ORAL ARGUMENT SCHEDULED ON JAN. 20, 2011

No. 10-1089

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

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, Washington, D.C.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, COUNCIL 33,

Intervenor.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The American Federation of Government Employees, Council of Prison Locals, Council 33 ("AFGE") and Department of Justice, Federal Bureau of Prisons ("BOP" or "agency"), appeared below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority"). In this court proceeding, BOP is the petitioner, the Authority is the respondent, and AFGE is the intervenor.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of Justice, Federal Bureau of Prisons, Washington, D.C. and American Federation of Government Employees, Council of Prison Locals, Council 33,* Case No. 0-AR-4225, decision issued on March 5, 2010, reported at 64 F.L.R.A. (No. 95) 559.

C. Related Cases

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

TABLE OF CONTENTS

Page No.

ADDENDUM

Page No.

TABLE OF AUTHORITIES

CASES

Page No.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page No.

*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

AFGE or union	American Federation of Government Employees, Council of Prison Locals, Council 33
Authority or FLRA	Federal Labor Relations Authority
BOP or agency	United States Department of Justice, Federal Bureau of Prisons
CBA	collective bargaining agreement or Master Agreement
FBOP	*U.S. Dep't of Justice, Fed. Bureau of Prisons,* 63 F.L.R.A. 132 (2009)
FCI	*Fed. Corr. Inst.*, 8 F.L.R.A. 604 (1982)
JA	Joint Appendix
Marine Corps	*Dep't of the Navy, Marine Corps Logistics Base v. FLRA,* 962 F.2d 48 (D.C. Cir. 1992)
PB	Petitioner's Brief
S&A	Sick and Annual Roster
SSA, Balt.	*U.S. Dept. of Health and Human Serv. Admin., Soc. Sec. Admin. Balt. Md.,* 47 F.L.R.A. 1004 (1993)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
Tr.	Transcript
ULP	Unfair Labor Practice

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on March 5, 2010. The Authority's

decision is published at 64 F.L.R.A. (No. 95) 559. A copy of the decision is included in the Joint Appendix ("JA") at 309-318. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) ("Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

1. Whether the Authority properly upheld the award of the arbitrator, who determined that the United States Department of Justice, Federal Bureau of Prisons ("BOP" or "agency") violated the Statute and the Master Agreement ("CBA") by refusing to bargain over the impact and implementation of its new cost-saving initiative instructing Wardens and Regional Directors to change the allocation and number of certain types of corrective services custody positions, when such a change was not the subject of any provision in the CBA.

2. Whether the Authority properly denied the agency's exceptions to the arbitrator's award because the agency failed to except to both of its separate and independent grounds.

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

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the CBA between American Federation of Government Employees, Council of Prison Locals, Council 33, ("AFGE" or "union") and the agency. The genesis of the proceeding was the union's formal grievance alleging that the agency violated § 7116 of the Statute and certain articles of the CBA when the agency refused to bargain over the impact and implementation of a new nationwide mission-critical initiative. The union invoked arbitration on March 11, 2005, when BOP denied the grievance. The arbitrator sustained the union's grievance finding that BOP had a duty to negotiate over the impact and implementation of the changes in work conditions brought about by BOP's initiative. The arbitrator held that the agency's failure to negotiate was a violation of CBA, Articles 3(c) and (d), 4 and 7(b), and was an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5). The arbitrator directed that BOP enter into good faith impact and implementation negotiations at the union's request. The arbitrator further directed that any agreement the parties reached during negotiations be made retroactive to February 2005, where appropriate, in providing back pay and/or leave restoration for employees who establish that they were adversely affected by BOP's initiative.

The agency filed exceptions to the arbitrator's award with the Authority pursuant to § 7122 of the Statute. The Authority denied the exceptions for two

reasons. First, the Authority disagreed with the agency that the mission-critical roster program, involving the nationwide reallocation of positions for budgetary reasons, was covered by Article 18 (entitled "Hours of Work") of the CBA, which sets forth procedures for posting quarterly rosters for assignments and selecting among employees who bid for the assignments. Second, the Authority denied the exceptions because the agency failed to address both of the separate and independent grounds for the award.

The agency now seeks review of the Authority's decision and order pursuant to § 7123(a) of the Statute. In addition, the Authority submits, along with its brief, a petition for enforcement of the Authority's order, pursuant to § 7123(b) of the Statute.

STATEMENT OF THE FACTS

A. The Mission-Critical Roster Directive and Article 18(d) of the CBA

Prior to January 5, 2005, the posts (*i.e.*, duty locations) on the quarterly rosters for correctional services employees consisted of a number of positions that were later deemed not to be mission-critical, such as the chapel officer or the front-gate officer at some prison institutions. JA 17-18. Part of the quarterly correctional services roster consisted of the "Sick and Annual Roster ("S&A"). JA 16-17; 292 (Tr. at 477). Employees assigned to S&A for the quarter functioned as relief, reserve, or floater employees who covered for employees who were absent

(generally on sick or annual leave) from their quarterly permanent-assigned jobs. JA 17 n.1. Unlike positions on the general quarterly roster, the S&A positions were not considered desirable because S&A employees did not know where they were going to be assigned from week to week and could be given short notice regarding changes in their daily assignments. *Id.;* JA 195, 246, 293 (Tr. 92, 293, 478).

On January 5, 2005, in an effort to comply with Congressional budgetary requirements to cut costs, the BOP Director announced the "Mission-Critical Posts" (or "Roster") nationwide initiative. JA 15-16. The BOP Director explained that the goal of the initiative was saving "at least $25 million in overtime for Fiscal Year '05." JA 16.

To accomplish this goal, BOP's Assistant Director, Correction Programs Division, had already issued a detailed memorandum to all agency Regional Directors providing "instructions and guidelines."[2] *Id.* According to the

[2] The agency asserts that the initiative was intended fundamentally to provide "guidance" to local wardens in establishing and filling out their quarterly rosters. *See* Petitioner's Brief ("PB") at 7. However, the arbitrator found that the "memorandum provided **instructions** and guidelines" for achieving the initiative's cost-saving goals. (Emphasis supplied). JA 16. The agency's claim at PB 7, that the initiative did not change the local warden's discretion and/or ability to issue rosters with the full complement of positions that had been previously available is belied by the arbitrator's findings and record evidence. *See* JA 26-27; 307 (Tr. 535-36) ("in the field [the practice of having regional directors approve local warden's roster selections] wasn't corrected.").

memorandum, "Captains" at the various facilities were "**instructed** to create a new quarterly roster to be reviewed and approved by their respective Warden and Regional Director." (Emphasis supplied). *Id.* The Assistant Director explained that: (1) some of the draft rosters the Captains had submitted did not reflect the goal of reducing overtime by eliminating a number of the positions that employees had once been able to bid on, and placing those positions on the S&A roster; and, thus, (2) the Captains had to resubmit their draft rosters to include the new "policy mandated posts." JA 16-17.

The Assistant Director's memorandum then set out instructions on what jobs should be eliminated (*e.g.*, "[m]ore than one [Rear Gate Officer] … is not deemed mission critical, and excess **should be** eliminated." [emphasis supplied]). JA 17-18. In addition to his instruction to eliminate certain posts, the Assistant Director also issued guidance concerning the elimination or modification of specific posts to meet the initiative's goals. *Id.* The Assistant Director recognized that the initiative would move some correction officers' permanent assignments on the custody roster back to a rotational assignment on the quarterly roster in which Article 18(d) procedures would be employed. JA 241, 295 (Tr. 275; *see also* Testimony of the union's Legislative Director at Tr. 487). Moreover, the initiative resulted in more BOP non-custody personnel employed to guard prison inmates. JA 27. The

initiative also caused a greater number of employees to be placed on the S&A roster. JA 194, 220, 242, 298 (Tr. 88, 193, 276, 499).

On January 13, 2005, the Council of Prison Locals' President requested that BOP bargain at the national level under Article 3, section 3(c) of the CBA over the changes that would result from implementation of the Mission-Critical Post initiative. JA 18. Both the Council of Prison Locals' President and AFGE's National President complained that placing many more correctional officers on S&A rosters (*i.e.*, changes in work assignments, days off, and shifts could occur with little or no prior notice) would have enormous effects on the employees' personal lives and on productivity. JA 19.

The Director of BOP acknowledged, that "[b]asically what happened … eliminated posts, which in turn put more people on sick and annual." (JA 233 (Tr. 244). Nonetheless, on February 4, 2005, he advised the union that BOP had no duty to bargain over changes to the roster because this subject had been already negotiated; *i.e.*, it was "covered by the Master Agreement." JA 19.

On February 10, 2005, the union filed a formal grievance with the agency alleging that BOP violated § 7116 of the Statute and Articles 3 and 4 (among others) of the CBA. The union maintained that these violations occurred when BOP implemented the mission-critical roster program without negotiating with the union over the impact and implementation of this change. JA 19-20.

On March 11, 2005, BOP denied the union's grievance on procedural and substantive grounds.[3] JA 20. BOP's position was that it had no duty to bargain over the mission-critical post initiative because Article 18(d)(2) of the CBA concerning roster procedures had already been negotiated, and the issue of mission-critical posts was therefore "expressly contained in, and thus covered by the current contract." *Id*.

Article 18, titled "Hours of Work," and, in particular, section (d), sets forth how quarterly rosters for "Correctional Services employees" will be prepared. JA 75-81. Subsection (d)(2) describes how the employer will post a blank roster for the upcoming quarter to give employees advance notice of assignments, days off, and shifts that are available. It also sets procedures by which the employees are to state their preferences for their time (*i.e.*, hours of work) and specific assignments. The remainder of section (d) details how the preferences are honored by a roster committee consisting of representatives of management and the union, and how the roster is completed after the Warden's final approval. JA 76-78.

On the same day that BOP denied the grievance, the union invoked arbitration. The parties stipulated that the issues to be resolved by arbitration were:

[3] The arbitrator subsequently rejected BOP's procedural ground for denying the grievance, and this finding was not appealed to the Authority. Thus, this issue is not before the Court.

> (1) Whether [BOP] violated 5 USC 7116 or the collective bargaining agreement by refusing to bargain over the impact and implementation of the mission critical rosters. [and] (2) If so, what is the appropriate remedy?

B. The Arbitrator's Award

The union's principal argument before the arbitrator was that BOP had a duty to negotiate over the impact and implementation of its decision to effect its nationwide mission-critical post initiative. JA 21-22. The union argued that the "covered-by" doctrine advanced by BOP is not applicable to BOP's implementation of the mission-critical posts initiative. *Id*. The union denied that it sought to bargain about management's prerogative to determine, in the first place, which posts are to be filled. Rather, the union argued that the Article 18 procedures do not cover or address the agency's initiative to reduce the number of employees assigned to existing job posts and reallocate excess employees to the S&A roster, or the impact of that initiative. JA 21. The union claimed that the impact of the initiative was much greater than *de minimis* and was reasonably forseeable at the time of its nationwide implementation. JA 22. The union asked that the arbitrator find that BOP violated the CBA and § 7116 of the Statute. The union sought a *status quo ante* remedy, including an order directing BOP to negotiate, upon request, over the impact and implementation of its initiative. JA 22-23.

The agency argued that it had no duty to negotiate with the union with respect to its mission-critical posts initiative because that matter was covered by Article 18(d) of the CBA. JA 23. The agency also stated that any "*status quo ante*" remedy would be unduly disruptive because "it now lacks the manpower to return to the *status quo ante*." JA 25. Further, the agency argued that because the union had not offered any evidence that bargaining unit employees were harmed financially, any award compensating them would be improper. BOP requested that the union's grievance be denied. *Id*.

After a hearing and the filing of post-hearing briefs, the arbitrator issued his award sustaining the grievance. JA 15-30. He held that "BOP violated Article 3, Sections (c) and (d); Article 4; and Article 7, section (b) of the parties' Master Agreement and committed unfair labor practices in violation of 5 U.S.C. 7116(a)(1) and (5)." JA 29.

The arbitrator rejected the agency's "covered-by" defense as "specious." JA 26. On this account he found the following:

> Article 18(d) deals exclusively with detailed negotiated procedures to fill correctional officers' posts once management decides what posts it wants to fill. It deals with procedures only, not with the impact of a nationwide change in staffing patterns launched in 2005 to save costs which affected, and continues to affect, virtually every bargaining unit employee.

Id.

The Arbitrator held that BOP had a duty to enter into impact and implementation negotiations because the impact of the initiative was "reasonably forseeable" at the time of its implementation and "the impact was greater than *de minimis* by a wide margin." JA 27. The arbitrator found that under the program: (1) "[T]he number of correctional officers' duty stations posts from which they oversee and guard some of this country's most violent criminals were eliminated or modified;" (2) "Some of these duties and responsibilities were given to non-custody personnel, who, though trained, do not normally do this work;" and (3) it was reasonably forseeable that prison inmates would be more inclined to violence because of the reduced number of correction officers in their area. JA 27-28.

Although the arbitrator granted the grievance, he did not grant *status quo ante* relief. JA 29. He found that such relief would be unduly disruptive to the agency, and would usurp management's rights to determine what jobs it wishes to fill. The arbitrator reasoned that because of those rights, and because management is familiar with the agency's cost-saving desires, management could, under the procedures found in Article 18(d), simply put on the roster those posts that it knows will accomplish budgetary goals. Thus, the arbitrator found that this form of *status quo ante* relief would "accomplish nothing." *Id*.

The arbitrator nevertheless ordered that BOP negotiate in good faith over the impact and implementation of the mission-critical roster initiative upon the union's

request. He ordered further that any agreement reached by the parties shall be made retroactive to February 2005, where appropriate, and include back pay and/or leave restoration for employees who demonstrate that they were adversely affected by BOP's violation of "law and contract." JA 29-30.[4]

C. The Authority's Decision

Pursuant to § 7122 of the Statute, BOP filed exceptions to the arbitrator's award with the Authority. JA 309. The agency contended that the award was contrary to law because the arbitrator did not find that its mission-critical roster initiative was covered by Article 18(d). JA 311. The union filed an opposition to BOP's exceptions. *Id*.

Consistent with its well-established precedent, the Authority reviewed the question of law raised by the agency *de novo*. *Id*. In applying a standard of *de novo* review, the Authority deferred to the arbitrator's underlying factual findings, also in accordance with its precedent. JA 311-12. The Authority determined that the arbitrator's legal conclusions were consistent with the applicable standard of law. JA 312-13.

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[4] The agency's description of the arbitrator's remedy is incomplete. PB at 13. While the agency correctly states that the arbitrator ordered impact and implementation bargaining, that was not the only remedy he directed. As explained above, he also ordered the parties to bargain over retroactive (*i.e.*, make whole) relief.

The Authority found that the arbitrator's rejection of the agency's "covered by" defense was reasonable and supported by the record. JA 312. Also, the Authority noted that the agency's argument in this case was similar to its argument in another case dealing with the same mission-critical roster program. *Id*. As in *U.S. Dep't of Justice, Fed. Bureau of Prisons*, 63 F.L.R.A. 132, 136 (2009), here the Authority rejected the agency's defense that the impact of the mission-critical roster program is expressly covered by, or inseparably bound up with, the procedures in Article 18 to fill in quarterly rosters. JA 312-13. The Authority thus concluded that the arbitrator's award was not deficient as contrary to law, and that the agency's failure to bargain over the impact and implementation of the initiative was a violation of §§ 7116(a)(1) and (5) of the Statute and the parties' CBA. JA 313.

The Authority also denied the agency's exceptions because the agency did not except to both of the grounds that the arbitrator had relied on in his award. *Id*. Specifically, the Authority noted that the arbitrator sustained the union's grievance because the agency's refusal to enter into impact and implementation negotiations over the mission-critical roster program not only had violated § 7116(a)(1) and (5) of the Statute, but also the CBA. *Id.* In particular, the Authority noted that Article 3(d) of the CBA, which makes no reference to the Statute, stands on its own as a provision that mandates bargaining over all proposed national policy issuances

affecting or changing personnel policies, practices, or conditions of employment. JA 313-14. Thus, the Authority found that the arbitrator's determination, that the agency violated Article 3(d), established a separate and independent ground from which the agency did not except. *Id.* The Authority then denied all the agency's exceptions and upheld the arbitrator's award. An appeal to this Court followed.

STANDARD OF REVIEW

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

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *NFFE, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations

omitted). At issue in this case is whether BOP has an obligation to bargain over the impact and implementation of its mission-critical roster initiative. In that regard, "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Patent Office Prof'l Ass'n* v. *FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995) (quoting *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)).

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *NTEU v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE, Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

Here, the Authority's decision is consistent with its statutory mandate and legislative intent. The Authority's decision is thus not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Authority's decision should be affirmed and the agency's petition should be denied under the standard of review.

SUMMARY OF ARGUMENT

The Authority properly affirmed, as consistent with law, the arbitrator's decision finding that the agency's refusal to negotiate over the impact and implementation of its new cost-saving mission-critical roster initiative violated both the Statute and the CBA. The Authority, correctly deferring to the arbitrator's fact-finding, reasoned that the adverse impact to bargaining-unit employees resulting from the initiative was much greater than *de minimis* and was not "covered by" the CBA. In addition, the Authority, in accordance with its precedent, properly denied the agency's exceptions to the arbitrator's award because the agency failed to except to both of the award's separate and independent grounds. The Authority's straightforward analysis of the applicable law and the facts of this case is sound, and the agency's contentions to the contrary fail to undermine the Authority's determination.

The agency's principle argument that it had no duty to bargain over the impact and implementation of its initiative because it was covered by Article 18 of the CBA is without merit. Not only is the agency's initiative not expressly contained in Article 18 (as the agency concedes), but the initiative is not inseparably bound up with that Article. And although Article 18(d) and the initiative are tangentially related because both have the word "roster" in common,

the initiative is not plainly an aspect of Article 18. While Article 18(d) sets forth procedures detailing how available work schedules will be posted on a quarterly-year basis and how employees bid for assignment preferences, it does not set forth any criteria which the agency uses in deciding what specific posts will appear on the initial posted work-schedule sheet. Instead, the agency's mission-critical roster initiative directed, and did not merely give guidance to, its management to meet budgetary goals by eliminating certain positions that were not "mission-critical" and placing more posts on the "Sick and Annual Roster" (for relief or floater positions).

Further, the Authority properly recognized that the arbitrator based his award on the following two separate and independent grounds: (1) the agency violated the Statute by refusing to engage in impact and implementation negotiations; **and** (2) the agency violated Article 3(d) of the CBA that sets forth a contractual duty to bargain over proposed national policy issuances that affect conditions of employment. Because the agency excepted only to the statutory ground of the arbitrator's award, but failed to except to the contractual ground as well, the Authority, consistent with its precedent, properly denied the agency's exceptions on this basis.

ARGUMENT

I. THE AUTHORITY PROPERLY UPHELD, AS CONSISTENT WITH LAW, THE ARBITRATOR'S AWARD FINDING THAT THE AGENCY'S REFUSAL TO NEGOTIATE OVER THE IMPACT AND IMPLEMENTATION OF ITS NATIONWIDE MISSION-CRITICAL INITIATIVE VIOLATED THE STATUTE AND THE CBA.

A. Governing Legal Principle

The Statute, 5 U.S.C. §§ 7101-7135, gives most federal employees the right to organize and bargain collectively, and requires agencies to negotiate with the recognized bargaining representative of their employees regarding "conditions of employment." *See* 5 U.S.C. §§ 7102, 7103(a)(2) and (12). "Conditions of employment" are defined, in part, as "personnel policies, practices, and matters … affecting working conditions." 5 U.S.C. § 7103(a)(14). Further, although the agency does not have the duty to bargain over its "management rights" as defined in 5 U.S.C. § 7106(a), such as determining its organization, number of employees, the assignment of work, and personnel by which agency operations shall be conducted, the agency is required to negotiate about the "impact and implementation" of those rights. *See* 5 U.S.C. § 7106(b)(2), (3); *see also Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992) ("*Marine Corps*"). When an agency refuses to negotiate over the impact and implementation of proposed personnel policies and practices that affect working

conditions, the agency may have commited an unfair labor practice. *Id*.; 5 U.S.C. § 7116(a)(5).

However, the agency has no duty to enter into impact and implementation negotiations if the proposed personnel policies and practices have already been negotiated and are covered in a collective bargaining agreement. *See U.S. Dep't of Health and Human Serv. Admin., Soc. Sec. Admin. Balt. Md.*, 47 F.L.R.A. 1004, 1013, 1015-1018 (1993) (*SSA, Balt.*). Accordingly, this principle, known as the "covered-by" doctrine operates as a defense to an agency's alleged unlawful refusal to bargain under §7116(a)(5) of the Statute. *See U.S. Dep't of Health and Human Serv., Admin., Soc. Sec. Admin. Headquarters, Balt., Md.*, 57 F.L.R.A. 459, 460 (2001). *Cf. NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 836 (D.C. Cir. 1993) ("[u]nless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract").

In 1993, the Authority devised a two-prong test to determine whether a disputed matter is covered by the contract, taking into account the statutory considerations for this doctrine observed by this Court in *Marine Corp.*, 962 F.2d at 59-61; *SSA, Balt.*, 47 F.L.R.A. at 1016-18. The Authority stated that it would first decide whether a matter on which a party seeks to bargain is covered by an existing agreement by considering whether the matter is "expressly contained" in the agreement. *Id*. at 1018. As to this first prong of the "covered-by" test, the

Authority said that it "will not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute." *Id*. If the disputed matter cannot be said to be "expressly contained" in the agreement, the Authority then continues to the second prong of the test. To have a successful defense under this prong, the matter to be bargained must be "inseparably bound up with," and thus "plainly an aspect of … a subject expressly covered by the contract." *Id*., (*citing C & S Industries, Inc.*, 158 NLRB 454, 459 (1966), *cited with approval in Marine Corps*, 962 F.2d at 60).

To determine whether the matter that a party seeks to negotiate is an inseparable aspect of the contract, the Authority will examine the circumstances of the case to see if "the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances." *Id*. at 1019. It is important to note, for purposes of this case, that "[i]f the subject matter in dispute is only tangentially related to the provisions of the agreement and, … it was not a subject that should have been contemplated as within the intended scope of the provision," the "covered-by" defense will fail and there will be an obligation to bargain. *Id*.

B. The Authority reasonably concluded that the agency's mission-critical post directive was not covered by the CBA.

The agency maintains, as it did before the FLRA, that the mission-critical initiative is "covered by" Article 18 of the CBA, and thus it had no duty to bargain over its impact and implementation. PB at 16-30. The agency appears to concede that the first prong of *SSA, Balt.* cannot be satisfied here because Article 18, titled "Hours of Work," does not explicitly address management's reallocation of posts under the initiative. PB at 15-16; 19-21. The agency nevertheless maintains that the second prong of *SSA, Balt*. applies because the subject matter of the mission-critical program is inseparably bound up with, and plainly an aspect of, the Article 18 roster procedures. *See* PB at 21. The agency is mistaken.

The agency's nationwide mission-critical post directive is not covered by, nor was it contemplated by, Article 18(d). The reasonable reader of that provision would perceive Article 18(d) as a set of procedures under which rosters are formulated by management and bargaining-unit employees alike. The second prong of the "covered by" doctrine contemplates a contract provision that is a broad umbrella under which narrower inseparable aspects may dwell. In other words, in the case at bar, a narrow procedural provision within a CBA cannot "cover" the broader subject of what is, in layman's terms, a reorganization of posts

fostered by management for cost savings.

Case precedent bears this out. For example, as in this case, in *U.S. Dep't of Homeland Sec., Customs and Border Prot., Washington, D.C.*, 63 F.L.R.A. 434 (2009), the Authority found that the directed reassignments of unit employees to supervisory positions (*i.e.*, to non-bargaining unit positions) was not "covered by" any provision in the parties' CBA. The Authority reasoned that the pertinent provision referencing reassignments applied solely to bargaining unit positions, given the limitations on bargaining over procedures for assigning employees to supervisory positions, and in light of the fact that the provision had never been applied to reassignments to supervisory positions. Thus, the Authority, finding that reassignment to non-bargaining positions was not inseparably bound up with, or an aspect of, reassignment to bargaining unit positions, concluded there was an obligation to bargain.

Further, where the CBA contains a broad provision that covers the disputed issue, the Authority has properly found the "covered by" defense applicable. For instance, in *NTEU v. FLRA*, 452 F.3d 793, 798 (D.C. Cir. 2006), the Court found "eminently reasonable" the Authority's decision that the proposal for an employee's leave-swapping program was already contained in or was an aspect of the parties' agreement that set forth the standard for determining who can receive leave when not all requests can be granted. The leave-swapping program was, of

course, subsumed in the negotiated leave-standard provision in the contract because a reasonable reader could conclude that such a broad standard settled the narrower employee-proposed program.

Similarly, in, *SSA, Balt*., the Authority concluded that a provision in the CBA entitled "Awards Information," which specifically provided for the disclosure of information relative to awards, including the distribution of cash awards, "covered" the narrower aspect of the union's proposal that the agency notify the union in writing about the availability and amount of performance award money. *SSA, Balt.*, 47 F.L.R.A. at 1019-20.

Likewise, in *Sacramento Air Logistics Center, McClellan Air Force Base, Ca.*, 47 F.L.R.A. 1249, 1252-53 (1993), the parties' agreement set forth a provision entitled "Performance Recognition" in which the parties agreed that the agency would recognize employees' performance and publicize awards. The Authority held that although the specific proposed award provision was not expressly in the CBA, the agency did not have a duty to bargain. The Authority reasoned that the union's proposal regarding the presentation, and posting of information regarding sustained superior performance awards was plainly an aspect of the broader award provision already negotiated and placed in the CBA.

Finally, in *Marine Corp.*, this Court found that a broad provision in a CBA relating to "detailing" employees, providing such specifics as the reasons, the

procedures, and duration of details, and grievance procedures arising from management decisions to detail employees, covered the union's proposal regarding the detail of four employees. "Put another way, the [CBA] plainly authorized the Marine Corps to detail employees … in the manner that it did." *Marine Corps*, 962 F.2d at 62. Here, by contrast, an initiative effecting a nationwide reorganization of positions to be included in rosters cannot be "covered by" a contract provision that merely addresses procedures for posting rosters and allowing employees to bid on posts.

Nonetheless, the agency attempts to analogize this case to *Marine Corps*. (PB at 27-28). In *Marine Corps*, the "detail" provision of the CBA was clearly the authority for the agency's detailing of the four employees. By contrast, the mission-critical roster initiative has only a tangential relationship to Article 18. The initiative and Article 18 do have the word "roster" in common. However, unlike in *Marine Corps*, it cannot be said here that Article 18 was the authority for the mission-critical initiative.

At the time the parties negotiated the scope of Article 18(d), they could not have contemplated that the agency would have to account for a budget shortfall and realign its positions nationwide before posting blank rosters. For this reason, the agency had an obligation to bargain over the initiative's impact and implementation. *See SSA, Balt.*, 47 F.L.R.A. at 1019 (subject not "covered by"

CBA if it should not have been contemplated as within the intended scope of the CBA provision).

Although the agency is correct in stating that Article 18 is about "an elaborate system for how available work schedules will be posted" and how employees put in their preferences for assignments, the agency is in error when it states that Article 18(d) pertains to "which posts will be listed on each quarterly roster." PB at 16, 22. There is nothing in Article 18 covering the initial selection by management of what posts will be placed on the quarterly blank roster. It is the mission-critical roster initiative, and not Article 18, that sets forth criteria for the employer to use in determining what posts should be on the blank roster.

And contrary to the agency's assertions (PB at 16-17, 26), Article 18 does not cover the warden's initial discretion to decide what posts to place in the blank roster and it does not purport to give wardens this authority. The agency's assertions that the mission-critical initiative did not affect the warden's authority to use Article 18(d) procedures and only provided "guidance" (PB 16, 24, 26) do not help its argument that Article 18(d) "covers" the initiative. Instead, they reflect a misapprehension of Article 18(d) and the "covered-by" doctrine. The only mention of the wardens' authority in Article 18(d) is in subsection (d)(6), and that concerns the wardens' final approval <u>after</u> the bidding process has occurred.

Even assuming, *arguendo*, that Article 18 governs the warden's initial

discretion to decide what posts go onto the blank roster for bidding, the initiative changed this discretion. The agency's attempts to characterize the mission-critical program only as "guidance" for wardens to choose the posts that they wish to fill (*see* PB at 6-7, 16, 24) must fail because the arbitrator correctly found otherwise based on the evidence presented. *See* JA 16-18, 26-28; 311-12. Indeed this factual finding is supported by substantial evidence and is conclusive. 5 U.S.C. § 7123(c); *NTEU v. FLRA*, 721 F.2d at 1405.

The arbitrator found that BOP Assistant Director Vanyur's detailed memorandum to Regional Directors setting forth the initiative contained "instructions" to eliminate certain posts and place them on the sick and annual leave roster. JA 16-18. He also found that the "guidance" in the memorandum for reduced/adjusted staffing in prison facilities suggested ways in which to accomplish the instructions; in some instances, the "guidance" definitively ordered Regional Directors/Wardens to eliminate specific types of positions such as "Intelligence/STG Officers/Criminal Investigators, Rear Deck Officers, Special Housing Unit (SKU) Property Officers …." JA 18. The Authority properly deferred to these fact-findings. *See NFFE, Local 1437*, 53 F.L.R.A. 1703, 1710 (1998). Moreover, the agency did not file exceptions to them.

The agency's argument (PB at 16, 24) that Article 18 does not contemplate that wardens will negotiate over the number of posts or what specific posts will be

identified on the roster makes the Authority's point that Article 18's procedural provisions have nothing to do with the agency's order to Regional Directors and wardens to eliminate posts and realign them on the rosters. Thus, again, Article 18 cannot be said to "cover" the initiative.

Further, this argument shows a misunderstanding of what the union sought to negotiate. The union sought impact and implementation bargaining over a new personnel policy that changed the conditions of work. And, specifically, the union did not seek negotiations over the number of posts or what specific posts would be identified on the roster. JA 21.

The agency's next argument, that Article 18 must cover the mission-critical initiative because the arbitrator did not order *status quo ante* relief as "it would accomplish nothing," also must fail. PB at 16-17; 25-26. Contrary to the agency's supposition that the arbitrator's explanation for not ordering *status quo ante* relief shows that Article 18(d) "covers" the subject matter of the initiative, the arbitrator's decision simply reflects that procedures for posting a roster are entirely different from, and not inseparably bound up with, management's choice of positions it wishes to fill, *i.e.*, the critical mission roster program.

While the agency correctly notes (PB at 25) that *status quo ante* relief is the normal remedy in an unfair labor practice ("ULP") case involving substantive bargaining, in the absence of special circumstances, *see, e.g., Dep't of Veterans*

Affairs Med. Ctr., Asheville, N.C., 51 F.L.R.A. 1572, 1580 n.13 (1996), where the bargaining obligation pertaining to a change in working conditions is limited to the impact and implementation of the decision, as here, the Authority applies criteria set forth in *Fed. Corr. Inst.* ("*FCI*"), 8 F.L.R.A. 604 (1982), to determine whether *status quo ante* relief is appropriate. In *FCI*, the Authority recognized that whether *status quo ante* relief is warranted must be determined on a case-by-case basis, carefully balancing the nature and circumstances of the particular violation against the degree of disruption in government operations that would be caused by such a remedy. *FCI*, 8 F.L.R.A. at 606. The arbitrator's decision for denying *status quo ante* relief was simply in accordance with this standard. JA 29. The arbitrator found that awarding such relief would be unduly disruptive to the agency. He also was cognizant of management's prerogative (pursuant to § 7106(a) of the Statute) to post the positions it decides to fill for employees' bids. And, most importantly, he recognized that the changes in staffing levels because of budgetary constraints were common knowledge to management because of the Vanyur Memorandum. *Id*. Thus, the arbitrator reasoned that ordering *status quo ante* relief would accomplish nothing because management still had rights to make assignments as it saw fit and could still use the procedures of Article 18(d) to post its choice of posts. The arbitrator found that the better remedy was to order impact and implementation negotiations upon a party's request and to award retroactive relief

to employees adversely affected, where appropriate, including back pay and/or leave restoration. *Id*.[5]

Finally, the agency maintains that the Authority's analysis was flawed because of its finding that the mission-critical initiative involved eliminated posts rather than realigned, renamed, or reallocated posts. PB at 29. The agency adds that the Authority compounded this error by relying on *U.S. Dep't of Justice, Fed. Bureau of Prisons*, 63 F.L.R.A. 132, 136 (2009) ("FBOP"). *Id*. This argument is but an exercise in semantics and reveals the weakness of the agency's position and/or a misunderstanding of the Authority's decision. Further, the agency seems to disagree with the arbitrator's fact findings, which are entitled to deference by the Authority. *NFFE, Local 1437*, 53 F.L.R.A. at 1710. And, it is important to note that the agency did not file exceptions with the Authority regarding the arbitrator's fact-findings.

The record before the arbitrator demonstrated, and the arbitrator found, that

[5] The agency's effort to support its position by stating that it has prevailed before FLRA Regional Directors in some local ULP grievances dealing with the mission-critical initiative is unpersuasive. PB at 26. The arbitrator found these local grievances to be distinguishable stating, "this dispute does not involve an isolated decision by a prison warden to change a post on his/her quarterly roster." JA 27. In other words, there is no indication that the local unions were attempting to bargain over the impact and implementation of the entire mission critical program. In any event, the Authority, as an adjudicatory body, "is not bound by prosecutorial decisions made in the processing of cases not before it." *SSA Balt.*, 39 F.L.R.A. 650, 655 (1991).

although there were no eliminated posts/positions in total numbers, specific types of posts/positions were, in fact, eliminated and reallocated to the S&A roster. *See* JA 16-18, 27.[6] Additionally, the Authority properly relied on *FBOP* because *FBOP* involved the same mission-critical initiative as well as Article 18(b). The only difference between this case and *FBOP* was that the grievance in *FBOP* largely concerned employees who occupied specialized positions through merit promotions and, because of the elimination of those positions, were forced to bid for positions on the quarterly rosters. Here, the union sought impact and implementation bargaining for all adversely affected union employees, including those employees in the *FBOP* case. JA 241, 295 (Tr. at 275, 487). Even if the employees in FBOP may not have been subjected to Article 18(d) procedures prior to the mission-critical initiative, all bargaining-unit employees' working conditions were affected by the initiative which in no event was "covered by" these procedures. Thus, as in *FBOP*, the agency here had a duty to negotiate as set forth in the Authority's decision and the arbitrator's award, and the agency's failure to do so violated the Statute and the CBA.

[6] Indeed, the Director of BOP, himself, acknowledged that posts were eliminated, which in turn put more people on S&A. JA 233 (Tr. 244).

C. The Impact of the Mission-Critical Post Program (*i.e.*, change in the employees' conditions of employment) Was Much Greater than *De Minimis.*

When an agency changes unit employees' conditions of employment by exercising a reserved management right, the substance of the decision is not itself subject to negotiation. *See Dep't of Health and Human Servs., Soc. Sec. Admin.*, 24 F.L.R.A. 403, 407-08 (1986). But, the agency has an obligation to bargain over the procedures to implement that decision and appropriate arrangements for unit employees adversely affected by that decision, if the resulting change has more than a *de minimis* effect on conditions of employment. *Id*. Here, the agency continues to argue that the mission-critical initiative did not effect a change in conditions of employment and that it did not have a duty to bargain. PB at 28. This is clearly wrong.

The arbitrator found that the record evidence demonstrated that the impact of the initiative on bargaining unit employees "was greater than *de minimis* by a wide margin." JA 27. In addition to the examples of the impact described by the union (JA 22) such as the use of non-custody staff to fill custody posts, the elimination of merit-filled positions with reassignment to S&A, and the obviously increased work-load, the arbitrator set forth the following other examples of the "reasonably forseeable impact" of the initiative:

> the likely situation where, once prison inmates figured out the number of correctional officers in their immediate area had been reduced, they would be more inclined to initiate attacks, gang related or otherwise, on each other or on the reduced staff. Clearly non-custody employees pressed into custody work would make a better target for an inmate than uniformed correctional officers who themselves are always at risk.

JA 27-28.

The arbitrator's fact finding in this regard was entitled to the Authority's deference, *NFFE, Local 1437*, 53 F.L.R.A. at 1710, and is conclusive in this Court because it is supported by substantial evidence. 5 U.S.C. § 7123(c); *NTEU v. FLRA*, 721 F.2d at 1405. Thus, again the agency abrogated its duty to bargain over this change in working conditions, and the Authority's decision finding violations of the Statute and the CBA was proper.

II. THE AUTHORITY PROPERLY DENIED ALL OF THE AGENCY'S EXCEPTIONS TO THE ARBITRATOR'S AWARD WHEN THE AGENCY FAILED TO EXCEPT TO ALL OF THE BASES FOR THE AWARD.

It has long been established that "when an arbitrator has based an award on separate and independent grounds, an appealing party must establish that all of the grounds are deficient to have the award found deficient." *OPEIU Local 268*, 54 F.L.R.A. 1154, 1158 (1998). Based on this tenet, the Authority properly denied the agency's exceptions on this basis.

The arbitrator articulated the grounds for his award as follows: "BOP violated Article 3, Sections (c) and (d); Article 4; and Article 7, Section (b) of the parties' Master Agreement and committed unfair labor practices in violation of 5 USC 7116(a)(1) and (5)." JA 30. As the Authority recognized, the plain meaning of this sentence is that the grounds for the award were a violation of the CBA **and** a violation of the Statute. As the Authority noted, the agency's exceptions addressed the statutory ground, but did not explicitly address the contractual ground. JA 313. The Authority found that Article 3, Section (c) and Articles 4 and 7 all contain language that "specifically references the parties' statutory duties." *Id*. However, the Authority found that Article 3, Section (d), which states a contractual duty to bargain over "[a]ll proposed national policy issuances" that affect conditions of employment, "stands on its own" and "makes no reference to any statutory bargaining obligation." JA 313-14, 315. Because the agency had not addressed this separate and independent ground, the Authority denied the exceptions. JA 314.

The agency argues that the Authority's ruling is erroneous because: (1) the only issue actually before the arbitrator was whether Article 18(d) covered the subject matter of the union's bargaining request; (2) the arbitrator did not "expressly" rely on a separate contractual basis for his determination; and (3) Article 3(d), as do Articles 3(c), 4, and 7, merely incorporates the bargaining

obligations in the Statute. PB 30-34. As explained below, these arguments lack merit.

The arbitrator stated the issues, to which the agency stipulated, as: "(1) Whether [BOP] violated 5 USC 7116 **or** the collective bargaining agreement by refusing to bargain over the impact and implementation of the mission critical rosters. (2) If so, what is the appropriate remedy?" JA 26 (emphasis added). In its brief, the agency now seeks to rewrite the issue as: Whether Article 18(d) excuses the agency from its statutory duty to bargain. The agency's argument attempts to convert its "covered by" defense into a ground for the award. In addition, the agency asserts that "had the Arbitrator correctly determined that the "covered by" defense applied, he would have found no duty to bargain – no matter what Article 3(c) or any other Article said." PB 32. This assertion ignores the fact that Article 3(d) is not qualified by a reference to the Statute, and, presumably, would not be subject to a "covered by" defense.

The agency's next argument is based on an unusual interpretation of the word "and" in the arbitrator's statement of his findings, which separates his contractual ground from his statutory ground. Instead of acknowledging that the word "and" customarily is used to keep separate ideas separate, the agency suggests "[t]hat syntax is more reasonably read to indicate that the contractual and statutory violations completely overlapped" and that the Authority's interpretation

to the contrary is a "strained reading." PB 32. This argument, too, should be rejected.

Finally, the agency argues that Article 3(d) of the CBA is not a separate and independent ground because some of the words and phrases in it can be found somewhere in the Statute. PB 33. But, that is to be expected, because both the Statute and the CBA address collective bargaining. However, the agency points to nothing in the Statute that explicitly addresses the crux of Article 3(d), that is, a separate contractual duty to bargain over **all** national policy issuances, such as the mission-critical rosters initiative at issue, that affect conditions of employment.[7] This argument merits the same fate as the previous two. Thus, the Authority properly denied all of the exceptions because the agency did not except to the arbitrator's finding that the agency violated its contractual duty.

CONCLUSION

The petition for review should be denied.

[7] Because this requirement is not qualified by a reference to the Statute, presumably, it would not be subject to a "covered by" defense.

Respectfully submitted,

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December 7, 2010

D.C.Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 7,854 words excluding exempt material.

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

U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, WASHINGTON, D.C., Petitioner,	)	
v.	)	No. 10-1089
FEDERAL LABOR RELATIONS AUTHORITY, Respondent, and	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL OF PRISON LOCALS, COUNCIL 33, Intervenor.	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority, have been filed with the Court and served this day, by way of the ECF filing system, and by mail, upon the following:

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Relevant Portions of the Federal Service Labor-Management Relations Statute
5 U.S.C. §§ 7101-7135

TABLE OF CONTENTS

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(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;

§ 7106. Management rights

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

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

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections forappointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

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

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

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

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

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

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

§ 7123. Judicial review; enforcement

(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.