)(2) of the Statute requires that unions and agencies "be represented at . . . . negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." 5 U.S.C. § 7114(b)(2). Moreover, as discussed previously, the legislative history of § 7114(c)(2) makes clear that the purpose of restricting agency head review of agreed-upon provisions to contrary-to-law issues was to prevent agency heads from "second-guessing" the parties' bargaining-table choices on "substantive issues." Federal Labor Relations Council, Summary of Developments to 1977, *reprinted in Legislative History*, at 1167.

The Authority's adoption of deference is also supported by the Statute's policies. As the Authority recognized in *EPA*, deference to the parties' bargaining choices "is consistent with the statutory 'policies of: (1) promoting collective bargaining and the negotiation of collective bargaining agreements; and (2) enabling parties to rely on the agreements that they reach, once they have reached them.'" *EPA*, 65 FLRA at 118 (citation omitted).

Regarding promoting collective bargaining, this Court has recognized that implicit in the statutory purpose of promoting collective bargaining is the need to assure bargaining parties "stability and repose with respect to matters reduced to writing in the agreement." *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 59 (D.C. Cir. 1992). Deference to the parties' choices at the bargaining table furthers that goal by ensuring parties that the deals they strike will be honored, unless those deals are contrary to law.

The agency contends that the abrogation standard is "demonstrably meaningless" (PB 11, 28) because the Authority has yet to find that a contract provision abrogates a management right. PB 11-12, 28-29. However, as the Authority explained in *NTEU*, if this observation proves anything at all, it is that agency negotiators are sufficiently aware of the agency's statutory management rights so as to not inadvertently agree to contract provisions that waive them. *NTEU*, 65 FLRA at 514-15 n.8.

To illustrate this point, the Authority's decision in *NTEU* lists some of the "plethora" of decisions, in a recent two-year time period, involving agency-bargaining-representative allegations that *proposals* are outside the duty to bargain

because they are contrary to management rights. *Id.* [4] The lack, thus far, of decisions finding that agreed-upon provisions abrogate management rights arguably reflects that negotiating parties know better than to agree to contract provisions that waive management rights. *See* 5 U.S.C. § 7114(b)(2) (Bargaining representatives must be "prepared to discuss and negotiate on any conditions of employment.").

That does not mean, of course, that the Authority could never find that a provision abrogated a management right. Indeed, in three decisions in which the majority of Authority Members found that negotiated provisions, as enforced in arbitration awards, excessively interfered with the exercise of management rights, a concurring Member stated that she would have found that the awards abrogated management rights. *See U.S. Dep't of Justice, Federal Bureau of Prisons Federal Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 117 (2002) (concurring that provision "abrogates the Agency's rights to assign work and determine the internal security practices" because it left virtually no circumstance under which the agency could leave posts vacant); *U.S. Dep't of Justice, Federal Bureau of Prisons Federal Correctional Complex, Coleman, Fla.*, 58 FLRA 291, 296 (2003)

[4] The Authority noted that this was in "stark contrast" to only two negotiability decisions it issued in that two-year time period that involved agency-head disapprovals of contract provisions on management-rights grounds. *NTEU*, 65 FLRA at 514 n.8.

(concurring that award abrogated management rights by leaving no circumstance under which the agency could choose not to assign one employee to each housing unit); *U.S. Dep't of the Army, Army Signal Center, Fort Gordon, Ga.*, 58 FLRA 511, 514 (2003) (concurring that award abrogated management rights by leaving no circumstance under which the agency would be permitted to dispatch a fire truck without four firefighters aboard).

The agency further contends that the Authority's decision will force agency heads to become directly involved in the collective-bargaining process in order to protect management rights, thereby impeding the process. PB 33-34.

The agency's claim is speculative. And as the Authority noted in *NTEU* (65 FLRA at 514 n.8), bargaining parties already have the authority to reach binding agreements with regard to, among other things, the permissive subjects of bargaining set out in § 7106(b)(1). But there is no evidence that, in response, agency heads are taking on a more active role in collective bargaining over permissive subjects of bargaining.

Accordingly, because the Authority acted reasonably when it adopted a policy of deference to the parties' assessments at the bargaining table of proposals' benefits and burdens, and because Petitioner's objections lack merit, the Court should uphold this aspect of the Authority's decision in *NTEU*.

C. Application of the abrogation standard to agency-head contract-review disputes, and the excessive interference standard to bargaining table duty-to-bargain disputes, is consistent with § 7106 of the Statute.

The agency's claims (PB 10-11, 15-18, 25) that "appropriate arrangements" determinations must be based on a single standard, because the term appears in a single statutory section, § 7106(b)(3). The agency's claim ignores the inherently contextual nature of "appropriate arrangements" as that provision functions within the Statute's collective-bargaining structure. Contrary to the agency's claim, and as the Authority held, the standard for determining whether an "arrangement" is "appropriate" may vary, depending on the circumstances in which the determination is made.

One circumstance where an "appropriate-arrangement" determination must be made arises when an agency at the bargaining table claims that a proposed arrangement's burden on management's rights outweighs its benefits to employees. If the union takes the dispute to the Authority, the Authority is required to re-weigh the proposal's benefits and burdens – applying the excessive interference test – to determine whether the proposed arrangement is within the parties' duty to bargain because it is "appropriate." *E.g., AFGE, Local 1547*, 65 FLRA 911, 917 (2011), *pet. for rev. denied sub nom. U.S. Dep't of the Air Force, Luke Air Force Base, Az.*, 680 F.3d 826 (D.C. Cir. 2012).

A different circumstance arises when the parties agree upon an assessment of a proposed arrangement's benefits and burdens, and include the proposal in their agreement because the proposal's benefits outweigh its burdens. In this circumstance, the parties at the bargaining table have conducted the evaluation required by the excessive-interference test.

On contract review, deferring to the parties' bargaining-table assessments of benefits and burdens, the only determination required of the agency head is whether those assessments exceed the limits on the deference to which they are due; i.e., whether the provision is contrary to law because it precludes the agency from exercising a management right – the abrogation test. Subsequent Authority review of the agency head's determination would employ the same abrogation standard.

For these reasons, the Court should reject the agency's claim that § 7106 of the Statute permits use of only a single standard to determine whether an "arrangement" is "appropriate."

II. IF THE COURT DETERMINES THAT THE AUTHORITY ERRED IN ADOPTING THE ABROGATION STANDARD, THEN THE COURT SHOULD REMAND THE MATTER TO THE AUTHORITY.

The agency argues that if this Court holds that the Statute prohibits the Authority from adopting the abrogation standard, then the Court should reverse the

Authority's decision and find that the disputed provision excessively interferes with management's right to discipline. PB 35.[5] However, if the Court determines that the abrogation standard is not permissible under the Statute, then the Court should, consistent with its own precedent, remand the case to the Authority to determine whether, using a different standard, the provision is an appropriate arrangement. *See, e.g.*, *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) (remanding case to the Authority to determine "in the first instance" the meaning and application of "appropriate" arrangements). And depending on the Authority's answer to that question, the Authority might also need to address an issue it did not reach in its original decision: Whether the provision is a procedure under § 7106(b)(2) of the Statute. *See* JA 120 n. 10.

CONCLUSION

The petition for review should be denied and the Authority's cross-

[5] As noted previously, the agency does not disagree with the Authority that the provision does not abrogate management's rights.

application for enforcement should be granted.

Respectfully submitted,

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April 19, 2013

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 5,876 words excluding exempt material.

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Certificate of Service

I hereby certify that on this 19th day of April, 2013, I caused the foregoing Brief for Respondent to be filed by way of the ECF filing system and served on counsel for the Agency by way of the Court's ECF notification system. On Monday, April 22, 2013, I also will cause eight (8) hard copies of the Brief to be filed with the Court and served by hand delivery on:

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ADDENDUM

Relevant Statutes and Regulations

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Relevant Statutes and Regulations

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

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

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, 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.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges

that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. § 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under—

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United

States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No 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. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be

subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. § 2424.2 - Definitions.

In this part, the following definitions apply:

(c) Negotiability dispute means a disagreement between an exclusive representative and an agency concerning the legality of a proposal or provision. A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at its election. A negotiability dispute also exists when an exclusive representative disagrees with an agency head's disapproval of a provision as contrary to law. A negotiability dispute may exist where there is no bargaining obligation dispute. Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:

(1) Affects a management right under 5 U.S.C. 7106(a);

(2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and

(3) Is consistent with a Government-wide regulation.

* * * * *

(e) Proposal means any matter offered for bargaining that has not been agreed to by the parties. If a petition for review concerns more than one proposal, then the term includes each proposal concerned.

(f) Provision means any matter that has been disapproved by the agency head on review pursuant to 5 U.S.C. 7114(c). If a petition for review concerns more than one provision, then the term includes each provision concerned.

5 C.F.R. § 2424.24 -Agency's statement of position; purpose; time limits; content; severance; service

(a) Purpose. The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively. As more fully explained in paragraph (c) of this section, the agency is required in the statement of position to, among other things, set forth its understanding of the proposal or provision, state any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's petition for review, and supply all arguments and authorities in support of its position.

(b) Time limit for filing. Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, the agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) Content. The agency's statement of position must be on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and must:

(1) Withdraw either:

(i) The allegation that the duty to bargain in good faith does not extend to the exclusive representative's proposal, or

(ii) The disapproval of the provision under 5 U.S.C. 7114(c); or

(2) Set forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a statement of the arguments and authorities supporting any bargaining obligation or negotiability claims, any disagreement with claims made by the exclusive representative in the petition for review, specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied

on by the agency, and a copy of any such material that is not easily available to the Authority. The statement of position must also include the following:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) If different from the exclusive representative's position, an explanation of how the proposal or provision would work, and the reasons for disagreeing with the exclusive representative's explanation;

(3) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review; and

(4) Any request for a hearing before the Authority and the reasons supporting such request.

(d) Severance. If the exclusive representative has requested severance in the petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) Service. A copy of the agency's statement of position, including all attachments, must be served in accord with § 2424.2(g).