ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1208

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

UNITED STATES DEPARTMENT OF THE AIR FORCE,
LUKE AIR FORCE BASE, ARIZONA
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1547
Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

CORRECTED BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority") were the U.S. Department of the Air Force, Luke Air Force Base, Arizona ("Agency") and the American Federation of Government Employees, Local 1547 ("Union"). In this Court proceeding, the Agency is the petitioner and the Authority is the respondent. The Union has intervened on the side of the Authority.

B. Ruling Under Review

The Agency seeks review of the Authority's decision in *AFGE, Local 1547 and U.S. Department of the Air Force, Luke Air Force Base, Arizona*, 67 FLRA (No. 128) 523 (July 29, 2014) ("*Local 1547 II*"). The Authority's subsequent decision denying the Agency's motion for reconsideration, published at 68 FLRA (No. 92) 557 (May 13, 2015) ("*Local 1547 III*"), is also on review before the Court.

C. Related Cases

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for Respondent is aware.

/s/ Fred B. Jacob
Fred B. Jacob
Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	Petitioner, U.S. Department of the Air Force, Luke Air Force Base, Arizona
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's opening brief
Panel	Federal Service Impasses Panel
JA	The parties' Joint Appendix
Local 1547 I	The Authority's 2010 decision
Local 1547 II	The Authority's 2014 decision
Local 1547 III	The Authority's 2015 decision denying the Agency's motion for reconsideration
The provision	Collective-bargaining contract provision rejected on Agency-head review
The Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	Intervenor, American Federation of Government Employees, Local 1547

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BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

This case is about a provision in a collective-bargaining agreement allowing employees at Luke Air Force Base ("the base") access to a convenience store and gas station run by the Air Force exchange system (together, "the Shoppette"). After the

U.S. Department of the Air Force, Luke Air Force Base, Arizona ("the Agency") disapproved the provision, the American Federation of Government Employees, Local 1547 ("the Union") petitioned the Federal Labor Relations Authority ("the Authority") for review. The Authority determined that the provision was negotiable and directed the Agency to rescind its disapproval.

The Authority had subject matter jurisdiction over this negotiability case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("the Statute"). 5 U.S.C. § 7105(a)(2)(E). The Authority's decision on review is published at 67 FLRA (No. 128) 523 (July 29, 2014) ("*Local 1547 II*"). Its subsequent decision, also on review, denying the Agency's motion for reconsideration is published at 68 FLRA (No. 92) 557 (May 13, 2015) ("*Local 1547 III*"). Copies of those decisions are included in the Joint Appendix ("JA") at 68-78 and 103-109, respectively. The Agency's petition for review was timely filed within 60 days of the Authority's decision. 5 U.S.C. § 7123(a). The Union has intervened on the side of the Authority.

STATEMENT OF ISSUES

1. Whether the Authority reasonably determined that the parties had a duty to bargain over Department of Defense civilian unit employees' access to the base Shoppette because the matter concerned conditions of employment?

2. Whether the Authority reasonably concluded that the provision allowing civilian unit employees access to the base Shoppette was not contrary to law?

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att 1.

STATEMENT OF THE CASE

During collective-bargaining negotiations with the Agency, the Union advanced proposals allowing civilian access to the base's commissary and exchange facilities, which the Authority found negotiable in 2010. *Am. Fed. of Gov't Emps., Local 1547*, 64 FLRA 642 (2010) ("*Local 1547 I*").

Instead of seeking review of that decision, the Agency bargained with the Union to impasse. The Federal Service Impasses Panel ("the Panel"), through an appointed arbitrator, resolved the parties' impasse and directed them to include a narrowed provision in their collective-bargaining agreement that would grant unit employees access only to the base's Shoppette, a convenience store with a gas station.

(Panel Decision, JA 17-25.) The Agency then disapproved the provision on agency-head review under 5 U.S.C. § 7114(c) of the Statute.

The Union filed a negotiability appeal of that disapproval with the Authority. The Authority (Chairman Pope and Member DuBester, Member Pizzella dissenting) found the imposed provision negotiable, and directed the Agency to rescind its disapproval. (*Local 1547 II*, JA 75.) The Agency filed a motion for reconsideration, which the Authority (Chairman Pope and Member DuBester, Member Pizzella dissenting) denied. (*Local 1547 III*, JA 107.)

STATEMENT OF THE FACTS

A. During Collective-Bargaining Negotiations, the Union Proposes Access to Commissary and Exchange Facilities for Unit Employees to Alleviate Traffic Concerns

Following the expiration of the Agency and Union's collective-bargaining agreement in 2000, the parties continued to follow the agreement as past practice. Shortly after negotiations for a new agreement began, the Union submitted proposals, among others, that would grant unit employees broad access to the base commissary and exchange facilities. (*Local 1547 II*, JA 68; *Local 1547 I*, JA 6.) The Agency's commissary is a supermarket, selling food and household supplies. (*Id.*) The exchange is similar to a department store, and it includes a main location, as well as satellite stores, including the Shoppette, which sell food, gas, and certain health and household items. (*Id.*)

Civilian unit employees work varying shifts on the base, during the week and on the weekends, with limited breaks. These employees are not authorized to make purchases at the commissary or exchange facilities, unless they independently have the privilege (as a result of, for instance, being a military retiree or dependent). (*Local 1547 II*, JA 68; *Local 1547 I*, JA 6.) If civilian employees need to purchase personal items that they may unexpectedly require during the work day, they must drive off the base during breaks in their shifts. (*Id.*) This became difficult for employees following the September 11, 2001 attacks, as the base closed four of its access gates, resulting in bottle neck traffic that prevented unit employees from leaving the base and returning within their half-hour lunch periods. (*Local 1547 I*, JA 8, Panel Decision, JA 23.) In response to the Union's attempts to grant the civilian unit employees access to the base facilities, the Agency declared the proposals to be outside of the duty to bargain. The Union then filed a petition for review with the Authority. (*Id.*)

B. In *Local 1547 I*, the Authority Requires the Agency to Bargain Over Two Proposals Involving Access to the Base Commissary and Exchange, Including the Exchange's Satellite Stores

In 2010, the Authority decided in *Local 1547 I* that the Agency was obligated to bargain over the Union's proposals allowing employee access to the commissary and to the exchange and its satellite stores (except for the purchase of articles of uniform items). (*Local 1547 II*, JA 68-69; *Local 1547 I*, JA 9-10.) Applying its two-part test in

Antilles Consolidated Education Association, 22 FLRA 235, 236-37 (1986) ("*Antilles*"), the Authority determined that the proposals concerned unit employees' conditions of employment and rejected the Agency's argument to the contrary. (*Local 1547 II*, JA 68-69; *Local 1547 I*, JA 9-10.) There was no dispute that the two proposals pertained to unit employees and satisfied the first part of the test. Applying well-settled case law, the Authority also found that the record established a direct connection between the proposals and the unit employees' work situation or employment relationship. (*Id.*)

The Authority also rejected the Agency's arguments that, among other things, the proposals could not involve conditions of employment because the requested access provided unit employees with a mere convenience and could occur during nonduty hours. (*Local 1547 II*, JA 68-69; *Local 1547 I*, JA 9-10.) Then, responding to the Agency's claim that that the two proposals were not "statutorily authorized" by Title 10 of the United States Code – namely, 10 U.S.C. §§ 2481 and 2484, 10 U.S.C. §§ 1061 to 1065 – the Authority found that nothing in the cited provisions indicates that the Agency lacks discretion to afford such privileges to civilian employees. (*Local 1547 II*, JA 69; *Local 1547 I*, JA 11.) As a result, the Authority concluded that the proposals were within the duty to bargain. (*Id.*) The Agency sought neither Authority reconsideration nor judicial review of *Local 1547 I*. (*Local 1547 II*, JA 70.)

C. The Parties Reach Impasse in Bargaining and Submit Their Dispute to the Panel, Which Imposes a Narrowed Provision Granting Access Only to the Shoppette

Following *Local 1547 I*, the parties resumed bargaining. When they did not reach agreement, they submitted the matter to the Panel, which determined that the dispute should be resolved through mediation and arbitration. (*Local 1547 II*, JA 69.) During the mediation phase, the Union narrowed the two proposals found negotiable in *Local 1547 I* to one proposal that would provide unit employees full access only to the Shoppette. (*Local 1547 II*, JA 69; Panel Decision, JA 22.) The proposal also indicated that the employees would not be allowed to purchase uniform items or "tax free" tobacco and alcohol. (*Id.*)

In December 2011, after considering the evidence and testimony produced by the parties, the arbitrator concluded that adoption of the Union's proposal was the proper way to resolve the parties' impasse. (Panel Decision, JA 22.) The arbitrator recognized that the Union had narrowed its proposal from total access to both the commissary and exchange facilities to only a subset of the exchange, that is, the Shoppette. (*Id.*) She then found that granting access would significantly benefit the civilian employees, and that the Agency had not shown that the proposal would measurably weaken any benefit to military personnel or create a recruitment and retention problem. (*Id.*)

During the arbitration, the Agency admitted that, following *Local 1547 I*, "there is no statutory bar to granting access to the Shoppette." (*Local 1547 II*, JA 69; Panel Decision, JA 24.) The Agency also recognized that Department of Defense ("DoD") Instruction 1330.21 allowed all civilian employees working on the base to have access to food and beverages sold at any exchange facility, if consumed on base. (*Local 1547 II*, JA 69; Panel Decision, JA 22-23.) The arbitrator disagreed with the Agency's view that the DoD Instruction's current access provisions limited any further adjustments through bargaining, noting that the Instruction permitted the Secretary of the Air Force to expand the list of authorized patrons of exchanges. (*Local 1547 II*, JA 69; Panel Decision, JA 24-25.) The arbitrator additionally observed that the Agency did not contend before the Authority in *Local 1547 I* that the proposals conflicted with the Instructions. (Panel Decision, JA 24.) In sum, the arbitrator found "it illogical that it is acceptable to have civilians enter a store to buy hot dogs but damaging to military morale if they are allowed to purchase aspirin, batteries, or tissues." (*Local 1547 II*, JA 69; Panel Decision, JA 23.)

The arbitrator concluded that full access to the Shoppette was a reasonable compromise between the Union's initial proposals and the Agency's prohibition against access, and that it would create only a slight change in the status quo while substantially enhancing the morale of the workforce. (*Local 1547 II*, JA 69; Panel

Decision, JA 25.) The arbitrator required the parties to adopt the following wording into their agreement to resolve the impasse:

> Bargaining[-]unit employees with a valid DoD [identification] card shall be granted full access to the Luke Air Force Base Exchange Shoppette, including the gas station. Employees may not purchase uniform items, "[t]ax free" tobacco items[,] and "[t]ax-free" alcoholic beverages.

(*Id.*)

D. The Agency Head Disapproves the Provision

Following the arbitrator's decision, pursuant to § 7114(c) of the Statute, the Agency head disapproved the imposed provision as contrary to law, rule, or regulation. (*Local 1547 II*, JA 70; Agency Disapproval Memo, JA 26.) The Agency head's analysis reads, in its entirety: "Because this provision does not conform to law, rule or regulation, it is hereby disapproved." (*Id.*) The Union then filed its petition for review of the disapproval with the Authority. (*Local 1547 II*, JA 70; Union Negotiability Petition, JA 28.) Before the Authority, the Union and Agency did not dispute the meaning of the provision or that it gives unit employees access to the Shoppette during both duty and non-duty hours. (*Local 1547 II*, JA 70.)

E. The Authority Orders the Agency To Rescind Its Disapproval of the Provision in *Local 1547 II* and Denies the Agency's Motion for Reconsideration in *Local 1547 III*

The Authority first noted that it had previously concluded, in *Local 1547 I*, that the Union's proposals concerned conditions of employment. (*Local 1547 II*, JA 70.)

The Authority explained that the Agency pressed the same arguments it had in the earlier case, and that the Agency neither filed a motion for reconsideration nor requested judicial review of that decision. (*Id.*) With the Agency raising nothing new, the Authority, referencing the same long-standing precedent, again concluded that the provision concerns unit employees' conditions of work. (*Id.*)

The Authority then addressed the Agency's arguments that the contract provision was contrary to law under several provisions of Title 10 of the U.S. Code. Specifically, the Agency argued that certain provisions of Title 10 give the Agency "sole and exclusive discretion" to determine who has access to the exchanges, rendering the provision not subject to collective bargaining. (*Local 1547 II*, JA 73 (citing Agency Statement, JA 54).) The Authority acknowledged that the provisions of Title 10 that the Agency cited "provide the Secretary with power to operate an exchange system, in concert with laudable statutory goals." (*Id.*) The Authority concluded, however, that the Agency failed to identify any statutory language or supportive precedent demonstrating that Congress granted the Agency the *exclusive* discretion to determine access, notwithstanding its collective-bargaining obligations. (*Id.*)

Next, the Agency argued that, even if it did not possess sole and exclusive discretion to determine exchange access, the provision was non-negotiable because it was inconsistent with the same sections of Title 10, which the Agency claimed

preclude it from extending exchange privileges to individuals who are not specifically authorized by statute. (*Local 1547 II*, JA 74 (citing Agency Statement, JA 11, 13, 15).) But the Authority found nothing in the wording of Title 10 that suggested the provision's incremental extension of benefits was unlawful. (*Id.* at 75.) The Authority noted that under DoD Instructions, the Agency had already exercised its discretion to allow some exchange access for civilians not specifically given access by statute, from unit employees to non-military persons, such as Red Cross employees and contract surgeons. (*Id.*) The Authority also noted that the Agency's position was inconsistent on this matter: it argued in *Local 1547 I* that Title 10 merely did not grant unit employees the privileges, but claimed in *Local 1547 II* that Title prohibited granting access. (*Id.*) And, before the Panel arbitrator, the Agency contended that the Secretary of the Air Force *did* have discretion to grant access and the Union should just ask. (*Id.*) The Authority concluded by ordering the Agency to rescind the Agency head's disapproval of the provision. (*Id.*)

The Agency filed a motion for reconsideration, which the Authority denied. (*Local 1547 III*, JA 103-09.) The Authority found no basis to reconsider the Agency's arguments because they merely attempted to relitigate claims that the Authority previously considered and rejected in *Local 1547 II*. (*Id.*, JA 103.) The Authority also rejected certain Agency arguments raised for the first time on reconsideration. (*Id.*, JA 105, 107.)

SUMMARY OF ARGUMENT

For decades, the Authority has found that parties have a duty to bargain over access to military exchanges. And the provision at issue here – that provides a modest extension of benefits at the base Shoppette – is well within the Authority's and this Court's long-settled precedent. While the case involves a somewhat long and winding history of bargaining under the Statute, the issues before the Court are straightforward: The collective-bargaining agreement provision allowing employees access to the base Shoppette concerns a condition of employment, and the Agency failed to demonstrate that the provision is contrary to law. Thus, it was reasonable for the Authority to require the Agency to rescind its disapproval of the provision.

As an initial matter, there is a presumption that an agency is required to bargain with a union over the employees' conditions of work. The Court should defer to the Authority's reasonable determinations that: (1) allowing employees access to the base Shoppette involves unit employees (which is not in dispute); and (2) there is a direct connection between access to the Shoppette and unit employees' work situation or employment relationship. Considering the facts in the case, showing that traffic congestion made it difficult for employees to exit and reenter the base during short lunch periods and on night and overtime shifts, the Authority applied its well-settled precedent and determined that access to food and services at the Shoppette, whether on- or off-duty, directly related to the employees' work relationship with the Agency.

Thus, the Agency had a duty to bargain over the proposal and adhere to the resulting provision, unless it could show there was some other recognized way to alleviate its bargaining obligation under the Statute. The Agency failed to make such a showing. First, the Authority reasonably rejected the Agency's claims that two sections of Title 10 demonstrate that it has sole and exclusive discretion over access to the Shoppette, an exchange facility. As the Authority correctly found, those sections, specifically 10 U.S.C. §§ 2481(b) and 2484(c)(2), do not provide the Agency with unfettered discretion to determine who is granted access. Section 2481(b), while describing laudable military goals, is only a statement of general purpose. The Agency focuses on § 2484(c)(2), but that section is equally unavailing. It applies to the categories and pricing of merchandise at the base commissary, which is a system separate from the base exchange system to which the Shoppette belongs. And, even if it did apply to the Shoppette, § 2484(c)(2)specifically concerns only categories of commissary sale items and has nothing to do with access. Moreover, nothing in the plain language of either of these sections demonstrates that Congress indicated that the Agency has sole and exclusive discretion over the matter. The text of the statute does not, for instance, include language such as "notwithstanding any other provision of law." Accordingly, the Authority reasonably concluded that the Agency failed to show that Congress meant to relieve the Agency of its bargaining obligations under the Statute.

Second, the Authority reasonably rejected the Agency's attempts to show that the contract provision is somehow inconsistent with Title 10. None of the sections the Agency cites show that it does *not* possess discretion to grant civilian access to the Shoppette. Here the Agency focuses on § 2481(b), which broadly describes the commissary system's intended benefits to military personnel. But this section simply does not demonstrate that civilians *cannot* access the Shoppette. Indeed, civilians in several ways already have access, including the unit employees here, who are allowed access to the "heat and eat" section of the Shoppette. As described by the Authority, this case involves a modest incremental extension of benefits, from "hot dogs" to "aspirin, batteries, [and] tissues." (*Local 1547 II*, JA 75 (internal quotation marks omitted).) The Authority reasonably found nothing in Title 10 inconsistent with the contract provision.

Most of the Agency's remaining arguments that the provision is inconsistent with law, such as its reliance on two DoD Instructions, are waived. Those Instructions were not raised before the Authority, and, as a result, they are not properly before the Court. For this reason alone, the Agency's arguments that the Authority should have deferred to the Instructions are inapposite. Even if the Court considers the Instructions, however, the Agency still fails to demonstrate that it has no discretion in allowing civilian access, as it contends. Among other things, the Agency claimed earlier in the litigation that it *did* have discretion, further undermining

its deference arguments. Moreover, the Instructions clearly indicate that the Agency has repeatedly granted civilian access and continues to do so. Lastly, the Authority properly rejected, as untimely, the Agency's remaining arguments, which it raised for the first time in its motion for reconsideration. As a result, the Agency improperly attempts to rely on them before the Court.

In sum, the Agency failed to demonstrate that granting civilian employees access to the Shoppette was contrary to law, and the Authority reasonably required the Agency to rescind its disapproval of the contract provision.

STANDARDS 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) ("*BATF*"); *see also Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). The scope of such review is narrow. *See, e.g., Am. Fed. of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

The Authority is tasked with interpreting and administering its own Statute. *See BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Accordingly, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the Authority]." *Chevron*, 467 U.S. at 844. This negotiability appeal arises under § 7117(a)(1) of the Statute, which states that federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). Because § 7117 is part of the Authority's enabling statute, this Court "owe[s] deference to the [Authority's] interpretation of the kind of inconsistency contemplated by 5 U.S.C. § 7117(a)(1)." *Nat'l Treasury Emps.*

Union v. FLRA, 30 F.3d 1510, 1515 (D.C. Cir. 1994); *see also BATF*, 464 U.S. at 97. Additionally, the Authority's interpretation of its own regulations, such as its regulations on waiver, is "'controlling unless plainly erroneous or inconsistent with'" the regulations. *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 709 (D.C. Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The Authority's fact findings are conclusive if supported by substantial evidence. 5 U.S.C. § 7123(c). Finally, the Court reviews the Authority's interpretations of other statutes and other agencies' regulations de novo. *Soc. Sec. Admin., Baltimore, Md. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000).

RELEVANT STATUTORY BACKGROUND

The Statute confers collective-bargaining rights upon federal civilian employees and governs collective bargaining between those employees and management. *See generally Am. Fed. of Gov't Emps. v. FLRA*, 778 F.2d 850, 851-52 (D.C. Cir. 1985) ("*AFGE*"). Under the Statute, an agency is required to bargain with the exclusive representative of its employees to the full extent of its discretion. 5 U.S.C. § 7117(a); *Am. Fed. of Gov't Emps., Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998) (citing cases). The Statute, however, also provides that an agency has no duty to bargain on a proposal to the extent that it is "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). Moreover, agencies are only excepted from bargaining over subjects that conflict with an *agency-wide* rule or

regulation where the Agency has shown that a "compelling need" exists for the rule. 5 U.S.C. § 7117(a)(2); *see Library of Cong. v. FLRA*, 699 F.2d 1280, 1284 n.16 (D.C. Cir. 1983). In those situations, an agency must demonstrate a compelling need by showing that the rule or regulation rule is essential (as distinguished from helpful or desirable) to the accomplishment of the mission; necessary to ensure the maintenance of basic merit principles; or required because it implements a mandate to the agency, which implementation is essentially nondiscretionary in nature. *See* 5 C.F.R. § 2424.50.

If, during bargaining, an agency raises a claim of nonnegotiability over a proposal, the union may seek resolution of the issue before the Authority, which "resolves issues relating to the duty to bargain in good faith under section 7117(c)." 5 U.S.C. § 7105(a)(2)(E); *see also* House Committee on Post Office and Civil Service, 98th Cong., 2d Sess., *Fifth Annual Report of the Federal Labor Relations Authority* 96–97 (Comm. Print 1984). Even after the Authority has decided a negotiability issue and the parties bargain to agreement (or the Federal Services Impasses Panel has imposed a provision, as explained below), the agreement is still subject to approval by the head of the agency under 5 U.S.C. § 7114(c)(1). The Statute directs the agency head to approve the agreement within thirty days from the date the agreement is executed "if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation." 5 U.S.C. § 7114(c)(2). If an agency head

disapproves of an agreement, it is "essentially an assertion of nonnegotiability," *AFGE,* 778 F.2d at 853, over which the union may seek Authority review, 5 U.S.C. § 7117(c)(2); 5 C.F.R. § 2424.21(a)(2).

The Statute establishes the Federal Service Impasses Panel to resolve any impasse the parties reach while bargaining over negotiable issues. The Panel is empowered to hold hearings, take testimony, and "take whatever action is necessary and not inconsistent with this chapter to resolve the impasse." 5 U.S.C. § 7119(c)(5)(B)(i)-(iii). As this Court has explained, the Panel determines "the public interest if the [agency] and its employees are at loggerheads." *U.S. Dep't of Treasury, Bureau of Engraving & Printing v. FLRA*, 88 F.3d 1279, 1996 WL 311465, at *1 (D.C. Cir. 1996) (unpublished). While the Panel has considerable power in settling disputes, only the Authority may consider a legal claim of nonnegotiability – whether the claims arise during bargaining over a proposal or on agency-head review of a provision. 5 U.S.C. §§ 7105 and 7117(c); *see also Nat'l Fed'n of Fed. Emps. v. FLRA*, 789 F.2d 944, 945-46 (D.C. Cir. 1986); *Interpretation and Guidance,* 11 FLRA 626, 628-29 (1983).

In the interest of finality, the Panel is authorized to impose contract terms on the parties. These imposed terms become "binding on such parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C). The Panel may delegate its authority to resolve bargaining impasses to individual Panel members, and a member's decisions relating to the parties' collective bargaining

agreement are subject to same review as decisions of the Panel itself. 5 U.S.C. §§ 7114(c), 7119(c)(5)(a); *Dep't of Def. Dependents Sch., Alexandria, Va. v. FLRA*, 852 F.2d 779, 784-85 (4th Cir. 1988).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE AUTHORITY'S FINDING THAT THE PROPOSAL FOR SHOPPETTE ACCESS CONCERNED CONDITIONS OF EMPLOYMENT UNDER THE STATUTE

In *Local 1547 I*, the Authority decided that the Union's proposal for employee access to the Shoppette (and other facilities) concerns conditions of employment. For the reasons explained below, the Court should defer to the Authority's reasonable finding. (*Local 1547 II*, JA 70; *Local 1547 I*, JA 9-10.)

The phrase "conditions of employment" derives directly from the Statute, which defines "collective bargaining" as the parties' mutual obligation to "bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting [the] employees." 5 U.S.C. § 7103(a)(12). The Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions[.]" *Id.* § 7103(a)(14). In *U.S. Department of Homeland Security, Customs and Border Protection v. FLRA*, the Court observed that "both courts and the Authority 'have accorded [working conditions [under § 7103(a)(14)]] a broad interpretation that encapsulates a wide range of

subjects. . . .'" 647 F.3d 359, 365 (D.C. Cir. 2011) (quoting *Dep't of the Air Force, 335th MSG/CC, Davis-Monthan Air Force Base, Arizona*, 64 FLRA 85, 90 (2009)). The Supreme Court has held that the Authority's determination whether a matter is a "condition of employment" is entitled to deference. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644 (1990).

To determine whether a proposal concerns conditions of employment, the Authority applies its two-part judicially-approved *Antilles* test. Specifically, the Authority considers whether: (1) the proposal pertains to bargaining-unit employees; and (2) the record establishes a direct connection between the proposal and the work situation or employment relationship of bargaining unit employees. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236-37 (1986) ("*Antilles*"); *see also Am. Fed. of Gov't Emps., Local 2761 v. FLRA*, 866 F.2d 1443, 1445 (D.C. Cir. 1989) ("*AFGE, Local 2761*").

The provision here, involving unit-employee access to the Shoppette, satisfies the two-part test. First, there is no dispute that the provision relates to unit employees. *See Antilles*, 22 FLRA at 237 (finding that "a proposal which is principally focused on bargaining unit positions" relates to unit employees). Second, the Authority reasonably found a direct connection between Shoppette access and the unit employees' work situation or employment relationship. (*Local 1547 I,* JA 9-10.) To ascertain whether there is a direct connection, the Authority "inquires into the extent and nature of the effect of the [provision] on working conditions[,]" and

whether there is a "link" or "nexus" between the subject matter of the provision and unit members' work situation or employment relationship. (*Local 1547 I*, JA 9 (quoting *AFGE, Local 2761*, 866 F.2d at 1445).) This is a factual determination, dependent on the record evidence in each individual case, and reviewed for substantial evidence supporting the Authority's conclusion. *AFGE, Local 2761*, 866 F.2d at 1446-47; *Am. Fed. of Gov't Emps., Local 1786*, 49 FLRA 534, 540 (1994) ("*Local 1786*").

In making this factual determination, the Authority has repeatedly found negotiable proposals similar to the provision here seeking employee access to on-base food and services. For example, in *American Federation of Government Employees, Local 2614*, 43 FLRA 830, 833-34 (1991), the Authority required bargaining over access to military exchange food privileges, where food is available on the base, in part because unit employees had a "half hour limitation" on their lunch periods. The Authority concluded that access to food on base related to employees' work situation because of the difficulty for unit employees to drive off the base, eat lunch, and return to work within their lunch period. *Id.* at 34; *see also Dep't of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605, 609 (1986) (finding that although commercial facilities were available in a neighboring community, the use of those facilities would require a difficult round trip).

Additionally, as the Authority explained, bargaining is not limited to food items. Rather, "the ability to obtain a variety of goods *and services* . . ., including health-

related supplies and food items, [during nonduty hours,] directly relates to the work situation of employees." (JA 10 (citing *Antilles Consol. Educ. Ass'n*, 46 FLRA 625, 630 (1992) ("*Antilles II*")) (emphasis added).) In *Antilles II*, the Authority reasoned that due to the variety in employees' assignments and the time it takes to leave base and return to work, employees' abilities to meet their shopping needs related to their work situation. *Antilles II*, 46 FLRA at 630. Moreover, the Authority has found that providing military-exchange shopping privileges, even when the base is not isolated, may improve employee morale and productivity, thereby establishing a direct connection to employees' work situation. *See Local 1786*, 49 FLRA at 540-41; *Serv. Emps. Int'l Union, Local 556,* 49 FLRA 1205, 1209 (1994).

This Court has similarly held that access to exchange privileges directly affects employee working conditions. *AFGE Local 2761*, 866 F.2d at 1448. In *AFGE Local 2761*, the Court relied on evidence that the privileges were a significant and valued benefit of employment used to induce civilians to work on the base, a perception among employees that certain off-base food (specifically milk) was unhealthy, and the agency's past practice of allowing access. *Id.* at 1447-48. Recognizing the fact-intensive nature of this determination, the Court explained that "any one of these factors alone might not be determinative." *Id.* at 1448; *see also Dep't of Defense, Dep't of the Army v. FLRA*, 685 F.2d 641, 648 (D.C. Cir. 1982) (enforcing the Authority's finding negotiable proposals regarding items available for employee purchase at

exchange, given their relation in that case to "the employer's duty . . . to provide certain essential facilities and services to all civilian employees serving overseas").

Here, substantial evidence supports the Authority's finding that Shoppette access directly connected to the unit employees' work situation. (*Local 1547 I*, JA 9-10.) The Union demonstrated to the Authority a nexus between its proposal for exchange access and unit employees' work situation because, "since September 11, 2001, there are four fewer gates for entry to and exit from the base and [] 'bottle neck traffic' prevents unit employees from leaving the base and returning within their half-hour lunch periods."[1] (*Id.*, JA 8; *see also* Panel Decision, JA 23.) Moreover, the Union continued, many unit employees work evening or overtime hours, which leaves a "limited amount of personal time available to satisfy their" shopping needs. (*Id.*) The

[1] The Agency is wrong to dismiss "the connection between shopping at the Exchange and easing commuting time" and to assert that there is "no precedent imposing any duty to negotiate over commuting time." Br. 28, 29. To the contrary, federal sector collective-bargaining relationships do implicate issues surrounding employee commutes. *See, e.g., U.S. Dep't of Health & Human Services, Wash., D.C.*, 68 FLRA 239, 239 (2015) (discussing contract provisions concerning reimbursement of commuting costs pursuant to the Federal Employees Clean Air Incentives Act), *dismissed for lack of jurisdiction*, No. 15-1068 (D.C. Cir. Sept. 10, 2015); *Nat'l Weather Serv. Emps. Org.*, 37 FLRA 392, 400 (1990) (holding negotiable a proposal to evaluate the effect on employee commuting after the employer implemented changes in shift beginning times). The same adheres in the private sector under the National Labor Relations Act. *See Local 777, Democratic Union Org. Comm., Seafarers Int'l Union of N. Am. v. NLRB,* 603 F.2d 862, 889 (D.C. Cir. 1978) (holding that drivers' use of their taxis to commute home was a mandatory subject of bargaining); *United Parcel Serv.*, 336 NLRB 1134, 1135 (2001) (closeness of employee parking to workplace was a mandatory subject of bargaining).

Authority, considering this evidence and the ample precedent described above, reasonably held "that proposals granting civilian employees access to exchange and exchange-affiliated facilities are within the duty to bargain because they concern conditions of employment." (*Local 1547 I*, JA 10 (citing cases).)

Consistent with Authority and this Court's precedent, the ability of the employees to important personal items at their place of employment – whether to obtain food or other services – is a condition of employment. The Court should defer to the Authority's expertise and institutional experience in making this determination. *See Dep't of Defense, Dep't of the Army v. FLRA*, 685 F.2d 641, 647-48 (D.C. Cir. 1982) (observing that "the phrase 'conditions of employment' is not a model of precision – no doubt purposefully so," making "this a proper case for the application of the familiar principle that 'great deference' is owed 'to an interpretation of a statute by the agency entrusted with its administration'" (quoting *Dep't of Defense, Army-Air Force Exchange Serv. v. FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981))).

To overcome the Authority's conclusion, the Agency wrongly points to *AFGE, Local 2761* – again, a case in which this Court found that access to military exchange facilities *was* a condition of employment for civilian employees. *See* Br. 25. Undeterred by the Court's conclusion, the Agency suggests that without a factual scenario similar to *AFGE, Local 2761*, the second factor of the *Antilles* test cannot be satisfied here – essentially claiming that base isolation is the determinative factor to

granting civilian access. *Id.* But as the Court recognized, no one factor is determinative of whether a matter affects conditions of employment. *AFGE, Local 2761*, 866 F.2d at 1448. *See also AFGE*, *Local 1786*, 49 FLRA at 540 (finding that no "one factor is more significant than another in establishing that a nexus exists between access to exchange privileges and unit employees' employment"). The Authority reasonably addressed the Agency's argument in *Local 1547 I*, stating: "a direct connection does not depend on the number of [previously considered] factors present in the circumstances of a case." (*See* JA 10 (citing *AFGE*, *Local 1786*, 49 FLRA at 536).) The fact that the Authority relied on other evidence to determine a link does not undermine its conclusion.

Arguing against the provision's link to working conditions, the Agency cherry picks the Panel arbitrator's finding that "access to the gas station [at the Shoppette] provides them no benefit other than convenience." Br. 27 (quoting *AFGE 1547 II*, JA 69). The Agency, however, fails to recognize that the Panel arbitrator was not tasked with determining whether the Union's proposals concerned conditions of employment – that is a negotiability matter indisputably within the Authority's purview. *See Nat'l Fed'n of Fed. Emps. v. FLRA*, 789 F.2d 944, 945-46 (D.C. Cir. 1986). From the Panel arbitrator's point of view, the Authority had already found that access to the exchange was negotiable in *Local 1547 I*, its 2010 decision. The arbitrator, then, was only required to assess and weigh the merits of the Union's proposal, considering

the parties' relevant evidence, their past practice, and other pragmatic concerns to resolve the impasse. Regardless of the arbitrator's finding that the proposal provided benefits, she only determined whether the proposal was in the public interest, not whether it involved conditions of employment.[2]

Similarly, the Agency broadly overstates that proposals including off-duty benefits cannot involve employees' conditions of employment. Br. 31-32. But this Court has rejected that argument before. *See U.S. Dep't of Air Force, Griffis Air Force Base, Rome, N.Y. v. FLRA*, 949 F.2d 1169, 1173 (D.C. Cir. 1991) (rejecting agency's argument "that policies affecting off-duty activities do not touch conditions of employment within the meaning of the statute except in rare circumstances"). As in

[2] In any event, the arbitrator's findings actually bolster the determination that the matter concerns conditions of employment. The bargaining proposal, in fact, would "significantly benefit" unit employees. (*See* Pet. for Review of Negotiability issues, JA 31-32; *Local 1547 II*, JA 69.) To this end, the Authority, citing the Panel arbitrator's findings, pointed to the increased travel time it takes civilian personnel to leave the base as a result of gate closings, and that unit employees were not able to buy necessary items such as "health items [and] feminine care products." (*Local 1547 II*, JA 69 (internal quotation marks omitted).) Moreover, even if such access were merely a convenience to the civilian employees, the Authority rejected the same arguments advanced by the Agency earlier in this litigation; providing employees with additional shopping and dining options directly relates to their employment situation. *See Local 1547 I*, JA 9 (citing *AFGE Local 1786*, 49 FLRA 534, 536 (1994) (rejecting argument that proposal was nonnegotiable because "there [were] adequate shopping facilities within close proximity of the Agency's facilities"); *Antilles II*, 46 FLRA at 629-30 (rejecting claims that other on-base dining options were sufficient); *Local R1-144*, 43 FLRA 1331, 1335 (1992) (finding proposal negotiable despite agency contention that it involved only "personal considerations")).

Griffis, the Authority has consistently found proposals concerning off-duty activities to be directly connected to employees' work situations or employment relationship. *E.g. Antilles II*, 46 FLRA at 630 (holding that the "ability of employees to obtain a variety of goods and services at the exchanges, including health-related supplies and food items, while awaiting [their next shift to begin], directly relates to the work situation of employees"). Allowing employees access to exchange-related food and services often inherently includes off-duty access. In the examples cited above, access during off-duty periods was part of the analysis – often explicitly related to lunch or prior to starting a new shift. *See, e.g., AFGE, Local 2614*, 43 FLRA at 833; *Antilles II*, 46 FLRA at 630. It was not unreasonable for the Authority to continue to adhere to its decades-long view that access to food and services at the base exchange, whether on-duty or off-, was directly connected to the employees' work situation and, as a result, negotiable.[3]

[3] The Agency contends that the Court has jurisdiction to consider whether the provision concerns a condition of employment, despite the Agency's decision against appealing the Authority's 2010 decision deciding essentially the same issue. (Br. 21-23.) The Authority recognized in *Local 1547 II* that the Agency "raise[d] nothing new" from *Local 1547 I*. (JA 70.) While the Authority does not contest the Court's jurisdiction, it notes that it "reach[ed] the same conclusion [here] as in [*Local 1547 I*] for the same reasons." (*Id.*) The Authority urges the Court to defer to its decision to abide by its earlier opinion in *Local 1547 I*, particularly after the parties bargained, and the Panel imposed a provision, in reliance on it.

II. THE AUTHORITY REASONABLY CONCLUDED THAT THE PROVISION ALLOWING FOR CIVILIAN UNIT-EMPLOYEE ACCESS TO THE SHOPPETTE WAS NOT CONTRARY TO LAW

The Agency attempts to overcome the longstanding precedent that allows parties to bargain over, and reach agreement on, civilian access to exchanges by claiming that the provision is contrary to law. Specifically, the Agency contends that the Secretary of Defense has sole and exclusive discretion to determine who has access to the exchanges under two provisions of Title 10: 10 U.S.C. §§ 2481(b) and 2484(c)(2).[4] *See* Br. 35-44. But nothing in these provisions indicates that Congress granted the Agency sole and exclusive discretion over access to the Shoppette. Furthermore, the Agency wrongly relies on DoD Instructions 1330.21 and 1330.09, given that it failed to raise those Instructions to the Authority as a reason for its agency head's disapproval of the provision. Finally, the Agency points to no statutory language demonstrating that negotiating over employee access to the Shoppette is

[4] In its brief to the Court, the Agency states repeatedly that the Agency has "exclusive authority" over access, without explaining whether this is different than the sole-and-exclusive-discretion framework in which the Authority addressed the argument. Here, the Authority treats these arguments as the same. If, however, the Agency believes them to require a different analysis, the Court should consider such arguments waived, as the Agency failed to raise them before the Authority in the first instance. The Court may not consider any "objection that has not been urged before the Authority," unless "the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . .").

generally contrary to Title 10. Before the Authority, the Agency failed to demonstrate that disapproval of the provision was warranted. The Agency's attempts before the Court should similarly fail.

A. Title 10 of the U.S. Code Does Not Show that the Agency Has "Sole and Exclusive Discretion" over Access to the Shoppette

1. Authority and judicial precedent require agencies to bargain over conditions of employment unless the agency demonstrates that Congress granted it "sole and exclusive" discretion over the proposal

The Statute presumes that an agency is obliged to negotiate most subjects of concern to employees. *Am. Fed'n of Gov't Emps., Local 3295 v. FLRA*, 46 F.3d 73, 74 (D.C. Cir. 1995). That presumption can be overcome, however, by "indications that Congress intended the agency in question to enjoy complete discretion over the particular matter at issue." *Id.* Where the Agency demonstrates its "sole and exclusive" discretion, the Authority has found that a subject matter is outside of the duty to bargain. *E.g.*, *Nat'l Treasury Emps. Union*, 59 FLRA 815, 816 (2004); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998). On the other hand, if an agency has discretion to take an action, and that discretion is not sole and exclusive, then the Statute requires the agency to bargain over that action to the fullest extent of its discretion, unless bargaining is otherwise unlawful. *See AFGE, Locals 3807 & 3824*, 55 FLRA 1, 2 n.3 (1998) (and cases cited therein).

This is a question of statutory interpretation. To determine whether an agency enjoys "sole and exclusive discretion" over an otherwise negotiable subject, such that bargaining would be contrary to law, the Authority and the courts examine the statutory language and legislative history. *See, e.g., Nat'l Treasury Emps. Union v. FLRA*, 435 F.3d 1049, 1051 (9th Cir. 2006); *Am. Fed'n of Gov't Emps., Local 3295*, 46 F.3d at 77; *Nat'l Treasury Emps. Union*, 59 FLRA at 816; *Int'l Ass'n of Machinists & Aerospace Workers, Franklin Lodge No. 2135*, 50 FLRA 677, 681–82 (1995), *aff'd mem. sub nom. U.S. Dep't of the Treasury, Bureau of Engraving & Printing v. FLRA*, 88 F.3d 1279, 1996 WL 311465 (D.C. Cir. 1996) (unpublished). The Authority's task is to ascertain whether Congress has clearly expressed an intent to deprive employees of their rights under the Statute. Congress has signaled that agency officials have sole and exclusive discretion by using phrases such as "without regard to the provisions of other laws" and "notwithstanding any other provision of law." *Nat'l Treasury Emps. Union*, 435 F.3d at 1051. As the Ninth Circuit explained, the task is to identify statutory language that would give "an agency unfettered discretion over the matter at hand." *Id.* (citing *Am. Fed'n of Gov't Emps., Local 3295*, 46 F.3d at 76; *U.S. Dep't of Def. Nat'l Imagery and Mapping Agency*, 57 FLRA 837, 844 n.10 (2002)). *See also AFGE, Local 3295*, 47 FLRA 884, 895 (1993). As with all statutes conferring rights, "administrators and reviewing courts must take care to assure that exemptions from [the Statute's] coverage are not

so expansively interpreted as to deny protection to workers the [the Statute] was designed to reach." *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996).

2. The Authority correctly held that the Agency failed to demonstrate that 10 U.S.C. § 2481(b) and § 2484(c)(2) conferred sole and exclusive discretion to determine access to the Shoppette

The Authority correctly pointed out that the Agency failed to explain how 10 U.S.C. § 2481 and § 2484[5] give the Secretary *unfettered* discretion over the matter at hand – e.g., access to exchange facilities. *See* JA 75. Those provisions read:

> 2481. Defense commissary and exchange systems: existence and purpose
>
> (a) Separate systems.—The Secretary of Defense shall operate . . . a world-wide system of commissary stores and a separate world-wide system of exchange stores. The stores . . . may sell, at reduced prices, food and other merchandise to members of the uniformed services on active duty, members of the uniformed services entitled to retired pay, dependents of such members, and persons authorized to use the system under chapter 54 of this title . . . .
>
> (b) Purpose of systems.—The defense commissary system and the exchange system are intended to enhance the quality of life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention.
>
> . . . .

10 U.S.C. § 2481(a)-(b).

[5] Before the Authority, the Agency also relied upon 10 U.S.C. §§ 101 and 113. (*Local 1547 II*, JA 72-73.) It has, however, abandoned its reliance on those provisions before the Court.

> 2484. Commissary stores: merchandise that may be sold; uniform surcharges and pricing
>
> > (a) In General – As provided in section 2481(a) of this title, commissary stores are intended to be similar to commercial grocery stores and may sell merchandise similar to that sold in commercial grocery stores.
> >
> > (b) Authorized commissary merchandise categories – Merchandise sold in, at, or by the commissary stores may include items in the following categories: [The statute then lists items such as meat, poultry, nonalcoholic beverages, produce, dairy products, and magazines.]
> >
> > * * *
> >
> > (c) Inclusion of other merchandise items.—
> >
> > > (1) The Secretary of Defense may authorize the sale in . . . commissary stores of merchandise not covered by a category specified in subsection (b). The Secretary shall notify Congress of all merchandise authorized for sale pursuant to this paragraph, as well as the removal of any such authorization.
> > >
> > > (2) Notwithstanding paragraph (1), the Department of Defense military resale system shall continue to maintain the exclusive right to operate convenience stores, shopettes, and troop stores, including such stores established to support contingency operations.

10 U.S.C. § 2484(a)-(c)(2).[6] The remainder of 10 U.S.C. § 2484 provides special rules for the sale of tobacco products, pricing of products, and surcharges for maintenance of the physical property of the commissary system. 10 U.S.C. § 2484(c)(3)-(h).

As the Authority appropriately found, the cited "sections, individually and as a whole, provide the Secretary with power to operate an exchange system, in concert

[6] The full text of 10 U.S.C. § 2484 may be found in the Statutory Addendum.

with laudable statutory goals." (*Local 1547 II*, JA 73.) But nothing in their language or context vests the Secretary of Defense with unfettered discretion to determine access to the Shoppette, an exchange system facility. (*Id.*) Simply put, the cited sections of Title 10 do not "address the situation at issue here, involving only an incremental extension of benefits (from a part of the Shoppette [heat and eat services] to the whole)." (*Id.*)

The Authority properly rejected the Agency's claim that § 2484(c)(2) – it relies on 10 U.S.C. § 2481(b) only symbolically (Br. 34) – grants the Agency sole and exclusive discretion over access for three reasons. First, the Shoppette is part of the exchange system, but § 2484 only applies to commissary stores, as its title makes clear – "Commissary stores: merchandise that may be sold; uniform surcharges and pricing." 10 U.S.C. § 2484. As the Authority found, "the *commissary* system addressed by § 2484 is 'separate' from the *exchange* system at issue here." (*Local 1547 II,* JA 73-74.) To make that finding, the Authority had to look no further than the plain language Congress provided in 10 U.S.C. § 2481(a):

> Separate Systems – The Secretary of Defense shall operate, in the manner provided by this chapter and other provisions of law, a world-wide system of commissary stores and a separate world-wide system of exchange stores.

And the legislative history bolsters this separation.[7] Thus, as the Authority observed, "it is unclear how § 2484(c)(2) is relevant." (*See Local 1547 II*, JA 74.)

Second, the Agency's myopic focus on a single sentence in § 2484(c)(2) ignores the statutory language and scheme. The plain wording of § 2484(c)(2), read in context, does not suggest that it is intended to provide sole and exclusive discretion in a way that would preclude bargaining over access. Section 2484(c)(2) specifically states that "*notwithstanding paragraph 1* [i.e., §2484(c)(1)], the Department of Defense military resale system shall continue to maintain the exclusive right to operate convenience stores, shopettes, and troop stores, including such stores established to support contingency operations." 5 U.S.C. § 2484(c)(2) (emphasis added). The "notwithstanding" language qualifies § 2484(c)(1), which authorizes the Secretary to expand upon the categories of merchandise for sale described in § 2484(b). As this Court recently observed, "'[a] dependent phrase that begins with notwithstanding indicates that the main clause that it introduces . . . derogates from the provision to which it refers.'" *S.W. General, Inc. v. NLRB*, 796 F.3d 67, 75 (D.C. Cir. 2015)

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[7] The House Report justifying Congress's adoption of § 2484(c) in the National Defense Authorization Act for Fiscal Year 2005, P.L. 108-375, §§ 651(a)(2), (4), suggests that Congress was focused entirely on the operation of the *commissary* system, not the exchange system of which the Shoppette is part. *See* H.R. REP. No. 108-491, at 335 (2004) (explaining the amendments' intent, *inter alia*, to direct the Secretary of Defense to specifically operate a commissary system and to define "categories of the merchandize that shall be sold in commissaries").

(quoting Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 126 (Thompson/West 2012)).

The Agency's interpretation of 10 U.S.C. § 2484(c)(2) would expand the "notwithstanding" clause by applying its language to the entire U.S. Code, instead of just the provision to which it refers. As further described below (pp. 38-39), if Congress wants to set a specific statutory provision above the rest of federal law through a "notwithstanding" clause, it knows how to do so. *See, e.g., Cisneros v. Alpine Ridge Grp.,* 508 U.S. 10, 18 (1993) (noting that courts generally interpret "notwithstanding any other provision of law" clauses "to supersede all other laws" and that "[a] clearer statement is difficult to imagine" (internal quotations omitted)) (citing cases). Accordingly, the "exclusive right to operate" set forth in § 2484(c)(2) is best read as qualifying the Secretary's authority to "authorize the sale in . . . commissary stores of merchandise not covered by a category specified in subsection (b)," perhaps as a limitation on non-military vendors selling additional merchandise in commissary stores, particularly in overseas contingency operations.

Third, the Authority reasonably found that § 2484(c)(2) "is about the sale of specific merchandise, not access to facilities selling it." (*Local 1547 II,* JA 74.) As noted, 10 U.S.C. § 2484 merely concerns authorized "merchandise that may be sold" in the commissary system and the pricing of those items. *See* 10 U.S.C. § 2484(a)-(c) (describing categories of goods); 10 U.S.C. § 2484(d)-(h) (describing pricing). These

provisions do not limit who has access to the facilities to make purchases or whether the Agency is shielded from bargaining over such matters. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). Section 2484(c)(2) must be read in its context as a provision governing merchandise and pricing in commissary stores, which does not support the Agency's claim that its "exclusive right to operate" language includes access determinations in exchange facilities.

Judicial and Authority precedent applying the sole-and-exclusive-discretion test supports the Authority's interpretation of 10 U.S.C. § 2484(c)(2). For example, in *American Federation of Government Employees, Local 3295 v. FLRA*, 46 F.3d 73 (D.C. Cir. 1995), this Court affirmed the Authority's interpretation of a federal statute authorizing the Director of the Office of Thrift Supervision to set employee compensation "without regard to the provisions of other laws applicable to officers or employees of the United States." *Id.* at 75. That statutory language, along with legislative history that clarified some ambiguous text, was sufficient to demonstrate sole and exclusive discretion. *Id.* at 78. Similarly, in *National Treasury Employees Union v. FLRA*, 435 F.3d 1049, 1051 (9th Cir. 2006), the Authority's interpretation of the

same statutory language – granting an agency head discretion over compensation "without regard to the provisions of other laws" – met the Ninth Circuit's approval.

In two other cases, this Court found sole and exclusive discretion based upon Congress's grant of authority to an agency "notwithstanding" other provisions of law. *See Colo. Nurses Ass'n v. FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988) (granting agency head power "to determine conditions of employment '[n]otwithstanding any law'"), *statutorily overruled on other grounds by* 38 U.S.C. § 7422(a); *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1404-05 (D.C. Cir. 1988) (authorizing agency heads to "prescribe hours of duty" for National Guard technicians "[n]otwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law"). Authority precedent also demands this level of precision in statutory language to confer sole and exclusive discretion. *See U.S. Dep't of Def., Nat'l Imagery & Mapping Agency*, 57 FLRA 837, 843 n.10 (2002); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998); *Am. Fed. of Gov't Emps., Local 3295*, 47 FLRA 884, 895 (1993), *pet. for review denied*, 46 F.3d 73 (D.C. Cir. 1995). As this Court recognized in *Illinois National Guard*, this type of "'preemptive language is powerful evidence that Congress did not intend any other, more general, legislation, whenever enacted, to qualify the authority.'" 854 F.2d at 1403 (quoting *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir. 1982)). The Agency's reliance on 10 U.S.C. § 2484(c)(2), with its textual *and* contextual infirmities, cannot meet this high standard.

The Agency also appears to suggest that that the DoD Instructions support a finding that it has sole and exclusive discretion over access to the Shoppette because the "Secretary of Defense has already exercised his discretion to bar full access to civilian employees." Br. 16, 37. This circular argument has no merit. As described above, Congress did not grant the Agency sole and exclusive discretion over access to the Shoppette, which would foreclose the application of other laws such as the Statute. The Agency conflates the standard, suggesting that the Agency, by issuing internal policies or declarations, can shield itself from the Statute's bargaining obligations. But the standard requires Congressional action, *see Am. Fed'n of Gov't Emps., Local 3295*, 46 F.3d at 76 (describing the indication coming from Congress), or a *government-wide* regulation, *see Patent Office Prof'l Ass'n*, 59 FLRA 331, 346 (2003) (reviewing a government-wide regulation from the Office of Government Ethics for sole and exclusive discretion). The Authority reasonably found that the Agency failed to show that Congress intended to relieve the Agency of its duty to bargain over Shoppette access under the Statute. The Authority correctly required the Agency to rescind its rejection of the provision.

B. The Agency Fails to Show that the Provision Providing Access Is Inconsistent with Title 10 or DoD Instructions

Under the Statute, an agency's duty to bargain includes the obligation "to discuss and negotiate on any condition of employment." 5 U.S.C. § 7114(b)(2). As

discussed above, the subject matter here concerns conditions of employment. The Statute, however, does not require bargaining over conditions of employment that are inconsistent with Federal law or Government-wide rule or regulation. *See* 5 U.S.C. § 7117(a)(1); *Ass'n of Civilian Technicians v. FLRA*, 370 F.3d 1214, 1217 (D.C. Cir. 2004). Here, the Authority not only correctly determined that the Agency's cited Title 10 provisions failed to confer sole and exclusive discretion, but it also reasonably found that the provision granting employee access to the Shoppette does not run afoul of 10 U.S.C. § 2484(b). (*Local 1547 II*, JA 74-75.) The Agency did not ask the Authority in its Statement of Position to determine whether the provision conflicted with Instruction 1330.21 and whether, if it did, the Agency articulated a compelling need under 5 U.S.C. § 7117(a)(2) for the Instruction. Consequently, that issue is not properly before the Court.

1. The Authority reasonably concluded that the provision is not contrary to 10 U.S.C. § 2481(b)'s general statement on the "Purpose of the Systems"

The Agency asserts that § 2481(b) "definitively answers the question of 'to whom' access may be accorded." Br. 34.[8] Section 2481(b) provides that the "[p]urpose of the [commissary and exchange] systems" is "to enhance the quality of

[8] In contending that the provision is contrary to law, the Agency appears to no longer rely on 10 U.S.C. §§ 101 and 113. The Authority does not address them here, and any attempts by the Agency to rely on them in its reply brief should be deemed waived.

life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention." 10 U.S.C. § 2481(b). Assuming that the Agency is renewing its claim that the provision is consequently inconsistent with § 2481(b) under the Statute, the Court should affirm the Authority's reasonable holding that the Agency's argument is unsupported by the statutory language or agency practice. (*Local 1547 II*, JA 75.)

The Authority recognized that, as the Agency contended, the exchanges are undoubtedly designed to support military personnel and operations. (*Local 1547 II*, JA 75.) But § 2481(b), even in conjunction with 10 U.S.C. § 2484(c)(2)'s grant of "exclusive authority to operate" commissary shoppettes, does not resolve the issue of whether extending those benefits to unit employees is contrary to law. *See id.* As noted above, 10 U.S.C. § 2484(c)(2) is not the broad grant of power the Agency asserts it is. In turn, § 2481(b) merely provides that "the exchanges are intended to benefit the military community" and "that those benefits support readiness, recruitment, and retention." (*Local 1547 II*, JA 75.)

As the Authority reasonably concluded (*id.*), none of the cited sections addresses civilian access to exchanges, and the Agency failed to provide any reasoning, or cite any precedent, in support of its positions to the contrary. Indeed, far from "specifically defin[ing] the very class of individuals" who may access the Shoppette (Br. 54), the Agency has exercised its discretion to extend access benefits to numerous

civilians not listed in § 2481(b), including the unit employees involved in this case. For instance, they allow unit employees access to the "heat and eat" sections of these facilities, including the Shoppette. (*Local 1547 II*, JA 75.) If the Agency has discretion under Title 10 to provide exchange access to some civilian employees, then – given that its discretion is not sole and exclusive – it has an obligation to bargain to the fullest extent of that discretion. *See Am. Fed. of Gov't Emps., Locals 3807 & 3824*, 55 FLRA 1, 4-5 (1998); *Am. Fed. of Gov't Emps., Nat'l Border Patrol Council*, 51 FLRA 1308, 1335 (1996). As the Authority reasonably concluded, "nothing in the wording of the provision suggests that the incremental extension of benefits encompassed by the provision (as stated by the arbitrator, from 'hot dogs' to 'aspirin, batteries, [and] tissues') is unlawful." (*Local 1547 II*, JA 75 (quoting Panel decision, JA 23).)

2. The Agency waived any argument that bargaining over the provision was inconsistent with DoD Instructions because it failed to raise the issue before the Authority

Before the Court, the Agency relies on DoD Instructions 1330.21 and 1330.09 to show that it has no discretion to grant access to civilian employees. Br. 21, 37-39, 39-45. According to the Agency, those agency-wide instructions prohibit unit employees' access to the Shoppette. Br. 39-45. Under 5 U.S.C. § 7117(a)(2), an agency may demonstrate that it need not bargain over a proposal that conflicts with an *agency-wide* regulation like the DoD Instructions, if it demonstrates a "compelling

need" for the rule. *See* 5 C.F.R. § 2424.50; *Library of Cong. v. FLRA*, 699 F.2d 1280, 1284 n.16 (D.C. Cir. 1983).

But in response to the Union's negotiability appeal, the Agency did not cite the DoD Instructions to the Authority, nor did it attempt to prove a compelling need for the Instructions (which it *sub silentio* suggests exists now, citing the compelling need provision of the Statute, 5 U.S.C. § 7117(a)(2), at Br. 42). Indeed, there is no mention of the DoD Instructions in any of the Agency's pleadings to the Authority defending its agency-head disapproval in *Local 1547 II*, either in its Statement of Position or in its untimely Reply to the Union's Response. (*See* JA 44-58, 60-67.) Even if the Agency somehow implicitly raised the DoD Instructions, it did not make any argument to the Authority under § 7117(a)(2)'s "compelling need" provision, the only provision of the Statute that would allow an agency-wide regulation to trump the statutory bargaining obligation. (*See* JA 44-67.) Absent that, the Statute requires bargaining over all conditions of employment, "whether established by rule, *regulation*, or otherwise." 5 U.S.C. § 7103(a)(14) (emphasis added).

Because the Agency failed to raise the DoD Instructions to the Authority, much less to contend that they should trump the Agency's bargaining obligation due to compelling need,[9] the Court is barred from considering the Agency's objections

[9] It is worth noting the Authority has previously found that no compelling need existed for earlier versions of the DoD Instructions at issue here, and it required the

now under 5 U.S.C. § 7123(c). *See, e.g., Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . ."); *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n.5 (D.C. Cir. 2005) (finding petitioner's argument waived); *Nat'l Treasury Emps. Union v. FLRA*, 810 F.2d 1224, 1228 (D.C. Cir. 1987) (same). As this Court has recognized, § 7123(c) is not merely advisory, but is "jurisdictional in nature." *Nat'l Labor Relations Bd. v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993); *accord Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986).

Assuming arguendo that the DoD Instructions *were* properly before the Court, they still do not demonstrate that the Agency has no discretion with respect to affording access to exchange facilities under 1330.21, as it claims.[10] Br. 37-41. Specifically, the Agency points to Section 6.5 of Instruction 1330.21, which provides that "'[o]nly authorized patrons are entitled to exchange privileges.'" Br. 37. But the

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Agency to bargain over shopping privileges at the base exchanges. *See Serv. Emps. Int'l Union, Local 556,* 49 FLRA 1205, 1210 (1994) (citing *Am. Fed. of Gov't Emps., Local 1786*, 49 FLRA 534, 543-44 (1994)). But the Agency makes no attempt to show that it would be futile to have raised the argument anew in light of military operational changes since 1995 and the current needs underlying the updated policies.

[10] In *Local 1547 II*, the Authority, *sua sponte*, referenced DoD Instruction 1330.21 to show that the Agency had already exercised discretion to allow civilian access to the base exchange system. (*See* JA 75.) Thus, we address the Agency claims regarding that Instruction here. The Agency failed, however, to cite Instruction 1330.09 until its motion for reconsideration, and any reliance on that Instruction is not properly before the Court. *See infra*, p. 46 n.11.

Authority found numerous examples in the Instruction of civilians with access, such as Red Cross employees, civilian exchange employees, and contract surgeons. (*Local 1457 II*, JA 77; *see* Instruction 1330.21, Table E6.T2.) Of course, the Agency cannot dispute that the civilian unit employees already have access to the heat-and-eat section of the Shoppette and "all food and beverages sold at any exchange food activity, if consumed on post." *Id.* And the Agency's shifting position on whether it has discretion to grant access – claiming before the Panel arbitrator that it did, *see* JA 20, 73 – further undermines its arguments before the Court here. Thus, even if the Agency had properly raised these objections, it is difficult to see how the DoD Instructions leave no room for granting civilian employees access to the Shoppette.

C. The Authority Properly Refused To Defer to the Agency's Interpretation of §§ 2481 and 2484 of Title 10

The Agency's multiple arguments for deference to its interpretations of Title 10 and the DoD Instructions are a distraction. Br. 47-56. Specifically, the Agency contends that "the Authority erred in failing to pay *Chevron* deference to Instructions issued by the Secretary of Defense, and further erred in refusing to pay *Auer* deference to the Agency's interpretation of those Instructions." Br. 47. But it would have been puzzling for the Authority to defer to DoD Instructions 1330.21 or 1330.09, given that, as explained above, the Agency did not cite them to the Authority in its Statement of Position (JA 44-58) or its untimely Reply to the Union's Response

(JA 60-66, 75). Nowhere in either of those pleadings did the Agency contend that the Authority should defer to these DoD Instructions as the Agency's formal interpretation of any purported ambiguity in 10 U.S.C. §§ 2481(b) and 2484(c)(2) regarding access. As such, the Statute precludes the Court from considering these arguments. 5 U.S.C. § 7123(c); *Nat'l Treasury Emps. Union v. FLRA*, No. 15-1122, slip op. at 2 (D.C. Cir. Jan. 29, 2016) (holding that the Court should not "consider[] on appeal arguments the Authority had no opportunity to consider").[11]

Given the deference arguments the Agency actually made below, the Authority reasonably found that deference was unwarranted, and instead analyzed the Agency's Title 10 interpretations under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). In its

[11] To the extent the Agency argues that DoD Instruction 1330.21 was before the Authority, Br. 57, thus allowing its arguments, it reads too much into *Local 1547 II*. The Authority in *Local 1547 II* did reference DoD Instruction 1330.21. But, as previously noted, it merely did so to illustrate that 10 U.S.C. § 2481(b) did not limit the categories of persons allowed access to the exchange, as the Agency claimed, because the Agency had extended access to the exchange facilities to other classes of civilian employees. (*See* JA 75.) Similarly, the Panel arbitrator noted the DoD Instruction only to decide whether adopting the Union's proposal would undermine agency operations; she was not charged with determining whether those Instructions rendered the proposal contrary to law, as that is a negotiability question entrusted to the Authority. *See Interpretation and Guidance,* 11 FLRA 626, 628-29 (1983); *see also Nat'l Fed'n of Fed. Emps. v. FLRA*, 789 F.2d 944, 945-46 (D.C. Cir. 1986). The Agency never contended, as it does before the Court, that DoD Instruction 1330.21 constituted an official agency interpretation of ambiguous statutory terms to which the Authority should defer. In the end, it is *the Agency's* responsibility to apprise the Authority of the reasons why it deems a proposal contrary to law or an agency-wide regulation, including claims of deference. The Agency failed to do so here.

Statement of Position, the Agency claimed that Title 10 in its entirety "exclusively authorized [the Secretary of Defense] to establish operational guidance" for the exchange system; in support of its deference claim, the Agency argued only that, "DoD's interpretation and implementation of its enabling statutes under Title 10, for the Armed Forces, is entitled to deference." (JA 56.) The Agency did not proffer the DoD Instructions as evidence of an interpretation of Title 10 meriting deference, nor did it offer any other support setting forth a prior official interpretation of Title 10 until after the Authority decided *Local 1547 II* and it was too late. (*Id.* at 56-57.)[12] Indeed, on Agency-head review, the Agency rejected the provision without referencing any section of Title 10. (*Id.* at 38, 71.)

Thus, the Authority found that "the Agency provide[d] no evidence that its interpretations of the cited sections of Title 10 were promulgated outside the course

[12] Charitably construing the Agency's motion for reconsideration as presenting the DoD Instructions as an argument for *Chevron* deference on issues of access, not just general military readiness, the Authority correctly applied its rules, as further discussed below, to hold that reconsideration was too late to raise a purportedly crucial document for the first time. (*Local 1547 III*, JA 105.) The Agency's Motion for Reconsideration (JA 80-101) cited DoD Instruction 1330.09, but only to argue that the Instruction set forth previously articulated policies about the important mission of the exchange programs. (JA 95; *Local 1547 III,* JA 105.) Because the Agency did not raise the issue on reconsideration, Section 7123(c) of the Statute bars judicial review. *Cf. Spectrum Health--Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011) (holding that, under the analogous waiver provisions of the National Labor Relations Act, raising an argument for the first time in a motion for reconsideration "was too late" to preserve the argument for judicial review).

of litigation." (*Local 1547 II*, JA 71.) In this context, the Authority properly found that post hoc statutory interpretations contained in agency briefs that are "'wholly unsupported by regulations, rulings, or administrative practice'" do not warrant deference, but only respect – to the extent they have the power to persuade – under *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). (*Id.* (quoting *Miller v. Clinton*, 687 F.3d 1332, 1340 (D.C. Cir. 2012)).)

Indeed, far from adhering to a public, consistent, and longstanding interpretation of Title 10, the Agency has proffered conflicting interpretations *in this litigation*. Curiously, referencing the DoD Instructions, the Agency states that it "exercised its discretion to bar full access to domestic civilian employees." Br. 37. Later, it argues that it "has no discretion to grant exceptions" that would allow for civilian access. Br. 39. But the Agency admits that it has exercised its discretion to allow some civilian access. Br. 37-39. In addition, before the arbitrator, it argued that the *Secretary of the Air Force* had discretion to grant such access. (*See* Panel Decision, JA 20.) As the Supreme Court recently reinforced, deference is unwarranted when "the agency's interpretation conflicts with a prior interpretation." *Christopher v. SmithKline Beecham Corp.*, __ U.S. __, 132 S. Ct. 2156, 2166 (2012) (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)). Thus, even if the Agency is correct that deference to litigation positions may be appropriate when it is "certain that they did not differ from the agency's," Br. 56 (quoting *GSA v. FLRA*, 86 F.3d 1185, 1188

(D.C. Cir. 1996)), given the Agency's shifting position and its lack of a formal process for enacting any consistent policy declarations, the Authority reasonably concluded deference here was unwarranted.[13]

D. The Agency's Contentions on Appeal Regarding Waiver Are Meritless

In its *Local 1547 III* decision denying the Agency's motion for reconsideration, the Authority reasonably found that the Agency waived certain arguments. First, the Authority found that the Agency failed to timely rely on DoD Instruction 1330.09, only mentioning it for the first time in its motion for reconsideration. *Local 1547 III*, JA 105. Second, the Authority similarly found that the Agency belatedly argued that the provision "negate[s] any oversight or discretion the Secretary of Defense has over the [exchange system]." *Id.* at 107. Under Authority regulations and precedent, the Agency was required to make its claims in the first instance when litigating

[13] Even if this were a *Chevron* case, *Chevron* deference is not due to the Agency because the inquiry ends at *Chevron* step one, and the Agency's interpretations here are therefore irrelevant. As the Authority held, the plain language of § 2481 provides only general policy statements for establishing a separate commissary and exchange, and § 2484 describes the categories and pricing of merchandise – at the commissary. The sections have nothing to do with granting civilian access to the exchange facilities, including the Shoppette. It is clear and unambiguous that Congress did not give the Agency sole and exclusive discretion over granting access to the base exchange system that would alleviate its bargaining obligation. Likewise, the language does not conclusively preclude the Agency from granting access to civilian employees. In skipping the *Chevron* step one analysis, the Agency dooms its case.

Local 1547 II. The Authority correctly found that the arguments were waived, and, as a result, the Agency's objections are not properly before the Court.

First, the Agency incorrectly claims, Br. 57-60, that the Authority erred in finding that the Agency waived reliance on DoD Instruction 1330.09 because it only relied on that provision in seeking reconsideration. (*Local 1547 III*, JA 105.) The Authority found "neither the Union nor the Agency referenced the DoD Instruction in its submissions" in *Local 1547 II*. (*Id.*) Under Authority regulations, "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument" absent good cause. 5 C.F.R. § 2424.32(c); *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter*, 60 FLRA 835, 836 (2005) (denying motion for reconsideration), *pet. for review denied*, 173 F. App'x 847 (D.C. Cir. 2006).

The Agency is wrong to argue that the Panel arbitrator's citation to DoD Instruction 1330.21 during that proceeding somehow preserves its new 1330.09 arguments on appeal. Br. 58. Parties frequently choose to forego and waive arguments made earlier in litigation. And nothing about the Agency's discussion of Instruction 1330.21 before the Panel arbitrator necessarily put the Authority on notice that the Agency meant to also rely on Instruction 1330.09. The Agency fails to offer anything that overcomes the requirements of § 2424.32(c) of the Authority's regulations. To the contrary, its argument rests on mischaracterizing the Authority's

and Panel arbitrator's earlier citations to DoD Instructions 1330.21 and 1330.09 as addressing the deference issues for which the Agency cites them now.

The Agency also wrongly contends, Br. 60, that the Authority erred in finding that the Agency waived any argument that the provision "negates" the discretion of the Secretary of Defense. In its decision denying the Agency's motion for reconsideration, the Authority rightly explained that the Agency failed to make this argument in its submission to the Authority in *Local 1547 II*, making it untimely under Authority precedent, and thus without a basis for reconsideration. (*See* JA 107 (citing *Dep't of HHS, Office of the Assistant Sec'y for Mgmt. & Budget*, 51 FLRA 982, 984 (1996)).)

Ultimately, however, the Authority recognized that any error was harmless, as neither Instruction 1330.09 nor the "negate" argument would have changed the result in *Local 1547 II*. First, the Authority indicated that DoD Instruction 1330.09 was, at best, merely supportive and repetitive of other arguments made by the Agency earlier in the litigation and thus not a reason for granting reconsideration. (*Local 1547 III*, JA 105.) Indeed, the Agency basically concedes that DoD Instruction adds little by pointing out that Instruction 1330.09 is duplicative of Instruction 1330.21. *See* Br. 58. Second, to the extent the Agency's "negate" argument is similar to its earlier arguments – that the provision "undermine[d]" and "usurp[ed]" the Secretary of Defense's authority – the Authority explained that it had already rejected them. (*Local 1457 III*, JA107 (internal quotation marks omitted).) The Agency does not signal in

its pleading before the Court that it was attempting to say anything else. And, as the Authority further explained, in any event, the Agency's claim is without merit: "An agency's discretion over a matter does not cease to exist simply because the agency's exercise of that discretion is subject to collective bargaining." (*See id.* (citing *Am. Fed. of Gov't Emps., SSA Gen. Comm.*, 68 FLRA 407, 409 (2015)).) Indeed, to hold otherwise would require eliminating *all* collective bargaining – despite Congress's intent otherwise – as unlawful impositions on agency discretion.

Truly, the case involves a single contract provision about access to the base Shoppette – a benefit to be sure, but a limited one. The Agency exaggerates the situation in arguing that the Secretary is left without an "iota" of discretion. Br. 61. As recognized by the Panel arbitrator, how can it be acceptable to allow civilians to enter a convenience store to buy hot dogs – which the Agency concedes it has discretion to do – but impermissible for a contract provision to allow them to go to the next aisle and purchase aspirin, batteries, or tissues?

CONCLUSION

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

Respectfully submitted,

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FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 12,851 words excluding exempt material.

/s/ Zachary R. Henige
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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Zachary R. Henige
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ATTACHMENT 1
PERTINENT STATUTORY PROVISIONS

5 U.S.C. § 7103(a)(12) and (14). Definitions; application

(a) For the purpose of this chapter—

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;
>
> * * *
>
> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--
>
> > (A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
> >
> > (B) relating to the classification of any position; or
> >
> > (C) to the extent such matters are specifically provided for by Federal statute;
>
> * * *

5 U.S.C. § 7105(a)(2). 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) resolves 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.

5 U.S.C. § 7114. Representation rights and duties

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

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

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

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

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

(ii) the employee requests representation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to

the provisions of this chapter and any other applicable law, rule, or regulation.

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

5 U.S.C. § 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.

* * *

5 U.S.C. § 7119. Negotiation impasses; Federal Service Impasses Panel

* * *

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

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

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

> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
>
> (2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence

is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * *

10 U.S.C. § 2481. Defense commissary and exchange systems: existence and purpose

(a) Separate systems.--The Secretary of Defense shall operate, in the manner provided by this chapter and other provisions of law, a world-wide system of commissary stores and a separate world-wide system of exchange stores. The stores of each system may sell, at reduced prices, food and other merchandise to members of the uniformed services on active duty, members of the uniformed services entitled to retired pay, dependents of such members, and persons authorized to use the system under chapter 54 of this title.

(b) Purpose of systems.--The defense commissary system and the exchange system are intended to enhance the quality of life of members of the uniformed services, retired members, and dependents of such members, and to support military readiness, recruitment, and retention.

* * *

10 U.S.C. § 2484. Commissary stores: merchandise that may be sold; uniform surcharges and pricing

(a) In general.--As provided in section 2481(a) of this title, commissary stores are intended to be similar to commercial grocery stores and may sell merchandise similar to that sold in commercial grocery stores.

(b) Authorized commissary merchandise categories.--Merchandise sold in, at, or by commissary stores may include items in the following categories:

(1) Meat, poultry, seafood, and fresh-water fish.

(2) Nonalcoholic beverages.

(3) Produce.

(4) Grocery food, whether stored chilled, frozen, or at room temperature.

(5) Dairy products.

(6) Bakery and delicatessen items.

(7) Nonfood grocery items.

(8) Tobacco products.

(9) Health and beauty aids

(10) Magazines and periodicals.

(c) Inclusion of other merchandise items.--(1) The Secretary of Defense may authorize the sale in, at, or by commissary stores of merchandise not covered by a category specified in subsection (b). The Secretary shall notify Congress of all merchandise authorized for sale pursuant to this paragraph, as well as the removal of any such authorization.

(2) Notwithstanding paragraph (1), the Department of Defense military resale system shall continue to maintain the exclusive right to operate convenience stores, shopettes, and troop stores, including such stores established to support contingency operations.

(3)(A) A military exchange shall be the vendor for the sale of tobacco products in commissary stores and may be the vendor for such merchandise as may be authorized for sale in commissary stores under paragraph (1). Except as provided in subparagraph (B), subsections (d) and (e) shall not apply to the pricing of such an item when a military

exchange serves as the vendor of the item. Commissary store and exchange prices shall be comparable for such an item.

(B) When a military exchange is the vendor of tobacco products or other merchandise authorized for sale in a commissary store under paragraph (1), any revenue above the cost of procuring the merchandise shall be allocated as if the revenue were a uniform sales price surcharge described in subsection (d).

(d) Uniform sales price surcharge.--The Secretary of Defense shall apply a uniform surcharge equal to five percent on the sales prices established under subsection (e) for each item of merchandise sold in, at, or by commissary stores.

(e) Sales price establishment.--(1) The Secretary of Defense shall establish the sales price of each item of merchandise sold in, at, or by commissary stores at the level that will recoup the actual product cost of the item.

(2) Any change in the pricing policies for merchandise sold in, at, or by commissary stores shall not take effect until the Secretary of Defense submits written notice of the proposed change to Congress and a period of 90 days of continuous session of Congress expires following the date on which notice was received. For purposes of this paragraph, the continuity of a session of Congress is broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment or recess of more than three days to a day certain are excluded in a computation of such 90-day period.

(3) The sales price of merchandise and services sold in, at, or by commissary stores shall be adjusted to cover the following:

(A) The cost of first destination commercial transportation of the merchandise in the United States to the place of sale.

(B) The actual or estimated cost of shrinkage, spoilage, and pilferage of merchandise under the control of commissary stores.

(f) Procurement of commercial items using procedures other than competitive procedures.--The Secretary of Defense may use the exception provided in section 2304(c)(5) of this title for the procurement of any commercial item

(including brand-name and generic items) for resale in, at, or by commissary stores.

(g) Special rules for certain merchandise.--(1) Notwithstanding the general requirement that merchandise sold in, at, or by commissary stores be commissary store inventory, the Secretary of Defense may authorize the sale of tobacco products as noncommissary store inventory. Except as provided in paragraph (2), subsections (d) and (e) shall not apply to the pricing of such merchandise items.

(2) When tobacco products are authorized for sale in a commissary store as noncommissary store inventory, any revenue above the cost of procuring the tobacco products shall be allocated as if the revenue were a uniform sales price surcharge described in subsection (d).

(h) Use of surcharge for construction, repair, improvement, and maintenance.—

(1)(A) The Secretary of Defense may use the proceeds from the surcharges imposed under subsection (d) only--

(i) to acquire (including acquisition by lease), construct, convert, expand, improve, repair, maintain, and equip the physical infrastructure of commissary stores and central product processing facilities of the defense commissary system; and

(ii) to cover environmental evaluation and construction costs related to activities described in clause (i), including costs for surveys, administration, overhead, planning, and design.

(B) In subparagraph (A), the term "physical infrastructure" includes real property, utilities, and equipment (installed and free standing and including computer equipment), necessary to provide a complete and usable commissary store or central product processing facility.

(2)(A) The Secretary of Defense may authorize a nonappropriated fund instrumentality of the United States to enter into a contract for construction of a shopping mall or similar facility for a commissary store and one or more nonappropriated fund instrumentality activities. The Secretary may use the proceeds of surcharges under subsection (d) to reimburse the nonappropriated fund instrumentality for the portion of the

cost of the contract that is attributable to construction of the commissary store or to pay the contractor directly for that portion of such cost.

(B) In subparagraph (A), the term "construction", with respect to a facility, includes acquisition, conversion, expansion, installation, or other improvement of the facility.

(3)(A) The Secretary of Defense may use the proceeds derived from surcharges imposed under subsection (d) in connection with sales of commissary merchandise through initiatives described in subparagraph (B) to offset the cost of such initiatives.

(B) Subparagraph (A) applies with respect to initiatives, utilizing temporary and mobile equipment, intended to provide members of reserve components, retired members, and other persons eligible for commissary benefits, but without reasonable access to commissary stores, improved access to commissary merchandise.

(4) The Secretary of Defense, with the approval of the Director of the Office of Management and Budget, may obligate anticipated proceeds from the surcharges under subsection (d) for any use specified in paragraph (1), (2), or (3), without regard to fiscal year limitations, if the Secretary determines that such obligation is necessary to carry out any use of such adjustments or surcharges specified in such paragraph.

(5) Revenues received by the Secretary of Defense from the following sources or activities of commissary store facilities shall be available for the purposes set forth in paragraphs (1), (2), and (3):

(A) Sale of recyclable materials.

(B) Sale of excess and surplus property.

(C) License fees.

(D) Royalties.

(E) Fees paid by sources of products in order to obtain favorable display of the products for resale, known as business related management fees.

5 C.F.R. § 2424.21. Time limits for filing a petition for review.

(a) A petition for review must be filed within fifteen (15) days after the date of service of either:

(1) An agency's written allegation that the exclusive representative's proposal is not within the duty to bargain, or

(2) An agency head's disapproval of a provision.

(b) If the agency has not served a written allegation on the exclusive representative within ten (10) days after the agency's principal bargaining representative has received a written request for such allegation, as provided in § 2424.11(a), then the petition may be filed at any time.

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

(a) Responsibilities of the exclusive representative. The exclusive representative has the burden of raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency's election, or not contrary to law, respectively, and, where applicable, why severance is appropriate.

(b) Responsibilities of the agency. The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively, and, where applicable, why severance is not appropriate.

(c) Failure to raise, support, and respond to arguments.

(1) Failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument. Absent good cause:

(i) Arguments that could have been but were not raised by an exclusive representative in the petition for review, or made in its response to the agency's statement of position, may not be made in this or any other proceeding; and

(ii) Arguments that could have been but were not raised by an agency in the statement of position, or made in its reply to the exclusive representative's response, may not be raised in this or any other proceeding.

(2) Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.

(d) Failure to participate in conferences; failure to respond to Authority orders. Where a party fails to participate in a post-petition conference pursuant to § 2424.23, a direction or proceeding under § 2424.31, or otherwise fails to provide timely or responsive information pursuant to an Authority order, including an Authority procedural order directing the correction of technical deficiencies in filing, the Authority may, in addition to those actions set forth in paragraph (c) of this section, take any other action that, in the Authority's discretion, is deemed appropriate, including dismissal of the petition for review, with or without prejudice to the exclusive representative's refiling of the petition for review, and granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c), with or without conditions.

5 C.F.R. § 2424.50. Illustrative criteria.

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.