ORAL ARGUMENT NOT YET SCHEDULED

No. 11-1433

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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 ("FLRA" or "Authority") were the American Federation of Government Employees, Local 1164 ("AFGE" or "Union") and the Social Security Administration ("SSA" or "Agency"). AFGE is the petitioner in this Court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *American Federation of Government Employees, Local 1164 and Social Security Administration,* Case No. 0-NG-3055, decision issued on September 16, 2011, reported at 66 FLRA (No. 24) 112.

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 which are related to this case within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

AFGE or Union or Petitioner	American Federation of Government Employees, Local 1164
Agency or SSA	Social Security Administration
FEI	Front-end interviewing
FLRA or Authority	Federal Labor Relations Authority
IBPW	Interview Barrier Privacy Wall
JA	Joint Appendix
KANG	*National Association of Government Employees, Local R14-87*, 21 FLRA 24 (1986)
Local 1923	*American Federation of Government Employees, Local 1923 v. FLRA*, 819 F.2d 306 (D.C. Cir. 1987)
Local 2782	*American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983)
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NWSEO	*National Weather Service Employees Organization v. FLRA*, 197 Fed. App'x 1 (D. C. Cir. 2006)
PB	Petitioner's Brief
POPA	*Patent Office Professional Association v. FLRA*, 873 F.2d 1485 (D.C. Cir. 1989)

Statute or FSLMRS	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006)

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FEDERAL LABOR RELATIONS AUTHORITY,
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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 September 16, 2011. The Authority's decision is published at 66 FLRA (No. 24) 112. A copy of the decision is included in the Joint Appendix (JA) at 182-194. 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) ("FSLMRS" or "Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether, in determining that the Union's proposal is not an appropriate arrangement under 5 U.S.C. § 7106(b)(3), the Authority was correct to apply the open-ended balancing test set forth in *National Association of Government Employees, Local R14-87*, 21 FLRA 24 (1986) (*KANG*), as applied by the Authority for twenty-five years and as endorsed by this Court and every other Court of Appeals to consider the question.

STATEMENT OF THE CASE

This case arises out of a negotiability proceeding under § 7117 of the Statute. The Social Security Administration ("Agency" or "SSA") informed the American Federation of Government Employees, Local 1164 ("AFGE," "Union," or "Petitioner") that it intended to relocate the Newport, Rhode Island, field office, and the parties bargained over Union proposals relating to the relocation. JA 48-50, 183. The Agency refused to bargain over one Union proposal in which the Union proposed an entirely different office layout, with – among other features – two workstations per employee instead of just one, and with employees dividing their time between the workstations depending upon the nature of their duties at a

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

particular moment. JA 185. Pursuant to § 7105(a)(2)(E) of the Statute, the Union sought review by the Authority.

The Authority, applying its *KANG* balancing test, held that the Union's proposal excessively interfered with SSA's right to determine the methods and means of performing work, and therefore was not an appropriate arrangement under § 7106(b)(3) of the Statute. JA 191.

The Union now seeks review of the Authority's decision, arguing that the Authority erred by not applying a pre-*KANG* decision of this Court in conducting its analysis and asserting that under the Union's preferred analysis, its proposal is an appropriate arrangement.

STATEMENT OF THE FACTS

A. Background

The Union represents six employees at SSA's Newport, Rhode Island, field office. JA 183. These employees collect and process information related to Social Security number applications, retirement and disability benefits, Medicare, and Supplemental Security Income. *Id.* Their work requires the employees to "conduct face-to-face and telephonic interviews with members of the public." *Id.*

B. Relocation of the Newport Office and the Agency's Floor Plan

The Agency determined to relocate the Newport office and, concomitant with the relocation, designed the floor plan for the new office space. JA 183. As a

central component of the floor plan, the Agency introduced an "Interview Barrier Privacy Wall (IBPW), which would separate employee work areas from publicly accessible areas, such as the waiting room." *Id.*

The Agency then decided that each of the six employees should have a single workstation located adjacent to the interviewing wall. Under the Agency's floor plan,

> [e]mployee workstations are mounted against the IBPW on one side, and, on the other side – at points that are adjacent to the employee workstations – there are seats for members of the public who are being interviewed. … [B]etween each IBPW-mounted workstation and the adjacent public seating area, there is a three feet by three feet opening in the IBPW … which enables employees … to conduct face-to-face interviews while maintaining the overall separation between employee work areas and publicly accessible areas. … [E]ach IBPW window is equipped with a rolling shutter that can be opened to conduct interviews and closed when interviewing concludes.

JA 183 (internal quotation marks, citations omitted). With SSA's design, these wall-integrated workstations are the employees' only workstations, and SSA intends that an employee will perform all of his or her work – interviewing *and* non-interviewing – from this single location. JA 184.

The Agency's floor plan also calls for a specific type of workstation to be used, the "MA-95" workstation. JA 184. The MA-95 is "a particular type of workstation setup – i.e. … a specific desk model in conjunction with a specific arrangement of other storage areas or units, work surfaces, and privacy panels." *Id.* n.4.

Both of these floor plan components – having a single wall-mounted workstation per employee and using the MA-95 as that workstation – are related to the Agency's mission. The Agency has a policy that offices with fewer than eight employees will have a single-workstation floor plan, because a dual-workstation floor plan is "inefficient and insecure" in small offices. JA 188. With respect to the MA-95 workstation, the Agency favors that configuration because its abundance of "work surfaces and storage space … allow[s] for more secure document storage at the IBPW-mounted workstations and facilitate[s] quick transitions between interviewing and non-interviewing work." JA 188-89.

The Agency and Union negotiated over the Newport office's relocation, and reached agreement on a number of proposals. JA 48-50; Petitioner's Brief (PB) at 5.

C. The Union's Disputed Proposal

The Agency declined to bargain with the Union over one proposal. That proposal, at issue here, would have reversed the Agency's decisions both as to the number and location of workstations in the new office and as to the type of workstation utilized.[2]

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[2] The Union's disputed proposal is largely pictorial. *See* JA 193 and *compare* JA 192 (drawing of Agency's floor plan). The text of the Union's proposal reads:

> The final floor plan approved by the parties is attached to this MOU. The workstations along the [IBPW] are interviewing workstations. Employee[s'] back end workstations are along the exterior wall as

In place of the single MA-95 workstation located adjacent to the interviewing wall, the Union's proposal substitutes two workstations as part of what the Union calls a "hybrid front-end interviewing [FEI] floor plan." JA 185. The Union's proposal would force SSA to shift from having one IBPW-mounted workstation per employee, as it prefers for efficiency and security in small offices, to a floor plan where every employee has two committed workstations, one located at the interviewing wall and another in the rear of the office, "situated alongside the office wall that runs parallel to, but is several feet away from" the interviewing wall. *Id.* In the Union's concept, employees would shuttle back and forth between their two workstations depending upon whether they are performing interviewing or non-interviewing work. The Union's proposal also replaces the wall-mounted MA-95 workstations with "K1-95" workstations, which, as the Union does not dispute, have less work surface and secure storage space than the MA-95 configuration. JA 188-89.

The Agency refused to bargain over the disputed proposal, contending that it "clearly and significantly affects management's rights under § 7106(b)(1) of the Statute … to determine the methods and means of performing work" at the Newport office, and also that the proposal "impermissibly affects its right to

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> indicated on the [Union's] plan. A plotted floor plan identifying employees' seat/workstation locations will also be provided to the Union when available."

JA 184 (alterations in original).

determine its internal security practices under § 7106(a)(1) of the Statute … and its right to assign work under § 7106(a)(2)(B) of the Statute." JA 186. The Agency also argued that "the proposal is not an appropriate arrangement under § 7106(b)(3) of the Statute[.]" JA 187. The Union filed a petition for review with the Authority.[3] JA 182.

D. The Authority's Decision

The Authority held that the Union's proposal is outside the duty to bargain. The Union's proposal affects the Agency's § 7106(b)(1) rights to determine the methods and means of performing work at the Newport office and, because it excessively interferes with those rights, is not an appropriate arrangement under § 7106(b)(3).

1. The Union's proposal affects the methods and means of performing work

The Authority began by reciting the legal framework for determining whether a proposal affects management's right to determine the methods and means of performing work. The Authority applies a two-part analysis, first considering whether the proposal concerns a "method" or "means" of performing

[3] The Union actually filed two documents with the Authority, one on December 23, 2009, and another on April 6, 2010, each purporting to be a petition for review of negotiability issues related to the disputed proposal. *See* JA 6, JA 38. As the Authority's decision explains, JA 182 n.1, the second petition is simply a revision of the first. To the extent the Union's two petitions differ, it is the April 6 petition (JA 38) that is the operative document and to which the Authority's decision refers when it cites the Union's "Petition."

work. JA 188, *citing Gen. Servs. Admin.*, 54 FLRA 1582, 1589 (1998). If so, the Authority then evaluates whether the Agency has demonstrated that "(1) there is a direct and integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted." *Id.*, *citing Ass'n of Civilian Technicians, Ariz. Army Chapter 61*, 48 FLRA 412, 420 (1993).

The Authority also noted that under its precedent,

> the relative importance of particular methods or means of performing work is irrelevant to a determination of whether a proposal concerns the right to determine the methods and means of performing work. In other words, an asserted method or means need not be indispensable to the accomplishment of an Agency's mission to come within the meaning of (b)(1).

Id., *citing Nat'l Treasury Emps. Union, Chapter 83*, 35 FLRA 398, 407-08 (1990) and *Am. Fed'n of Gov't Emps., Local 2441 v. FLRA*, 864 F.2d 178, 186 (D.C. Cir. 1988).

Applying this framework, the Authority first determined that the Agency had adopted a policy "not to use hybrid FEI [*i.e.*, dual-work station] floor plans in offices with fewer than eight employees because such a setup is inefficient and insecure[,]" JA 188, and that this policy "functions as a plan or policy for the accomplishment or furtherance of the performance of its work with the public[,]" JA 189 (citations and quotation marks omitted). The single-workstation policy,

then, constitutes a method of performing work. JA 189. The Authority also found that the storage and work surface features of the MA-95 workstation are "tools and devices" for the furtherance of SSA's work, and therefore constitute a means of performing work. JA 189.

Continuing with the analysis, the Authority determined that the single-workstation "method" and MA-95 workstation "means" of performing work have a direct and integral relationship to the accomplishment of the Agency's mission. JA 189. Specifically, as the Agency explained, the single-workstation floor plan allows it to operate more efficiently and securely than a multiple-workstation alternative, JA 188, and the MA-95's more abundant secure storage and work surfaces "allow for more secure document storage … and facilitate quick transitions between interviewing and non-interviewing work[,]" JA 189, thereby allowing the Agency to "serve the public in an office with only six employees[,]" *id.*

Next, the Authority determined that the Union's proposal to use multiple workstations per employee and the K1-95 configured workstation "would directly interfere with the mission-related purposes for which the method or means was adopted." JA 189. In support, the Authority cited as undisputed facts that: (1) switching back and forth between front- and back-end workstations "will consume more work time than what is required to transition between tasks in a single-

workstation environment[;]" (2) the Union's preferred multiple-workstation floor plan works better in larger offices because larger staff complements minimize the time lost transitioning between workstations; and (3) the MA-95 workstation provides more work surfaces and secure storage space than the K1-95 workstation. *Id.*

Based on these determinations, the Authority held that the Union's proposal affects SSA's rights to determine the methods and means of performing work at the Newport office. JA 190.

2. The proposal is not an appropriate arrangement because it excessively interferes with the Agency's § 7106(b)(1) rights to determine the methods and means of performing work

Having determined that the Union's proposal affects the Agency's rights to determine the methods and means of performing work, the Authority proceeded to consider whether the proposal is an "appropriate arrangement" under § 7106(b)(3). JA 190-91. A proposal that affects a reserved management right may nonetheless be negotiable if, *e.g.*, it is an "appropriate arrangement" under § 7106(b)(3). In its decision, the Authority held that the Union's proposal is not an appropriate arrangement because its benefits to adversely-affected bargaining unit employees are outweighed by its burdens on the Agency's exercise of its management rights. JA 191.

In reaching this conclusion, the Authority began by assuming that the Union's proposal is an arrangement; that is, that the proposal ameliorates the adverse effects of an exercise of management's rights and is sufficiently tailored to benefit employees who suffer those adverse effects. JA 190 (and cases cited therein).

The Authority next considered whether the proposal is an *appropriate* arrangement. "If the proposal is determined to be an arrangement, then the Authority determines whether it is appropriate or whether it is inappropriate because it excessively interferes with … management right(s)." JA 190, *citing KANG*, 21 FLRA at 31-33. "In doing so, the Authority weighs the benefits afforded to employees against the intrusion on the exercise of management's rights[,]" *id.*, a balancing test commonly known as the "*KANG* analysis."

The Authority rejected the Union's argument that its proposal is automatically an appropriate arrangement because it "would not significantly hamper the ability of the [A]gency to get its job done." JA 187 (quotation marks omitted). The Union based this argument on its reading of *National Weather Service Employees Organization*, 64 FLRA 569 (2010) (on remand from *Nat'l Weather Serv. Emps. Org. v. FLRA*, 197 Fed. App'x 1 (D.C. Cir. 2006) (per curiam, unpublished) (*NWSEO*) (relying on *Am. Fed'n of Gov't Emps., Local 1923 v. FLRA*, 819 F.2d 306 (D.C. Cir. 1987) (*Local 1923*))). In the *NWSEO* remand,

the Authority performed this inquiry – referred to in this brief as the "significantly hampers" analysis – as the law of the case. As the Authority explained in the instant case, though, "in decisions subsequent to *NWSEO*, the Authority has continued to apply the *KANG* standard, not the *NWSEO* standard." JA 190 n.9.

Performing the *KANG* balancing here, the Authority assessed "the alleged benefits afforded to employees": a guarantee of ergonomic workstations, personal privacy, decreased exposure to noise and illness, a dedicated reception area, and employees not having "to stare at a hole in the wall all day." JA 191, 190 (quotation marks omitted). Against those benefits, the Authority weighed

> the burdens on management's exercise of its rights[.] [T]he proposal would totally eliminate the single-workstation setup chosen by the Agency, and it would replace the Agency's preferred IBPW-mounted, MA-95 workstations with K1-95 workstations. Thus, *the proposal would essentially negate the Agency's determinations entirely.*

JA 191 (emphasis added). The Authority also considered several undisputed impacts of the proposal on the Agency's operations:

> [T]he six employees in the Newport office will use more work time frequently switching between stations – during which they will not be performing assigned work – than would be the case in a larger office that uses an FEI setup[.] [E]mployees who have two different workstations cannot transition between work tasks as quickly as those who remain at a single workstation for all of their work tasks[.] [E]mployees at the IBPW-mounted workstations will have fewer work surfaces and less secure storage space at the K1-95 workstations than they would have at the MA-95 workstations that the Agency selected.

Id. On balance, the Authority found that "the burdens on management's rights outweigh the benefits to employees. Thus, the proposal excessively interferes with management's exercise of its (b)(1) rights and is not an appropriate arrangement[.]" *Id*. As the Authority ruled, the proposal is, therefore, outside the duty to bargain, and the Authority accordingly dismissed the Union's petition for review.[4] *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); *see also Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

With regard to a negotiability decision, such a "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). Courts "also owe deference to the FLRA's interpretation of the union's proposal." *Nat'l Treasury Emps. Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

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[4] Because the proposal impermissibly infringes on SSA's right to determine the methods and means of performing work, the Authority found it unnecessary to address the Agency's arguments regarding the rights to determine internal security practices and to assign work. JA 191 n.10.

Critically, courts "afford considerable deference to the FLRA's balancing of management and employee interests under its [*KANG*] 'excessive interference' test[.]" *Dep't of Treasury, Office of the Chief Counsel, Internal Revenue Serv. v. FLRA*, 960 F.2d 1068, 1074 (D.C. Cir. 1992), *citing Patent Office Prof'l Ass'n. v. FLRA*, 873 F.2d 1485 at 1487, 1491 (D.C. Cir. 1989) (*POPA*) (reviewing the Authority's application of *KANG*).

SUMMARY OF ARGUMENT

At the outset, it is important to establish what the Union is *not* challenging. The Union does *not* challenge the Authority's understanding of its proposal, or the Authority's description of the proposal's benefits and burdens. Nor does the Union challenge the Authority's determination that its proposal affects SSA's rights to determine the methods and means of performing work. Neither does the Union challenge that, if *KANG* is the proper analysis for determining "appropriateness" under § 7106(b)(3), then its proposal excessively interferes with the Agency's rights.

Indeed, the Union points to no analytic path under which its proposal might be negotiable other than the long-dormant and thoroughly-superseded "significantly hampers" inquiry first stated in *Local 1923* and not reprised for nearly twenty years. The Union's arguments in favor of adopting the "significantly hampers" analysis and rewriting *KANG* as a *per se* test whereby any arrangement

that does not significantly hamper an agency's ability to get its work done is automatically an *appropriate* arrangement are unavailing.

The Union's faulty reasoning begins by misunderstanding the relationship between *KANG* and *Local 1923*, the forbearer of *NWSEO*. This Court did not review *KANG* in *Local 1923*, and *Local 1923*'s analytic approach was simply a one-time stopgap, employed while the Court waited for the Authority's *KANG* analysis to come before it.

To the contrary, once this Court had the opportunity to review *KANG*, it accepted the Authority's construction of an open-ended, non-mechanistic analysis for determining when an arrangement's interference with management rights is excessive. This and other Courts have unanimously endorsed the open-ended *KANG* analysis as applied by the Authority over the last twenty-five years.

Finally, this Court should not impose the *per se* "significantly hampers" test on the Authority. The "significantly hampers" test is inconsistent with *KANG* because it would require consideration of that particular factor in every § 7106(b)(3) case, and would give that factor primary or determinative weight. Granting the Union's petition for review would therefore be tantamount to overruling not only *KANG*, but also the abundance of D.C. Circuit precedent that both endorses *KANG* and recognizes that the contours of the "excessive interference" test are for the Authority to determine. Furthermore, *NWSEO* – to

the extent that it cannot be reconciled with *KANG* and this Court's acceptance of *KANG* – is an aberration, which this Court should not embrace but rather distance itself from.

ARGUMENT

IN DETERMINING THAT THE UNION'S PROPOSAL WAS NOT AN APPROPRIATE ARRANGEMENT UNDER 5 U.S.C. § 7106(b)(3), THE AUTHORITY WAS CORRECT TO APPLY THE *KANG* BALANCING TEST AS APPLIED BY THE AUTHORITY FOR TWENTY-FIVE YEARS AND AS ENDORSED BY THIS COURT AND EVERY OTHER COURT OF APPEALS TO CONSIDER THE QUESTION.

The Union's petition for review should be denied, as the Authority applied the correct legal analysis – the *KANG* balancing test – in determining that the Union's proposal excessively interferes with the Agency's rights to determine the methods and means of performing work.

As explained below, under *KANG*, the Authority balances an arrangement's benefits to adversely-affected employees against its burdens on management's exercise of its reserved rights. This balancing commonly utilizes the factors set forth in the Authority's *KANG* decision, but the specific factors considered, and the weight afforded to each of them, vary depending upon the circumstances of the particular case. The *sine qua non* of *KANG* is not reliance on any one factor, but rather an open-ended balancing of benefits and burdens.

The Union now asks this Court to rewrite *KANG* to strictly conform to the analytic line of *Local 1923*, under which "[t]he determination whether an interference with managerial prerogatives is excessive *depends primarily* on the extent to which the interference hampers the ability of an agency to perform its core functions – to get its work done in an efficient and effective way." PB at 16 (quoting *Local 1923*, 819 F.2d at 308-09). The Union would require the Authority to consider this particular factor in every case and to give that factor primary importance – both of which are anathema to the Authority's application of *KANG*.[5]

This Court should reject the Union's argument, honor decades of its precedent and that of other Circuits, and continue to allow the Authority to determine "appropriateness" under § 7106(b)(3) by applying the longstanding *KANG* balancing test.

[5] The Union reads *Local 1923* as requiring that the "significantly hampers" factor be considered in every case, and as the primary factor. *E.g.*, PB 20. However, *Local 1923* could be read as going even farther, making that factor determinative: "[I]f implementation of a proposal … will not significantly hamper the ability of an agency to get its job done, the proposal … is negotiable … as an appropriate arrangement." *Local 1923*, 819 F.2d at 309. For reasons not explained in its brief, the Union seems to stop short of demanding this *per se* test. However, the Union does not explain how the analytic line of *Local 1923* could be applied as-is without creating a *per se* test, and so this brief will refer to the *per se* nature of *Local 1923* where appropriate.

A. The Union's Brief Misstates the Relationship Between *KANG* and *Local 1923*

In asking this Court to impose *Local 1923* on the Federal sector, the Union fundamentally misstates the relationship between *KANG* and the Court's *Local 1923* decision. The Union attempts to portray *Local 1923* as correcting and clarifying *KANG*; *i.e.*, as the Court explaining to the Authority how to conduct a *KANG* balancing. PB 16, 19. The Union claims, for example, that *Local 1923* "clarified that the primary factor in an excessive interference analysis is the extent to which the union's proposal might hamper agency operations." *Id.* at 19.

Local 1923 does no such thing. As a review of § 7106(b)(3) jurisprudence over the last thirty years shows, *Local 1923*'s emphasis on agency operations was simply an analytic stopgap employed by the Court until it had an opportunity to review – and endorse – the Authority's *KANG* analysis.

1. The Authority adopted the "excessive interference" standard and the *KANG* balancing test following this Court's *Local 2782* decision

In the Statute's earliest years, the Authority had applied a "direct interference" test for determining "appropriateness" under § 7106(b)(3); that is, if a proposed arrangement directly interfered with a management right, then the Authority would hold that it was not appropriate. *E.g., Am. Fed'n of Gov't Emps., Local 2782*, 7 FLRA 91, 93 (1981).

In *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) (*Local 2782*), this Court explained that the "direct interference" test misapplied the Statute. In order for § 7106(b)(3) to have any meaning, then-Judge Scalia explained, it must be read as "an *exception* to the otherwise governing management prerogative requirements of [§ 7106](a)." *Id.* at 1187. An arrangement can still be appropriate even if it directly interferes with a management right; instead, the question is whether that interference is excessive. "Undoubtedly, some arrangements may be inappropriate because they impinge upon management prerogatives *to an excessive degree*." *Id.* at 1188.

However, the Court expressly declined to define "appropriate" or "excessive," judging that the Authority had the authority and responsibility to do so:

> Beyond that, we decline to speculate as to what the word "appropriate" may lawfully be interpreted to exclude. Its precise content is for the Authority to determine in the first instance, based on its knowledgeable estimation of the competing practical needs of federal managers and union representatives.

Id.

Three years later, in 1986, the Authority adopted its *KANG* analysis for determining excessiveness (and therefore, appropriateness) under § 7106(b)(3). As the Authority explained,

> Since the date of [the *Local 2782*] decision the Authority has applied the D.C. Circuit rule and rationale only to cases remanded to it by that

> Court. … Today we adopt that test as the Authority's standard. Additionally, we articulate factors to be considered in arriving at a determination of whether or not a given proposal is appropriate as an arrangement and therefore negotiable, or inappropriate as an arrangement because it excessively interferes with management prerogatives, and is therefore nonnegotiable.

KANG, 21 FLRA at 25-26. Under *KANG*, the Authority first considers whether a proposal is, in fact, an arrangement. *Id.* at 31. If so, "the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit, by weighing the competing practical needs of employees and managers." *Id.* at 31-32.

The Authority went on to give five examples of factors that it might consider in this balancing; *e.g.*, the nature and extent of the impact on management's ability to "deliberate and act pursuant to its statutory rights[.]" *Id.* at 32. However, the Authority emphasized that "[t]hese considerations are not intended to constitute an all-inclusive list … a ritualistic or mechanistic approach is neither suggested, nor contemplated[.]" *Id.* at 33. In other words, not all of the listed factors warrant analysis in every § 7106(b)(3) case, and some cases require analysis of one or more factors not among the five examples in *KANG*.

2. Separately, and without applying *KANG*, the Authority and the Court ruled on *Local 1923*

A month after the Authority's *KANG* decision, the Authority decided *American Federation of Government Employees, Local 1923*, 21 FLRA 178 (1986), a case concerning the negotiability of six union proposals. Of those six proposals, only one involved a § 7106(b)(3) question, and that proposal was held non-negotiable not on the basis of a *KANG* analysis, but rather on the basis of being "substantially identical to [a] proposal which the Authority held to be outside the duty to bargain in [*National Labor Relations Board Union*, 18 FLRA 320 (1985) (*NLRBU*)]." *Id.* at 186. The Authority noted its recent *KANG* decision, and reminded parties that "we will *henceforth* determine whether a proposal constitutes a negotiable 'appropriate arrangement' … by determining whether the proposal excessively interferes with the exercise of management's rights[,]" but it did *not* apply *KANG*. *Id*. at 186, n.2 (emphasis added). *See also id.* at 187 ("*For the reasons set forth in the* [*NLRBU*] *case,* we find that Union Proposal 6 is contrary to the Agency's right … to remove employees or reduce them in grade or pay for unacceptable performance.") (emphasis added).

The Union is absolutely wrong, then, when it claims that "the Authority's application of *KANG* [was] squarely in front of [the Court]," PB 16, when it considered *Local 1923* on review. If anything, the Authority's *non*-application of

KANG was at issue. The Court's primary criticism of the Authority's underlying decision was that

> the FLRA failed to analyze as accurately as it might have the union proposal at issue in this proceeding. Most of the FLRA's analysis consisted of analogizing – indeed, virtually equating – Proposal 6 to the union proposal involved in the [*NLRBU*] case. Convenient as that comparison might be, the two proposals differ in significant ways. … Rather than relying so heavily on [*NLRBU*], the FLRA should have evaluated thoroughly the actual terms of Proposal 6.

Local 1923, 819 F.2d at 310. *See also id.* at 309 ("In reaching this conclusion, the FLRA relied primarily on its earlier decision in [*NLRBU*]."). Nowhere in its decision did the *Local 1923* court ever mention or cite to *KANG*, much less expressly modify it.

Because *KANG* was not before it, the *Local 1923* Court – like the *Local 2782* Court – was left to try to explain what is and is not excessive interference without the benefit of the Authority's perspective. "Excessive interference," the Court said, "is something more than direct interference: implementation of a proposal may interfere directly with managerial prerogatives, yet the interference may not be excessive." *Id.* at 308. Ultimately, the Court agreed with the Authority's outcome – that the Union's proposal was non-negotiable – but it needed to find a standard for excessiveness in order to decide the case, since the Authority's analogizing was considered unpersuasive. Not having *KANG* before it, the Court suggested a *per se* test whereby

> [t]he determination whether an interference with managerial prerogatives is excessive depends primarily on the extent to which the interference hampers the ability of an agency to perform its core functions – to get its work done in an efficient and effective way. Thus, if implementation of a proposal will directly interfere with substantive managerial rights, but will not significantly hamper the ability of an agency to get its job done, the proposal is not negotiable as a procedure, but is negotiable … as an appropriate arrangement.

Id. at 308-09.

3. ***Local 1923*** **cannot be read as a modification of, or response to,** ***KANG*****.**

Contrary to Petitioner's representations, then, *Local 1923* was *not* "a case where the Authority claimed to have applied *KANG*," PB at 19; *KANG* was *not* "squarely in front" of the *Local 1923* court, PB at 16; and *Local 1923* was *not* a "clarif[ication] that the primary factor in a[] [*KANG*] excessive interference analysis is the extent to which the union's proposal might hamper agency operations[,]" PB at 19.

To read *Local 1923* otherwise – to read it as modifying *KANG* even before the Authority's application of that analysis came before the Court – requires assuming that, in the short time between *Local 2872* and *Local 1923*, the Court reversed its position that the precise content of the test for excessiveness would be "for the Authority to determine in the first instance, based on its knowledgeable estimation of the competing practical needs of federal managers and union representatives[,]"*Local 2782*, 702 F.2d at 1188, and that the Court, without further

discussion, instead decided to develop a test on its own. This view of *Local 1923* has no support in the Court's decision.

Properly understood, *Local 1923* was an analytic stopgap: the Court understood that § 7106(b)(3) demanded an excessiveness analysis, but had not yet had the opportunity to review the excessiveness analysis developed by the Authority. As discussed below, once this Court was given that opportunity – in *POPA* and a dozen cases thereafter – it made perfectly clear that *KANG* is a reasonable interpretation of the Statute, and that no one factor has primary or determinative importance or must be used in every analysis.

B. *KANG* is the Proper Legal Test for Determining Excessive Interference under § 7106(b)(3).

For more than twenty-five years, the Authority has applied – and this and other Courts have embraced – the open-ended, non-mechanistic *KANG* test for determining whether interference with management rights is "excessive" under § 7106(b)(3). *KANG* was, and is, a reasonable exercise of the Authority's discretion in developing a test for excessiveness, as is the Authority's insistence that no single factor must be cited in every analysis, much less be afforded primary or determinative consideration.

1. This Court has repeatedly endorsed *KANG* – and specifically its "open-endedness" – as the test for determining excessive interference.

This Court has reviewed the Authority's application of *KANG* in nearly a dozen cases.[6] With the exception of a single unpublished, per curiam decision in *NWSEO* (discussed below at 42-45), this Court has repeatedly and deferentially ratified the *KANG* analytic framework without even a hint that whether a proposal significantly hampers the ability of an agency to perform its core functions – "to get its work done in an efficient and effective way" – must be given primary consideration in every case.

As explained above, *Local 1923* did not review the Authority's application of *KANG*; this Court's first opportunity to assess *KANG* did not come until *POPA*, in 1989. In *POPA*, the Court noted the Authority's adoption of *KANG*, and observed that, while the Authority had not explicitly "discuss[ed] the relevant factors" in its underlying decision, the decision would be affirmed nonetheless "under our deferential standard of review." *POPA*, 873 F.2d at 1491. The Court

[6] *Nat'l Treasury Emps. Union v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008); *Ass'n of Civilian Technicians, P.R. Army Chapter v. FLRA*, 534 F.3d 772 (D.C. Cir. 2008); *Nat'l Treasury Emps. Union v. FLRA*, 437 F.3d 1248 (D.C. Cir. 2006); *Nat'l Treasury Emps. Union v. FLRA*, 404 F.3d 454 (D.C. Cir. 2005); *Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214 (D.C. Cir. 2004); *Am. Fed'n of Gov't Emps. v. FLRA*, 352 F.3d 433 (D.C. Cir. 2003); *Patent Office Prof'l Ass'n v. FLRA*, 47 F.3d 1217 (D.C. Cir. 1995); *NLRB v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993); *U.S. Dep't of the Treasury, Office of the Chief Counsel, Internal Revenue Serv. v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992); *Patent Office Prof'l Ass'n v. FLRA*, 873 F.2d 1485 (D.C. Cir. 1989).

was slightly more expansive in *United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992), affirming the Authority's holding that a proposal was an appropriate arrangement because

> [t]he Authority, using its [*KANG*] balancing test, said that the proposal is appropriate because it does not "excessively interfere" with management rights. The benefit employees receive from the [proposal] … it is said, outweighs any inconvenience management suffers[.]

Id. at 1071.

Although these early decisions show that this Court approved of *KANG*, *National Labor Relations Board v. FLRA*, 2 F.3d 1190 (D.C. Cir. 1993) (*NLRB*) erased any lingering doubt. In that case, the Court:

1. Expressly approved of *KANG* as "a reasonable interpretation of the term 'appropriate' in section 7106(b)(3)," *id.* at 1193 (citing *Overseas Educ. Ass'n, Inc. v. FLRA*, 961 F.2d 36, 39-40 (2d Cir. 1992));

2. Confirmed that *KANG* is faithful to the Court's decision in *Local 2782*, *id.* at 1192 ("[T]he FLRA has, since 1986, applied the two-part test articulated in [*KANG*] … which was developed in response to this court's decision in [*Local 2782*] …"); and

3. Acknowledged that an integral component of *KANG* is that it is "an open-ended balancing analysis that *may* include consideration of such factors as" those listed in *KANG*, *id.* at 1193 (emphasis added).

In the years since *NLRB*, this Court has returned several times to the "open-endedness" of *KANG*, echoing the Authority's initial reminder that the balancing is neither "ritualistic" nor "mechanistic." *E.g.*, *Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214, 1221 (D.C. Cir. 2004) ("the conclusion as to [whether the proposal excessively interferes] may turn on a variety of considerations," including considerations particular to the proposal at issue); *Nat'l Treasury Emps. Union v. FLRA*, 437 F.3d 1248, 1253 (D.C. Cir. 2006) (citing *NLRB* and *KANG* with regard to the "open-ended" nature of the balancing analysis).

2. Other circuits have joined this Court in embracing *KANG*.

This Court has been joined by several other circuits in endorsing *KANG* as the proper method for determining excessiveness – and therefore appropriateness – under § 7106(b)(3). *E.g.*, *Am. Fed'n of Gov't Emps., Local 3748 v. FLRA,* 797 F.2d 612, 618 (8th Cir. 1986) ("The Authority's position in [*KANG*] follows federal precedent in effect when this case arose."); *U.S. Immigration & Naturalization Serv., U.S. Border Patrol v. FLRA,* 12 F.3d 882, 884 (9th Cir. 1993) (adopting *KANG*); *Nuclear Reg. Comm'n v. FLRA*, 895 F.2d 152, 155 (4th Cir. 1990) (same).

Of note, the two other circuits to have reviewed *KANG* most closely – the Second and Fifth – have both echoed the Authority's emphasis on analyzing "various factors" without so much as a passing reference to "significant hampering of core functions" or *Local 1923*'s suggestion that this is a necessary and primary or determinative factor in determining appropriateness.

Both the Second and Fifth Circuits approve of the open-ended balancing described in *KANG*. *See Overseas Educ. Ass'n, Inc. v. FLRA,* 961 F.2d 36, 39-40 (2d Cir. 1992) ("[D]etermin[ing] whether the arrangement is appropriate … is a more delicate task, requiring that the competing practical needs of employees and managers be weighed in light of various factors[.] … We therefore join the other circuits that have sanctioned the [*KANG*] excessive interference test."); *U.S. Dep't of Justice, Immigration & Naturalization Serv. v. FLRA,* 975 F.2d 218, 224-25 (5th Cir. 1992) ("[*KANG*] involves weighing the competing practical needs of employees on the one hand and managers on the other hand, so as to determine whether the impact of the proposal on management's right is excessive when compared to the benefits afforded employees. … [K]eeping in mind the deference due the Authority when it interprets the Statute … we find the FLRA's interpretation of § 7106(b)(3) to be reasonable and thus we adopt the [*KANG*] excessive interference test.") (internal quotation marks omitted).

3. Under *KANG*, the Union's proposal excessively interferes with the Agency's rights to determine the methods and means of performing work

As explained above, *supra* at 14, the Union does not contest that under an open-ended *KANG* analysis (*i.e.*, one in which the "significantly hampers" factor is neither required nor determinative), its proposal excessively interferes with the Agency's rights and therefore is not an appropriate arrangement. It bears repeating, however, that the Authority conducted a proper *KANG* analysis in this case, balancing the proposal's benefit to adversely affected employees against its burden on SSA's statutory rights.

The Union's proposal takes the Agency's determination of the method and means of performing work (a single MA-95 configuration workstation per employee, located adjacent to the interviewing wall) and turns it on its head by requiring two workstations per employee and converting the interviewing wall workstation into a K1-95 configuration. The Authority was therefore reasonable in describing the Union's proposal as "essentially negat[ing] the Agency's determinations entirely." JA 191.

The Authority also noted several undisputed practical effects of the Union's proposal, specifically, that employees would use more work time "frequently switching between [work]stations" under the Union's proposal, that employees with multiple workstations "cannot transition between work tasks as quickly as

those who remain at a single workstation for all of their work tasks," and that the Union's preferred workstations "will have fewer work surfaces and less secure storage" than the Agency's selected configuration. *Id.*[7]

As required by *KANG*, the Authority balanced these burdens against "the alleged benefits afforded to employees": a guarantee of ergonomic workstations, personal privacy, decreased exposure to noise and illness, a dedicated reception area, and not requiring employees "to stare at a hole in the wall all day." JA 191, 190 (quotation marks omitted).

The Authority properly determined that these benefits did not outweigh the proposal's burdens. This was particularly reasonable in light of the Union proposal's complete negation of SSA's chosen method and means for performing work. Proposals – like the one here – that go beyond ameliorating the effects of an exercise of management rights and attempt to overturn the management right's very exercise have generally been held to excessively interfere. *E.g.*, *Nat'l Ass'n*

[7] The Union complains that the Authority should not have considered the practical effects of its proposal, because doing so constitutes "delve[s] too far into the merits of its proposal and use[s] its judgment as to those merits." PB 25. This complaint is both ill-founded (as the *KANG* analysis permits consideration of practical effects to gauge a proposal's benefits and burdens) and ironic (as the Union's preferred focus, whether a proposal significantly hampers an agency's ability to accomplish its work in an efficient and effective manner, *allows nothing other* than an examination of a proposal's practical effects). It is unclear how the Union would resolve this inconsistency in its position.

of Gov't Emps., Local R7-23, 23 FLRA 753, 759 (1986); *Int'l Fed'n of Prof'l & Technical Eng'rs, Local 128*, 39 FLRA 1500, 1527 (1991).

This Court has taken the same approach, holding, *e.g.*, that the "effective[] nullif[ication]" of an agency's security policy would excessively interfere with the agency's right to determine internal security practices. *Nat'l Treasury Emps. Union v. FLRA*, 550 F.3d 1148, 1154 (D.C. Cir. 2008); *see also Local 2782*, 702 F.2d at 1188 ("[S]ome arrangements may be inappropriate because they impinge upon management prerogatives *to an excessive degree*. A provision, for example, that would require a demoted employee simply to be repromoted to his or her former job would be inappropriate (to the point of absurdity) for that reason.").

Because *KANG* is the proper test for determining excessive interference, and therefore "appropriateness" under § 7106(b)(3), and because the Authority reasonably applied the open-ended *KANG* balancing in this case, the Authority was correct to hold the Union's proposal to be outside the duty to bargain.

C. This Court Should Reject the Union's Invitation to Read *Local 1923* or *NWSEO* as Imposing a "Significantly Hampers" Test on Appropriate Arrangement Analyses

According to the Union, *Local 1923* held that "the primary consideration that the Authority should review" in determining whether an arrangement is appropriate under § 7106(b)(3) is whether the "proposal significantly hampers an agency's ability to get its work [done,]" and the Authority erred in this case by not

applying that as the primary factor in its excessiveness analysis. PB 11-12. This Court should reject the Union's argument for three reasons.

First, it is incompatible with *KANG* to require whether an arrangement significantly hampers an agency's ability to get its work done to serve as a *per se* test for determining appropriateness. *KANG* does not require that any particular factor be considered in every case, much less that one factor be determinative. To the contrary, *KANG* recognizes that the Statute's management rights provisions protect a broad range of management interests, and not just the ability to get work done efficiently.

Second, imposing *Local 1923*'s analytic line would be contrary to the deference that the Authority is due under the Statute and this Court's own precedent.

Third, this Court should distance itself from – not embrace – the "significantly hampers" analysis because neither *Local 1923* nor *NWSEO* modified the well-established *KANG* analysis: *Local 1923* did not relate to *KANG*, and subsequent decisions show that *NWSEO* was not intended to create a new analysis, either.

1. *KANG* would be overruled by requiring the Authority to consider whether an arrangement significantly hampers an agency's ability to get its work done in an efficient and effective way as the primary factor in every analysis

Petitioner insists that it is not asking this Court to impose an "alternative standard" for determining excessiveness, but merely for one particular factor to be considered first and foremost in every *KANG* case. PB 12. This is an inherent contradiction. As discussed below, requiring the consideration of any factor in every § 7106(b)(3) analysis, and making that factor primary or determinative, would completely remake *KANG*.

a. *KANG* does not require consideration of any one factor in any – or every – case

Requiring the application of a particular factor in every case, and providing that a particular factor must take precedence over all others, is flatly inconsistent with an "open-ended balancing that *may* include consideration of *such* factors" as those set forth in *KANG*. *KANG*, 21 FLRA at 33. Although "the effect of the proposal on effective and efficient government operations" is one of the five illustrative *KANG* factors, no sooner had the Authority provided those examples than it reminded parties that "considerations will be applied where relevant and appropriate … a ritualistic or mechanistic approach is neither suggested, nor contemplated[.]" *Id.*

Indeed, the Authority has consistently applied *KANG* as a fluid test, relying upon those considerations that best delineate an arrangement's benefits and burdens. *E.g.*, *Am. Fed'n of Gov't Emps., Local 3937*, 66 FLRA 393, 396-97 (2011) (holding proposal to excessively interfere without mechanistic application of all five illustrative factors and without consideration of arrangement's effect on agency's ability to get its work done); *Am. Fed'n of Gov't Emps., Local 701, Council of Prison Locals 33*, 58 FLRA 128, 132-33 (2002) (then-Member Pope and then-Chairman Cabaniss separately dissenting as to other matters) (same, but holding proposal to be appropriate arrangement); *Am. Fed'n of State, Cnty,& Mun. Emps., Locals 2910 and 2477*, 49 FLRA 834, 841-42 (1994) (same, holding proposal to excessively interfere).

To require the Authority, after twenty-five years of applying *KANG* as an open-ended analysis, to apply a particular factor in every case, and to afford that factor primary or determinative consideration, would be to turn *KANG* on its head. The Petitioner is simply mistaken when it claims that imposing its preferred language from *Local 1923* would not create "an alternative standard." PB 12. *KANG* with a mandatory factor, or with a primary or determinative factor, is no longer *KANG*.

b. Placing primary weight on whether a proposal permits effective and efficient operation is inconsistent with the Statute's broader protection of management's rights

The Authority and this Court have consistently recognized that § 7106 protects management's *rights* and *prerogatives*, not just agencies' abilities to get their jobs done. Under the Union's analysis, however, the fact that a proposal absolutely restricts management's statutory rights is irrelevant, so long as the proposal is not a demonstrably less efficient way of performing the agency's work. This is flatly contradictory to the Authority's and the Court's precedent holding that the Statute protects management's rights against excessive interference of every nature, not merely interferences that hamper efficiency.

In *American Federation of Government Employees, Local 738*, 38 FLRA 1203, 1219 (1990), for example, the Authority considered "a proposal which would 'remove' or nullify an agency requirement that employees indicate their agreement to be tested for the use of illegal drugs[.]" Because the proposal would have foreclosed the agency's ability to exercise its rights by determining which employees would be subject to drug testing and having those employees sign corresponding agreements, the Authority held that the proposal "excessively interferes with management's right to determine its internal security practices and, thus, does not constitute an appropriate arrangement." *Id.* The Authority did not make this assessment based on a mechanistic application of the *KANG* factors, or

on whether the agency would have run more or less efficiently under the union proposal, but rather because of the proposal's interference with agency rights. *See also Int'l Fed'n of Prof'l & Technical Eng'rs, Local 1*, 49 FLRA 225, 249 (1994) (union proposal prohibiting employees who test positive for illegal drugs from being part of chain of custody for other employees' drug test specimens excessively interfered with right to assign work; "no duties relating to bargaining unit specimens could be assigned to various individuals for some period of time. Because the restriction on the Agency's ability to assign particular duties is absolute, we find that the Agency's right to assign work would be substantially impaired.")

This Court has also consistently recognized that § 7106 is meant to protect an agency's "reserved discretion" and "managerial judgment," *National Treasury Employees Union v. FLRA*, 404 F.3d 454, 457 (D.C. Cir. 2005), and an agency's "ability to deliberate and act pursuant to its statutory rights," *National Treasury Employees Union v. FLRA*, 437 F.3d 1248, 1253 (D.C. Cir. 2006). *See also Overseas Educ. Ass'n v. FLRA*, 876 F.2d 960, 962 n. 9 (D.C. Cir. 1989) ("[E]ven a proposal fitting into one of these categories is nonnegotiable if the end result would be immoderate interference with a reserved management right."); *POPA*, 873 F.2d at 1491 ("[T]he proposal limits the agency's discretion …. We therefore uphold the Authority's conclusion that the proposal excessively interferes with management's

right … and hence is not a negotiable 'appropriate arrangement' within the meaning of section 7106(b)(3).").

The Union's compulsory and determinative "significantly hampers" analysis would appear to require agencies to negotiate even over proposals that entirely usurp their statutory rights. Consider a hypothetical in which a union proposes that management may not assign any work to any employee; rather, union representatives will make all work assignments. That proposal would have a profound (and, under *KANG*, likely excessive) effect on the agency's § 7106(a)(2) right to assign work. But if the union could show that its superior knowledge of employee workloads and capabilities would result in the proposal benefitting (or only somewhat hampering) the agency's operations, then the proposal would be negotiable under the Union's *per se* test. The agency would be required to bargain over a proposal that requires it to completely cede a management responsibility to the union.

This is inconsistent with what both the Authority and this Court have recognized: that the Statute's protection of management rights extends beyond the purely functional, to encompass the discretion to act or not act in any manner related to the reserved right. Adoption of the union's *per se* test would convert the excessive interference analysis to nothing more than an inquiry of whether management or the union has the better idea about how to run the agency.

2. Imposing *Local 1923*'s analytic approach would be contrary to the deference owed to the Authority in determining how to define excessive interference.

The Court should not require the Authority to abandon its *KANG* analysis because the content of that analysis falls squarely within the Authority's sound discretion as the administrative agency responsible for implementing the Statute. Even if this Court would prefer an "excessive interference" analysis that relies more heavily – or exclusively – on a proposal's effect on the agency's ability to perform its core functions, the Authority has decided otherwise, and is entitled to deference in that determination because *KANG* reflects a reasonable interpretation of § 7106(b)(3).

"We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations." *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Where the law leaves a particular concept undefined, as the Statute does with "appropriate" in § 7106(b)(3),

> [t]he power of an administrative agency to administer a congressionally created … program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. … [Where] the legislative delegation to an agency on a particular question is implicit rather than explicit … a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Id. at 843-44 (second change in original). That the Authority's open-ended *KANG* analysis is "reasonable" and thus beyond judicial interference is affirmed by the numerous decisions of this and other Circuits, *supra* at 24-28, adopting and applying *KANG* as the test for excessive interference and appropriateness under § 7106(b)(3).

Deference is particularly applicable here, where this Court has always been of the view that "the precise content [of the excessive interference test] is for the Authority to determine in the first instance, based on its knowledgeable estimation of the competing practical needs of federal managers and union representatives." *POPA*, 873 F.2d at 1491. *See also* 5 U.S.C. § 7105(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.") That "knowledgeable estimation," to which this Court has consistently deferred, has resulted in the *KANG* analysis as currently composed; *i.e.*, an open-ended analysis without any mandatory or primary factors.

For these reasons, disturbing the Authority's reasonable adoption of *KANG* would be contrary not only to *Chevron* deference and the plain language of the Statute, but also to this Court's numerous published decisions which left the contours of the excessive interference test to the Authority to decide and subsequently repeatedly ratified the Authority's *KANG* analysis for that purpose.

3. The Court should take this opportunity to distance itself from the "significantly hampers" analysis because neither *Local 1923* nor *NWSEO* modified the well-established *KANG* analysis

Petitioner argues that *NWSEO* "demonstrates that *Local 1923* remains a published and precedential panel decision of this court. As such … it is settled law in this circuit that the question of whether a union's proposal would significantly hamper an agency's ability to get its work done is a necessary and integral part of the excessive interference test.[.]" PB 19. At best, this is a gross oversimplification.

a. *Local 1923* did not modify *KANG*, as demonstrated by the context of the decision and this Court's subsequent treatment of *KANG*

As discussed in detail above, *supra* at 21-23, the Authority did not apply its new *KANG* analysis in deciding *Local 1923*, and so the Court was not reviewing – much less modifying – *KANG* in the *Local 1923* decision. Rather, *Local 1923* reflected the Court's attempt to conduct an excessive interference analysis without the benefit of the Authority's perspective on the matter.

It is true that this Court has never expressly overruled *Local 1923*. But neither has it had the need. After the Court endorsed *KANG* as a reasonable excessive interference analysis of the type called for in *Local 2782*, the analytic line of *Local 1923* was superseded by *KANG* and by the Authority's and Court's application of *KANG*.

This is confirmed by reference to this Court's post-*Local 1923* § 7106(b)(3) jurisprudence. In the decades following *Local 1923*, this and other Courts have reviewed a number of Authority decisions applying *KANG* and, other than in *NWSEO*, no court has ever suggested that excessive interference is decided primarily by any one factor, or that any factor must be analyzed in every case. This Court, in particular, has repeatedly ratified the Authority's view of *KANG* as not requiring consideration of any single factor in every case, and certainly not giving any single factor "primary" status. In *NLRB*, for instance, this Court wrote that

> [determining excessive interference] is accomplished "by weighing the competing practical needs of employees and managers," *an open-ended balancing analysis that may include consideration of such factors* as "the nature and extent of the impact experienced by the adversely affected employees" and "the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights."

NLRB, 2 F.3d at 1193, *citing KANG*, 21 FLRA at 31-33 (internal citations omitted, emphasis added). *See also Nat'l Treasury Emps. Union v. FLRA*, 437 F.3d 1248, 1253, 1255 (D.C. Cir. 2006) (quoting *NLRB* passage cited above and describing *KANG* test without reference to a "significantly hampers" component); *Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214, 1221 (D.C. Cir. 2004) ("The conclusion as to [whether a proposal excessively interferes] may turn on a variety of considerations."); *Nat'l Treasury Emps. Union v. FLRA*, 550 F.3d 1148, 1150-

51 (D.C. Cir. 2008) (appropriateness determined by "balancing the practical needs of employees and managers to see if the proposal excessively interferes" and reciting entire *KANG* analysis without referring to whether the proposal significantly hampered the agency's ability to get its work done).

Even in cases where this Court has closely scrutinized the Authority's balancing, it has never – again, with the exception of *NWSEO* – faulted the Authority for failing to consider a proposal's effect on agency efficiency, even though the Authority's decisions on review have not included an assessment of the proposals' effect on this particular factor. *E.g., Nat'l Treasury Emps. Union v. FLRA*, 437 F.3d 1248, 1254-55 (D.C. Cir. 2006); *Nat'l Treasury Emps. Union v. FLRA*, 404 F.3d 454, 457-58 (D.C. Cir. 2005).

b. *NWSEO* – to the extent it cannot be reconciled with the weight of judicial precedent supporting *KANG* – is an aberration and should not be followed

The only outlier to an otherwise unbroken line of cases accepting *KANG*'s open-endedness is this Court's unpublished, per curiam, *NWSEO* decision. In *NWSEO*, the Court remanded a proposal to the Authority to "consider to what extent implementation of the [proposal] would hamper the ability of the [agency] to perform its work in an efficient and effective manner." *NWSEO*, 197 Fed. App'x at 2 (quotation marks omitted, citing *Local 1923*). It may be possible to

reconcile *NWSEO* with the mainstream of *KANG* jurisprudence, but if not, then *NWSEO* should be viewed as an aberration and should not be followed.

As a threshold matter, it seems possible that this Court views the "significantly hampers" analysis as simply another expression of the normal open-ended *KANG* analysis, in which the Authority determines which considerations are most relevant to understanding a proposal's benefits and burdens and then proceeds to balance those considerations. The first post-*NWSEO* decision from this Court held that

> "The determination whether an interference with managerial prerogatives is excessive depends primarily on the extent to which the interference hampers the ability of an agency to perform its core functions – to get its work done in an efficient and effective way." [*Local 1923*], 819 F.2d at 308-09. That inquiry involves "weighing the competing practical needs of employees and managers." *KANG*, 21 FLRA at 31-32. We "afford considerable deference to the FLRA's balancing of management and employee interests under its 'excessive interference' test."

Ass'n of Civilian Technicians, P.R. Army Chapter v. FLRA, 534 F.3d 772, 777 (D.C. Cir. 2008) (citation omitted). Far from imposing *Local 1923*, this passage seems to suggest that the *Local 1923* inquiry –does a proposal hamper the ability of an agency to get its work done? – is synonymous with the conventional, open-ended *KANG* inquiry.

If that is true; *i.e.*, if the *Local 1923* question is subsumed within *KANG*, and the Authority remains free to conduct *KANG* in an open-ended manner,

considering whichever factors are most relevant to understanding a particular proposal's impact on management rights (including, where appropriate, a proposal's effect on efficiency of operations), then there may not be a conflict between *NWSEO* and the remainder of Authority and judicial precedent. If, however, *NWSEO* stands for some other proposition, then it would most accurately be viewed as an exceptional outlier from the mainstream of the Authority's and this Court's precedent for the following reasons.

First, nothing in any of the published § 7106(b)(3) cases preceding *NWSEO* signals that the Court was reconsidering its long-standing position on *KANG*. On the contrary: just six months before *NWSEO* issued, this Court was still emphasizing that excessiveness is analyzed through "an open-ended balancing analysis that *may include* consideration of such factors" as those listed in *KANG*. *Nat'l Treasury Emps. Union v. FLRA*, 437 F.3d 1248, 1253 (D.C. Cir. 2006).

Second, nothing in *NWSEO* indicates that the Court intended to break with precedent. The text of the decision certainly does not indicate that the Court was intentionally returning to a long-dormant analytic approach or converting *KANG* from an open-ended, context-specific analysis into a mechanistic or ritualistic test of the type expressly disavowed by the Authority. In fact, despite being a pure §7106(b)(3) case, *NWSWEO* never cited or discussed *KANG*, a further illustration of *NWSEO*'s aberrant nature.

Third, post-*NWSEO* § 7106(b)(3) decisions continue to describe the excessive interference question as one that does not require consideration of any specific factor. In *National Treasury Employees Union v. FLRA*, 550 F.3d 1148, 1150-51 (D.C. Cir. 2008), for example, this Court recited the *KANG* analysis without any reference to a "significantly hampers" consideration and did not fault the Authority for not including that factor in its balancing analysis. The Court, in fact, endorsed the Authority's balancing, calling it a "reasonable weighing," and agreed that the proposal was not an appropriate arrangement because it "effectively nullif[ied]" the agency's decision, *not* because of the proposal's effect on the agency's ability (or inability) to get its work done. *Id.* at 1154.

CONCLUSION

For the reasons stated above – the Union misstates the relationship between *Local 1923* and *KANG*, *KANG* is the proper legal test for determining excessive interference under §7106(b)(3), and the Court should not read *Local 1923* or *NWSEO* as overturning *KANG* in favor of a mandatory and primary or determinative "significantly hampers" test – the Union'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 10,175 words excluding exempt material.

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Certificate of Service

I hereby certify that on this 16th day of May, 2012, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Union by way of the Court's ECF notification system, and also provided a courtesy copy by U.S. Mail to:

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ADDENDUM A

Relevant Statutes

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§ 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 forappointments 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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