**ORAL ARGUMENT NOT SCHEDULED**

**No. 05-1266**

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

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**NATIONAL TREASURY EMPLOYEES UNION,**
**Petitioner**

**v.**

**FEDERAL LABOR RELATIONS AUTHORITY,**
**Respondent**

**and**

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY,**
**UNITED STATES CUSTOMS AND BORDER PROTECTION,**
**Intervenor**

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

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# BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY


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**ORAL ARGUMENT NOT SCHEDULED**

## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Treasury Employees Union, Chapter 143 (NTEU or union) and United States Department of Homeland Security, Bureau of Customs and Border Protection, Port of El Paso, El Paso, Texas (Customs or agency). NTEU is the petitioner in this court proceeding; the Authority is the respondent and Customs is the intervenor.

### B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *National Treasury Employees Union, Chapter 143 and United States Department of Homeland Security, Bureau of Customs and Border Protection, Port of El Paso, El Paso, Texas*, Case No. 0-AR-3883, decision issued on May 16, 2005, reported at 60 F.L.R.A. (No. 167) 922.

### C. Related Cases

This case has not previously been before this Court or any other court. The following cases pending in this Court (and being held in abeyance) involve the same parties and related issues: *NTEU v. FLRA*, No. 05-1338, (D.C. Cir., filed Aug. 24, 2005); and *NTEU v. FLRA*, No. 05-1352 (D.C. Cir., filed Sept. 2, 2005). In

addition, a case involving the same parties and related issues is pending in the United States Court of Appeals for the Ninth Circuit: *NTEU v. FLRA*, No. 05-76783 (9th Cir. filed November 28, 2005).

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## GLOSSARY

| | |
|---|---|
| Authority | Federal Labor Relations Authority |
| *Border Patrol* | *United States Border Patrol, Livermore Sector, Dublin, Cal.*, 58 F.L.R.A. 231 (2002) |
| BOTA | Bridge of the Americas |
| *Bowman Transp.* | *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974) |
| *Chevron* | *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) |
| Customs or agency | United States Customs Service |
| *Customs Service* | *United States Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 F.L.R.A. 703 (2004) |
| *Federal Bureau of Prisons* | *United States Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 F.L.R.A. 201 (1999) |
| JA | Joint Appendix |
| *Chapter 137* | *NTEU, Chapter 137*, 60 F.L.R.A. 483, reconsideration denied, 61 F.L.R.A. 60 (2005), *petition for review filed*, No. 05-1338 (D.C. Cir. filed Aug. 24, 2005) |
| *Chapter 137 reconsideration* | *NTEU, Chapter 137*, 61 F.L.R.A. 60 (2005) |
| Chapter 143 | NTEU, Chapter 143 |
| NIAP | National Inspectional Assignment Policy |
| NTEU or union | National Treasury Employees Union |

## GLOSSARY
## (Continued)

| | |
|---|---|
| *NTEU v. FLRA* | *NTEU v. FLRA*, 414 F.3d 50 (D.C. Cir. 2005) |
| PDN | Paso Del Norte |
| RNIAP | revised National Inspectional Assignment Policy |
| Statute | Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000) |

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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## STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority (Authority) on May 16, 2005. The Authority's decision is published at 60 F.L.R.A. 922. A copy of the decision is included in the Joint

Appendix (JA) at JA 7-36. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (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 the Authority reasonably determined that the United States Customs Service had no obligation to bargain at the local level over changes to assignment policies implemented at the port of El Paso, Texas, because the agency had properly exercised its right to disclaim such an obligation.

## STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement between National Treasury Employees Union ("NTEU" or "union") and the United States Customs Service ("Customs" or "agency").[2] The union filed a grievance alleging that Customs violated § 7116(a)(5) of the Statute and relevant collective bargaining agreements

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

[2] At the time this case was initiated, Customs was a Bureau within the Department of the Treasury. Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296; 6 U.S.C. §§ 101 *et seq.*), the United States Customs Service transferred to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. § 203(a)(1).

when Customs unilaterally implemented changes in employees' rotation schedules and scheduled days off in the port of El Paso, Texas. After the arbitrator held that Customs had no obligation to bargain at the local level and had legally implemented the changes in conditions of employment, NTEU filed exceptions with the Authority pursuant to § 7122 of the Statute. On exceptions, the Authority determined that the arbitrator's determination was proper and denied the union's exceptions.

NTEU now seeks review of the Authority's decision and order pursuant to § 7123(a) of the Statute.

## STATEMENT OF THE FACTS

### A. Background

This case concerns a collective bargaining dispute that arose in October 2001 when the Customs Port Director in El Paso, Texas, proposed to implement changes in the manner in which employees were assigned certain duties. The employees involved here are inspectors and canine enforcement officers who are responsible for passenger processing duties at three bridges at the border: Ysleta, Paso Del Norte (PDN), and Bridge of the Americas (BOTA). The affected employees are members of a nationwide bargaining unit represented by NTEU.

NTEU, Chapter 143 (Chapter 143) is the local bargaining agent for employees at the port of El Paso. JA 8.

Customs and NTEU were parties to a nationwide collective bargaining agreement (National Agreement) that expired in 1999, but continued to be applied pending re-negotiation.[3] *See NTEU, Chapter 137*, 60 F.L.R.A. 483, 483 and n.5 (2004), *reconsideration denied*, 61 F.L.R.A. 60 (2005), *petition for review filed*, No. 05-1338 (D.C. Cir., filed Aug. 24, 2005) (*Chapter 137*).[4] In addition to the National Agreement, Customs and NTEU had jointly developed a National Inspectional Assignment Policy (NIAP) in 1995. Matters covered by the NIAP included permissive subjects of bargaining under § 7106(b)(1) of the Statute relating to staffing levels and tours of duty. The NIAP also provided for local negotiations over such matters. *Id.*

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[3] Under well-established law, contract provisions concerning mandatory subjects of bargaining continue in effect after an agreement expires until those provisions are renegotiated. *United States Border Patrol, Livermore Sector, Dublin, Cal.*, 58 F.L.R.A. 231, 233 (2002) (*Border Patrol*). However, provisions concerning permissive subjects of bargaining may be unilaterally terminated by either party upon expiration of the agreement. *Id.* at n.5.

[4] *Chapter 137* raised substantially identical issues as the instant case and was relied upon by the Authority in resolving the instant case. Many of the background facts were set out in greater detail in the earlier case.

By letter dated August 2, 2001, Customs notified the union that Customs would no longer be bound by provisions in the National Agreement or the NIAP involving § 7106(b)(1) subjects. The August 2nd letter also enclosed a revised NIAP (RNIAP). *Chapter 137*, 60 F.L.R.A. at 483. As relevant here, section 3 of the RNIAP, entitled "Precedence and Function" provided:

> The policies and procedures contained in this [RNIAP] take precedence over any and all other agreements, policies, or other documents or practices executed or applied by the parties previously, at either the national or local levels, concerning the matters covered within this [RNIAP].
>
> The policies and procedures [in the RNIAP] reflect the parties' full and complete agreement on the matters contained and addressed herein. No further obligation to consult, confer, or negotiate, either upon the substance or impact and implementation of any decision or action, shall arise upon the exercise of any provision, procedure, right or responsibility addressed or contained within this [RNIAP].

JA 144.

Although NTEU was provided notice and an opportunity to bargain over the RNIAP, the RNIAP was implemented unilaterally on October 1, 2001, after a protracted dispute over the bargaining procedures to be used. In that regard, the Authority and this Court held that Customs' unilateral implementation of the RNIAP was lawful because the union had improperly conditioned bargaining over the RNIAP on concurrent bargaining on the expired National Agreement. *United States Dep't of the Treasury, Customs Serv., Wash., D.C.*, 59 FLRA 703, 710-711

(2004) (Member Pope concurring) (*Customs Service*); *NTEU v. FLRA*, 414 F.3d 50, 57-60 (D.C. Cir. 2005) (*aff'g Customs Service*) (*NTEU v. FLRA*). Customs advised its field operations that under the RNIAP, changes in inspectional assignment policies may be made without local negotiations. JA 128.

On October 3, 2001, under the Authority of the RNIAP, the Customs Port Director, El Paso, notified Chapter 143 of proposed changes in assignments. Prior to that date, employees at El Paso were assigned to one of the three bridges for 2 weeks and, on completion of such time, would rotate to another bridge for 2 weeks, followed by a rotation to the third bridge for 2 weeks. After the 2-week period was completed at the third bridge, the employee returned to the bridge where the initial 2-week assignment occurred. The existing practice also rotated regular days off so that every 3 weeks employees would receive an extended weekend of 4 consecutive days off. JA 9. Under the revised policy: (1) bridge assignments would no longer be 2 weeks but would remain in effect for 1 year and, at the end of that year, the employee could bid on his or her next assignment; and (2) the long weekend or 4 consecutive days off would occur once every 6 weeks for employees at Ysleta and PDN, and once every 5 weeks for employees at BOTA. *Id*.

Chapter 143 responded the following day, requesting to bargain over the new assignment policies. Customs refused to bargain and implemented the

changes on or about October 7, 2001. JA 9. Thereafter, Chapter 143 filed a grievance under the parties' National Agreement concerning the changes in rotations for bridge assignments and scheduled days off. The grievance was not resolved and the matter was submitted to arbitration. *Id*.

### B. The Arbitrator's Award

Before the arbitrator, the union contended that the agency's refusal to bargain violated Articles 20 and 37 of the National Agreement as well as § 7116(a)(1) and (5) of the Statute. In that regard, Article 20 of the National Agreement provides that the union will be given notice and an opportunity to bargain whenever customs intends to change a rotation system. JA 225-40. Article 37 provides that that changes which apply to only one office will be negotiated within that office, *i.e*, local changes will be negotiated at the local level. JA 241-46. As relevant here, the referenced portions of the Statute obligate the agency to bargain in good faith. 5 U.S.C. § 7116(a)(1) and (5). In defense, Customs argued that the RNIAP relieved the agency from any obligation to bargain over the exercise of its management rights at the local level.[5] JA 10-11.

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[5] The agency also argued that the grievance was not arbitrable. The arbitrator held to the contrary, however, and the arbitrability of the grievance is no longer at issue. JA 10.

Relying on the Authority's decision in *Customs Service*, the arbitrator held that the RNIAP was legally implemented and, according to its terms, takes precedence over all other practices, policies, and agreements. Further, in agreement with the agency, the arbitrator held that the RNIAP does not provide for bargaining at the local level. The arbitrator noted that under well-established precedent, the obligation to bargain attaches at the level of recognition, here the national level, and concluded that Customs had no obligation to bargain at the local level over the changes implemented in El Paso. Accordingly, the arbitrator held that there was no violation of the Statute or the National Agreement for refusing to bargain at the local level as requested by Chapter 143. JA 10-11.

The arbitrator further found that the length of bridge assignments and days off were "covered by" the RNIAP and, for this reason as well, the agency was not obligated to bargain over the changes made at El Paso. The arbitrator also rejected the union's claim that the relevant portions of the RNIAP are unenforceable. JA 11-12.

In sum, the arbitrator held that Customs had no obligation to bargain over the changes in assignment policy in El Paso and the union's grievance was denied. Pursuant to § 7122 of the Statute, NTEU filed exceptions to the arbitrator's award with the Authority.

### C. The Authority's Decision

The Authority denied the unions exceptions to the arbitrator's award. In that regard, the Authority held both that the award was consistent with applicable law (JA 17-27), and that the union had not demonstrated any other grounds upon which the award would be deficient (JA 27-30).[6]

The Authority first held that Customs did not violate § 7116(a)(1) and (5) of the Statute by unilaterally implementing changes in rotations and days off. Relying on its previous decision in *Chapter 137*, the Authority held that Section 3 of the RNIAP "effectively terminated any previously existing agreement that required [Customs] to bargain at the local level over the impact and implementation of decisions concerning the assignment of inspectors." JA 20.

In this regard, the Authority noted that Section 3 established the RNIAP as the governing policy with respect to inspectional assignment matters. Citing section 5 of the RNIAP, the Authority found that such assignment matters include the length of the workweek, tours of duty, and days off. JA 20 and n.9. As the union's request to bargain over inspectional assignment matters was presented only

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[6] Section 7122 of the Statute provides that the Authority may find an arbitrator's award deficient "because it is contrary to any law, rule, or regulation[,]" or "on other grounds similar to those applied by Federal courts in private sector labor-management relations[.]" 5 U.S.C. § 7122

at the local level, the Authority held that Customs had no obligation to bargain in response to the union's request. Accordingly the Authority concluded that Customs did not violate the duty to bargain provided in § 7116(a)(1) and (5) of the Statute.[7] JA 21.

The Authority next held that the arbitrator's finding that the RNIAP takes precedence over Articles 20 and 37 of the National Agreement was not contrary to law. Again relying on *Chapter 137*, the Authority noted that, insofar as these articles provided for bargaining below the national level, the articles concerned permissive subjects of bargaining and may be terminated by either party upon expiration of the agreement. JA 22-25.

Consistent with its decision in Chapter 137, the Authority held, in agreement with the union, that the arbitrator misapplied the "covered by" doctrine. Nonetheless, the Authority determined that the arbitrator's error provided no basis for overturning the award, because the arbitrator correctly concluded that, under the RNIAP, the agency was not obligated to bargain at the local level. JA 25-27.

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[7] The Authority also rejected the union's contention that the award violated § 7118 of the Statute, which provides procedures for resolving ULP complaints. The union had contended that the arbitrator failed to apply the proper standards in resolving the statutory issue. JA 18.

Finally, the Authority held that the union had not established other grounds for finding the arbitrator's award deficient. Specifically, the Authority held that the union had not demonstrated that the arbitrator's award did not draw its essence form the parties' agreement, that the arbitrator exceeded his authority, or that the award was based on a nonfact. JA 27-29.

## STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *Nat'l Treasury*

*Employees Union v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983) (*NTEU v. FLRA*). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

## SUMMARY OF ARGUMENT

1. The Authority properly held that Customs was under no obligation to bargain the disputed changes at the local level. In that regard, it is well established, and not in dispute, that although national level parties may contractually agree to bargain locally, upon the expiration of a collective bargaining agreement containing such an agreement, either party may unilaterally terminate the obligation to bargain at the lower level.

The Authority had previously determined that Section 3 of the RNIAP effectively terminated the obligation to bargain at the local level over matters concerning inspectional assignments. *NTEU, Chapter 137*, 60 F.L.R.A. 483, 483 and n.5 (2004), *reconsideration denied*, 61 F.L.R.A. 60 (2005). As the Authority held in *Chapter 137*, the RNIAP unambiguously disclaimed the agency's obligation to bargain over inspectional assignment matters at any level, *i.e.*, both

the national and local levels. Although the Authority held that the RNIAP did not extinguish Customs' statutory bargaining obligations at the national level, this fact does not undermine the validity of the conclusion that the agency was privileged to terminate its obligation to bargain matters locally.

2. The union mistakenly contends that the Authority's determination as to the effect of Section 3 of the RNIAP constitutes reversible error. First, the Authority did not, as the union argues, depart from its precedent; specifically, *United States Department of Justice, Federal Bureau of Prisons, FCI Danbury, Danbury, Conn*., 55 F.L.R.A. 201 (1999) (*Federal Bureau of Prisons*). Consistent with the standards set out in *Federal Bureau of Prisons,* Section 3 of the RNIAP was sufficient to eliminate any confusion as to whether Customs intended to disclaim its local bargaining obligations. In that regard, the RNIAP unambiguously informed the union that Customs was disclaiming its obligation to bargain at all levels, including locally, over inspectional assignments. Further and contrary to the union's contentions, the Authority did not "rewrite" Section 3 and impute to Customs an intent to disclaim only its obligation to bargain locally over inspectional assignment matters. Rather the Authority properly interpreted Section 3 as intending to disclaim a bargaining obligation both at the level of recognition and at lower levels. However, the Authority also found that despite Customs'

broader intentions, the legal effect of Section 3 was limited to bargaining at the local level.

Further, the union mistakenly contends that the record evidence, including witness testimony, fails to support the Authority's conclusions. To the contrary, an agency witness specifically testified that the agency rescinded its agreement to bargain locally "through the RNIAP." JA 105-6.

The union also mistakenly contends that Customs could not have intended a bargaining regime where all local changes in conditions of employment would be negotiated nationally because such a bargaining regime would be unworkable. First, and as noted above, Customs did not intend such a process but rather intended to eliminate the bargaining obligation at all levels. Second, and in any event, whether the actual effect of the RNIAP, *i.e.*, only a national bargaining obligation, is "unworkable," is a matter to be determined by the parties.

3. In the alternative, the union argues that even if the RNIAP effectively eliminated the obligation to bargain locally over matters covered by the RNIAP, Customs was nonetheless obligated to bargain over the changes in rotations and days off because such matters are not within the scope of the RNIAP. The union's arguments are without merit.

First, the RNIAP expressly addresses days off. As the Authority noted, section 5(c) of the RNIAP is entitled "Days Off" and provides that "[d]ays off shall be determined by agency managers in accordance with operational needs."

Second, although "rotations" are not mentioned *per se* in the relevant portions of the RNIAP, it is evident that rotations are covered by the RNIAP. In that regard, section 5 of the RNIAP addresses the scheduling of employees for, among other things, tours of duty, shifts, and locations, the very components of the disputed rotation policy.

Finally, the union mistakenly contends that the record expressly contradicts the arbitrator's finding that rotations are covered by the RNIAP. However, nothing in the record establishes that the scheduling of employees at different locations within a post of duty was exempt from the inspectional assignment matters covered by the RNIAP.

Accordingly, the petition for review should be denied.

## ARGUMENT

**THE AUTHORITY REASONABLY DETERMINED THAT THE UNITED STATES CUSTOMS SERVICE HAD NO OBLIGATION TO BARGAIN AT THE LOCAL LEVEL OVER CHANGES TO ASSIGNMENT POLICIES IMPLEMENTED AT THE PORT OF EL PASO, TEXAS, BECAUSE THE AGENCY HAD PROPERLY EXERCISED ITS RIGHT TO DISCLAIM SUCH AN OBLIGATION**

At issue in the instant case is whether Customs lawfully implemented changes in rotations and days off for certain of its employees at the port of El Paso without bargaining with the local union chapter. The Authority held that Customs was under no obligation to bargain these changes at the local level because Customs, through section 3 of the RNIAP, had adequately notified NTEU that it would no longer bargain over inspectional assignment policies at that level.[8]

The relevant legal principles are well established and not in dispute. Under the Statute, the obligation to bargain exists only at the level of recognition, here the national level. *United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 F.L.R.A. 1269, 1274 (1998). Parties may contractually agree to bargain at an organizational level below that of recognition. However, such lower level bargaining is itself a permissive subject of bargaining. *Id.* at 1274-76. In this

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[8] The union's bargaining request was made only at the local level. Whether Customs would have been obligated to bargain at the national level, had such a request been made, is not at issue here.

case, the parties agreed to lower level bargaining in the National Agreement that expired in 1999. However, it is also well established that permissive terms of an agreement may be unilaterally terminated by either party upon expiration of that agreement. *Border Patrol* 58 F.L.R.A. at 233 n. 5.

Here, the Authority reasonably determined that after the National Agreement expired, Customs provided NTEU with adequate notice that it would no longer bargain inspectional assignments at the local level. As the Authority found, in August 2001, well after the expiration of the National Agreement, Customs notified NTEU that it was intending to implement the RNIAP. Section 3 of the RNIAP provided that Customs would not be required to bargain over matters addressed within the policy at any level, including the local level. Accordingly, after the RNIAP was lawfully implemented without bargaining or revision on October 1, 2001, Customs no longer was obligated to bargain over changes in inspectional assignment policies at local levels.

Before this Court, NTEU contends that that the Authority is in error because: 1) the RNIAP did not provide adequate notice of Customs' intent to terminate contractual provisions requiring local bargaining; and 2) even if the RNIAP effectively terminated local bargaining over matters within its coverage, the

matters at issue here were not within the scope of the RNIAP. Neither of the union's contentions have merit.

## A. Section 3 of the RNIAP effectively terminated Customs obligation to bargain at the local level

### 1. The Authority reasonably determined that Customs validly revoked its contractual obligation to bargain at levels beneath that of recognition.

The Authority first determined that the RNIAP effectively terminated the obligation to bargain at the local level over matters concerning inspectional assignments in *Chapter 137*. Upholding an arbitrator's award, the Authority determined that, "by its terms," section 3 of the RNIAP took precedence over any and all agreements at the local level and terminated the agency's obligation to bargain at the local level. *Chapter 137*, 60 F.L.R.A. at 487. The Authority expressly adopted the reasoning and conclusions of *Chapter 137* in the instant case. JA 19-21. The Authority's conclusion is reasonable and supported by substantial evidence in the record.

By its terms, Section 3 of the RNIAP states that there will be "[n]o further obligation to consult, confer, or negotiate" over matters addressed or contained within the policy. Because the phrase "no further obligation to . . . negotiate" is unqualified, it is reasonable to infer that the phrase means that there will be no obligation to negotiate *at any level*, including levels below the level of recognition.

As the Authority stated in its denial of reconsideration of *Chapter 137*, "[s]ection 3 clearly stated the [a]gency's intent not to engage in *any* future bargaining over inspectional assignment matters." *NTEU Chapter 137*, 61 F.L.R.A. 60, 63 (2005) (emphasis added) (*Chapter 137 reconsideration*).

It is, therefore, clear that section 3 of the RNIAP unambiguously informed the union that Customs intended to no longer bargain at the local or national level over matters related to inspectional assignments. It is also clear that Customs was legally entitled to foreclose bargaining at the local level. *See, e.g., Border Patrol*, 58 F.L.R.A. at 233 n. 5. In *Chapter 137*, however, the Authority held that "[s]ection 3 of the unilaterally, but lawfully, implemented RNIAP did not extinguish [Customs'] statutory bargaining obligations at the national level (that is, at the level of exclusive recognition)." 60 F.L.R.A. at 488. But, as the Authority properly stated, this fact does not undermine the validity of the conclusion that the agency was no longer obligated to bargain matters locally. *Id*.

The Authority reasonably concluded that Customs provided NTEU with unambiguous notice that it would no longer be obligated to bargain over inspectional assignment policies at either the national or local level. The Authority has also held that the agency had no legal authority to disclaim its obligation to bargain at the national level. However, as Customs was privileged to disclaim is

obligation to bargain locally, this independent component of the agency's notice remains valid.

### 2. The union's arguments are without merit

The union mistakenly contends that the Authority's determination as to the effect of section 3 of the RNIAP constitutes reversible error. In that regard, NTEU argues that: 1) the Authority departed from its precedent because Customs did not provide the union with explicit notice of its intent to disclaim the obligation to bargain locally (Br. 16-20); 2) the Authority improperly "rewrote" section 3 to mean something other than Customs intended (Br. 20-21); 3) the Authority's position is contradicted by the record (Br. 22); and 4) the Authority's interpretation of section 3 is inherently implausible because it results in an unworkable bargaining regime (Br. 23). As will be discussed in turn below, none of the union's arguments provide a reason to reverse the Authority's well-reasoned decision.

The Authority did not depart from its precedent. In *Federal Bureau of Prisons*, the Authority stated that "[its] precedent suggested that to be effective, a party must give notice that explicitly contains a statement of intent to terminate a provision dealing with a permissive bargaining subject." 55 F.L.R.A. at 205. Noting that the RNIAP never mentions Article 37 of the National Agreement

(where the obligation to bargain locally is provided), the union contends that Section 3 of the RNIAP is not the explicit notice that *Federal Bureau of Prisons* requires.

The union's contention lacks merit. Nothing in *Federal Bureau of Prisons* requires that terminated provisions be identified by specific article and section number. Rather, *Federal Bureau of Prisons* makes it clear that what is required is notice sufficient to eliminate any confusion over whether certain contractual agreements are in effect. 55 F.L.R.A. at 205. In that regard, the Authority reasonably determined that section 3 of the RNIAP unambiguously informed the union that Customs was disclaiming its obligation to bargain locally, as well as nationally, over inspectional assignments. That Article 37 was not specifically mentioned did not in any way diminish the clarity of the agency's notice. In fact, it is conceded in the union's brief (Br. 19-20) that the plain language of section 3 of the RNIAP constitutes a repudiation of all of Customs' bargaining obligations, including local bargaining, and the union so understood.

Second, the Authority did not "rewrite" Section 3 and impute to Customs an intent to disclaim only its obligation to bargain locally over inspectional assignment matters. In that regard, the union mischaracterizes the Authority's analysis. As did the union, the Authority interpreted section 3 as intended to

disclaim a bargaining obligation both at the level of recognition and at lower levels. *See Chapter 137 reconsideration*, 61 F.L.R.A at 63 ("Section 3 clearly stated [Customs'] intent not to engage in *any* future bargaining over inspectional assignment matters" (emphasis added)). However, when the Authority found that only the revocation of the local bargaining obligation was valid under the Statute, it was not changing the intended meaning of the provision, but only limiting its legal effect. The fact remains that the union was on notice that Customs intended to foreclose local and national bargaining and, insofar as the notice applied to local bargaining, Customs was privileged to do so.

With regard to the union's third contention, NTEU erroneously suggests (Br. 22, citing JA 57-59, 103) that the record supports a conclusion that the agency did not intend to foreclose local bargaining. Contrary to the union's arguments, the record supports the conclusion that Customs intended section 3 of the RNIAP to eliminate the obligation to bargain locally.

The testimony relied upon by the union is inapposite. The union's quotation of this testimony by an agency witness (Br. 22) ("Q: You did not rescind local bargaining on non-(b)(1) matters, did you? A: No, we didn't . . ." (JA 103) is taken out of context. That testimony did not concern the RNIAP itself, but rather the content of the August 2, 2001, letter from the agency to the union that transmitted

the RNIAP. *See* JA 102-104. Later testimony clarifies the agency's intent. Responding to the union's arbitration counsel's question -- "During that process of the rescission of (b)(1) matters, isn't it true that the [a]gency did not rescind local bargaining on impact and implementation of local changes and conditions of employment?"--, the agency witness stated, "No, they accomplished that through the revised NIAP." JA 105-06. Thus, record testimony is consistent with and supports the Authority's conclusion that the agency intended to eliminate local bargaining through the revised NIAP.

Finally, the union's contention (Br. 23) that the Authority's interpretation of section 3 of the NIAP is inherently implausible is unavailing. In that regard, the union argues that Customs could not have intended a bargaining regime where all local changes in conditions of employment would be negotiated nationally. Initially, we note that, as discussed above, the Authority did not interpret section 3 as intending to create such a scheme. The Authority recognized that Customs intended section 3 to eliminate the bargaining obligation at all levels. Nonetheless, as the Authority held (*Chapter 137*, 60 F.L.R.A. at 488), the legal effect of section 3 is to eliminate only the local bargaining obligation.

As to whether such a scheme is "unworkable," as the union contends, that is a matter to be determined by the parties. Certainly, limiting bargaining over all

matters, no matter their organizational scope, to the level of recognition is within the agency's right under the Statute. If the agency determines that its collective bargaining interests would be better served by local bargaining, it can make such a proposal to the union. *See Chapter 137*, 60 F.L.R.A. at 488

In sum, the Authority's conclusion that, through the RNIAP, Customs legally terminated its contractual obligation to bargain locally over inspectional assignments constitutes a reasonable interpretation of the relevant provisions of the Statute and is supported by substantial evidence in the record.

### B. The Authority properly upheld the arbitrator's determination that the rotations and days off at issue here were matters addressed in the RNIAP

The union argues (Br. 24) that even if section 3 of the RNIAP effectively eliminates the obligation to bargain locally over matters covered by the NIAP, Customs was nonetheless obligated to bargain over the changes in rotations and days off because such matters are not within the scope of the RNIAP. According to the union, the Authority did not analyze this aspect of the union's exceptions to the arbitrator's award. As discussed below, the union's arguments are without merit.

The Authority specifically noted that the RNIAP constituted Customs' governing policy with respect to "inspectional assignment matters, including, . . .,

the length of the work week, tours of duty, and days off." JA 20 (internal quotes omitted). First, it can hardly be denied that the RNIAP addresses days off.[9] As the Authority expressly cited (JA 20-21 n.9), section 5(c) of the RNIAP is entitled "Days Off" and provides that "[d]ays off shall be determined by agency managers in accordance with operational needs." JA 145. Days off are, therefore, clearly a matter within the scope of the RNIAP.

Second, although "rotations" are not mentioned *per se* in the Authority's discussion of the scope of the RNIAP, it is evident that rotations are covered by the RNIAP. The union relies on the definition of "rotation" found in Article 20 of the National Agreement where rotation is defined as "[t]he recurring assignment of employees to different work locations, assigned work, shifts, and/or tours of duty within the confines of the employees' post of duty and/or other locations to which employees are regularly assigned." Br. 25, quoting JA 226.

Even accepting the union's definition of "rotation," it is clear that rotational assignments are covered by the RNIAP. Section 5 of the RNIAP is entitled

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[9] As an initial matter, the union's contention before the Authority was limited to the claim that rotations are not covered by the RNIAP. JA 14-15. Accordingly, the contention that days off are not covered by the NIAP is not properly before this court. 5 U.S.C. § 7123(c); *see also Equal Employment Opportunity Comm'n* v. *FLRA*, 476 U.S. 19, 23 (1986). In that regard, the union's discussion of this matter in its brief (Br. 24-27) is also limited to rotations.

"General Scheduling and Staffing Principles" and addresses the scheduling of employees for, among other things, tours of duty, shifts, and locations, the very components of the agreed upon definition of a rotation policy. Further, section 5(2)(b) specifically addresses management's ability to assign employees to different facilities, the very subject of the El Paso rotation policy. In this regard, the Authority cites to these sections of the RNIAP in its explanatory footnote to its explication of the RNIAP's scope. JA 20-21 n. 9.[10]

Further, the union's contention that the record expressly contradicts the arbitrator's finding that rotations are covered by the NIAP (Br. 26) is mistaken. The union first contends (citing JA 115-16) that an agency witness denied that the

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[10] Although the Authority's explanation of the scope of the RNIAP is made in general terms, such explanation is sufficient because the Authority's reasoning is readily discernable. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (court "will uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned"); *see also Dep't of the Interior, Bureau of Land Mgmt. v. FLRA*, 873 F.2d 1505, 1509 (1989) (applying *Bowman Transp.*).

Further, even if the court would determine that the Authority's expressed rationale is inadequate, the Court should affirm the Authority's decision because the record clearly supports the Authority's conclusion. Under such circumstances a remand would be unnecessary and a waste of administrative resources. *See AFGE v. FLRA*, 778 F.2d 850, 862 n.19 (D.C. Cir. 1985), and authorities cited therein (court should apply the obvious result, rather than remand to agency); *see also Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (remand unnecessary where it is clear that the agency would have reached the same result had it applied the correct reasoning).

RNIAP addresses rotations. However, what the witness denied was that the NIAP affected the process by which employees may bid for a particular rotation, not the duration of any particular assignment. JA 115-16. Similarly, the management-issued guidance relied upon by the union (citing JA 129) references the bidding process for rotations, not the duration of assignments to any particular location.

**CONCLUSION**

The petition for review should be denied.

Respectfully submitted,

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

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| NATIONAL TREASURY EMPLOYEES UNION,<br>Petitioner<br><br>v.<br><br>FEDERAL LABOR RELATIONS AUTHORITY,<br>Respondent<br><br>and<br><br>UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION,<br>Intervenor | ) | No. 05-1266 |

# CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by hand, upon the following:

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