74 FLRA No. 66

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL TRADE COMMISSION
WASHINGTON, D.C.
(Agency)

0-NG-3732

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 1, 2026

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Before the Authority: Colleen Duffy Kiko, Chairman, and Anne Wagner and Charles O. Arrington, Members
(Member Wagner concurring in part and dissenting in part)

I. Statement of the Case

This matter is before the Authority on a negotiability appeal that the Union filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The Union's petition for review (petition) appeals the Agency's disapproval of an interim collective-bargaining agreement (interim agreement) under § 7114(c) of the Statute.[2] After the Agency filed a statement of position (statement), the Union filed a response (response), in which the Union challenges the legality of both the disapproval notice and the Presidential Memorandum[3] that formed the basis for the disapproval notice.

We find that the Agency lawfully disapproved the interim agreement. Accordingly, we dismiss the petition.

II. Background

The parties concluded negotiations for the interim agreement on Sunday evening, January 19[4] – roughly eighteen hours before the second inauguration of President Donald J. Trump.[5] That same evening, the parties executed the interim agreement, with the Agency's then-Chair Lina Khan (Chair Khan) signing the interim agreement on the Agency's behalf.[6]

The Statute requires that "[a]n agreement between an[] agency and an exclusive representative shall be subject to approval by the head of the agency."[7] As relevant here, the Statute provides an agency head with thirty days to approve an executed agreement if it "is in accordance with [the Statute] and any other applicable law, rule, or regulation."[8]

After the parties executed the interim agreement, the Union emailed the Agency's Chief of Staff to inquire "if Chair Khan's signature is sufficient for [a]gency[-h]ead [r]eview."[9] The Union continued that, if the signature was not sufficient for agency-head review, then "an email stating the [interim a]greement passes [a]gency[-h]ead [r]eview . . . will suffice."[10] The Union also provided an example of such an email. The Chief of Staff responded six minutes later stating, "Chair Khan's signature is sufficient for [a]gency[-h]ead [r]eview."[11]

After his inauguration on January 20, President Trump designated Andrew Ferguson to be Chairman of the Agency (Chairman Ferguson).[12]

On January 31, President Trump issued a Presidential Memorandum entitled, "Limiting Lame-Duck Collective Bargaining Agreements That Improperly Attempt To Constrain the New President" (the Memorandum).[13] It requires agency heads to disapprove certain collective-bargaining agreements that

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] *Id.* § 7114(c).
[3] Limiting Lame-Duck Collective Bargaining Agreements That Improperly Attempt To Constrain the New President, 90 Fed. Reg. 9581 (Jan. 31, 2025).
[4] All dates are in 2025.
[5] *See* Union's Resp. to Agency's Statement of Position (Resp.), Ex. F, Emails between Union's Counsel and Agency's Chief of Staff (agreeing to several changes to interim agreement and exchanging executed, final document).
[6] Pet., Attach. 2, Interim Agreement at 38 (signature page); *see also* Resp. at 5 ("Chair . . . Khan signed the [i]nterim [agreement] on behalf of the [Agency]."); *id.*, Ex. F, Email from Union's Counsel to Agency's Chief of Staff (Jan. 19, 2025, 5:54 PM) (exchanging copies of fully executed agreement shortly before 6:00 PM).
[7] 5 U.S.C. § 7114(c)(1).
[8] *Id.* § 7114(c)(2).
[9] Resp., Ex. F, Email from Union's Counsel to Agency's Chief of Staff (Jan. 19, 2025, 5:54 PM).
[10] *Id.*
[11] Resp., Ex. F, Email from Agency's Chief of Staff to Union's Counsel (Jan. 19, 2025, 6:00 PM).
[12] *See* President Trump Designates Chairmen and Acting Chairmen, 2025 WL 244200 (Jan. 20, 2025).
[13] 90 Fed. Reg. at 9581.

were "ma[d]e" during the thirty days that precede the inauguration of a new President.[14] The Memorandum specifies that agency heads should disapprove agreements only when "the applicable agency head has not yet approved such agreement pursuant to" § 7114(c) of the Statute.[15]

On February 17, Chairman Ferguson notified the Union that he was disapproving the interim agreement in its entirety under § 7114(c) of the Statute.[16] He explained, as relevant here, that the Memorandum required his disapproval because the interim agreement was executed just one day before the President's inauguration.[17]

On March 4, the Union filed the petition to appeal the Agency's disapproval notice. Thereafter, the Agency filed its statement; the Union filed its response; and the Agency filed a reply to the response (reply).

III. Preliminary Matters

A. We do not consider the Agency's untimely statement, but we consider negotiability arguments from the Agency's disapproval notice.

As mentioned, the Union filed its appeal of the Agency's disapproval notice on March 4. Consistent with § 7117(c)(3) of the Statute,[18] § 2424.24(b) of the Authority's Regulations required the Agency to file a statement within thirty days "after the date the head of the [A]gency receive[d] a copy of the petition."[19] The Agency acknowledges that it received the petition on March 4, and as a result, its statement was due on April 3.[20] The Agency filed its statement one day late, on April 4.[21]

The Authority's Office of Case Intake and Publication (CIP) ordered the Agency to show cause why the Authority should not find that the Agency conceded the negotiability of the interim agreement by failing to timely file its statement.[22] After receiving the order, the Agency moved for an extension of time to file its statement.[23] Alternatively, the Agency moved to waive the expired filing deadline.[24]

Section 2429.23(a) of the Authority's Regulations requires that a request for an extension of time "be . . . received . . . [no] later than five . . . days *before* the established time limit for filing."[25] Because the Agency moved for an extension after the statement's due date, the Agency did not timely request an extension of time.[26] As such, we deny the extension request.

As for the Agency's waiver request, under § 2429.23(b) of the Authority's Regulations, with certain exceptions not relevant here, the Authority "may waive any expired time limit . . . in extraordinary circumstances."[27] The Agency contends that its statement was untimely filed due to clerical error.[28] However, under Authority precedent, ordinary administrative errors do not constitute extraordinary circumstances warranting the waiver of an expired filing deadline.[29] Accordingly, we deny the Agency's waiver motion, and we do not consider the untimely statement.

Concerning the portion of CIP's order that directed the Agency to show cause why the Authority should not find that the Agency conceded the interim agreement's negotiability,[30] the Agency asserts that its untimely statement could not have conceded any negotiability arguments because the Union did not present any negotiability arguments in its petition.[31] In other

[14] *Id.* (§ 2).
[15] *Id.* (§ 2(c)).
[16] *See generally* Pet., Attach. 1, Disapproval Notice (Feb. 17, 2025).
[17] The Chairman's disapproval notice also provided alternative bases for disapproving specific sections of the interim agreement that the Chairman found inconsistent with management's rights under § 7106 of the Statute. We need not reach those alternative bases for disapproval here.
[18] 5 U.S.C. § 7117(c)(3)(A)(ii) ("On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition . . . , the agency shall . . . file with the Authority [its] statement . . . setting forth in full its reasons supporting [its] allegation [of nonnegotiability].").
[19] 5 C.F.R. § 2424.24(b).
[20] *See* Resp. to Order to Show Cause (Apr. 25, 2025) at 2-3 (acknowledging filing the statement "one day after the filing deadline").
[21] *Id.*
[22] Order to Show Cause (Apr. 14, 2025) at 1-2 (citing *AFGE, Loc. 32*, 73 FLRA 464, 467 (2023) (*Loc. 32*) (where agency's allegation of nonnegotiability contained no arguments and agency untimely filed statement and reply, Authority held agency failed to support its position that proposal was outside duty to bargain); *NATCA, AFL-CIO*, 61 FLRA 336, 339 (2005) (treating agency's failure to file a reply contesting a claim in the union's response as a concession)).
[23] Mot. (Apr. 15, 2025) at 1, 3.
[24] *Id.* at 2.
[25] 5 C.F.R. § 2429.23(a) (emphasis added).
[26] *See, e.g., Loc. 32*, 73 FLRA at 465 (finding a motion for extension of time untimely because the motion was filed after the pertinent due date expired).
[27] 5 C.F.R. § 2429.23(b).
[28] Resp. to Order to Show Cause at 2.
[29] *See, e.g., AFGE, Loc. 3283*, 66 FLRA 691, 692 (2012) (citing *NTEU*, 64 FLRA 833, 835 (2010)) (finding that "error on the part of a party's mailroom does not establish an extraordinary circumstance justifying the waiver of an expired time limit").
[30] Order to Show Cause at 1.
[31] Resp. to Order to Show Cause at 1-2, 5-6.

words, the Agency contends there were no negotiability arguments available for concession at the time the Agency's statement was due.[32]

When an agency's statement is untimely, the Authority will consider agency arguments that are raised in its allegation of nonnegotiability.[33] Consistent with this precedent, we find that the Agency has not conceded the negotiability of the interim agreement. Further, we will consider the specific negotiability arguments raised in the Agency's disapproval notice,[34] which constitutes an allegation of nonnegotiability.[35]

B. We consider the Union's response.

In cases where an agency untimely filed its statement, but the Authority nevertheless considered the agency's arguments from its allegation of nonnegotiability, the Authority has also considered the legal arguments in a timely filed union response.[36] We follow that precedent here and consider the legal arguments in the Union's response, despite the untimeliness of the Agency's statement.[37]

C. The Agency's disapproval was timely.

The Union argues that, in this case, agency-head review under § 7114(c) of the Statute "concluded before [Chairman Ferguson's] purported disapproval of the [i]nterim [agreement] on February 17."[38] In essence, the Union argues that Chairman Ferguson's disapproval occurred too late to be legally effective because, according to the Union, Chair Khan had already approved the agreement when she conducted agency-head review.[39] Thus, the Union's position depends on the accuracy of its contention that Chair Khan approved the interim agreement – and thereby concluded the process of agency-head review under the Statute – when she signed the interim agreement on January 19.[40]

In pertinent part, § 7114(c)(2) says that "[t]he head of [an] agency shall approve [an] agreement within [thirty] days from the date the agreement is *executed* if the agreement is in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation."[41] As this statutory wording makes plain, and as the Union acknowledges,[42] the agency-head-review period under § 7114(c)(2) begins only *after* an agreement is executed.[43] Further, the parties manifestly intended for their signatures to mark the execution of their agreement.[44] It is temporally impossible for a single signature to both execute an agreement *and* signify the completion of § 7114(c)'s review-and-approval process. And the specific facts here – that Chair Khan signed the agreement

[32] *See id.*

[33] *NTEU*, 72 FLRA 752, 753 (2022) (Chairman DuBester concurring in relevant part, dissenting in part on other grounds) (citing *AFGE, Loc. 997*, 66 FLRA 499, 499-500 (2012) (*Loc. 997*)).

[34] We note that the Union has not asked that we reconsider this precedent. *See Loc. 997*, 66 FLRA at 500 & n.2 (when considering legal arguments in an allegation of nonnegotiability despite an agency's untimely filing of its statement, Authority noted that the union did not challenge the underlying precedent that permitted considering such arguments). We also note that this case is unlike *AFSCME, Loc. 1653*, 74 FLRA 355, 356 (2026) (*Loc. 1653*), because the agency in that case filed a *timely* statement, in which it made different arguments than in its allegation. Thus, the Authority found the agency in *Loc. 1653* "abandon[ed]" the earlier arguments in its allegation. *Id.*

[35] *See AFGE, Loc. 1815*, 53 FLRA 606, 609 (1997) ("[A]n agency head's disapproval of a negotiated agreement constitutes an allegation of nonnegotiability as to the disapproved provisions."); *accord Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1154 (D.C. Cir. 1994) ("The agency head's disapproval of an agreement under § 7114(c) . . . is essentially an assertion of nonnegotiability of matters that have erroneously been subjected to collective bargaining."); *AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 853 (D.C. Cir. 1985) (same holding).

[36] *See Marine Eng'rs' Beneficial Ass'n, Dist. No. 1 – PCD*, 60 FLRA 828, 829 (2005) (*Marine*) (recognizing that the Authority's petition form allows a union to reserve its legal arguments until the union files a response, and concluding, on that basis, that it would be inappropriate to refuse to consider legal arguments in a properly filed response merely because the agency did not timely file its statement); *Am. Fed'n of Tchrs., Indian Educators Fed'n, Loc. 4524*, 63 FLRA 585, 585 (2009) (following the precedent set in *Marine*).

[37] We need not address whether to consider the Agency's reply because the record is sufficient to resolve this case without the reply. *See AFGE, Council 220*, 74 FLRA 114, 114 (2024) (where Authority's decision on proposal's negotiability resulted in petition's dismissal, Authority found that it need not address other preliminary matters).

[38] Resp. at 10.

[39] *See id.*

[40] *See id.* at 5 (asserting the interim agreement "went into effect immediately" on January 19 because Chair Khan completed agency-head review).

[41] 5 U.S.C. § 7114(c)(2) (emphasis added).

[42] *See, e.g.*, Resp. at 3, 11.

[43] 5 U.S.C. § 7114(c)(2).

[44] *See* Resp., Ex. F, Email from Union's Counsel to Agency's Chief of Staff (Jan. 19, 2025, 5:54 PM) (in email with subject line "Re: Signed agreement," Union confirms to Agency that the attached, signed interim agreement was "fully executed").

before the Union signed the agreement[45] – further demonstrate that Chair Khan's single signature was for the *execution* of the agreement, not § 7114(c)'s review-and-approval process.[46] To reiterate, until the final requisite signature is affixed to the agreement, the agreement has not been executed,[47] and, consequently, the agreement is ineligible for § 7114(c) review and approval.[48] Only after the *final* requisite signature is affixed to the agreement does the clock begin ticking for agency-head review under § 7114(c)(2).[49]

Moreover, in order to approve an executed agreement during the review period, an agency head must do something that signals approval – something beyond identifying a signature that was affixed to the agreement *before* the review period began.[50] We do not mean to suggest that there is a precise type of action that an agency head must perform to approve an agreement. We merely hold that actions that occurred before an agreement was fully executed are necessarily insufficient to show approval because they did not take place during the thirty-day period that § 7114(c)(2) prescribes for review.

Perhaps anticipating these difficulties with its position, the Union relies on its email communications with the Agency's Chief of Staff on January 19 to show that "Chair Khan intended to complete agency[-]head review when she signed the [i]nterim [agreement]."[51] In that correspondence, the Chief of Staff stated that "Chair Khan's signature [wa]s sufficient for [a]gency[-h]ead [r]eview."[52] However, that statement reflected a legally mistaken belief that an individual could sign an agreement in order to simultaneously execute it and review it under § 7114(c).[53] In reality, no executed agreement existed that was eligible for agency-head review until *after* the final requisite signature – the Union's – was affixed to it.

Indeed, the Union suggested an additional action to show that Chair Khan had approved the agreement after its execution.[54] Specifically, the Union provided a template email for the Agency to complete to mark the agreement's approval.[55] But the Agency declined that suggestion and, instead, rested on its legally mistaken belief that agency-head review had taken place at the same time that the agreement was being executed.

Although the dissent contends that Chair Khan "waived" the agency-head review period when she signed the agreement,[56] that position is inconsistent with both the Union's arguments before us and the Chief of Staff's

[45] *See* Resp., Ex. F (showing that Agency's Chief of Staff sent the Union a copy of the "interim agreement with Chair Khan's signature," with a message that the Agency "look[ed] forward to finalizing the agreement" – after which the Union replied with an attachment described as the "fully executed" interim agreement).

[46] However, our conclusion that the same signature could not both execute an agreement *and* signify the completion of § 7114(c)'s review-and-approval process would remain the same even if the Union had signed the agreement before Chair Khan signed it.

[47] *See, e.g., U.S. DOD, Ill. Nat'l Guard, Springfield, Ill.*, 68 FLRA 199, 201 (2015) (*DOD*) ("[T]he Authority 'has recognized that the date of execution normally is the date [on which] the local parties sign the agreement.'" (alteration in original) (quoting *Fort Bragg Ass'n of Tchrs.*, 44 FLRA 852, 857 (1992))). There are circumstances in which an agreement may be considered "executed" under § 7114(c)(2) without either party signing the agreement, such as when the Federal Service Impasses Panel (the Panel) imposes contract terms. *E.g.*, *U.S. DOD, Domestic Dependent Elementary & Secondary Schs.*, 72 FLRA 601, 604-05 (2021) (Chairman DuBester concurring) (finding the issuance date of a Panel decision was an agreement's execution date for purposes of agency-head review, where parties did not negotiate further after the decision issued), *mot. for recons. denied*, 73 FLRA 149, 152 (2022) (Chairman DuBester concurring), *pet. for review denied sub nom., Fed. Educ. Ass'n Stateside Region v. FLRA*, 104 F.4th 275, 286-87 (D.C. Cir. 2024); *AFGE, Nat'l VA Council*, 39 FLRA 1055, 1057 (1991) (same). Those circumstances are not relevant here.

[48] *See DOD*, 68 FLRA at 201 ("[T]he legislative history of the Statute supports the view that the agency-head-review period begins on 'the date the agreement is signed by the negotiating parties.'" (quoting S. Rep. No. 95-969 at 109 (1978), *reprinted in* H. Subcomm. on Postal Pers. & Modernization, H. Comm. on Post Office & Civil Serv., 96th Cong., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 769 (1979) (explaining agency-head-review provision of Senate bill))).

[49] 5 U.S.C. § 7114(c)(2) ("The head of [an] agency shall approve [an] agreement within [thirty] days *from the date the agreement is executed* if the agreement is in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation . . . ." (emphasis added)).

[50] *See AFGE, AFL-CIO, Nat'l INS Council*, 8 FLRA 347, 381 (1982) (Member Applewhaite concurring on other grounds) ("[S]ection 7114(c) contemplates that approval or disapproval . . . will occur only *after* the agreement in question has been 'executed.'"), *rev'd on other grounds sub nom., U.S. DOJ, INS v. FLRA*, 709 F.2d 724, 727-30 (D.C. Cir. 1983); *see also AFGE, Loc. 1770*, 64 FLRA 953, 954 (2010) (finding agreement was not executed until both parties signed it, and the execution of the agreement was what triggered the agency-head-review period).

[51] Resp. at 11.

[52] *Id.*, Ex. F, Email from Agency's Chief of Staff to Union's Counsel (Jan. 19, 2025, 6:00 PM).

[53] *See* Resp. at 11 (Union explains its email with Chief of Staff shows "Chair Khan intended to complete agency[-]head review *when she signed the* [*i*]*nterim* [*agreement*]" (emphasis added)).

[54] *Id.*, Ex. F, Email from Union's Counsel to Agency's Chief of Staff (Jan. 19, 2025, 5:54 PM).

[55] *Id.*

[56] Dissent at 14.

email.[57] In particular, the Union argues that Chair Khan "*approved* the agreement" – not that she waived her opportunity to review the agreement.[58] And the Chief of Staff wrote that "Chair Khan's signature [wa]s *sufficient for*" agency-head review – not that the signature waived agency-head review.[59] Finally, contrary to the dissent's assertion,[60] the effective date listed in the agreement does not show that the Agency waived the review period because parties may agree to a retroactive effective date that predates the completion of agency-head review.[61]

For the reasons just explained, Chair Khan did not – within the meaning of § 7114(c)(2) agency-head review – "approve" the interim agreement on January 19, even if the parties may have mistakenly believed otherwise.[62] Because Chair Khan did not approve (or disapprove) the interim agreement, the period for agency-head review under § 7114(c)(2) continued to run for thirty days from January 19 – the date of the interim agreement's execution.[63] Chairman Ferguson's February 17 disapproval notice was within that thirty-day window.[64] Accordingly, we find the disapproval notice timely under § 7114(c)(2).

IV. Presidential Memorandum and Agency-Head Disapproval

The Union argues that, apart from its alleged untimeliness, the disapproval of the interim agreement is unlawful for two reasons, which we address below.

A. The Agency did not conduct two rounds of agency-head review, and the Memorandum does not require two rounds of agency-head review.

The Union argues that Chairman Ferguson's disapproval was unlawful because it resulted from the second round of agency-head review concerning the interim agreement.[65] However, this argument depends on the same flawed legal premise that we rejected when assessing the disapproval's timeliness. That is, Chairman Ferguson's disapproval would constitute a *second* round of agency-head review only if Chair Khan had previously completed a *first* round of agency-head review. For the reasons discussed in part III.C. above, Chair Khan's signature executing the interim agreement did not also "approve" that agreement as part of an agency-head-review process under § 7114(c). As such, Chairman Ferguson's disapproval resulted from the *only* agency-head review of the interim agreement. And the Union acknowledges the Agency's right under the Statute to conduct such a review on every executed agreement to which the Agency is a party.[66]

To the extent that the Union claims the Memorandum itself is inconsistent with § 7114(c) because the Memorandum requires two rounds of agency-head review,[67] the Union's claim misrepresents the pertinent requirements. The Memorandum states that an agency head must disapprove a conflicting agreement only when "the applicable agency head *has not yet approved* such agreement."[68] Consequently, if an agency head has

[57] We note the dissent's assertion that agency-head review can be waived in this instance is misleading. *Id.* at 13-14. The dissent relies on cases involving facts not in play in the instant dispute. *See id.* at 13 n.7 (citing *POPA*, 41 FLRA 795, 798 (1991) (involving provisions imposed on parties by a third-party neutral); *Kan. Army Nat'l Guard, Topeka, Kan.*, 47 FLRA 937, 943 (1993) (noting "the agency head is not *obligated* to conduct a review of an agreement entered into locally but is provided the *opportunity* to conduct a review" (emphases added))). This case does not involve imposed provisions or an agency "waiving" agency-head review of a local agreement due to inaction for the statutorily required thirty days. As such, those cases are inapposite and do not support the dissent's assertion.

[58] Resp. at 1 (emphasis added); *see also id.* at 11 (asserting Chair Khan "*approved* and signed the agreement" and "intended to *complete* agency[-]head review when she signed the agreement" (emphases added)).

[59] *Id.*, Ex. F, Email from Agency's Chief of Staff to Union's Counsel (Jan. 19, 2025, 6:00 PM).

[60] Dissent at 13-14.

[61] *See NAGE, Loc. R14-52*, 45 FLRA 910, 915-17 (1992) (provision stating that agreement "will be effective 10 Dec 91" did not preclude agency-head review after December 10, 1991; rather, it "require[d] that upon approval by the agency head or expiration of the [thirty]-day period for agency-head review, the terms of the agreement will be applied retroactive to December 10, 1991").

[62] 5 U.S.C. § 7114(c)(2).

[63] *Id.*

[64] *See* Pet., Attach. 1, Disapproval Notice at 1 (dated February 17).

[65] *See* Resp. at 11-12.

[66] *See id.* at 12 ("Under the Statute, agency[-]head review is a one-time opportunity for an agency's leader to review a[n agreement] for legal compliance before it goes into effect.").

[67] *Id.* (arguing that the Memorandum requires a second round of agency-head review). In the context of a negotiability dispute, where an agency relies on an executive order or presidential memorandum in its allegation of nonnegotiability, the Authority will analyze a union's claim that the executive order or presidential memorandum is inconsistent with the Statute. *See POPA*, 71 FLRA 1223, 1224-26 (2020) (Member DuBester dissenting); *see also* Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000) (Presidential Directive) ("[T]here is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is not styled as an executive order.").

[68] 90 Fed. Reg. at 9581 (§ 2(c)) (emphasis added).

already conducted agency-head review and approved an agreement, then the challenged portion of the Memorandum would not apply. Further, the Memorandum specifies that it "shall be implemented consistent with applicable law," which shows that the President intends for implementation to be in harmony with the Statute, rather than in conflict with it.[69] Thus, the Union has failed to establish that the Memorandum conflicts with the Statute by requiring two rounds of agency-head review.

B. The Union does not show that the Memorandum requires disapproving agreements for reasons that are inconsistent with § 7114(c).

The Union argues that the Memorandum conflicts with the Statute's agency-head-review structure by requiring agency heads to disapprove agreements based purely on the proximity of execution to a change in presidential administration.[70] This argument oversimplifies the Memorandum's operation.

When the President issued the Memorandum, he invoked his authority under the Constitution and laws of the United States, including 5 U.S.C. § 7301.[71] Section 7301 states, "The President may prescribe regulations for the conduct of employees in the executive branch."[72] Although the Union argues that the President cannot require the disapproval of agreements executed during the last month before a presidential transition, the Union fails to address the President's broad authority under § 7301 to "prescribe regulations for the conduct of" executive-branch employees.[73]

The President explained that, in his judgment, many agreements "negotiated . . . on the eve of a new administration are purposefully designed to circumvent the will of the people and our democracy. Such [agreements] inhibit the President's authority to manage the executive branch . . . ."[74] Consequently, the President prescribed a new rule or regulation – the Memorandum – to discourage executive-branch employees from conducting themselves in ways that the President found harmful to democratic self-government.[75] By not addressing the President's § 7301 authority, the Union has failed to establish that the President's issuance of the Memorandum falls outside the scope of that authority.

We recognize that previous negotiability decisions about conflicts between proposals, or provisions, and presidential directives have dealt with executive orders, rather than presidential memoranda.[76] However, the Office of Legal Counsel has confirmed that "there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is not styled as an executive order."[77] In addition, federal courts have treated executive orders and presidential memoranda as having equal legal stature.[78] Relatedly, federal courts have held that the President's authority to issue directives in § 7301 matters is especially broad. For example, a § 7301 presidential directive – like the Memorandum here – may override a conflicting government-wide regulation that was promulgated through notice-and-comment rulemaking.[79] Further, the Authority has recognized in the arbitration context that a presidential memorandum may amend an executive order, which supports finding that presidential memoranda merit equal treatment as § 7301 presidential directives.[80] Moreover, the President clearly intended that the Memorandum here would be treated as a government-wide rule or regulation because he provided

[69] *Id.* at 9582 (§ 3(b)).
[70] Resp. at 2.
[71] 90 Fed. Reg. at 9581 (pmbl.).
[72] 5 U.S.C. § 7301.
[73] *Id.*
[74] 90 Fed. Reg. at 9581 (§ 1).
[75] *Id.* ("Such last-minute, lame-duck CBAs, which purport to bind a new President to his predecessor's policies, run counter to America's system of democratic self-government.").
[76] *E.g.*, *NTEU*, 71 FLRA 1235, 1236-37 (2020) (Member DuBester dissenting); *POPA*, 71 FLRA at 1224-30 (conflicts with Executive Orders (EOs) 13,836 and 13,837); *NFFE, Loc. 1655*, 49 FLRA 874, 888-90 (1994) (conflicts with EO 12,564); *AFGE, Nat'l Council of HUD Locs.*, 43 FLRA 1405, 1406-13 (1992) (same); *AFSCME, Loc. 3097*, 42 FLRA 412, 417-21, 492-96, 498-500 (1991) (same); *NTEU*, 31 FLRA 181, 186-88 (1988) (conflicts with EO 11,222).
[77] Presidential Directive, 24 Op. O.L.C. at 29.
[78] *See, e.g.*, *League of United Latin Am. Citizens v. Exec. Off. of the President*, 808 F. Supp. 3d 29, 64 & n.37 (D.D.C. 2025) (stating that the distinction between an "executive order" and a "presidential memorandum" is an "immaterial" "difference in nomenclature" (citing Presidential Directive, 24 Op. O.L.C. at 29)); *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995) (relying on executive-order precedent to decide whether presidential memorandum created a private right of action).
[79] *Clarry v. United States*, 85 F.3d 1041, 1047-48 (2d Cir. 1996) (finding President's memorandum to Office of Personnel Management Director could override 5 C.F.R. § 731.303); *Korte v. OPM*, 797 F.2d 967, 970 (Fed. Cir. 1986) (same); *cf. Dehainaut v. Pena*, 32 F.3d 1066, 1073-74 (7th Cir. 1994) (reaching the same conclusion based on President's authority under 5 U.S.C. § 3301).
[80] *U.S. Dep't of the Air Force, Davis-Monthan Air Force Base*, 72 FLRA 716, 718 (2022) (Chairman DuBester concurring) (finding it was "necessary for the [a]rbitrator to consider [a presidential memorandum] in order to interpret and apply" an executive order because the memorandum stated that it amended the executive order).

an interpretive rule to ensure that the Authority treats it as such.[81] Based on these considerations, we find that the Memorandum should be treated no differently than a § 7301 executive order.[82]

Even so, the Union provides additional arguments to try to show that the Memorandum is inconsistent with § 7114(c)(2). The Union argues that the Agency disapproved the interim agreement based merely on the proximity of the agreement's execution to the presidential inauguration, rather than a conflict with an applicable law, rule, or regulation.[83] But that argument ignores the Agency's reliance on a duly prescribed rule or regulation (the Memorandum) to support the disapproval.[84] Contrary to the Union's argument, § 7114(c)(2) expressly contemplates that, as part of the agency-head-review process, an agency head will disapprove an agreement that is not "in accordance with . . . any . . . applicable law, rule[] or regulation,"[85] as the Agency did in this case.

The Union also asserts that, if the President may direct disapprovals for agreements that were executed within the thirty days before a presidential transition, then in the future, this basis for disapproval could be stretched much further so as to require the disapproval of agreements that were executed within "two years or four years" before a presidential transition.[86] But the Union's hypothetical is based on an impossible scenario because the agency-head-review period under § 7114(c) lasts only thirty days from an agreement's execution[87] – not two to four years. Thus, there would be no way for an agency head to conduct a § 7114(c) review years after an agreement's execution and disapprove that agreement based on a hypothetical future presidential memorandum. Therefore, the supposed dangers that the Union posits are entirely illusory.

For the foregoing reasons, the Union has failed to show that the Agency's disapproval of the interim agreement was unlawful due to its reliance on the Memorandum. Because the Union has not established that the disapproval was untimely or unlawful, and as the Union has also not shown that the Memorandum is inconsistent with the Statute, the entire interim agreement is nonnegotiable due to its inconsistency with the Memorandum.[88]

V. Order

We dismiss the petition.

[81] 90 Fed. Reg. at 9582 (stating, in § 3(c), "If the Federal Labor Relations Authority or a court of competent jurisdiction issues a final judgment holding that section 2(d) of this [M]emorandum would prevent this [M]emorandum from being considered a [g]overnment-wide rule or regulation . . . , section 2(d) of this [M]emorandum shall be severed and rendered inoperative thereby and given no force or effect.").

[82] *See POPA*, 71 FLRA at 1224-26 (in a negotiability proceeding, finding § 7301 executive orders have the force and effect of law).

[83] Resp. at 2.

[84] *See* Pet., Attach. 1, Disapproval Notice at 1 ("I am required by the Presidential Memorandum to disapprove the [i]nterim [agreement].").

[85] 5 U.S.C. § 7114(c)(2).

[86] Resp. at 15.

[87] 5 U.S.C. § 7114(c)(2).

[88] As explained in note 17 above, our resolution of the petition based on the Memorandum makes it unnecessary for us to address any alternative bases that Chairman Ferguson provided for disapproving certain provisions of the interim agreement.

Member Wagner, concurring in part and dissenting in part:

As an initial matter, I agree that we should not consider the Agency's untimely filed statement of position (statement). However, I do not agree that we should reach back to the arguments contained in the Agency's allegation of nonnegotiability (allegation) to resolve the interim agreement's negotiability. Section 2424.24 of the Authority's Regulations requires agencies to put in their *statements* all of their legal arguments as to why a provision is contrary to law.[1] Unions are not required, in either their petitions for review or their responses to agency statements (responses), to address claims that agencies made in their allegations.[2] In fact, with one exception not relevant here, unions' responses are "*limit*[*ed*] . . . to the matters that the agency raised in its statement."[3] Consistent with these Regulations – and as the Authority recently, unanimously reaffirmed – if an agency includes in its allegation an argument that it "does not repeat" in its *timely* filed statement, then the Authority will not consider that argument.[4] In my view, it is therefore incongruous, and contrary to the Authority's Regulations, to consider arguments from an allegation where, as here, an agency's statement is wholly rejected as *untimely*. Instead, I would find that, by failing to file a timely statement, the Agency waived its arguments as to why the interim agreement is contrary to law.[5]

Nevertheless, even if I were to consider the arguments in the Agency's allegation, I would reject them on the merits. Undoubtedly, § 7114(c) of the Federal Service Labor-Management Relations Statute provides a thirty-day period for agency heads to review collective-bargaining agreements.[6] But the agency-head-review period is waivable.[7] In the instant case, the interim agreement's signature page – which the Agency head at the time (Chair Khan) and the Union signed on January 19, 2025 – clearly and unequivocally states that "[t]he [a]greement will be *effective* on January 19, 2025."[8] By personally signing that agreement, and agreeing to an effective date of January 19, Chair Khan waived the Agency-head-review period and preemptively approved the agreement. And, if her signature alone did not sufficiently make that clear, an email from her chief of staff to the Union later that day – that "Chair Khan's signature is sufficient for Agency[-h]ead [r]eview"[9] – removed any doubt. I note that there is no evidence in the record that the chief of staff's statement did not reflect Chair Khan's position.[10] Further, although the majority contends that I rely on "cases involving facts not in play in the instant dispute,"[11] none of the cases cited by the majority involved the type of – admittedly unusual – situation where, as here, an agency head herself signs the collective-bargaining agreement.

[1] 5 C.F.R. § 2424.24(a) ("The purpose of the agency's statement . . . is to inform the Authority and the exclusive representative why a . . . provision is . . . contrary to law, . . . and whether the agency disagrees with any facts or arguments made by the exclusive representative in the petition."); *id.* § 2424.24(c)(2) (providing that, in their statements, agencies must "[s]et forth in full [their] position on any matters relevant to the petition that [they] want the Authority to consider in reaching its decision, including . . . [a] statement of the arguments and authorities supporting any bargaining obligation or negotiability claims").

[2] *Id.* § 2424.22(c) (setting forth the contents of petitions); *id.* § 2424.25(a) ("The purpose of the . . . response is to inform the Authority and the agency why, despite the agency's arguments in its *statement* . . . , the . . . provision is . . . not contrary to law, . . . and whether the exclusive representative disagrees with any facts or arguments in the agency's *statement* . . . ." (emphasis added)).

[3] *Id.* § 2424.25(c) (emphasis added).

[4] *AFSCME, Loc. 1653*, 74 FLRA 355, 357 (2026).

[5] 5 C.F.R. § 2424.32(d)(1) ("Failure to raise and support an argument may, in the Authority's discretion, be deemed a waiver of such argument. . . .").

[6] 5 U.S.C. § 7114(c).

[7] *POPA*, 41 FLRA 795, 798 (1991) (citing *DOD v. FLRA*, 879 F.2d 1220, 1224 (4th Cir. 1989)) (noting that an agency may "forfeit agency[-]head review" where "it is clear that an agency has agreed to binding [interest] arbitration"). *Cf. Kan. Army Nat'l Guard, Topeka, Kan.*, 47 FLRA 937, 943 (1993) (noting that, under § 7114(c) of the Statute, "the agency head is not *obligated* to conduct a review of an agreement entered into locally but is provided the *opportunity* to conduct a review" (emphasis added)).

[8] Pet., Attach. 2, 2025 NTEU & FTC Interim Agreement at 38 (emphasis added). All dates hereinafter are from 2025.

[9] Resp., Ex. F at 1.

[10] *Cf. POPA*, 48 FLRA 546, 547 (1993) (agency heads may delegate authority to approve or disapprove agreements).

[11] Majority at 7 n.57.

Thus, the interim agreement took effect on January 19, and Chairman Ferguson's subsequent, purported disapproval of the interim agreement had no legal effect. As such, the January 31 Presidential Memorandum cannot be the basis for finding the interim agreement contrary to law. In this regard, even assuming that the Presidential Memorandum rises to the level of an executive order for these purposes,[12] the Authority has previously treated executive orders as government-wide regulations.[13] With one exception not relevant here, a collective-bargaining agreement governs over a government-wide regulation that is promulgated after the agreement has taken effect.[14] Therefore, even if I were to treat the Presidential Memorandum as a government-wide regulation, it could not invalidate the interim agreement.

For the above reasons, I would find that the Agency has not established that the interim agreement is contrary to law, rule, or regulation, and I would direct the current Agency head to rescind his disapproval of the interim agreement. Accordingly, I concur in part and dissent in part.

[12] I note that the majority states that "federal courts have treated executive orders and presidential memoranda as having equal legal stature." *Id.* at 10. For support, the majority cites: (1) dicta from *League of United Latin American Citizens v. Executive Office of the President*, 808 F. Supp. 3d 29, 64 & n.37 (D.D.C. 2025), which, in turn, cited an opinion from the Department of Justice's Office of Legal Counsel; and (2) *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995), which held that a presidential memorandum did not "create any enforceable duty," and stated that "[e]xecutive orders without specific foundation in congressional action are not judicially enforceable in private civil suits" – but did *not* hold that presidential memoranda have an equal legal stature to executive orders. In the absence of any citation to binding authority on this point, I reserve judgment on whether presidential memoranda should be treated the same as executive orders in this context.

[13] *See, e.g.*, *U.S. Dep't of VA*, 72 FLRA 287, 290 (2021) (Member Abbott concurring).

[14] 5 U.S.C. § 7116(a)(7) (stating that it is an unfair labor practice for an agency "to enforce any rule or regulation (other than a rule or regulation implementing [5 U.S.C. § 2302] 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"); *see also AFGE, Nat'l Citizenship & Immigr. Servs., Council 119*, 73 FLRA 490, 491-92 (2023) (finding that § 7116(a)(7) precluded the agency from enforcing an executive order while the parties' agreement was in effect).