66 FLRA No. 165

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-NG-3073

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

August 22, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of one provision disapproved by a representative of the Secretary of the United States Department of Homeland Security (DHS) under § 7114(c) of the Statute. DHS filed a statement of position (SOP), the Union filed a response (response), and DHS filed a reply (reply).[1]

For the reasons that follow, we find that DHS has not demonstrated that the provision is contrary to law, and we order DHS to rescind its disapproval.

II. Background

The Union and the DHS, U.S. Customs and Border Protection (CBP) reached agreement on a new term collective bargaining agreement. *See* Record of Post-Petition Conference (Record) at 1. On agency-head review under § 7114(c) of the Statute, DHS disapproved the term agreement. *See id.* Subsequently, the parties agreed to sever the provision disputed here – Article 22, Section 2 – from the rest of the term agreement, and DHS approved the term agreement without the provision. *See id.* The Union then filed this negotiability appeal.

III. The Provision

A. Wording

An employee being interviewed by a representative of the Agency (e.g., [DHS] Office of Inspector General) in connection with either a criminal or non-criminal matter has certain entitlements/rights regardless of who is conducting the interview.

Petition for Review (Petition) at 3-4.

B. Meaning

The parties agree that the provision has the meaning set forth in paragraphs 11 and 12 of the Union's petition. *See* Record at 2. As relevant here, in those paragraphs, the Union asserts that the provision would ensure that bargaining-unit employees receive "the full negotiated protections of Article 22" of the term agreement whenever any CBP representative – including a representative of DHS's Office of Inspector General (DHS-OIG) – interviews them regarding any criminal or noncriminal matter.[2] Petition at 4-5.

C. Positions of the Parties

1. DHS

DHS argues that "the procedures to be followed by [DHS-OIG] in conducting its investigations" (IG-investigation procedures) are nonnegotiable. SOP at 3. According to DHS, the United States Court of Appeals for the Fourth Circuit's decision in *U.S. Nuclear Regulatory Commission, Washington, D.C. v. FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*), is "directly on point" in this regard. SOP at 4. Quoting that decision, DHS asserts that "'the Inspector General in each agency is entrusted with the responsibility of auditing and investigating the agency, a function which may be exercised in the judgment of the Inspector General as

[1] We note that DHS filed its reply within fifteen days of the date on which the Secretary of DHS's designee received the Union's response. *See* DHS Reply, Attach., Declaration at 1. Therefore, the reply is timely. *See* 5 C.F.R. § 2424.26(b); *AFGE, Local 520*, 60 FLRA 615, 615-16 (2005). In addition, the Union requested leave to file – and did file – a supplemental submission. As noted further below, we assume, without deciding, that this submission is properly before us.

[2] The pertinent wording of Article 22 is set forth in the appendix to this decision. We note that only the provision – and not the rest of Article 22 – is disputed in this case.

each deems it 'necessary or desirable.'"" *Id.* at 5 (quoting *NRC*, 25 F.3d at 234 (quoting 5 U.S.C. App. 3 § 6(a)(2))). DHS claims that DHS-OIG is therefore "'shielded with independence from agency interference' and [that] collective bargaining affecting [DHS-]OIG directly interferes with the statutory independence granted to" Inspectors General (IGs) under the Inspector General Act of 1978 (the IG Act). *Id.* (quoting *NRC*, 25 F.3d at 234).

DHS concedes that, in *NASA v. FLRA*, 527 U.S. 229 (1999) (*NASA*), the United States Supreme Court held that the right to representation set forth in § 7114(a)(2)(B) of the Statute (the *Weingarten* right) applies to OIG investigations. SOP at 5. But DHS contends that *NASA* did not overturn *NRC* and did not hold that IG-investigation procedures are negotiable. *Id.* Quoting Article 22, Sections 3 and 5 of the parties' agreement, DHS states that "[t]hese procedures, and the others which follow, extend far beyond" the *Weingarten* right "and amount to interference with the OIG's statutory right to conduct independent investigations." *Id.* at 6. According to DHS, the IG Act "carefully defines and preserves the independence of [IGs], both in organization and function," and "[b]argaining over the auditing and investigating functions of the [IGs] allows parties to collective bargaining to compromise, limit, and interfere with the independent status of the [IG], which is clearly inconsistent with the IG Act." *Id.* at 4. Because the provision extends the procedures of Article 22 to DHS-OIG investigations, DHS claims that the provision is contrary to the IG Act.

In its reply, DHS adds that it disagrees with the Union's assertion that the provision simply "flesh[es] out" the *Weingarten* right, and claims that the provision "extend[s] far beyond" that right. Reply at 3; *see also id.* at 5 (asserting that the Union "unfairly equates bargaining unit employees' statutory rights with the contractual provisions that it negotiated with CBP," when the provision extends beyond the *Weingarten* right). DHS also argues that *NTEU*, 55 FLRA 1174 (1999) (*NTEU II*), cited by the Union, is distinguishable from this case and does not support a conclusion that the provision is consistent with law. Reply at 8-9. In addition, DHS states that it "does not agree that [its] OIG performs investigations of CBP employees 'on behalf of, and for the benefit of, CBP.'" *Id.* at 4 n.4. In this regard, DHS asserts that it "has maintained throughout this process that . . . DHS[-]OIG is an independent entity created by a government-wide statute to be just that – independent." *Id.* But DHS also asserts that the Union's characterization of DHS-OIG as generally performing investigations on behalf of CBP is "beside the point" because "the issue before the Authority is whether CBP and [the Union] may agree to contractually bind . . . [DHS-]OIG to various procedures from the outset." *Id.* In this regard, DHS states that "the question before the Authority is one of law, not fact." *Id.* Further, DHS argues that the OIG cannot be bound to a contract to which it is not a party. *See id.* at 9 (citing *Motorsport Eng'g, Inc. v. Maserati Spa*, 316 F.3d 26, 29 (1st Cir. 2002) (*Motorsport*); *Rockney v. Blohorn*, 877 F.2d 637, 644 (8th Cir. 1989) (*Rockney*); and *Greyhound Lines, Inc. v. Bender*, 595 F. Supp. 1209, 1226 (D.C. Cir. 1984) (*Greyhound*)). Finally, DHS notes that the Union has requested severance of the provision, and claims that: severance is inconsistent with the parties' agreement to sever the provision from the rest of the term agreement; and if the Authority grants the severance request, then it should "order" that the parties' agreement to sever the provision from the term agreement "is null and void." *Id.* at 10.

2. Union

The Union contends that the provision is not inconsistent with the IG Act. Regarding DHS's reliance on *NRC*, the Union asserts that *NRC* is not persuasive authority because it predates, and is "inconsistent with the . . . reasoning in," *NASA*. Response at 10. The Union acknowledges that *NASA* involved the statutory *Weingarten* right, not the right to bargain, but claims that *NASA*'s "analysis applies with equal force here" because, "[l]ike *Weingarten* rights, the duty to bargain in good faith is grounded in the Statute." *Id.* at 6 (citing 5 U.S.C. § 7117). The Union contends that the Court found in *NASA* that the statutory *Weingarten* right "did not infringe on the IG's independence," and states that because the contractual rights referred to in the provision "simply flesh out" the *Weingarten* right, "there is no greater reason [here] than in *NASA* to fear infringement of the IG's independence." *Id.* at 8. The Union also contends that "the Authority should not differentiate between the contractual right at issue here" and the statutory *Weingarten* right because "the OIG is equally the representative of the employer in both contexts." *Id.* at 9. Specifically, the Union asserts that DHS "does not deny that [DHS-]OIG representatives perform investigations of CBP employees on behalf of, and for the benefit of, CBP." *Id.* at 4. Additionally, the Union claims that because *NRC* is inconsistent with the reasoning in *NASA*, the Authority's underlying decision in that case – *NTEU*, 47 FLRA 370 (1993) (*NTEU*), *enforcement denied*, *NRC*, 25 F.3d 229 –"remains good law." Response at 5. And, according to the Union, in both *NTEU* and *NTEU II*, the Authority "definitively rejected a per se rule that any procedural safeguards applicable to the OIG that are negotiated to implement the [*Weingarten* right] are contrary to law." *Id.* at 9. Further, the Union argues that the provision advances the policies that underlie the *Weingarten* right. *Id.* at 6.

Finally, the Union requests severance of the provision. Specifically, the Union requests that the Authority consider the provision "both with and without

the parenthetical, '(e.g., [DHS] Office of Inspector General).'" Record at 2; *see also* Response at 11-13.

D. Analysis and Conclusions

The parties' arguments in this case present two substantive issues: (1) Has DHS demonstrated that the IG Act bars agreements concerning all IG-investigation procedures, regardless of their nature?; and (2) If not, then has DHS demonstrated that the provision is contrary to any specific terms of the IG Act? We answer these two questions separately below.

1. DHS has not demonstrated that the IG Act bars all agreements concerning all IG-investigation procedures.

In *NTEU*, the Authority addressed the negotiability of certain proposals that applied to criminal and noncriminal investigatory interviews – including those conducted by the agency's OIG – and were intended to "codify and supplement" employees' *Weingarten* right. 47 FLRA at 377. The Authority stated that it would not find proposals outside the duty to bargain "merely because the[y] . . . concern[] the conduct of IG investigations under the IG Act." *Id.* at 378. The Authority found that, instead, proposals concerning IG-investigation procedures "will be found nonnegotiable [only] if they are inconsistent with the IG Act or are nonnegotiable on other grounds." *Id.*

In *NRC*, the Court of Appeals for the Fourth Circuit reversed the Authority's decision in *NTEU*. The court assessed the provisions of the IG Act and found that "[t]he bulk of [those] provisions are . . . devoted to establishing the independence of the [IGs] from the agencies that they oversee." *NRC*, 25 F.3d at 233. According to the court, proposals concerning IG-investigation procedures "are not appropriately the subject of bargaining," because to allow such bargaining "would impinge on the statutory independence of the IG." *Id.* at 234. Specifically, the court stated that "if we were to interpret the [Statute] to require the [agency] to bargain over rights and procedures for investigatory interviews conducted by the [IG], we would indirectly be authorizing the parties to collective bargaining to compromise, limit, and interfere with the independent status of the [IG] under the [IG Act]." *Id.* at 235. Thus, the court found that parties may not negotiate over proposals concerning IG-investigation procedures. *Id.* at 236.

The Authority has not previously expressly addressed whether it would adopt the reasoning of *NRC*.[3] The issue of whether the Authority should do so is squarely presented here. For the following reasons, to the extent that *NRC* holds that parties may not bargain over *any* IG-investigation procedures, regardless of their particular terms, we respectfully disagree.

After *NRC*, in *Headquarters NASA Washington, D.C.*, 50 FLRA 601 (1995) (*NASA HQ*), the Authority held that an OIG investigator is a "representative of the agency" for purposes of investigatory interviews under § 7114(a)(2)(B) of the Statute. 50 FLRA at 602. While acknowledging that the IG Act gives OIGs "a degree of independence" from their own parent agencies, the Authority found that "the text of the IG Act establishes that the IG plays an integral role in assisting the agency and its subcomponent offices in meeting the agency's objectives."[4] *Id.* at 617. In this regard, the Authority stated that the IG's activities "support, rather than threaten, broader agency interests and make the IG a participant, with other agency components, in meeting various statutory obligations, including the agency's labor relations obligations under the Statute." *Id.* Quoting a decision of the United States Court of Appeals for the Third Circuit, the Authority stated that it was "unwilling . . . 'to find a partial, implied repeal of § 7114(a)(2)(B) based solely on Congress' decision in 1978 to authorize the creation of [IG] offices in a number of federal agencies.'" *Id.* at 619 (quoting *Def. Criminal Investigative Service (DCIS), Dep't of Def. (DOD) v. FLRA* 855 F.2d 93, 100 (3d Cir. 1988) (*DCIS*)). The Authority concluded that the IG Act had "no inconsistency with the Statute in general, or § 7114(a)(2)(B) in particular." *Id.* at 617.

On appeal, the United States Court of Appeals for the Eleventh Circuit upheld the Authority's decision. *See FLRA v. NASA*, 120 F.3d 1208 (11th Cir. 1997). The court acknowledged that "Congress believed it necessary to grant OIGs a significant degree of independence from the agencies they were charged with investigating." *Id.*

[3] We note that in *NTEU II*, the Authority ordered an agency to rescind its disapproval of a contract provision similar to the one at issue here. 55 FLRA at 1183-84, 1187. There, an administrative law judge (ALJ) of the Authority made recommended findings (adopted by the Authority) regarding the meaning of the provision, and concluded that the provision "recognize[d] no specific rights" for unit employees, *id.* at 1183 (quoting ALJ), but merely was a "preamble to rights set forth in other parts" of the contract article in which it was included, *id.* at 1184. The Authority did not address the reasoning of *NRC*.

[4] We note that, in appropriate circumstances, the Authority has found that even individuals employed *outside* their own parent agencies may be agency representatives for purposes of conducting investigatory interviews. *See, e.g., NTEU*, 66 FLRA 506 (2012), *pet. for review filed sub nom. NTEU v. FLRA*, No. 12-1199 (D.C. Cir.) (Office of Personnel Management investigators were agency representatives with regard to investigations of some, but not all, employees); *Pension Benefit Guar. Corp. Wash., D.C.*, 62 FLRA 219 (2007) (Chairman Cabaniss dissenting) (outside contractors were agency representatives).

at 1214. Specifically, the court stated that Congress believed "such independence was necessary to prevent agency managers from covering up wrongdoing within their agencies," and that, "[i]n light of the potentially conflicting agendas of agency management and [IGs], Congress created the safeguards necessary to ensure that [IGs] could conduct their investigations without interference from agency management personnel." *Id.* Despite this significant degree of independence, the court found "nothing in the text or legislative history of the IG Act . . . to justify exempting OIG investigators from compliance with the federal *Weingarten* provision." *Id.* In this regard, the court stated that "[n]o provision of the IG Act suggests that Congress intended to excuse OIG investigators from honoring otherwise applicable federal statutes." *Id.* Thus, the court "refuse[d] to read the IG Act to have impliedly repealed" § 7114(a)(2)(B) of the Statute. *Id.* at 1215. In addition, the court stated that "[i]n conducting investigations within the agency, [the OIG] serves the interest of [the agency] by soliciting information of possible misconduct committed by . . . employees," *id.* at 1216, and that "the Authority's order directing [the agency] to order [the OIG] to comply with" § 7114(a)(2)(B) "d[id] not intrude on the independence of" the OIG, *id.* at 1217. According to the court, "the OIG need only have enough independence from agency management so that it can effectively discover and cure abuses and inefficiency within the agency," and "[r]equiring agency management to order the OIG to comply with a congressional directive does not . . . intrude on the statutory independence of the OIG." *Id.* at 1217.

The United States Supreme Court affirmed. *See NASA*, 527 U.S. 229. Like the Authority and the Eleventh Circuit, the Court acknowledged that Congress intended OIGs to "enjoy a great deal of autonomy," including the authority under § 3(a) of the IG Act to "initiate and conduct investigations and audits without interference from the agency head." *Id.* at 230. But the Court also found that "management-prompted investigations are not rare." *Id.* at 241. In this regard, the Court stated that "not all OIG examinations subject to § 7114(a)(2)(B) will implicate an actual or apparent conflict of interest with the rest of the agency; and in many cases we can expect honest cooperation between an OIG and management-level agency personnel." *Id.* at 242. The Court further stated that the need for cooperation between OIGs and management "becomes more obvious when the practical operation of OIG interviews and § 7114(a)(2)(B) rights are considered." *Id.* In particular, the Court found that the IG Act limits IGs' authority in some ways – such as not giving them the authority to subpoena witnesses or to discipline employees – and determined that "[s]uch limitations . . . enhance the likelihood and importance of cooperation between the agency and its OIG." *Id.* Further, the Court stated that despite OIGs' authority to initiate investigations and audits without interference from the agency head, "those characteristics do not make [the agency's] OIG any less a representative of [the agency] when it investigates a[n] [agency] employee." *Id.* at 241. In this connection, the Court stated that, "unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the [IG Act], is performed with regard to, and on behalf of, the particular agency in which it is stationed." *Id.* at 240. Consequently, the Court found that "[a]s far as the [IG Act] is concerned, [the agency's OIG] investigators [were] employed by, act[ed] on behalf of, and operate[d] for the benefit of [the agency]," *id.* at 241, and that the agency's IG investigators were "unquestionably 'representatives' of [the agency] when acting within the scope of their employment," *id.* at 240. Finally, the Court noted that "representation is not the equivalent of obstruction," and that "[i]n many cases the participation of a union representative will facilitate the factfinding process and a fair resolution of an agency investigation– or at least Congress must have thought so." *Id.* at 245.

Based on the foregoing, the Court found that the *Weingarten* right set forth in § 7114(a)(2)(B) of the Statute does not conflict with the IG Act. *Id.* at 242-43. In other words, the Supreme Court held that, regardless of IGs' statutory authority to conduct independent investigations, that independence is not unfettered and may be limited by rights set forth in other laws. *Id.*

We acknowledge that the statutory provision involved in *NASA* was § 7114(a)(2)(B) of the Statute, which is not at issue here. We also acknowledge that the Supreme Court did not resolve whether it would conflict with the IG Act to require bargaining over IG-investigation procedures. *See id.* at 244 n.8. However, for the following reasons, we find no basis in the Statute or the IG Act for reaching the broad conclusion urged by DHS here: that *all* such procedures, regardless of their particular terms, *necessarily* conflict with the IG Act.

We begin with the plain wording of the Statute. Section 7102(2) expressly provides employees with the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under" the Statute. 5 U.S.C. § 7102(2). Section 7114(a)(1) expressly provides, in pertinent part, that exclusive representatives are "entitled to . . . negotiate collective bargaining agreements covering[] all employees" in the bargaining unit that they represent. And, in turn, § 7114(a)(4) expressly obligates agencies and exclusive representatives to "negotiate in good faith for the purposes of arriving at a collective bargaining agreement."

There is no indication in the Statute that the bargaining rights and obligations set forth in § 7114(a)(1)

and (4) are less significant, or should be accorded any less weight, than the *Weingarten* right set forth in § 7114(a)(2)(B) – which is part of the very same section of the Statute. In fact, in setting out the congressional findings underlying the Statute, § 7101(a) states, in pertinent part:

> The Congress finds that . . . experience in both private and public employment indicates that the statutory protection of the right of employees to . . . bargain collectively . . . safeguards the public interest, . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment[.] . . . Therefore, . . . collective bargaining in the civil service [is] in the public interest.

5 U.S.C. § 7101(a). Put simply, one of the primary purposes that Congress had in enacting the Statute was to protect the right to bargain collectively.

This right is not unlimited. For example, agencies are obligated to bargain over a matter only if it is a "condition[] of employment," as defined in § 7103(a)(14), and only to the extent that the matter is consistent with "Federal law[,] . . . Government-wide rule or regulation," and agency-wide rules or regulations for which there is a "compelling need," 5 U.S.C. § 7117(a)(2); *see also Library of Cong. v. FLRA*, 699 F.2d 1280, 1284 & n.16 (D.C. Cir. 1983) (summarizing the exceptions to the duty to bargain) (*Library*). If parties bargain and reach an agreement that is contrary to the Statute or "any other applicable law, rule, or regulation," then the head of the agency may disapprove it within thirty days from the date on which the agreement is executed. 5 U.S.C. § 7114(c)(2). And if the agency head does not timely disapprove the agreement, then the agreement takes effect "subject to the provisions [of the Statute] and any other applicable law, rule, or regulation." *Id.* § 7114(c)(3).

But "Congress manifestly established a generalized obligation on an agency to bargain with the exclusive representative of the agency's employees," and "[t]he statutory framework . . . may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions." *Library*, 699 F.2d at 1285. That Congress listed specific exclusions from the duty to bargain indicates that we should be cautious not to infer additional ones. *See Horner v. Andrzjewski*, 811 F.2d 571, 575 (Fed. Cir. 1987) ("[A]s a general rule of statutory construction, the expression of one exception indicates that no other exceptions apply."); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 47.23, at 418 (7th ed. 2007) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically included."); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

Nothing in the plain wording of the Statute indicates that IG-investigation procedures are always exempted from the statutory duty to bargain or, if agreed upon, are always unlawful.[5] In fact, the Statute does not mention IG investigations at all. Further, Congress enacted the Statute only one day after it enacted the IG Act. *See NASA*, 527 U.S. at 229. Presumably, it was aware that the Act did not expressly preclude bargaining over IG-investigation procedures. *Cf. Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-99 (1979) (presuming Congress was aware of interpretations of statute after which new statute was modeled). Yet Congress did not give any indication in the Statute that IG-investigation procedures should receive special treatment and be excluded from the scope of bargaining. That fact is significant.

With regard to the terms of the IG Act, when Congress has intended laws outside the Statute to completely preclude bargaining over subject matters, it has made that intent clear, either through statutory text or legislative history. *See Int'l Ass'n of Machinists & Aerospace Workers, Franklin Lodge No. 2135 & Int'l Plate Printers, Die Stampers & Engravers Union of N. Am. Local Nos. 2, 24, & 32, & Graphic Commc'ns Int'l Union Local No. 285, & Int'l Ass'n of Siderographers Wash. Ass'n*, 50 FLRA 677, 691-92 (1995); *NFFE, Council of VA Locals*, 49 FLRA 923, 933 (1994) (in determining whether matter is outside the duty to bargain, Authority looks to whether statute or regulation gives agency sole and exclusive discretion "without regard to other laws" (citing *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (statute providing agency with discretion "notwithstanding any other provision of law" precluded bargaining)). *See also AFGE, Local 3295 v. FLRA*, 46 F.3d 73, 74 (D.C. Cir. 1995) ("The presumption that an agency is obliged to negotiate most subjects of concern to employees can be overcome by indications that Congress intended the agency in question to enjoy complete discretion over the particular matter at issue."). DHS does not cite any provision of the IG Act or its legislative history that indicates that IG-investigation procedures are entirely nonnegotiable, regardless of their particular terms. Although DHS relies

[5] We note, in this regard, that there is no claim before us that IG-investigation procedures are not conditions of employment.

on the fact that the IG Act gives IGs the authority to conduct "independent investigations," that authority is not unlimited. *See* S. Rep. No. 1071, at 28 (1978), *reprinted in* 1978 USSCAN 2676, 2703 ("Broad as it is, the [IG's] mandate is not unlimited.") *See also NASA*, 527 U.S. at 242 (investigative independence limited); *Burlington N. R.R. Co. v. OIG, R.R. Retirement Bd.*, 983 F.2d 631, 641-42 (5th Cir. 1993) (same); *DCIS*, 855 F.2d at 100 (same). In fact, the IG Act (as amended) expressly allows the Secretary of DHS to prohibit DHS-OIG from conducting certain audits and investigations. *See* IG Act, 5 U.S.C. App. 3 § 8I(a)(2). DHS' position encompasses the proposition that DHS may not negotiate over OIG investigations that it may entirely prohibit. Neither law nor logic supports such a proposition.

Additionally, courts have held that, in some circumstances, authority is limited even where statutes contain wording that provides that authority may be exercised without regard to other laws. *See, e.g., Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 795, 797 (9th Cir. 1996) (authority limited despite wording saying "[n]otwithstanding any other law . . . the Secretary concerned shall" perform certain acts); *D.C. Fed'n of Civic Assoc., Inc. v. Volpe*, 434 F.2d 436, 437, 447 (D.C. Cir. 1970) (authority limited despite wording saying that "[n]otwithstanding any other provision or law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall" take certain actions). If a statute that *does* contain such wording is compatible with limited authority, then the IG Act – which DHS has not alleged contains such wording – is certainly compatible with limited authority. For these reasons, we find that DHS has not demonstrated that there is any basis in the IG Act – including its provision for independent investigations – that supports the sweeping conclusion that bargaining over all IG-investigation procedures is unlawful.

Further, the DHS-OIG's investigators are representatives of DHS, and "[a]s far as the [IG Act] is concerned, [DHS]-OIG's investigators are employed by, act on behalf of, and operate for the benefit of [DHS]." *NASA*, 527 U.S. at 241. The Authority repeatedly has held that "'a component of an agency is obligated to bargain with the exclusive representative of its employees over conditions of employment even though control over a particular condition of employment resides in another component of the same agency[,]' unless the discretion is limited by law, government-wide rule or regulation, or agency regulations supported by a compelling need."[6] *U.S. Dep't of Def. Dependents Schools, Alexandria, Va.*, 41 FLRA 982, 1000 (1991) (quoting *Overseas Educ. Ass'n*, 29 FLRA 485, 492 (1987)). *See also NFFE, Local 2050*, 36 FLRA 618, 622 (1990); *Nat'l Guard Bureau & Adjutant Gen. State of Pa.*, 35 FLRA 48, 53 (1990); *Overseas Educ. Ass'n Inc.*, 29 FLRA 734, 772 (1987); *Overseas Educ. Ass'n, Inc.*, 22 FLRA 351, 361 (1986), *aff'd sub nom. Overseas Educ. Ass'n, Inc. v. FLRA*, 827 F.2d 814 (D.C. Cir. 1987). As applied here, that means that CBP (which, like DHS-OIG, is a component of DHS) was obligated to bargain over conditions of employment affecting unit employees, even if DHS-OIG had control over those conditions of employment. And there is no basis for finding that the result of such bargaining is unenforceable merely because DHS-OIG allegedly controls the conditions of employment that were the subject of that bargaining.[7]

By arguing that we should find that the IG Act precludes bargaining over any and all IG-investigation procedures, "in effect, [DHS] asks [the Authority] to find a partial, implied repeal of [the bargaining rights and obligations set forth in the Statute] based solely on Congress' decision . . . to authorize the creation of [an] IG office[] in [DHS]. This we decline to do." *DCIS*, 855 F.2d at 100. *See also NASA HQ*, 50 FLRA at 619. DHS's employees "are, after all, federal employees to whom Congress has given important bargaining rights – rights that should not be blithely ignored absent some explicit or compelling reason of governmental prerogative." *Library*, 699 F.2d at 1289. Based on the foregoing, we find that DHS has not demonstrated that the IG Act completely forecloses bargaining over IG-investigation procedures, regardless of the nature of the particular procedures at issue. Accordingly, we address whether DHS has demonstrated that the provision is contrary to any specific terms of the IG Act.

[6] Further, even when an entity outside an agency has control over a particular matter, the agency is required to bargain to the extent of its discretion, which may include bargaining over proposals that the agency make recommendations to the outside entity. *See Library*, 699 F.2d at 1289-90.

[7] As noted previously, the Union requested permission to, and did, file a supplemental submission. In that submission, the Union asserts that "[c]ertain statements by [DHS in its reply] suggest that it might . . . be disputing that the OIG is not a 'representative' [of DHS] as a factual matter." Supplemental Submission at 2. Specifically, the Union cites DHS's statement that it "does not agree" that DHS-OIG performs investigations of CBP employees "on behalf of, and for the benefit of, CBP." *Id.* (quoting Reply at 4 n.4). In response, the Union notes that it withdrew its request for a hearing based on DHS's claim that it were no material facts in dispute, *id.* at 2-3 (citing SOP at 5, 7), and submits that DHS "has not put into dispute any factual issues, despite its denial of the representative relationship between the OIG and CBP," *id.* at 4. Because neither the statement in DHS's reply nor the Union's supplemental submission has any bearing on our conclusion in this case, we assume, without deciding, that they are properly before us. In this regard, as discussed above, DHS-OIG is a representative of DHS as a matter of law, *see NASA*, 527 U.S. at 241, and CBP is a component of DHS. Thus, any purported factual dispute regarding the relationship between the OIG and CBP does not change our conclusion that it was not unlawful for CBP to reach an agreement that affects DHS-OIG.

2. DHS has not demonstrated that the provision is contrary to any specific terms of the IG Act.

For the reasons stated below, we conclude that DHS has not met its regulatory burden to demonstrate that the provision is contrary to any specific terms of the IG Act. In this regard, we find that, as discussed further below, despite being on notice that it must "supply all arguments and authorities in support of its position" in its SOP, 5 C.F.R. § 2424.24(a), DHS: (1) in its SOP, has not met its burden of proving that the provision is contrary to the IG Act, and (2) is precluded from making certain arguments for the first time in its reply. In order to explain these findings, it is necessary to discuss the relevant provisions of the Statute and the Authority's regulations.

Section 7114(c) of the Statute sets out the sequence and time deadlines for filing most documents in negotiability cases. In this regard, § 7114(c)(2) requires an exclusive representative to file, and serve on the agency head, its petition for review – which initiates a negotiability proceeding before the Authority – within fifteen days after the agency alleges that the duty to bargain in good faith does not extend to any matter. The agency then has thirty days to file its statement of position, *see* 5 U.S.C. § 7114(c)(3), and the exclusive representative then has fifteen days to file its response, *see id.* § 7114(c)(4).[8]

In 1999, the Authority revised its negotiability regulations. In so doing, the Authority noted that its existing negotiability regulations "d[id] not directly address filing requirements, burdens, waivers, and concessions." Negotiability Proceedings, 63 Fed. Reg. 66405-01, 66412 (Dec. 2, 1998) (Fed. Reg.). The revisions changed that situation. Specifically, in addition to restating the sequence of filings and time deadlines set forth in the Statute, the revised regulations also expressly set forth the parties' burdens and laid out the consequences for failing to satisfy those burdens.

First, the exclusive representative files its petition for review, which, as discussed above, initiates a negotiability proceeding. *See* 5 C.F.R. § 2424.20. In its petition, "the exclusive representative is not required . . . to anticipate agency arguments" regarding a proposal's or provision's nonnegotiability. Fed. Reg. at 66409.

After the exclusive representative files its petition, the agency must file its SOP, in which it must, "among other things, set forth its understanding of the . . . provision, state any disagreement with the facts, arguments, or meaning of the . . . provision set forth in the . . . petition . . ., and supply all arguments and authorities in support of its position." 5 C.F.R. § 2424.24(a). In this regard, the agency's SOP must

> [s]et forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a statement of the arguments and authorities supporting any bargaining obligation or negotiability claims, any disagreement with claims made by the exclusive representative in the petition . . . , specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the agency, and a copy of any such material that is not easily available to the Authority.

Id. § 2424.24(c)(2).[9] Consistent with these regulations, in its SOP, "an agency has the burden of providing a record to support its assertion" that a provision is contrary to law. *AFGE, Local 3928*, 66 FLRA 175, 178 (2011) (Member Beck dissenting as to application of burden) (discussing proposals); *NFFE, Fed. District 1, Local 1998, Int'l Ass'n of Machinists & Aerospace Workers*, 66 FLRA 124, 125 (2011) (Member Beck dissenting as to application of burden) (same) (*Local 1998*). The Authority has found that agencies fail to meet their regulatory burden when they merely cite a law or regulation without explaining how a particular proposal or provision conflicts with that law or regulation. *See Local 1998*, 66 FLRA at 128 & n.7; *AFGE, Local 1547*, 65 FLRA 911, 913 (2011) (Member Beck dissenting), *pet. for review filed sub nom. U.S. Dep't of the Air Force, Luke Air Force Base v. FLRA*, No. 11-1281 (D.C. Cir. Aug. 12, 2011); *AFGE, Local 1367*, 64 FLRA 869, 875 (2010) (Member Beck dissenting). Additionally, an agency's "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument." 5 C.F.R. § 2424.32(c)(1).

Once the agency has filed its SOP, the exclusive representative may file a response. *See* 5 C.F.R. § 2424.25. If it does so, then the response "must

[8] The Authority may extend the time deadlines for filing, *see* 5 C.F.R. § 2429.23(a), and, in this case, did grant brief extensions of time for DHS to file its SOP, *see* Record at 2, and for the Union to file its response, *see* Aug. 25, 2010 Order.

[9] We note that several of the Authority's Regulations, including § 2424.24(c)(2), were amended, effective June 4, 2012. *See* Unfair Labor Practice Proceedings; Negotiability Proceedings; Review of Arbitration Awards; Miscellaneous and General Requirements, 77 Fed. Reg. 26,430-01 (May 4, 2012). As the petition in this case was filed before the effective date of the amended Regulations, we apply the prior Regulations. *See Revised* § 2424.1 (noting that revised Regulations in 5 C.F.R. part 2424 apply only to petitions filed on or after June 4, 2012).

include," among other things, "[a]ny disagreement with the agency's . . . negotiability claims." *Id.* § 2424.25(c)(1). If the response does not state the exclusive representative's disagreement with the agency's negotiability claims, then this may "be deemed a concession" to those claims. *Id.* § 2424.32(c)(2).

After the exclusive representative has filed its response, the agency may file an additional document – a reply. *See* 5 C.F.R. § 2424.26. Although § 7117(c) of the Statute does not expressly provide for agency replies, the Authority created this additional filing by regulation because the Authority recognized that an exclusive representative may raise certain arguments "for the first time in [its] response to the [SOP]." Fed. Reg. at 66409. Specifically, the Authority stated: "In order that the agency has an opportunity to address arguments raised for the first time in the . . . response, this section of the final rule establishes that the agency may file a reply to such arguments." *Id.* However, the reply "is specifically limited to the matters raised for the first time in the exclusive representative's response." 5 C.F.R. § 2424.26(c). *See also* Fed. Reg. at 66409 ("under § 2424.32(c)(1) . . . , the agency may not raise new arguments . . . after the filing of the [SOP].") That is, the Authority's regulations provide for a reply in order to give agencies a chance to respond *only* to arguments made for the first time in an exclusive representative's response – not to raise new arguments that they could have raised in their SOPs.

Here, in addition to its argument that we should rely on *NRC* to find the provision contrary to law (which we have rejected above), DHS provides only general arguments regarding the provision, the IG Act, and DHS-OIGs' rights to conduct independent investigations. *See* SOP at 3 ("the procedures to be followed by the OIG in conducting its investigations are nonnegotiable"); *id.* (the provision "impermissibly interferes with the independent status of the OIG as set forth in the [IG Act]" because "the procedures set forth in Article 22 extend far beyond the 'Weingarten' right"); *id.* at 4 (the "effect of [the provision] is . . . to compromise, limit, and interfere with the independent status of the [IG], which is clearly inconsistent with the IG Act"); *id.* at 5 ("the [IG] in each agency is entrusted with the responsibility of auditing and investigating the agency, a function which may be exercised in the judgment of the [IG] as each deems it necessary or desirable'"); *id.* (the DHS-OIG is "'shielded with independence from agency interference' and collective bargaining affecting the [DHS-]OIG directly interferes with the statutory independence granted to" IGs under the IG Act (quoting *NRC*, 25 F.3d at 234)); *id.* at 4 (the IG Act "carefully defines and preserves the independence of [IGs], both in organization and function," and "[b]argaining over the auditing and investigating functions of the [IGs] allows parties to collective bargaining to compromise, limit, and interfere with the independent status of [DHS-OIG], which is clearly inconsistent with the IG Act.")

DHS cites only one section of the – quite lengthy – IG Act, and does so only indirectly. Specifically, DHS quotes a passage from *NRC*, and, in its citation to that decision, notes the court's citation to § 6(a)(2) of the IG Act. *Id.* at 5. Even assuming that this is sufficient to raise a claim that the provision is contrary to § 6(a)(2) – which provides that the IGs are authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the [IG], necessary or desirable," 5 U.S.C. App. 3 § 6(a)(2) – DHS does not provide any arguments regarding how any of the fifteen sections, or any of the appendices, of Article 22 are contrary to that wording. In this regard, DHS quotes two sections of Article 22 (Sections 3 and 5) – which concern certain aspects of advance notice to the Union, the location of investigatory interviews, giving employees certain general information, and giving employees forms to sign and date – and asserts that "[t]hese procedures, and the others which follow, extend far beyond the statutory right of representation established by the Supreme Court in *NASA*, and amount to interference with the OIG's statutory right to conduct independent investigations." SOP at 6. This blanket assertion is insufficient to meet DHS's regulatory burden to demonstrate how particular sections of the provision are contrary to specific terms of the IG Act. Accordingly, we find that DHS's arguments are insufficient to demonstrate that the provision is contrary to the IG Act.[10]

DHS also contends, for the first time in its reply, that the OIG cannot be bound to a contract to which it is not a party. Reply at 9. For support, DHS cites *Motorsport*, 316 F.3d at 29; *Rockney*, 877 F.2d at 644; and *Greyhound*, 595 F.Supp. at 1226. DHS could, and

[10] We acknowledge the decision in *U.S. Department of Transportation, Federal Aviation Administration v. FLRA*, 145 F.3d 1425 (D.C. Cir. 1998) (*FAA*), in which the United States Court of Appeals for the District of Columbia Circuit reversed an Authority decision that had found that the agency had failed to sufficiently explain its position regarding the nonnegotiability of a proposal. For two reasons, that decision does not require us to find that DHS has met its regulatory burdens here. First, as the Authority noted in revising its negotiability regulations, *FAA* "applied the Authority's . . . negotiability regulations" that existed prior to the amendments, and those existing regulations "d[id] not directly address filing requirements, burdens, waivers, and concessions." Fed. Reg. at 66412. Second, that decision is distinguishable because there, the agency clearly stated what aspect of the proposals that it found problematic (pay for travel), and explained why that aspect was inconsistent with specific laws. *FAA*, 145 F.3d at 1427. Here, by contrast, DHS cites the provision generally and quotes two of its sections, but does not explain how the provision interferes with any particular provisions of the IG Act.

should, have made this contention and cited these decisions in its SOP. In this regard, DHS relies on this contention and the cited decisions to support its claim that the provision is nonnegotiable – not to respond to an issue raised for the first time in the Union's response. As such, § 2424.26(c) of the Authority's regulations precludes DHS from raising this argument and citing these decisions, and we do not consider them.[11]

For the foregoing reasons, we find that DHS has not met its burden of demonstrating that the provision is contrary to law, rule, or regulation, and we direct DHS to rescind its disapproval of the provision. And, as the provision as a whole has not been shown to be contrary to law, rule, or regulation, we find it unnecessary to resolve the Union's request to sever the provision.

IV. Order

DHS shall rescind its disapproval of the provision.

[11] Even if the DHS's claim were properly before us – which it is not – we note that we would reject it. As discussed above in section III.D.1., CBP is obligated to bargain over conditions of employment of unit employees – even if DHS-OIG has control over those conditions – and any agreement reached is enforceable unless it is contrary to law, rule, government-wide regulation, or agency regulation supported by a compelling need. Further, DHS-OIG's investigators operate as CBP's OIG when investigating CBP bargaining-unit employees, and there is no basis for finding that an agreement between CBP and the Union limiting the IG-investigation procedures of CBP's own OIG is unlawful merely because DHS-OIG does not have a bargaining relationship with the Union. In addition, the court decisions cited by DHS – which arose in the private sector and discuss the circumstances under which non-signatories to contracts may be held liable under those contracts – are inapposite because they do not address the circumstances under which one component of a federal agency may enter into agreements that impose obligations on another component of the same agency. *See Motorsport*, 316 F.3d at 29; *Rockney*, 877 F.2d at 638; and *Greyhound*, 595 F.Supp. at 1223.

APPENDIX

Article 22 of the CBA, "Investigations," provides, in pertinent part:

Section 1. This Article contains the policy and procedures to be followed when bargaining unit employees are the subjects of, or involved with investigative and administrative interviews. These policies and procedures will be followed by Agency and Union representatives and employees participating in these interviews/examinations.

. . . .

Section 3. Union Notice.

A. When the Agency knows in advance that it is going to conduct an interview of an employee(s), the applicable NTEU Chapter will receive reasonable advance notice when interviews are being conducted by the Agency and whether the interview will be audio/video tape-recorded. The Union will also be informed where and when the interview will take place and the general subject matter of the interview.

B. Absent extenuating circumstances, interviews will be conducted at the employee's worksite.

Section 4.A. Employees and Union representatives acknowledge their responsibilities under Sections 11 and 12 when participating in investigative and administrative interviews under this Article.

B. Agency representatives will also act in a professional manner when conducting investigative and administrative interviews under this Article.

Section 5. General Notice. When an employee is interviewed by the Agency, and the employee is the subject of an investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated and be informed whether or not the interview is related to possible criminal misconduct by him/her. This notice shall be on a form (see Appendix A-1) which the employee will sign and date at the outset of the interview.

Section 6. Employee Weingarten Rights. When the Agency conducts an interview of an employee and the employee is a potential recipient of any form of discipline or adverse action, the Agency shall advise the employee of his/her right to union representation prior to the commencement of questioning. This notice shall be on a form (see Appendix A-2) that the employee signs at the beginning of the interview and is witnessed by the investigating agent.

A. If the employee exercises his or her option to have union representation present, the employee will have a reasonable period of time to secure Union representation.

B. The arrangements made to accommodate Union representation in subsection A may not cause an unnecessary delay prompting an obstruction of the Agency's investigation.

C. Where a representative of the Agency denies an employee the opportunity to be represented by the Union during an interview, the employee will, upon request, be provided with the reason for the denial in writing.

D. Interviews that continue beyond the employee's regular duty hours shall constitute hours of work and be compensated for by the Agency.

E. The Agency will annually inform employees of their rights under 5 U.S.C. § 7114(a)(2)(B).

Section 7. Third Party Witness Interviews. Prior to beginning interviews with employees who are being interviewed as third party witnesses, the Agency will provide employees with a form (see Appendix A-3), which shall be signed and dated by the employee at the outset of the interview.

Section 8. Miranda Rights. When an employee who is the subject of a criminal investigation is interviewed in custody by the Agency, the employee shall be given a statement of his/her Constitutional rights in writing on a form (see Appendix A-4) prior to commencement of questioning. The employee shall sign the statement of rights and indicate if (s)he is waiving these rights.

Section 9. Beckwith Rights. In a non-custodial interview involving possible criminal matters, an employee will be advised in writing of his/her rights and the consequences of refusing to answer the questions posed to him/her on the grounds that the answers may tend to incriminate him/her. This notice shall be on a form (see Appendix A-5) that the employee signs and dates prior to the commencement of questioning.

Section 10. Kalkines Rights. In an interview involving possible criminal matters, where prosecution has been declined by appropriate authority, an employee will be required to answer questions only after the Agency representative has provided the employee with the appropriate assurances. Prior to requiring an employee to answer under such circumstances, the Agency representative shall inform the employee that his/her statements concerning the allegations during the interview cannot and will not be used against the employee in a subsequent criminal proceeding, except for possible perjury charges for any false answers given during the interview. This notice shall be on a form (see Appendix A-6) which shall be signed and dated by the employee at the outset of the interview.

Section 11.A. In any interview where the employee is not the subject of a criminal investigation, or when an employee has been advised of his/her rights under Section 10., above, the Agency representative has the authority to inform the employee that:

(1) The employee must disclose any information known to him concerning the matter being investigated;

(2) The employee must answer any questions posed regarding any matter which has a reasonable relationship to matters of official interest and may properly refuse to answer questions regarding matters in which the Agency has no official interest;

(3) The employee's failure or refusal to answer such questions may result in disciplinary or adverse action; and

(4) A false answer to any such questions may result in criminal prosecution.

(5) The employee may discuss the matters raised in the interview with the Union but not with other employees until the investigation is completed.

B. When an employee refuses to answer a question in accordance with this section, the Agency representative shall inform the employee of his/her obligation to answer.

Section 12.A. When the person being interviewed is accompanied by a representative furnished by the Union, in both criminal and non-criminal cases, the role of the representative includes, but is not limited to the following rights:

(1) To clarify the questions;

(2) To clarify the answers;

(3) To assist the employee in providing favorable or extenuating facts;

(4) To suggest other employees who have knowledge of relevant facts; and

(5) To advise the employee.

B. However, a union representative may not disrupt an investigation by transforming the interview into an adversarial contest.

Section 13. Prior to interviewing anyone other than the subject of the investigation, the Agency will be mindful of its obligations to obtain all reasonable and necessary information from the employee, rather than others, in accordance with the Privacy Act.

Section 14. At the conclusion of an investigation governed by this Article which does not result in the proposal of any criminal or administrative action, the Agency will notify the affected employee of that fact.

Section 15. Periodic Reinvestigations. The following procedures are applicable to any NTEU bargaining unit employees undergoing a Periodic Re-Investigation (PRI):

A. Employees will be permitted to utilize up to sixteen (16) hours of administrative time to complete the forms required in their respective periodic reinvestigation It is understood that some employees may need more time than others to complete the forms.

B. Administrative time may not necessarily be taken consecutively. It may need to be scheduled an hour or two at a time, based on workload and staffing requirements.

C. Employees will be permitted to leave the work site during the administrative time if reasonably necessary to complete the forms. Due to potential privacy conflicts, employees need not

provide specific reason(s) for requesting time away. A general explanation or a reference to one of the following examples will be sufficient. Examples of situations for which employees shall be permitted to leave the worksite are: to visit a financial institution, to visit a storage facility to inventory property, or to find a private location to complete the forms. However, if a private work location is afforded the employee, (s)he is encouraged to complete the forms at the work location.

D. Photocopies of previously submitted forms will no longer be accepted as the information will not be transferable to the government's electronic filing system.

E. Within ten (10) days of receiving the notice to complete the periodic reinvestigation forms, employees may request copies of their last set of previously completed forms similar to those that are now required. The employee's PRI package will identify where to forward this request. Employees shall have fourteen (14) days from the date they receive the requested information to complete the documents.

F. Employees will receive sufficient training to enable them to access and use the government's electronic filing system.

G. Investigators will advise all third parties they interview of the purpose of the PRI interview prior to asking any questions.

H. Absent extenuating circumstances, PRI interviews will be conducted at the employee's worksite during duty hours.

I. Copies of the certification of investigation will be inserted into the employee's Official Personnel Folder (OPF) and the Agency will take necessary steps to notify the employee of the completion of the PRI simultaneous to the entry in the OPF.

SOP, Ex. D at 2-6.

Article 22 also includes six appendices. Appendix A-1 is a form entitled, "General Notice." *Id.* at 7. Appendix A-2 is a form entitled, "Weingarten Rights." *Id.* at 8. Appendix A-3 is a form entitled, "Third Party Witness Interview Notification." Id. at 9. Appendix A-4 is a form entitled, "Miranda Rights." *Id.* at 10. Appendix A-5 is a form entitled, "Beckwith Rights." *Id.* at 11. Appendix A-6 is a form entitled, "Kalkines Rights." *Id.* at 12.