ORAL ARGUMENT SCHEDULED FOR NOVEMBER 25, 2013
Nos. 12-1383 & 13-1067

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

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL COMPLEX, COLEMAN, FLORIDA,
Petitioner/Cross-Respondent,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent/Cross-Petitioner

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, COUNCIL 33, LOCAL 506,
Intervenor.

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the American Federation of Government Employees, Council of Prison Locals 33, Local 506 (the "Union") and the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida (the "Agency"). The Agency is the petitioner and cross-respondent in this Court proceeding; and the Authority is the respondent and cross-petitioner. The Union has intervened on behalf of the Authority.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *American Federation of Government Employees, Council of Prison Locals 33, Local 506 and United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida,* Case No. 0-NG-3117, decision issued on July 23, 2012, reported at 66 FLRA (No. 152) 819.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court that are related to this case within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Agency	United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida
Authority	Federal Labor Relations Authority
CCNV	*Community for Creative Non-Violence v. Hess*, 745 F.2d 697, 700 (D.C. Cir. 1984)
JA	Joint Appendix
KANG	*National Association of Government Employees, Local R14-87*, 21 FLRA 24 (1986)
PB	Petitioner's Brief
SOP	Agency's Statement of Position
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006)
Union	American Federation of Government Employees, Council of Prison Locals 33, Local 506

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BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (the "Authority") issued the decision and order under review in this case on July 23, 2012. The Authority's decision is

published at 66 FLRA (No. 152) 819, a copy of which is included in the Joint Appendix ("JA") at 284-311. The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) (the "Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute. The Agency filed a timely petition for review on September 19, 2012 under § 7123(a), which imposes a 60-day period for appeal, beginning on the date the Authority's order issues. The Authority filed an application for enforcement on March 15, 2013.

STATEMENT OF THE ISSUES

1. Whether the Authority reasonably determined that Proposal 1 is negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute because it benefits employees, and because the Agency failed to explain before the Authority how the proposal burdens any management right.

2. Whether the Authority reasonably determined that Proposal 2, Sentence 3 is within the duty to bargain because it does not obligate the Agency to undertake any action and, therefore, does not affect the exercise of any management right under § 7106(a) of the Statute.

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[1] Pertinent statutory provisions and regulations are set forth in Addendum A to this brief.

3. Whether the case is not moot and whether vacatur is inappropriate where the Agency's voluntary actions have not completely and irrevocably eradicated the effects of the installation of the metal detectors, where the new movement procedures are vague, and where no exceptional circumstances exist.

STATEMENT OF THE CASE

This case arises out of a negotiability proceeding under § 7117 of the Statute. The American Federation of Government Employees, Council of Prison Locals 33, Local 506 (the "Union") submitted nine proposals related to the decision of the Agency to install two metal detectors on the north and south sides of the recreation yard of a maximum- security penitentiary. JA 81-82.

The Agency declared all of the proposals nonnegotiable. JA 81-90. In response, the Union filed a negotiability appeal under § 7105(a)(2)(E) of the Statute. JA 12-36. The Agency filed a statement of position ("SOP"), JA 95-188, to which the Union filed a response. JA 189-283.

The Authority found one entire proposal (Proposal 1) and the third sentence of another proposal (Proposal 2) within the duty to bargain. JA 284-311. The Authority determined that the remaining proposals were nonnegotiable. The Agency now seeks review of the Authority's finding that Proposal 1 and Proposal 2, Sentence 3 are within the duty to bargain. Also, the Authority seeks review of its cross-application for enforcement of its order.

STATEMENT OF THE FACTS

A. Background

The United States Penitentiary in Coleman, Florida, is a maximum-security facility housing male inmates. JA 81-82, 98. A buffer zone called the "compound" borders the prisoners' recreation yard and separates the yard from housing units located to the north and south of the yard and various other buildings located to the east and the west of the yard. JA 81-82. The Agency decided to install two metal detectors in the compound, one on the north and one on the south side of the yard. JA 81. At the time of installation and until March 2013, the Agency required all inmates to pass through one of the two metal detectors whenever entering or exiting the yard. JA 82. The Agency assigns compound officers to monitor the movement of inmates through the metal detectors. JA 82, 100.

The Union advanced proposals to mitigate the adverse effects of the outdoor metal detector's installation on, among other things, the safety of compound officers monitoring the detectors and on the amount of time officers spent outdoors monitoring inmate movements. JA 288-91, 296. One of these proposals and one sentence of another proposal, summarized below, are at issue.

Proposal 1 concerns the wearing of watches that trigger the compound detectors. JA 287. Under the proposal, the Agency requires inmates to turn in

watches that do not clear the compound detector (prohibited watches. JA 287. The Agency is also to confiscate and treat as contraband any prohibited watches) that are not turned in and is to ensure that the commissary does not sell prohibited watches. JA 287.

Proposal 2 consists of three sentences. JA 292-93. The first two sentences, not at issue here, require the Agency to build an officer's station on the compound. JA 292-93. The third sentence of Proposal 2, which is at issue here, suggests but does not require that the metal detector on one side of the compound "*should* have a secure area to be used as a control center for controlling inmate movement through the metal detector area, enclosed in a chain link fence, or something comparable." JA 293 (emphasis added). During the proceedings before the Authority, the Union explained that "should" in the third sentence means "not required to," but the Agency disagreed with that explanation. JA 83-84, 299. The Authority, consistent with its precedent, examined the proposal's wording and the Union's statement of intent. JA 294 (citing *NAGE, Local R-109*, 66 FLRA 278, 278 (2011)). The Authority found that the Union's explanation of the proposal's meaning comported with the wording and, as such, adopted the Union's explanation. JA 294.

As explained below, the Authority found Proposal 1 and the third sentence of Proposal 2 within the duty to bargain and ordered the parties to negotiate over them. JA 292, 299, 309.

B. The Authority's Decision

Proposal 1

The Authority began its duty to bargain analysis, as it always does, by considering whether the disputed proposal affects the exercise of a management right under § 7106(a) of the Statute. It found that Proposal 1 would eliminate Agency discretion in deciding whether to allow inmates to wear prohibited watches as they pass through the compound metal detectors and whether to confiscate the watches and treat them as contraband. JA 290. As such, the Authority determined that Proposal 1 affects the Agency's exercise of its right to determine its internal security practices under § 7106 of the Statute. JA 289-90.

The Authority found, nonetheless, that Proposal 1 does not "excessively interfere" with that right but, rather, constitutes an "appropriate arrangement" within the duty to bargain pursuant to § 7106(b)(3) of the Statute. JA 290-92. The Authority applied the standards set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) ("*KANG*"), which require that a proposal: (1) be intended as an "arrangement"; and (2) be appropriate because it does not "excessively interfere" with the exercise of management's rights. JA 290.

The Authority explained that to demonstrate that a proposal is intended as an "arrangement" (the first consideration under *KANG*), a union must: (1) identify the effects or reasonably foreseeable effects on employees that flow from the exercise of the management right and how these effects are adverse, and (2) show that the arrangement is sufficiently tailored to compensate employees suffering the adverse effects. JA 290.

Here, the Authority found that the Union identified bottlenecks at the entrances of the access points of the compound detectors as an adverse effect flowing from management's decision to install the two metal detectors. JA 290. According to the Union, bottlenecks reduced the effectiveness of the clearing process, increased risks to the safety of the compound officers, and required officers to spend more time outdoors. JA 290-91. The Authority also determined that the Agency conceded that the installation of the detectors causes officers to spend at least "slightly" more time outdoors. JA 291, citing SOP 4-5 (JA 99-100).

The Authority found further that the Agency's silence was a tacit concession of the other adverse effects identified by the Union – namely, the bottlenecks and attendant threats to officer safety and effectiveness of the screening procedure at the compound. JA 291. On this basis, the Authority found that Proposal 1 is intended to ameliorate the adverse effects of management's decision to install

metal detectors in the compound by reducing the delays and safety risks associated with prohibited watches triggering alarms. JA 291.

The Authority rejected the Agency's assertion that, because any officer monitoring a metal detector, not just those officers monitoring the two new compound detectors, could benefit, the Union had not sufficiently tailored the proposal. JA 291. Instead, the Authority found that the proposal is "intended to eliminate the possibility" that prohibited watches will set off compound detectors. JA 291. As such, the Authority found, consistent with its own precedent, that Proposal 1 is "prophylactic" in nature, and, therefore, sufficiently tailored. JA 291.

The Authority then considered the second *KANG* requirement, the "appropriateness" of Proposal 1, and determined that it was appropriate because it does not excessively interfere with the exercise of management's rights. JA 291. In so concluding, the Authority weighed the proposal's substantial benefits to employees against the Agency's "unexplained burden." JA 291-92. According to the Union, a ban on prohibited watches would reduce delays, inefficiencies, and security risks caused by nuisance alarms and bottlenecks at the compound detectors. JA 291. The Authority observed that these benefits are entirely consistent with the Agency's own internal security objectives and standards, which dictate a "zero tolerance rule" for nuisance alarms. JA 264, 291.

The Agency asserted that Proposal 1 burdens its right to determine internal security practices in that it "leaves management no discretion whatsoever to make the internal security decisions about what is and is not contraband as it relates to inmates['] watches." JA 292, citing SOP at 15 (JA 110). But the Authority disagreed. JA 292. According to the Authority, Proposal 1, which leaves the Agency's contraband policies intact except that it prohibits watches that trigger the nuisance alarms, is not particularly burdensome. JA 292. Further, the Authority emphasized that the Agency had not identified any security objectives furthered by allowing inmates either to wear prohibited watches or to buy them at the commissary. JA 292. The Authority therefore determined that Proposal 1 is an appropriate arrangement for the exercise of management's right to determine internal security. The Authority explained that although the Union demonstrated the proposal's benefits to employees, the Agency failed "to offer any evidence or make any specific arguments explaining how the proposal burdened management's ability to determine internal security practices." [2] JA 292.

Proposal 2, Sentence 3

The Authority addressed two issues with respect to Sentence 3: (1) whether to grant the Union's request to sever it from the remainder of the proposal; and (2)

[2] The Authority similarly rejected the Agency's argument that Proposal 1 interferes with its right to assign work under § 7106(a)(2)(B) of the Statute. The Agency does not renew this argument before this Court.

whether, if severed, the sentence is within the duty to bargain. The Authority found that the Union amply supported its severance request by explaining how Sentence 3 "may stand alone, and how such severed portion(s) would operate." JA 299 (quoting 5 C.F.R. § 2424.25(d)). Accordingly, the Authority granted the Union's severance request over the Agency's objection. JA 299.

The Agency premised its claim that the severed sentence falls outside the duty to bargain by "specifically incorporat[ing]" arguments it made with regard to other proposals. JA 299, citing SOP 16 n.7 (JA 111 n.7). Those other proposals, however, stand on entirely differently footing – they impose clear affirmative obligations on the Agency. The Agency never explained why the disputed sentence, which states only that the compound-detector area *should* have a secure area but does not require one, is outside the duty to bargain. JA 299. Under these circumstances, the Authority reasonably found that Sentence 3 is within the duty to bargain. JA 299.

Based on the foregoing, the Authority ordered the Agency to negotiate with the Union over Proposal 1 and the third sentence of Proposal 2.

C. Agency's February 19, 2013 Memorandum on Movement Procedures

On February 19, 2013, after filing its petition for review, the Agency, under the leadership of a new warden overseeing the correctional facility, issued a memorandum announcing its intention to alter, but not abandon, the use of the

compound detectors. Addendum B to Petitioner's Brief (PB). Under the memorandum, movement procedures would no longer require the screening of every inmate. *Id.* Rather, officers would conduct screening at the outdoor metal detectors on an "as needed for security purposes" basis, at the Agency's sole discretion. *Id.* Under the altered procedure, "as needed" situations include, but are not limited to, "random screening" and "suspicious behavior." *Id.*

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[.]" *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983) (quotation marks omitted) ("*BATF*"); *see also Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). This court grants broad deference to decisions of the Authority. *See AFGE, Local 2761 v. FLRA,* 866 F.2d 1443, 1446 (D.C.Cir.1989) ("It is well established that the court's role in reviewing the [Authority's] negotiability determinations is narrow."). "Congress intended that the [the Authority] develop specialized expertise in the field of labor-management relations and use it in applying the general provisions of the Act to the complexities of federal labor relations." *Dep't of Air Force v. FLRA*, 949 F.2d 1169, 1172-1173 (D.C. Cir. 1991) (citation and quotation marks omitted).

As such, negotiability decisions "will be upheld if the [Authority's] construction of the [Statute] is reasonably defensible." *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation and internal quotations omitted). Courts "also owe deference to the [Authority's] interpretation of the union's proposal." *NTEU v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994). Further, courts "afford considerable deference to the FLRA's balancing of management and employee interests under its [*KANG*] 'excessive interference' test[.]" *Dep't of Treasury v. FLRA*, 960 F.2d 1068, 1074 (D.C. Cir. 1992), citing *Patent Office Prof'l Ass'n. v. FLRA*, 873 F.2d 1485, 1487, 1491 (D.C. Cir. 1989) (reviewing the Authority's application of *KANG*). *See also Ass'n of Civilian Technicians v. FLRA*, 353 F.3d 46, 50 (D.C. Cir. 2004) (This Court will "ordinarily defer to the Authority's reasonable interpretations of the Statute and its resulting negotiability determinations.").

SUMMARY OF ARGUMENT

The Authority reasonably determined that Proposal 1 and Proposal 2, Sentence 3 are within the duty to bargain. Regarding Proposal 1, the Authority found that the proposal was an appropriate arrangement on the basis of its determination that the proposal's substantial benefits to employees affected by the installation of the outdoor compound metal detectors outweigh the unidentified burden on the Agency's reserved rights under the Statute. Further, the Authority

considered that the proposal is entirely consistent with an existing security policy, and the Agency failed to explain how refusing to negotiate the proposal furthered any internal security practice.

Regarding Proposal 2, Sentence 3, the Authority reasonably determined that Sentence 3 stands alone as an independent proposal, and, as such, is severable. The Authority also reasonably determined that, once severed, Proposal 2, Sentence 3 is within the duty to bargain on the basis of the Agency's failure to identify any management right affected by the proposal. In the absence of such a showing, the Authority reasonably concluded that Proposal 2, Sentence 3 is negotiable.

Moreover, contrary to the Agency's contentions, this case is not moot, nor is vacatur appropriate under the circumstances. The controversy surrounding the use of the compound metal detectors still exists even though, after the Agency filed its petition for review, it unilaterally changed from a practice of requiring the regular, routine movement of inmates through the outdoor metal detectors to a vague "as needed" standard for use of these metal detectors. The Agency's new procedures may result in little change from the old procedures because they do not, in any way, limit the Agency's use of the outdoor metal detectors. Lastly, even if the Agency's actions resulted in intervening mootness, vacatur is not appropriate under *United States v. Munsingwear* because there are no exceptional circumstances here warranting such extraordinary relief.

ARGUMENT

I. THE AUTHORITY REASONABLY DETERMINED THAT PROPOSAL 1 IS NEGOTIABLE AS AN APPROPRIATE ARRANGEMENT UNDER § 7106(b)(3) OF THE STATUTE BECAUSE IT BENEFITS EMPLOYEES, AND BECAUSE THE AGENCY FAILED TO EXPLAIN BEFORE THE AUTHORITY HOW THE PROPOSAL BURDENS ANY MANAGEMENT RIGHT

Proposal 1, which would require inmates to turn in prohibited watches, provides as follows:

> Inmates will be required to turn in all watches that do not clear the metal detectors. This will be accomplished through a deadline of sixty (60) days from the date of completion of negotiations. If any inmate is caught not complying with this mandate their watch will be confiscated and considered contraband. Management will ensure all watches sold through the commissary will be able to pass through the metal detector without activating the alarm.

JA 287. As described above, at 6, the Authority determined that this proposal affects the exercise of the Agency's right to determine internal security practices under § 7106(a)(1) of the Statute. The Authority's negotiability analysis does not, however, end there. Under the analytical framework established in *KANG*, the Authority will find such a proposal to be negotiable as an appropriate arrangement provided the proposal meets certain conditions. First, the proposal must be intended to be an arrangement for employees adversely affected by management's exercise of its reserved rights. *KANG*, 21 FLRA at 31. Second, the proposed arrangement must also be appropriate. Here, the Authority properly

applied this test and reasonably concluded that Proposal 1 is an appropriate arrangement.

A. The Authority Reasonably Found that Proposal 1 is an Arrangement

A union seeking to establish that a proposal that affects the exercise of a management right is an arrangement must first identify the effects or reasonably foreseeable effects on employees resulting from the exercise of management's right and how those effects are adverse. *KANG*, 21 FLRA at 31. "In other words, a union must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management [right(s)]." *Id.* The claimed arrangement must not be hypothetical or speculative and must be sufficiently tailored to compensate employees suffering adverse effects attributable to the exercise of management's rights. *AFGE, Local 1770*, 64 FLRA 953, 959 (2010)

In this regard, the Authority will find "prophylactic" proposals sufficiently tailored where the drafting of a specific proposal targeting only those employees adversely affected by agency action is impossible. *See AFGE, Local 1770*, 64 FLRA at 959-60 (rejecting claim that proposal was not sufficiently tailored where agency "failed to establish how the provisions could be tailored more narrowly.").

Here, as Authority found, the Union identified several adverse effects resulting from the Agency's decision to install new outdoor metal detectors. These adverse effects included: bottlenecks at the metal detector entrances that compromised the safety of officers and the efficacy of the clearing process and that increased the amount of time officers were "at the mercy of . . . climate conditions." JA 291. Moreover, the Agency expressly conceded an increased amount of officer time outdoors and, through silence, conceded, as the Union asserted, that metal detector bottlenecks threatened officer safety and process efficiency.[3]

Further, the proposal is not speculative or hypothetical and is sufficiently tailored. The Authority has long held that it "will not require that proposals be tailored with surgical precision" so as "to give full effect to the purpose and intent of § 7106(b)(3), in applying the analytical framework for determining whether a proposal constitutes an arrangement." *NTEU, Chapter 243*, 49 FLRA 176, 184 (1994).

The Authority's view stems from the recognition that there are "real world" limits on bargaining over proposals intended to prevent harms that would foreseeably flow from an agency's exercise of its management rights. *Id*. at 194. Accordingly, the Authority has specifically declined to impose a stringent tailoring

[3] Under 5 C.F.R. § 2424.32(c)(2), the Authority will treat a party's failure to respond to another a party's assertion as a concession.

requirement that would "seriously dilute" a union's ability "to address in a meaningful and effective manner adverse effects resulting from the exercise of a management right." *Id.* at 192, 194. It bears repeating that the Authority is to be given some latitude in developing specialized expertise in federal labor law. *See BATF*, 464 U.S. at 97.

In applying this expertise, the Authority will find that a "prophylactic" proposal is sufficiently tailored "if it targets a group of employees that is likely to be harmed by the exercise of a management right and seeks to address, compensate for, or prevent the actual or anticipated adverse effects of the exercise of the management right or rights on those employees." *NTEU, Chapter 243*, 49 FLRA at 194. This is precisely the situation here. Proposal 1 is sufficiently tailored because it targets a group of employees likely to be harmed by a particular exercise of management's right to determine internal security practices, here, the installation of outdoor metal detectors. It is intended to reduce nuisance alarms triggered by prohibited watches, thereby moving inmates through the compound-detector bottlenecks more quickly. JA 291. That other employees may benefit does not matter because to conclude otherwise would seriously dilute, if not entirely eliminate, the Union's ability to address the adverse effects associated with the bottlenecks.

Accordingly, the Authority reasonably concluded that Proposal 1 is an arrangement.

B. The Authority Reasonably Found Proposal 1 is an "Appropriate" Arrangement in that it Does Not Excessively Interfere with the Exercise of Any Management Right

Once the Authority determined that the Union's proposal is an arrangement, it then assessed whether the proposal is "appropriate" or whether it "excessively interferes" with management's rights. *KANG*, 21 FLRA at 31. In evaluating this factor, the Authority balances the competing practical needs of employees and managers "to determine if the benefit to employees afforded by the proposal is greater than the burden placed by the proposal on the exercise of the management right involved." *NFFE, Local 1482*, 44 FLRA 637, 649 (1992), citing *KANG*, 21 FLRA at 31-33.

As the Authority found, and the Agency does not contest, the proposal's benefits to employees include "reduc[ing] the delays, inefficiencies, and security risks caused by nuisance alarms at the compound-detector bottlenecks . . ." JA 291. Moreover, these beneficial effects are "consistent with the Agency's internal security objections . . . which encourage a 'zero tolerance rule' for nuisance alarms." JA 291; *see Patent Office Prof'l Ass'n*, 41 FLRA 795, 839-40 (1991) ("*POPA*") ("[T]he fact that this provision reflects an existing practice and the

[a]gency has made no contention that that practice has proven burdensome, indicates that the [proposal] is not unduly burdensome.").

In contrast, before the Authority, the Agency left the proposal's burden on management's rights "unexplained." As the Authority found, "the Agency fail[ed] to offer any evidence or make any specific arguments explaining how the proposal burdens management's ability to determine internal security practices." JA 292. The Agency's only objection was that the proposal "leaves management no discretion whatsoever to make the internal security decision as to what is and is not contraband as it relates to inmates' watches." *Id*. But, as the Authority pointed out, "the Agency does not explain why Proposal 1 . . . is particularly burdensome." *Id*.

The Authority has previously held that failure to identify a burden defeats a claim of excessive interference. *See, e.g., NFFE, Local 2050*, 36 FLRA 618, 628 (1990) (rejecting claim of excessive interference where the agency offered no argument and presented no evidence as to the burden that the proposal would place on the exercise of management's rights.); *NFFE, Local 2050*, 35 FLRA 706, 711-12 (1990) (same).

Under these circumstances – where the Union's proposal benefits employees by reducing delays, inefficiencies, and security risks caused by nuisance alarms from prohibited watches at compound-detector bottlenecks, and also furthers an

existing security practice, and the Agency utterly failed to explain how maintaining the practice was burdensome – the Authority's conclusion that the arrangement is appropriate is eminently reasonable.

C. The Agency's Claims Are Meritless

1. The Agency advances several unpersuasive arguments in its attempt to demonstrate that Proposal 1 is nonnegotiable. First, the Agency erroneously argues (PB 17-18) that the proposal is nonnegotiable because the Statute "delegates to management, *alone*, the discretion . . . to determine the substance of its internal security practices, [including] the right to determine what constitutes contraband." PB 17. This argument does not accurately reflect the statutory scheme.

Instead, the Statute expressly conditions the exercise of a management right on a union's right to negotiate appropriate arrangements. 5 U.S.C. § 7106(b)(3). Section 7106(a) of the Statute provides that: "*Subject to subsection (b) of this section*, nothing in this chapter shall affect the authority of any management official of any agency to determine the . . . internal security practices of the agency." 5 U.S.C. § 7106(a)(1) (emphasis added). But subsection 7106(b) provides, correspondingly, that: "Nothing in this section shall preclude any agency and any labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials." 5 U.S.C. § 7106(b)(3). Thus, the Statute plainly

reserves the exercise of certain rights to management; but, equally plainly, reserves to a union the right to negotiate appropriate arrangements where the exercise of the management right has an adverse effect on bargaining unit employees. Contrary to the Agency's assertion (PB 17), the Statute does not delegate to management *alone* the discretion to determine internal security practices.

The cases cited by the Agency (PB 17) do not further its claim. To the contrary, they underscore that the exercise of a management right is not without certain restrictions, including the limitations embodied in § 7106(b)(3). *See*, *e.g.*, *Patent Office Prof'l Ass'n*, 56 FLRA 69, 104-05 (2000) (analyzing proposal as a procedure or appropriate arrangement once the Authority determined the proposal interfered with the exercise of management's rights); *POPA*, 41 FLRA at 837 (finding that a proposal that interferes with an Agency's right to determine its internal security practices "is nonnegotiable *unless it constitutes an appropriate arrangement under section 7106(b)(3) of the Statute*.") (emphasis added). Thus, the Agency's claim that it "alone" has the exclusive and absolute right to implement internal security practices is patently at odds with the Statute.

2. The Agency similarly misapprehends its statutory obligations by claiming that the proposal is not an arrangement because it "does not seek to mitigate any adverse effects that arose *solely* because of the placement of the two compound detectors." PB 18 (emphasis added). The Statute imposes a duty to

negotiate over a proposal intended to ameliorate adverse effects that flow from the exercise of management rights, irrespective of whether the same adverse effects may exist elsewhere. 5 U.S.C. § 7106(b)(3). It is of no moment whether there were "twenty other detectors" in use at the facility (PB 18) or whether officers may already have "similar security duties" elsewhere. PB 19. Rather, the inquiry here is whether the Union can establish that adverse effects flow from the Agency's decision to implement new internal security measures at the outdoor compound. The Authority reasonably concluded that the Union had made this showing – an eminently reasonable conclusion given the Agency's explicit concession of some adverse effects and its tacit concession of others.

3. The Agency's assertion (PB 20) that the proposal is not sufficiently tailored because it is not tailored "to the adverse effects caused by the two compound detectors" is also meritless. As the Authority explained (JA 290), a "tailoring" analysis focuses on the employees who stand to benefit from a proposal, not on the adverse effects of a management practice.

As discussed above, at 17, the Authority expressly declines to require that a benefit run uniquely to those employees who would suffer an adverse effect as a result of an exercise of a management right in those cases where it is not possible to craft a proposal with such precision. *See, e.g., NTEU*, 65 FLRA 509, 511 (2011) ("Prophylactic proposals . . . will be found sufficiently tailored in situations where

it is not possible to determine reliably which employees will be adversely affected by an agency action so as to draft a proposal . . . to apply only to those employees."); *NTEU, Chapter 243*, 49 FLRA at 191.

The Authority's approach is consistent with this Court's precedent. "[W]e see nothing in the language of paragraph (b)(3) that requires union proposals to target in advance the very individual employees who will be adversely affected. *We think it sufficient that the Authority reasonably concluded that [the management action] will surely have adverse effects on some employees.*" *Dep't of the Treasury*, 960 F.2d at 1071 (emphasis added).[4] Here the Union tailored the proposal as narrowly as possible and further precision would substantially impair its ability to address in a meaningful and effective manner the adverse effects on employees of the nuisance alarms triggered by the prohibited watches. The Union cannot change the dynamics of the metal detectors, so a proposal to ban watches that trigger the alarm was the best it could do and still address its concerns. Notably, the Agency makes no suggestion of a more narrowly tailored

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[4] This case does not present the concern articulated by this Court in *NLRB v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993). In that case, the Court reversed the Authority's finding regarding the narrow tailoring of a proposal because, according to the Court, "the Authority made no effort to discern whether the balm provided by the proposal would be administered only to hurts arising from the [exercise of management rights.]" *Id.* at 1198. Here, the Authority recognizes that the Union – in these circumstances – has done its best and cannot craft a narrower proposal.

arrangement. In short, the Authority reasonably concluded that Proposal 1 is sufficiently tailored.

4. Lastly, the Agency erroneously claims (PB 20-21) that Proposal 1 excessively interferes with the right to determine internal security practices. As explained more fully above, at 19-21, the Authority assesses excessive interference by balancing a proposal's benefits against the proposal's burdens on the exercise of management's rights.

Before the Authority, the Agency argued that the proposal "excessively interferes" with its management rights because it would leave it without discretion to decide "what is and is not contraband as it relates to inmate watches." JA 110. However, the Agency did not explain to the Authority just how this purported loss of discretion would burden management or "excessively interfere." In its brief (PB 21), the Agency states, for the first time, that the proposal would "implicate [the Agency's] relationship with its prisoners."

Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in court. As this Court held, its "jurisdiction to review the Authority's decisions does not extend to an 'objection that has not been urged before the Authority.'" *AFSCME Capital Area Council 26 v. FLRA*, 395 F.3d 443, 451-52 (D.C. Cir. 2005). The Supreme Court explained that, in promulgating § 7123(c), Congress intended that the Authority should be the

first to analyze issues arising under the Statute, "thereby bringing its expertise to bear on the resolution of those issues." *EEOC v. FLRA*, 476 U.S. 19, 23 (1986).

And, even if the Agency could raise this objection before the Court, its brief does nothing to explain how the proposal would implicate the Agency's relationship with its prisoners. Finally, Proposal 1 does not, in fact, dictate what constitutes contraband (PB 20); rather, it simply advances the Agency's existing practice of zero tolerance by prohibiting watches that trigger the alarms.

II. THE AUTHORITY REASONABLY DETERMINED THAT SENTENCE 3 OF PROPOSAL 2 IS WITHIN THE DUTY TO BARGAIN BECAUSE IT DOES NOT OBLIGATE THE AGENCY TO UNDERTAKE ANY ACTION AND, THEREFORE, DOES NOT AFFECT THE EXERCISE OF ANY MANAGEMENT RIGHT

Applying the regulations reasonably, the Authority granted the Union's request effectively to treat the third sentence of Proposal 2 as a separate proposal by severing it from the rest of the proposal. JA 299, citing 5 C.F.R. § 2424.2(h). Then, ruling on the sentence's negotiability, the Authority reasonably determined to adopt the Union's explanation that the third sentence would not require any action by the Agency, a finding the Agency does not now contest. Accordingly, noting that the Agency did not explain how the sentence, so interpreted, is outside the duty to bargain, the Authority reasonably determined that the sentence is negotiable. Because the Authority acted reasonably in making all of these determinations, the

Court should uphold the Authority's ruling that Sentence 3 of Proposal 2 is within the Agency's duty to bargain.

A. The Authority Acted Reasonably in Determining that Proposal 2, Sentence 3 Was Severable

As the Authority found, the Union supported its request to sever Sentence 3 from the remainder of Proposal 2 by demonstrating that the third sentence could stand alone and operate independently. JA 299. Under the Authority's regulations, severance is defined as "the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law." 5 C.F.R. § 2424.2(h). Severance arises when "some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law." *Id.* The Authority's grant of a severance request effectively creates "separate proposals or provisions." *Id.* Pursuant to its regulations, the Authority will generally find that a party has met the burden to sever if the party explains how each portion may stand alone and operate independently. 5 C.F.R. § 2424.25(c); *NATCA*, 61 FLRA 341, 343 (2005).

The Agency does not contest the Authority's interpretation of its severance regulations. Also, courts give deference to an agency's interpretation of its own regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulations is ordinarily entitled to deference).

As the Authority found, the Union explained how the third sentence has a separate meaning from the first two sentences of Proposal 2. The first two sentences address the construction of an officer's station, while the third sentence suggests that a "secure area" enclosed in a chain link fence or something comparable "should" exist. JA 299. The Authority held that there was "no basis for finding" that the suggested "secure area" would necessarily be the officer's station addressed in the first two sentences of Proposal 2. *Id.* Accordingly, the Authority severed Sentence 3 – a decision that is reasonable. *NFFE v. FLRA*, 745 F.2d 705, 708 (D.C. Cir. 1984).

B. The Authority Reasonably Determined that Proposal 2, Sentence 3 is Within the Duty To Bargain Because it Does Not Obligate the Agency to Undertake Any Action and, Therefore, Does Not Affect the Exercise of Any Management Right Under § 7106(a) of the Statute

As the Authority found, sentence 3 of Proposal 2 does not require the Agency to do anything at all about creating "a secure area to be used as a control center." JA 299. Given that the proposal does not require the Agency to construct a secure area and the Agency's stark failure to demonstrate how the proposal's use of "should" implicates the exercise of any management right, the Authority reasonably concluded that the proposal was within the duty to bargain. *Cf. AFGE, Local 3511*, 12 FLRA 76, 85-87 (1983) (finding "should" proposal to be negotiable).

C. The Agency's Claims Are Meritless

1. The Agency erroneously claims first that the Authority should not have severed Sentence 3 because it "cannot have any meaning" (PB 22) without the first two sentences. Without citing any supporting authority, the Agency suggests that, once having found that certain parts of a proposal are non-negotiable, the Authority must treat those nonnegotiable parts as never having existed at all. But, the first two sentences of Proposal 2 remained part of the case's record and clearly did not evaporate once the Authority determined they were nonnegotiable. They clearly provide a point of reference for the secure area referred to in Sentence 3. Nothing in the law or Authority regulations prohibits the Authority from considering non-negotiable parts of proposals to ascribe meaning to other negotiable parts of the same proposal.

The Agency's claim also ignores the other parts of the case's record that give meaning to sentence 3. According to the Record of the Post-Petition Conference, the parties discussed the specific location of the detector station and the secure area was in reference to the metal detectors. JA 82. Under these circumstances, it is clear that the Authority could reasonably assign meaning to Sentence 3 of Proposal 2, and that the Authority did not act arbitrarily or capriciously in severing it.

2. The Agency next erroneously posits (PB 23-24), in the alternative, that the Authority erred by finding the proposal to be an appropriate arrangement.[5] But, the Authority made no such finding.

The Agency's claim is based on a misunderstanding of the Authority's decision. The Authority did not base its finding that Sentence 3 is within the duty to bargain on a determination that the sentence is an appropriate arrangement. Rather, the Authority found that the proposal is within the duty to bargain because it "does not require that the compound-detector area have a secure area," only that it *should* have such an area. JA 299. In other words, the Authority determined that the proposal's use of the non-obligatory term "should" does not affect any management right – a predicate finding to engage in any appropriate arrangement analysis. The Agency's claim must fail because the Agency did not, and cannot, explain how a proposal that does not require it to do anything could be outside the duty to bargain.[6]

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[5] In making this erroneous argument, the Agency asserts (PB 23) that the Union's suggestion to construct a secure area somehow concedes no adverse effect. The Agency did not make this challenge to the Authority below, and is therefore precluded from doing so now. *EEOC*, 476 U.S. at 23.

[6] The Agency did incorporate "the arguments made in Part IV and VII" of its SOP (JA 111 n.7), but none of those arguments specifically addresses how the Union's "should" proposal affects a management right.

III. THE AGENCY'S VOLUNTARY ACTIONS HAVE NOT MOOTED THIS CASE, AND VACATUR IS INAPPROPRIATE WHERE THEY HAVE NOT COMPLETELY AND IRREVOCABLY ERADICATED THE EFFECTS OF THE INSTALLATION OF THE METAL DETECTORS, WHERE THE NEW MOVEMENT PROCEDURES ARE VAGUE, AND WHERE NO SPECIAL CIRCUMSTANCES EXIST

A. The Case Is Not Moot

1. As noted above, the new warden at the correctional complex voluntarily abandoned the practice of requiring regular, routine movement of prison inmates through the outdoor metal detectors and replaced it with a practice of using the metal detectors to screen inmates "as needed for security purposes (randomly, suspicious behavior, etc.)." It is "well settled" that the voluntary cessation of a challenged practice does not automatically moot a case in which the legality of that practice is challenged. *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 724-25 (D.C. Cir. 2012) ("*Kifafi*") quoting *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, ___ U.S. ____, 130 S. Ct. 2971, 3009 n.3 (2010) (Alito, J., dissenting). Instead, voluntary cessation moots a case only if: "(1) there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Kifafi*, 701 F.3d at 725 (internal quotation marks omitted).

2. The facts here do not satisfy either requirement for mootness upon voluntary cessation in that the new movement procedures do not "completely and irrevocably eradicate[]" use of the outdoor metal detectors. Indeed, the February 2013 memorandum declares that the metal detectors "will not be removed . . . . They will remain and be utilized to screen inmates as needed. . ..." Addendum B. To be sure, inmates will presumably be required to pass through the metal detectors less frequently, but the Agency is free to designate when and for how long their use is needed. While this new arrangement may disadvantage the Union to a lesser degree than did routine use of the metal detectors, it still disadvantages the Union. That is, the possibility of "prohibited watches" setting off the compound detectors persists. The Agency's determinations of an "as needed" use of the metal detectors will potentially still result in delays, inefficiencies, and security risks caused by nuisance alarms going off during inmate passage through the detectors. As such, the voluntary change in procedure does not moot the case. *See Ne. Fla. Chapter of the Ass'd Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662-63 (1993) (controversy not mooted by city's repeal of an ordinance that disadvantaged contractors and replacement of it with an ordinance that disadvantaged the same contractors, but to a lesser degree).

3. The Agency suggests that the Court should dismiss this case even if the Court were to find it "not technically moot." PB 25. But, the Agency cannot

show that this Court should take the extraordinary step to "stay its hand and [] withhold relief it has the power to grant." *Cmty. for Creative Non-Violence v. Hess*, 745 F.2d 697, 700 (D.C. Cir. 1984) ("*CCNV*"). As the Supreme Court has explained, in deciding whether to dismiss a technically non-moot case, "the court should consider whether there remains some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). In making this determination, a court should weigh "the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of the past violations." *Id.* at 633.

4. Here, while there is no reason to question the sincerity of the warden's commitment to new movement procedures, even full and honest compliance with those procedures may not necessarily result in much difference from the prior procedures. As discussed above , at 11, because the new procedures do not specifically proscribe any use of the metal detectors and prescribe only vaguely "as needed" use, the Agency can fully comply and yet still cause the adverse effects (inefficiencies, bottlenecks, and security concerns) the Union's proposals seek to mitigate.

5. Similarly, the vagueness of the new procedures and the resulting boundless Agency discretion to require use of the compound metal detectors at any

time for any length of time dramatically undermines the effectiveness of the discontinuance. At any time, for any reason, and for as long as it deems appropriate, the Agency could, under the new procedures, require every inmate in the recreation yard to pass through the new compound metal detectors.

6. Further, the character of the Agency's past actions also weighs in favor of adjudicating the case. The Agency acted willfully and knowingly when it installed the new compound metal detectors and refused to bargain over the Union's proposals. Contrary to the Agency's claim, the facts here are decidedly distinct from those of *CCNV*, wherein this Court determined that the case was "so attenuated that considerations of prudence and comity" compelled it to refrain from adjudication. *Id.* at 700. Most importantly, *CCNV* was a declaratory judgment case involving First Amendment concerns, specifically freedom not to stand in the courtroom based on religious tenets eschewing exhibitions of respect for any worldly entity. *Id.* at 699. Federal courts are wary to decide constitutional issues where a basis exists to avoid the controversy without passing on the constitutional issue. This case does not implicate similar weighty, constitutional concerns.

Further, in *CCNV*, the Court found it significant that the parties had reached a mutual agreement for proceeding with courtroom etiquette in the future. *Id.* at 701 ("[T]he judges have volunteered to reconcile their needs for respect and order in the courtroom with members' religious dictates. . . . That, combined with

members' willingness to make known their expected court attendances, leads us to exercise our discretion to stop short of resolution of the pre-existing constitutional dispute."). The Agency and the Union have made no such mutual agreement here with respect to the compound metal detectors.

B. Vacatur Is Inappropriate Under the Circumstances Presented

The Agency also claims that its actions have mooted the case such that vacatur of the Authority's decision is warranted. First and foremost, for the reasons shown above, the Authority strongly disagrees that the Agency's actions have, in fact, mooted the case. Assuming, however, that the Court decides otherwise, vacatur based on intervening mootness is not warranted.

1. In *United States v. Munsingwear*, the Supreme Court held that when intervening mootness prevents appellate review of a decision, the decision ordinarily should be vacated. 340 U.S. 36, 39 (1950). Vacatur is appropriate when review of the decision is "prevented through happenstance." *Id*. at 40. "Happenstance" in this context means that the controversy becomes moot "due to circumstances unattributable to any of the parties." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 23 (1994) ("*Bonner Mall*"). The "principal condition to which [the Supreme Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id*. at 24; *see also N. Cal. Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004)

(regional agency entitled to vacatur of NRC order when mootness was caused by a settlement agreement to which agency was not a party); *NTEU*, 40 FLRA 966, 967 (1991), *on remand from FLRA v. FDIC*, 927 F.2d 1257 (D.C. Cir.) (Table), 1991 WL 32178 (Authority entitled to vacatur of its own order when mootness was caused by new legislation).

2. Absent "exceptional circumstances [that] may conceivably counsel in favor of such a course," mootness caused by a party who enters into a settlement (or who has otherwise caused mootness) does not justify vacatur. *Bonner Mall*, 513 U.S. at 29. The burden on the party seeking vacatur is to demonstrate "equitable entitlement to the extraordinary remedy of vacatur." *Id*. at 26. Vacatur is "not an automatic right." *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 351 (D.C. Cir. 1997) (vacatur was warranted when case was mooted by passage of legislation).

3. As the Agency acknowledges (PB 27), its own actions caused any mootness that arguably exists. However, the Agency argues that exceptional circumstances warrant vacatur of the Authority's decision because the Agency's voluntary cessation was motivated by "unusually sensitive" concerns over the safety and security of a correctional complex. *Id*. But, there is nothing exceptional about the Agency making or modifying decisions based on sensitive safety and security issues. That is part of the mission of the Agency and other federal

agencies as well, and the Authority considers this sensitivity when deciding cases involving agencies such as the Bureau of Prisons that must routinely address "unusually sensitive" concerns present in correctional facilities. The Authority has already given special deference to the Agency's mission when it analyzed the negotiability of the proposals (JA 289-90), and the Agency's request for vacatur does not necessitate a further layer of deference. Should this Court allow the Agency to obtain vacatur of any unfavorable Authority decision merely by claiming that safety or security concerns motivated its subsequent voluntary partial cessation, that could, before long, render ordinary the extraordinary relief of vacatur.

4. Further, the absence any of ill-motive by the warden in adopting the change in policy (PB 28) does not render vacatur appropriate. As discussed previously, the new procedures have no defined limits. Therefore, the policy, while changed on paper, may well not change in practice, which would render the warden's intentions, sincere or otherwise, irrelevant.

5. Lastly, the Authority's lack of a quorum has no bearing on the issue of the equitable remedy of vacatur. The Agency is hardly "hamstrung" (PB 28) by the Authority's issuance of a negotiability decision determining the lawful limits on negotiating matters related to the installation of metal detectors at a correctional

facility. The cases cited by the Agency (PB 28) are inapposite or stand for the unremarkable proposition that arbitrators must follow Authority precedent.

For instance, *Patent and Trademark Office v. FLRA*, 672 F.3d 1095 (D.C. Cir. 2012) ("*PTO*") is inapposite. *PTO* was not a negotiability case, nor did it involve mootness. In *PTO*, the Authority addressed the extent to which it was bound by an earlier decision reviewing a different arbitration award involving the same parties and issues. *Id.* at 1097-98.

And, neither *Social Security Admin.*, 59 FLRA 257 (2003) nor *General Servs. Admin.*, 54 FLRA 1582 (1998) ("*GSA*"), support vacatur in this case either. They simply hold that an arbitrator must follow Authority precedent when resolving negotiability disputes involving issues that have come before the Authority. The effect of the Authority's decision here is simply to bind an arbitrator to find a similar proposal negotiable and to order bargaining over that proposal. The Authority's decision would not compel any further action from an arbitrator or otherwise encumber arbitral authority. The extraordinary relief of vacatur cannot be premised on this unremarkable consequence.

CONCLUSION

For the reasons stated above, the Agency's petition for review should be denied.

Respectfully submitted,

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D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(C) 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 proportionally 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 8,367words excluding exempt material.

/s/ Rosa M. Koppel
Rosa M. Koppel
Counsel for the Respondent

Certificate of Service

I hereby certify that on this 20th day of September, 2013, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause eight (8) paper copies of this brief to be filed with the Court within two (2) business days. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Rosa M. Koppel
Rosa M. Koppel

ADDENDUM

Relevant Statutes

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5 U.S.C. § 7105(a)	1
5 U.S.C. § 7106	1
5 U.S.C. § 7117	2
5 U.S.C. § 7123(a)	5

Relevant Regulations

5 C.F.R. § 2424.2(h)	5
5 C.F.R. § 2424.25(c)	5
5 C.F.R. § 2424.25(d)	6
5 C.F.R. § 2424.32(c)(2)	7

§ 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.

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§ 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.

§ 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.

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.

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5 C.F.R. § 2424.2(h)

Severance means the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law. In effect, severance results in the creation of separate proposals or provisions. Severance applies when some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.

5 C.F.R. § 2424.25(c): Response of the exclusive representative; purpose; time limits; content; severance; service.

Content. You must file your response on a form that the Authority has provided for that purpose, or in a substantially similar format. You meet this requirement if you file your response electronically through use of the eFiling system on the FLRA's Web site at *www.flra.gov.* That Web site also provides copies of response forms. With the exception of a request for severance under paragraph (d) of this section, you must limit your response to the matters that the agency raised in its statement of position. You must date your response, unless you file it electronically through

use of the FLRA's eFiling system. And, regardless of how you file your response, you must ensure that it includes the following:

(1) Any disagreement with the agency's bargaining obligation or negotiability claims. You must: State the arguments and authorities supporting your opposition to any agency argument; include specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely; and provide a copy of any such material that the Authority may not easily access (which you may upload as attachments if you file your response electronically through use of the FLRA's eFiling system). You are not required to repeat arguments that you made in your petition for review. If not included in the petition for review, then you must state the arguments and authorities supporting any assertion that the proposal or provision does not affect a management right under 5 U.S.C. 7106(a), and any assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter negotiable at the election of the agency under 5 U.S.C. 7106(b)(1);

(ii) Whether and why the proposal or provision constitutes a negotiable procedure as set forth in 5 U.S.C. 7106(b)(2);

(iii) Whether and why the proposal or provision constitutes an appropriate arrangement as set forth in 5 U.S.C. 7106(b)(3); and

(iv) Whether and why the proposal or provision enforces an “applicable law,” within the meaning of 5 U.S.C. 7106(a)(2).

(2) Any allegation that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations.

5 C.F.R. § 2424.25(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.

5 C.F.R. § 2424.32(c)(2): **Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.**

Failure to raise, support, and respond to arguments. … Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.