ORAL ARGUMENT HAS BEEN SCHEDULED FOR APRIL 16, 2019
No. 18-1195

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES NATIONAL COUNCIL, 118-ICE,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

And

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT

Intervenor for Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement (the "Agency") and the American Federation of Government Employees National Council, 118-ICE (the "Union"). In this Court proceeding, the Union is the petitioner, the Authority is the respondent, and the Agency is the intervenor.

B. RULING UNDER REVIEW

The Union seeks review of the Authority's decision in *U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement and American Federation of Government Employees National Council, 118-ICE*, 70 FLRA (No. 127) 628 (June 15, 2018).

C. RELATED CASES

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

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Acting Deputy Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

AFGE	Petitioner, American Federation of Government Employees, National Council, 118-ICE
Agency	Intervenor, U.S. Immigration and Customs Enforcement, a component of the U. S. Department of Homeland Security
APA	Provisions of the law allowing for judicial review of Administrative Procedure Act decisions, 5 U.S.C. §§ 701-706 (2018)
AUO	Administratively Uncontrollable Overtime
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's opening brief
Decision	The decision of the Authority in this case, dated June 15, 2018
Department	U.S. Department of Homeland Security
GAO	U.S. Government Accountability Office
ICE	Intervenor, U.S. Immigration and Customs Enforcement, a component of the U.S. Department of Homeland Security
JA	The Joint Appendix
OPM	U. S. Office of Personnel Management
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Union	Petitioner, American Federation of Government Employees, National Council, 118-ICE

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This matter is about the proper refusal of the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement, (the "Agency" or "ICE") to engage in pre-implementation bargaining before changing a policy concerning the calculation of administratively uncontrollable overtime ("AUO") that conflicted with a government-wide regulation.[1]

The Agency's AUO policy change was triggered by a series of investigations of alleged AUO abuse at the Department of Homeland Security (the "Department" or "DHS"), of which ICE is a component. The investigations uncovered widespread AUO problems in all DHS components and culminated in U.S. Office of Special Counsel ("OSC") and U.S. Government Accountability Office ("GAO") reports to Congress and the President.

Following the investigations, DHS determined that ICE and other DHS components had AUO policies that conflicted with Office of Personnel Management ("OPM") regulations and guidance. DHS directed ICE to adopt a policy that complied with OPM regulations. ICE did so without engaging in pre-implementation bargaining with the American Federation of Government Employees, National

[1] As described more fully in the 2014 U.S. Government Accountability Office Report on DHS AUO use ("GAO Report"), AUO is a pay premium of up to 25% of an employee's basic pay for performing irregular or unscheduled overtime work that cannot be controlled administratively. (*See* JA 616, 620-623.)

Council, 118-ICE (the "Union" or "AFGE"), but offered to engage in impact and implementation bargaining after ICE adopted the new policy. AFGE grieved ICE's refusal to engage in pre-implementation bargaining, asserting that ICE's refusal to do so constituted an unfair labor practice ("ULP").

The Federal Labor Relations Authority (the "Authority") determined that the Agency did not commit a ULP in violation of Section 7116 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute"), when the Agency first ensured that AUO policy complied with government-wide regulations and, after it adopted a lawful policy, offered to engage in post-implementation negotiations. As the Authority correctly found that the Agency did not commit a ULP, this Court should deny the Union's Petition for Review.

The Authority had subject matter jurisdiction over this arbitration case pursuant to Section 7122(a) of the Statute. 5 U.S.C. § 7122(a). The Authority's decision on review is published at 70 FLRA (No. 127) 628 (June 15, 2018) (the "Decision") and is included in the Joint Appendix ("JA") at 1040-49. The Union's Petition for Review was timely filed within 60 days of the Authority's Decision. 5 U.S.C. § 7123(a).[2]

[2] This Court has noted that although 5 U.S.C. § 7123(a)(1) refers to "an unfair labor practice under section 7118," that provision should read section 7116. *Nat'l Treasury Emps. Union v. FLRA*, 745 F.3d 1219, 1222 n.1 (D.C. Cir. 2014).

STATEMENT OF ISSUES PRESENTED

1. Whether the Authority reasonably determined that the Agency's AUO leave exclusion practice violated OPM regulations and guidance.

2. Whether the Authority's determination that the Agency did not commit a ULP by changing its unlawful AUO policy without first negotiating with the Union was based upon a permissible construction of the Statute.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. (Add. 1.)

STATEMENT OF THE CASE

This case concerns whether the Agency committed a ULP by refusing to bargain with AFGE before changing AUO practices that violated OPM regulations and guidance. (JA 1042.)

Under the Statute, an agency has no duty to bargain over a matter to the extent that it is "inconsistent with . . . any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). In this case, although it had no statutory duty to negotiate with AFGE *prior* to bringing the AUO policy into conformity with law, the Agency offered to engage in *post*-implementation bargaining after it adopted the revised AUO policy. The Agency's decision to engage only in post-implementation negotiations did not constitute a ULP under the Statute.

Problems with the Agency's AUO policy became apparent following investigations concerning possible AUO abuse at DHS. AUO is a premium pay that employees receive for performing irregular and unscheduled overtime work that is administratively uncontrollable. It is calculated by dividing the number of AUO hours an employee works by the total number of hours an employee worked in a week or pay period.[3] Employees may receive, in addition to their basic pay, up to 25% of their basic pay for AUO work.

ICE's historic practice had been to exclude leave, such as annual and sick leave, from the total number of hours that an employee worked. GAO and DHS determined, however, that ICE's historic AUO practices conflicted with OPM regulations and guidance that require agencies to include annual leave and sick leave in the total number of hours that an employee worked. DHS instructed ICE to cease calculating AUO in a manner that conflicted with OPM regulations.

In May 2015, the Agency stopped excluding certain types of leave from AUO calculations without engaging in pre-implementation bargaining with the Union.

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[3] The increments in which AUO and leave time are discussed vary based on the entity that is addressing them. OPM regulations and guidance refer to this time in increments of hours. (JA 682); 5 C.F.R. § 550.161 GAO, the arbitrator, and Union refer to time in increments of days. (*See* JA 6, 641; Br. 18.) To avoid confusion, Respondent will refer to AUO and leave usage in terms of hours because ultimately days are comprised of hours. *Cf. Chamberlain v. Throckmorton*, 206 F. 459, 460 (8th Cir. 1913) (taking judicial notice that the season of 1909 was near to 1910).

AFGE filed a grievance, alleging that the Agency violated its collective bargaining agreement ("CBA") with the Union and committed a ULP under 5 U.S.C. § 7116 by failing to engage in impact and implementation bargaining before changing the manner in which AUO is calculated. An arbitrator found in favor of the Union, and the Agency filed exceptions to that decision.

The Authority set aside the arbitrator's award, determining that he erred when he found that Section 7116(a)(5) of the Statute, and the parties' agreement, required the Agency to negotiate with the Union before correcting a policy that conflicted with a government-wide regulation. (JA 1040-42)

STATEMENT OF THE FACTS

This dispute arose from ICE's decision to engage in bargaining only after it adopted an AUO policy that complied with the law and the Union's demand that bargaining take place before ICE implemented the new policy. (JA 2-3)

AUO is an OPM-regulated, overtime-pay system that allows agencies to compensate eligible federal employees for a particular type of overtime, namely irregular, unscheduled overtime that cannot be administratively controlled. AUO is paid as a premium based on a percentage of the employee's annual basic pay. *See* 5

C.F.R. §§ 550.151-550.154, 550.161-550.164.[4] Agencies calculate AUO rates by periodically reviewing eligible employees' time sheets to determine the average number of AUO hours worked in a review period. 5 C.F.R. § 550.161(f). Agencies compute AUO averages by dividing the number of AUO hours worked by the total number of hours worked in the applicable time period. (JA 620-626, 1040.)

Before 2015, ICE had a "longstanding practice" of excluding certain leave times, such as annual and sick leave, from the total number of hours worked. (JA 6; Br. 18.) The practice artificially increased employee AUO compensation. That is because when the number of AUO hours worked is divided by a reduced number of total hours worked, the average number of AUO hours increases. As the average number of AUO hours was increased, employees could meet the threshold-hour requirement for AUO more easily and receive a higher AUO percentage rate. (JA 6, 623-624, 642); 5 C.F.R. § 550.154(a). This resulted in high Agency AUO costs. For example, the Agency, which has approximately 20,000 employees, of which 5,800 are represented by the Union, paid approximately $105 million for AUO in fiscal year 2013 alone. (JA 2-3, 633.)

The Agency's practice of excluding paid-leave continued even though it was contrary to OPM regulations and guidance. 5 C.F.R. § 550.154(c). OPM has

[4] One defining feature of this form of overtime is that it is initiated and claimed by the employee without prior assignment or approval by a supervisor. (JA 620-621, 679); 5 C.F.R. § 550.153(c).

specified time periods that are "*not considered* in computing the average hours of irregular and occasional overtime work" in 5 C.F.R. § 550.162(c), (g). 5 C.F.R. § 550.154(c). Paid leave, such as annual and sick leave, are not listed as permissible exclusions.[5]

OPM confirmed that annual and sick leave were not permissible exclusions in 1997, with the publication of "Office of Personnel Management Guidance on Administratively Uncontrollable Overtime." (JA 616, 670-684.) OPM's 1997 guidance specifically provided that "in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave)." (JA 682.)

The vast sums of public funds spent on AUO by ICE and other DHS components and the poor administration and inappropriate use of AUO sparked OSC investigations. (JA 7, 610.) Those investigations culminated in the Special Counsel's testimony before Congress in 2013. (JA 8-9.) In prepared remarks entitled, "Abuse of Overtime at DHS: Padding Paychecks and Pensions at Taxpayer Expense," and in

[5] Permissible exclusions include periods in which an employee is: (1) on "temporary assignment to [non-AUO-eligible] duties" for a period of not more than ten consecutive prescribed workdays, (2) in duty-related "advanced training" for an aggregate period of not more than 60 prescribed workdays, or (3) on a temporary assignment "directly related to a national emergency declared by the President." 5 C.F.R. § 550.162(c)(1), (c)(2), (g).

her oral testimony, the Special Counsel described the poor administrative controls that resulted in wide-spread AUO abuses. (JA 8, 615.)

The Special Counsel's probe sparked a GAO investigation of the matter. (JA 9, 617.) That inquiry culminated in a December 2014 GAO Report to Congress entitled, "Continued Action Needed to Strengthen Management of Administratively Uncontrollable Overtime." (JA 619-678.)

The GAO Report concluded that as early as 1997, DHS entities had mismanaged AUO by, for example, allowing the use of AUO without much oversight and regardless of whether AUO was appropriate compensation for the work performed. (JA 661.) GAO further found that some DHS components, including ICE, calculated AUO rates in a manner inconsistent with federal regulations and guidance. (JA 641.) The report specifically noted that then-existing ICE policies provided for "excludable days during periods of leave, including annual or sick leave, or for periods of leave without pay" even though applicable regulations did not authorize the exclusion of those days, and notwithstanding OPM's 1997 guidance. (*Id.*)

While GAO investigated, DHS and ICE assessed their administration of AUO, employee AUO abuse, and new ways to control AUO use. (JA 9-10, 618.) In May 2014, the Department issued a memorandum to its largest components, including ICE, directing them to develop comprehensive plans for achieving full compliance

with AUO laws, and specifically correcting the practice of inappropriately "excluding" certain days from AUO calculations. (JA 10, 1041.)

By January 2015, DHS directed its components, including the Agency, to provide plans for achieving and maintaining full compliance with the "laws governing AUO." (JA 12-13.) The Department again instructed components to address the issue of "excluding" days from AUO calculations beyond those prescribed by regulation. (JA 12-13.) The Department told its components to take "immediate" action to correct such ongoing, unauthorized practices. (JA 13.)

Department and Agency communications culminated in May of 2015. On May 2, 2015, the Agency sent an email informing all employees that the Agency's "prior" excludable day AUO policy was contrary to law and would end immediately. (JA 689, 1041.) That same day the Agency notified the Union separately and offered *post*-implementation bargaining. (JA 3, 29, 1041.) On May 7, 2015, the Agency issued the premium pay guide. (JA 484, 1041.) The Union grieved the lack of notice and opportunity for *pre*-implementation bargaining; the parties proceeded to arbitration. (JA 1041.)

Arbitrator Jeffery J. Goodfriend sustained the Union's grievance in September 2016. (JA 42.) He discussed at length two decisions the Authority issued in 2015 and 2016 concerning the same two parties: *American Federation of Government Employees, ICE, National Council 118*, 69 FLRA 248 (2016) ("*AFGE 2016*") and *American Federation of*

Government Employees, ICE, National Council 118, 68 FLRA 910 (2015) ("*AFGE 2015*"). He concluded that the Agency's prior policy of excluding from AUO calculations use of annual leave and sick leave was not contrary to OPM's government-wide regulations. (JA 24-28, 1041.) Consequently, the arbitrator found the Agency's failure to provide notice and an opportunity to engage in pre-implementation bargaining was a ULP under 5 U.S.C. § 7116(a)(5), and a violation of the parties' CBA. (JA 1041.)

The Agency filed exceptions to the award on the ground, *inter alia*, that the arbitrator's determination as to the legality of the prior excludable-day policy was contrary to law. (JA 1041-42.) The Authority (Chairman Kiko and Member Abbott, with Member DuBester dissenting) set aside the arbitrator's award after determining the Agency's prior excludable-day policy did not conform with OPM regulations and guidance. (JA 1042.)

SUMMARY OF ARGUMENT

The Agency was not statutorily required to engage in pre-implementation bargaining concerning its AUO policy change because its prior policy conflicted with OPM's AUO regulations. The Authority reasonably interpreted the plain text of government-wide regulations, 5 C.F.R. §§ 550.154(c), 550.162(c), 550.162(g) and applicable OPM guidance concerning those regulations. It correctly determined that the Agency's prior practice of allowing annual and sick leave to be excluded from the calculation of the AUO rate was contrary to OPM regulations.

As the Authority found, the Agency's prior AUO policy conflicted with OPM's government-wide regulations concerning the calculation of AUO. OPM regulations provide that AUO is calculated by dividing an eligible employees' regular duty time by the number of administratively uncontrolled overtime hours also worked in the same period. Section 550.154(c) of those regulations identifies only three categories of time that may be excluded from the weeks in a review period; those categories all relate to temporary assignments – not the use of paid leave. *See* 5 C.F.R. § 550.162(c)(1), (c)(2), & (g). Guidance that OPM issued in 1997 made clear that the regulations did not permit the exclusion of paid leave, such as annual and sick leave, from AUO calculations. (*See* JA 682 ("in determining the number of weeks in a review period, [agencies had] no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave)").)

The Authority's conclusions concerning the illegality of ICE's prior AUO policy were buttressed by similar conclusions reached by other agencies. Indeed, GAO determined, during the course of an investigation of AUO use at DHS, that the exclusion of paid leave from AUO calculations could not be reconciled with OPM regulations. (JA 641-642.) Spurred by the GAO Report and its own investigations, DHS directed ICE and other DHS components to amend their AUO policies to bring them into compliance with OPM regulations.

Given this wide agreement, the Authority reasonably determined that ICE's prior AUO policy conflicted with government-wide regulation. That conclusion is not altered by the Union's attempt to rely on *AFGE 2015* and *AFGE 2016*, cases that the Union abandoned, and the Authority vacated in 2018. Vacatur rendered the decisions void.

Having found a conflict between ICE's prior AUO policy and OPM regulations, the Authority applied well-established precedent to determine that the Agency had no duty to engage in pre-implementation bargaining. The Authority has consistently held that no pre-implementation duty to bargain is triggered by an agency that changes an illegal practice to bring that practice into conformity with government-wide regulations. This Court has twice come to the same conclusion. Deference to the Authority's statutory determination that ICE did not commit a ULP is therefore appropriate.

Finally, notwithstanding the Union's arguments to the contrary, the Authority's decision honors the purpose and intent of the Statute. The Authority's decision does not deny the Union the ability to engage in bargaining concerning the AUO change; it only addresses *when* that bargaining may take place. Moreover, the Authority's Decision supports collective bargaining in the federal sector by providing a bright-line rule that will facilitate consistency and stability in bargaining relationships.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)("*Chevron*")). This Court defers to the Authority's construction of the Statute, *U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991), which is "entrusted by Congress to FLRA's administration," and upholds the Authority's decisions so long as they are "reasonable and defensible," *Dep't of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

When judicial review is permitted under Section 7123(a) of the Statute, this Court will uphold an Authority decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act ("APA") standards of review). The scope of such review is narrow. *See, e.g., Am. Fed. of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

AFGE's challenge to the Authority's determination that ICE did not commit a ULP is reviewed under the two-step *Chevron* framework. Where Congress "has directly spoken to the precise question at issue," this Court "give[s] effect to [its] unambiguously expressed intent," but if the statute is silent or ambiguous this Court defers to the Authority's interpretation so long as it is "based on a permissible construction of the statute." *Nat'l Treasury Emps. Union v. FLRA*, 414 F. 3d 50, 57 (D.C. Cir. 2005) (quoting *Chevron,* 467 U.S. at 842–43); *see also Hosp. of Barstow, Inc. v. NLRB*, 897 F.3d 280, 286 (D.C. Cir. 2018); *Nat'l Treasury Emps. Union*, 754 F.3d at 1041. This Court, however, reviews *de novo* the Authority's interpretation of OPM's AUO regulations. *U.S. Dep't of the Air Force, Luke Air Force Base, Az. v. FLRA,* 844 F.3d 957, 960 (D.C. Cir. 2016).

ARGUMENT

The Statute's requirement that parties bargain in good faith concerning Union members' conditions of employment is not limitless. Agencies do not commit ULPs by refusing to negotiate practices that are "inconsistent with any Federal Law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). There is substantial support for the Authority's determination that ICE had no choice other than to change its AUO policies because they conflicted with government-wide regulations. Once the Authority came to that conclusion, it applied longstanding Authority precedent that an agency's unilateral change in practice to comply with a government-

wide regulation does not trigger a duty to bargain prior to the change. *See Dep't of the Air Force, Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah,* 17 FLRA 394, 395-396 (1985). As no duty to bargain was triggered, the Authority properly concluded the Agency did not violate 5 U.S.C. § 7116(a)(5), or commit a ULP, when it did not offer pre-implementation bargaining to the Union.

I. The Authority Reasonably Determined that the Agency's AUO Leave Exclusion Practice Violated Government-Wide Regulations

Regulations concerning the calculation of AUO, OPM guidance, the conclusions of GAO and OSC investigations concerning DHS AUO policies, and ultimately DHS directives, all support the Authority's conclusion that the Agency's prior AUO practices conflicted with government-wide regulations.[6]

A. The Agency's Prior AUO Excludable Days Practice was Contrary to OPM Regulations and Guidance

The Authority reasonably interpreted the plain text of 5 C.F.R. §§ 550.154(c), 550.162(c), (g) and properly deferred to OPM's 1997 guidance concerning those regulations when it determined that ICE's AUO policy conflicted with them.

The manner in which agencies may calculate AUO is described in 5 C.F.R. § 550.154. That section articulates only limited instances in which time may be

[6] Although Member DuBester dissented from the Authority's decision, he agreed that ICE's AUO policy conflicted with OPM regulations. (*See* JA 1048 "As [OPM's] guidance specifically states that agencies lack authority to exclude sick and leave from their AUO calculations, I would find that the Agency's excludable-days practice[] is contrary to regulation.")

excluded from AUO calculations: temporary assignments related to work, training, or national emergencies. 5 C.F.R. §§ 550.154(c); 550.162(c), (g). Other forms of leave, such as annual or sick leave, do not fall into those categories. That omission led the Authority to the reasonable conclusion that annual and sick leave may not be excluded from AUO calculations. (JA 1042.)

The Authority,[7] like federal courts,[8] generally defers to an agency's interpretation of its own regulations. The Authority therefore deferred to OPM's 1997 guidance concerning its AUO regulations. That guidance buttressed the conclusion that the Agency's prior AUO policy conflicted with OPM regulations. The 1997 guidance provided in relevant part:

> in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave).

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[7] *See U.S. Dep't of VA, Med. Ctr., Wash., D.C.,* 67 FLRA 194, 197-98 (2014); *Am. Fed'n. Gov. Emps. Local 2006,* 65 FLRA 465, 469 (2011) (Authority deferring to OPM guidance and regulations); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tx.,* 56 FLRA 1057, 1065 (2001) (holding that the Authority is not the proper forum for agency challenges to OPM regulations).

[8] *See Nat'l Treasury Emps. Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994) (applying OPM's interpretation of its own regulations); *FLRA v. U.S. Dep't of Treasury*, 884 F.2d 1446, 1454 (D.C. Cir 1989) ("An agency's interpretation of its own regulations is normally controlling unless it is 'plainly erroneous or inconsistent' with the language of the regulation") (*quoting United States v. Larionoff*, 431 U.S. 864, 872 (1977)).

(JA 682.) In other words, OPM interpreted its regulations as not permitting agencies to exclude annual and sick leave from its AUO computations. (*See* JA 680-684.)[9]

The GAO Report to Congress further supports the Authority's conclusion that ICE's prior AUO practices were contrary to government-wide regulations. Indeed, the GAO Report specifically criticized DHS components' AUO policies that continued to provide for "excludable days during periods of leave including annual or sick leave, or for periods of leave without pay" in spite of OPM regulations and guidance to the contrary. (JA 641.)[10]

The Authority's conclusion that the Agency's AUO policies conflicted with a government-wide regulation is amply supported by the foregoing. This Court should therefore find the Authority's conclusion to be reasonable.

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[9] The Court should reject the Union's argument (Br. 8), that the OPM's guidance was somehow less reliable or relevant because the DHS never sought a formal opinion from OPM on the subject of leave exclusion. That stance is the opposite of the argument made by the Union to the Authority below. (JA 1042 n.21.) There the Union specifically opposed the Agency's request that the Authority seek an opinion from OPM. *Id.*

[10] The Union makes much of the decades that passed as both parties allowed the problematic AUO excludable-days policy to fester. (Br. 18, 24.) The Union, however, cites no case law supporting the proposition that illegal activity becomes less illegal the longer it continues. This Court should therefore disregard this unsupported argument. *Cf. Janus v. Am. Fed. of State, Cty., & Mun. Emp., Council 31*, 138 S. Ct. 2448, 2485-86 (2018) (holding that even if permitted in the past, unconstitutional extractions "cannot be allowed to continue indefinitely"); *see Dep't of the Navy, U.S. Marine Corps.*, 34 FLRA 635, 639 (1990) (agency's four-month adherence to an agreement that was inconsistent with law did not render unlawful the agency's eventual repudiation of the agreement without bargaining).

B. Vacated Authority Decisions Have No Precedential Value

This Court should reject the Union's attempt to bolster its arguments with decisions that the Authority vacated in *American Federation of Government Employees, ICE Nat'l Council 118*, 70 FLRA 441 (2018) ("*AFGE 2018*") and other distinguishable Authority decisions. Those decisions do not constitute "30 years of precedent" supporting the Unions claims, but are cases that are void, decided before OPM issued its 1997 guidance, or are otherwise distinguishable.

It is axiomatic that a vacated decision has no precedential value. Indeed, this Court has defined the term "vacate" to mean "to annul, to cancel or rescind; to declare, to make, or to render, void; . . . to make of no authority or validity." *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 797 (D.C. Cir 1983).

In *AFGE 2018* the Authority rendered void the in decisions in *American Federation of Government Employees, ICE, National Council 118*, 69 FLRA 248 (2016) ("*AFGE 2016*") and *American Federation of Government Employees, ICE, National Council 118*, 68 FLRA 910 (2015) ("*AFGE 2015*"). *AFGE 2015* and *AFGE 2016* were Authority decisions concerning a negotiability petition involving the Agency and the Union, respectively the Intervenor and Petitioner in this case. The Agency filed, in this Court, a petition for review of the Authority's *AFGE 2015* and *AFGE 2016* decisions. The Authority subsequently asked this Court to remand the case for

reconsideration in light of the passage of the Administrative Leave Act of 2016. *See AFGE 2018*, 70 FLRA at 441. In an unpublished decision, the Court remanded the case to the Authority. *U.S. Dep't of Homeland Sec., Immigration & Customs Enf't v. FLRA*, No. 16-1144 (D.C. Cir. Dec. 19, 2017).

On remand, the Authority ordered supplemental briefings. In response, the Union asked to withdraw its underlying negotiability petition. *AFGE 2018*, 70 FLRA at 441. The Agency did not oppose the Union's request, but asked that if the Authority granted the Union's request, it vacate the underlying *AFGE 2015* and *2016* decisions. *Id.* In *AFGE 2018*, the Authority granted both parties' requests and vacated the *AFGE 2015* and *AFGE 2016* decisions, rendering them void. *Id.* As the *AFGE 2015* and *AFGE 2016* decisions are void, they cannot be compared to, or distinguished from, this case.

The Petitioner's numerous references to *AFGE 2015* and *AFGE 2016* attempt to mask the Petitioner's choice to withdraw the negotiability petition that gave rise to those decisions. If the Petitioner regretted withdrawing a negotiability petition that ultimately resulted in the Authority vacating *AFGE 2015* and *AFGE 2016*, then, under Section 7123(a) of the Statute, the Petitioner should have sought review within 60 days of *AFGE 2018*.

The few other cases cited by the Petitioner (Br. 22-25) are distinguishable. Two cases cited by the Union, *Beeunas v. U.S.*, 1 Cl. Ct. 706 (1983), a Court of Claims

decision (Br. 24), and *National Border Patrol Council, American Federation of Government Employees,* 23 FLRA 106 (1986) (Br. 23), were decided years before OPM's 1997 guidance. Finally, although the Authority's more recent decision *U.S. Department of Homeland Security, Customs & Border Protection*, 69 FLRA 579, 583 (2016) ("*DHS 2016*") does cite to the *AFGE 2015* and *AFGE 2016* decisions, it distinguished itself from the now-vacated cases. *DHS 2016* found those decisions did not apply because OPM regulations were dispositive of the issue before it.

The Union's claims that the Decision did not consider relevant precedent should thus be disregarded.

II. The Authority's Decision that the Agency Did Not Commit a ULP Was Based on a Permissible Construction of the Statute

Thirty-five years of Authority precedent, spanning six administrations, in addition to decisions by this Court, have held that an agency is not obliged to initiate bargaining *before* correcting an unlawful practice.[11] Deference to the Authority's determination that the Agency did not commit a ULP when it offered only post-implementation bargaining is therefore appropriate.

[11] *See Patent Office Prof'l Ass'n v. FLRA*, 872 F.2d 451, 455 (D.C. Cir. 1989) ("*Patent Office*") (no duty to bargain over changes Agency made to tuition assistance program to conform to governing law); *Am. Fed'n. Gov. Emps., Local 1923 v. FLRA*, 796 F.2d 530, 532 (D.C. Cir. 1986) (no duty to engage in pre-implementation bargaining of change to conform to Comptroller General decisions).

A. The Agency was Not Required to Engage in Pre-implementation Bargaining

When the Authority interprets its organic Statute and applies its own precedent, the Court's already narrow review of the Authority's final determinations is at its most narrow. *See Colorado Interstate* Gas *Co. v. Fed. Energy Reg. Comm'n*, 599 F.3d 698, 703 (D.C. Cir. 2010); Overseas *Educ. Ass'n. v. FLRA*, 872 F.2d 1032, 1033 (D.C. Cir. 1988). The Authority's determination that the Agency did not commit a ULP is a reasonable conclusion based on a "permissible construction" of the Statute. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

The Authority has interpreted the Statute to provide that the duty of agencies to give unions notice and an opportunity to engage in bargaining is not triggered when an agency practice violates a government-wide regulation. 5 U.S.C. §§ 7116(a)(5); 7117(a)(1); *see Am. Fed. Gov. Emps. v. FLRA,* 446 F.3d 162, 165 (D.C. Cir. 2006) (agencies are obliged to negotiate only bargainable issues). The Authority has consistently interpreted the Statute in this manner for over three decades. *See, e.g., U.S. Dep't of Interior, Bureau of Reclamation*, 20 FLRA 587, 587-88 (1985) ("*Bureau of Reclamation*").[12]

[12] *See Dep't of the Air Force, Air Force Logistics Command, Ogden Air Logistics Ctr., Hill Air Force Base, Utah,* 17 FLRA 394, 395-396 (1985) (agency did not violate Section 7116(a)(5) of the Statute when it unilaterally stopped paying employees for duty-free meal breaks in order to conform to with a government-wide regulation); *see also U.S. Dep't of Agric., Food Safety & Inspection Serv., Boaz, Ala.,* 66 FLRA 720, 723 (2012)

The Authority analyzed those requirements in *Bureau of Reclamation*. In that case, the Authority examined a policy the agency had unilaterally changed without notifying the union and giving it an opportunity to bargain. *Id.* at 587. The Authority determined that the agency committed a ULP with respect to all of the changes, save one. *Id.* at 587-88. The Authority determined that one portion of the policy had "been inconsistent with a Government-wide rule or regulation under section 7117 of the Statute." *Id.* The Authority therefore concluded that the agency had no obligation to provide the union with notice before changing that portion of the policy. *Id.* at 589.[13]

In this case, once the Authority concluded that the Agency's prior AUO policy did not conform with government-wide regulations, the Authority then reasonably

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(agency had a duty to bargain because it was unable to establish that its prior policy was illegal); *U.S. Immigration and Naturalization Serv., Wash., D.C.*, 55 FLRA 69, 73 n.8 (1999) (Member Wasserman, dissenting) (identifying three instances when an agency may unilaterally implement a change: when the impact on bargaining unit is *de minimis*; when the union's proposal is non-negotiable; and when implementing a change to correct an unlawful practice).

[13] The Union's case is not strengthened by *Department of the Interior, U.S. Geological Survey Conservation Division, Gulf of Mexico Region, Metairie, La.*, 9 FLRA 543 (1982) ("*Geological Survey*"), to which Member DuBester cites in his dissent. (JA 1047 n.52.) As the Authority explains (JA 1042 n.22), that case stands for the proposition that an agency must provide notice and an opportunity to engage in bargaining when changing a policy to correct an illegal practice. *Geological Survey*, 9 FLRA at 545-46. The decision does not state when that bargaining must take place. *Id.* In fact, it holds, "This is not to suggest that the obligation to bargain over the impact of a decision to discontinue an unlawful past practice could justify a delay in correcting the unlawful past practice." *Id.* at 546 n.9.

interpreted and applied its own well-established precedent to conclude that an agency had no obligation to substantively bargain a unilateral change in policy made to conform that policy to the law. (JA 1041-1042.)

That conclusion is similar to this Court's decision in *Patent Office Professional Association v. FLRA*, 872 F.2d 451, 455 (D.C. Cir. 1989). In that case, the Court agreed with the Authority's determination that the agency did not commit a ULP when it made substantive changes to a law school tuition assistance program to conform to federal law without offering an opportunity to bargain the those changes with the union. *Id.* (citing *Am. Fed'n of Gov't Emps., Local 1923, v. FLRA*, 796 F.2d 530, 532 (D.C. Cir. 1986)).

The Authority's determination that the Agency had no duty to engage in pre-implementation bargaining before changing an illegal AUO policy is thus consistent with the Statute.

B. The Decision is Consistent with the Statute's Purpose

This Court should reject the Union's argument that the Authority's decision is contrary to public policy. (Br. 39-41.) As cases cited in Respondent's brief demonstrate (Br. 39-41), although "collective bargaining in the civil service [is] in the public interest" (5 U.S.C. 7101), there are limits on the right to collectively bargain. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92 (1983) ("In general, unions and federal agencies must negotiate over terms and conditions of employment,

unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation.") (citing 5 U.S.C. §§ 7103(a), 7114, 7116, and 7117(a)); *Dep't of Health & Human Servs. Soc. Sec. Admin.*, 24 FLRA 403, 408 (1986) (no obligation to bargain concerning procedures or appropriate arrangements pertaining to the reassignment of an employee); *U.S. Dep't of VA, Med. Ctr., Wash. D.C.,* 34 FLRA 182, 186 (1990) (where there was no duty to bargain, agency did not commit a ULP by refusing to provide information pertaining to the conditions of employment). Moreover, this Court has held that the task of determining when and whether a procedure is negotiable, "involves questions of judgment and balance . . . . And Congress intended the needed judgments to be made, not by this court, but by the Authority." *Dep't of Def., Army-Air Force Exch. Serv. v. FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981).

The substance of the Union's public policy argument (Br. 39-41), is undercut by two points. First, the Union was not deprived of the right to bargain. Indeed, as Member DuBester observed in his dissent, "The issues that separates us . . . is *when* – not *whether* – the Agency had an obligation to notify, and engage in bargaining with the Union over the change." (JA 1046 (emphasis added).) Under the Authority's decision, the Union would still be able to engage in post-implementation bargaining concerning the revised AUO policy.

Second, collective bargaining, which Congress indeed found to be in the public's interest,[14] is strengthened for both employing agencies and labor organizations when the Authority provides bright-line rules that parties can understand. Such a bright-line rule is at issue in this case. The Petitioner's argument advocating for pre-implementation bargaining of changes to an illegal policy is a call for confusion, not sound public policy.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that this Court deny the Union's Petition for Review in its entirety.

Respectfully submitted,

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[14] *See* 5 U.S.C. § 7101(a).

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 5,891 words excluding exempt material.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Acting Deputy Solicitor
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Rebecca J. Osborne
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ADDENDUM 1

STATUTORY AND REGULATORY PROVISIONS

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C § 7101 Findings and Purpose

(a) The Congress finds that--

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

5 U.S.C. § 7103 Definitions; application

(a) For the purpose of this chapter--

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual--

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution1 but does not include--

(A) the Government Accountability Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means--

(A) an employee engaged in the performance of work--

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which--

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit--

(i) on the basis of an election, or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

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

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

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

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

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

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

(ii) the employee requests representation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

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

5 U.S.C. § 7116(a) Unfair Labor Practices

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

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

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

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

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

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

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

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

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

5 U.S.C. § 7117(a) Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section

that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

5 U.S.C. § 7122 Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. § 7123 (a)-(c) Judicial review; enforcement

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

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

(2) section 7112 of this title (involving an appropriate unit determination),

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

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

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

of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. § 550.151 Authorization of premium pay on an annual basis

An agency may pay premium pay on an annual basis, instead of other premium pay prescribed in this subpart (except premium pay for regular overtime work, and work at night, on Sundays, and on holidays), to an employee in a position in which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular or occasional overtime work, with the employee generally being responsible for recognizing, without supervision, circumstances which require the employee to remain on duty. Premium pay under this section is determined as an appropriate percentage, not less than 10 percent nor more than 25 percent, of the employee's rate of basic pay (as defined in § 550.103).

5 C.F.R § 550.152 [Reserved]

5 C.F.R. § 153 Bases for determining positions for which premium pay under § 550.151 is authorized.

(a) The requirement in § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position. A typical example of a position which meets this requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it. He is often required to perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities. His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty

(which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required.

(b) In order to satisfactorily discharge the duties of a position referred to in § 550.151, an employee is required to perform substantial amounts of irregular or occasional overtime work. In regard to this requirement:

(1) A substantial amount of irregular or occasional overtime work means an average of at least 3 hours a week of that overtime work.

(2) The irregular or occasional overtime work is a continual requirement, generally averaging more than once a week.

(3) There must be a definite basis for anticipating that the irregular or occasional overtime work will continue over an appropriate period with a duration and frequency sufficient to meet the minimum requirements under paragraphs (b)(1) and (2) of this section.

(c) The words in § 550.151 that an employee is generally "responsible for recognizing, without supervision, circumstances which require him to remain on duty" mean that:

(1) The responsibility for an employee remaining on duty when required by circumstances must be a definite, official, and special requirement of his position.

(2) The employee must remain on duty not merely because it is desirable, but because of compelling reasons inherently related to continuance of his duties, and of such a nature that failure to carry on would constitute negligence.

(3) The requirement that the employee is responsible for recognizing circumstances does not include such clear-cut instances as, for example, when an employee must continue working because a relief fails to report as scheduled.

(d) The words "circumstances which require him to remain on duty" as used in § 550.151 mean that:

(1) The employee is required to continue on duty in continuation of a full daily tour of duty or that after the end of his regular workday, the employee resumes duty in accordance with a prearranged plan or an awaited event. Performance of only call-back overtime work referred to in § 550.112(h) does not meet this requirement.

(2) The employee has no choice as to when or where he may perform the work when he remains on duty in continuation of a full daily tour of duty. This differs from a situation in which an employee has the option of taking work home or doing it at the office; or doing it in continuation of his regular hours of duty or later in the evening. It also differs from a situation in which an employee has such latitude in his working hours, as when in a travel status, that he may decide to begin work later in the morning and continue working later at night to better accomplish a given objective.

5 C.F.R. § 550.154 Rates of premium pay payable under § 550.151.

(a) An agency may pay the premium pay on an annual basis referred to in § 550.151 to an employee who meets the requirements of that section, at one of the following percentages of the employee's rate of basic pay (as defined in § 550.103):

(1) A position which requires an average of at least 3 but not more than 5 hours a week of irregular or occasional overtime work—10 percent;

(2) A position which requires an average of over five but not more than 7 hours a week of irregular or occasional overtime work—15 percent;

(3) A position which requires an average of over seven but not more than 9 hours a week or irregular or occasional overtime work—20 percent;

(4) A position which requires an average of over 9 hours a week of irregular or occasional overtime work—25 percent.

(b) If an agency proposes to pay an employee premium pay on an annual basis under § 550.151 but unusual conditions seem to make the applicable rate in paragraph (a) of this section unsuitable, the agency may propose a rate of premium pay on an annual basis for OPM approval. The proposal shall include full information bearing on the frequency and duration of the irregular or occasional overtime work required; the nature of the work which prevents hours of duty from being controlled administratively; the necessity for the employee being generally responsible for recognizing, without supervision, circumstances which require him to remain on duty; and any other pertinent conditions.

(c) The period of time during which an employee continues to receive premium pay on an annual basis under § 550.151 under the authority of paragraphs (c) or (g) of § 550.162 is not considered in computing the average hours of irregular and occasional overtime work under this section.

5 C.F.R. § 550.161 Responsibilities of the agencies.

The head of each agency, or an official who has been delegated authority to act for the head of an agency in the matter concerned, is responsible for:

(a) Fixing tours of duty; ordering employees to remain at their stations in a standby status; and placing responsibility on employees for remaining on duty when required by circumstances.

(b) Determining, in accordance with section 5545(c) of title 5, United States Code, and this subpart, which employees shall receive premium pay on an annual basis under § 550.141 or § 550.151. These determinations may not be retroactive.

(c) Determining the number of hours of actual work to be customarily required in positions involving longer than ordinary periods of duty, a substantial part of which consists of standby duty. This determination shall be based on consideration of the time required by regular, repetitive operations, available records of the time required in the past by other activities, and any other information bearing on the number of hours of actual work which may reasonably be expected to be required in the future.

(d) Determining the number of hours of irregular or occasional overtime work to be customarily required in positions which require substantial amounts of irregular or occasional overtime work with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty. This determination shall be based on consideration of available records of the hours of irregular or occasional overtime work required in the past, and any other information bearing on the number of hours of duty which may reasonably be expected to be required in the future.

(e) Determining the rate of premium pay fixed by OPM under § 550.144 or § 550.154 which is applicable to each employee paid under § 550.141 or § 550.151; or, if no rate

fixed under § 550.144 or § 550.154 is considered applicable, proposing a rate of premium pay on an annual basis to OPM.

(f) Reviewing determinations under paragraphs (b), (c), (d) and (e) of this section at appropriate intervals, and discontinuing payments or revising rates of premium pay on an annual basis in each instance when that action is necessary to meet the requirements of section 5545(c) of title 5, United States Code, and this subpart.

5 C.F.R. § 550.162 Payment provisions.

(a) Except as otherwise provided in this section, an employee's premium pay on an annual basis under § 550.141 or § 550.151 begins on the date that he enters on duty in the position concerned for purposes of basic pay, and ceases on the date that he ceases to be paid basic pay in the position.

(b) When an employee is in a position in which conditions warranting premium pay on an annual basis under § 550.141 or § 550.151 exist only during a certain period of the year, such as during a given season, an agency may pay the employee premium pay on an annual basis only during the period he is subject to these conditions.

(c) An agency may continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151:

(1) For a period of not more than 10 consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of premium pay on an annual basis, and for a total of not more than 30 workdays in a calendar year while on such a temporary assignment.

(2) For an aggregate period of not more than 60 prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which premium pay on an annual basis is payable.

An agency may not continue to pay an employee premium pay on an annual basis under this paragraph for more than 60 workdays in a calendar year.

(d) When an employee is not entitled to premium pay on an annual basis under § 550.141, he is entitled to be paid for overtime, night, holiday, and Sunday work in accordance with other sections of this subpart.

(e) An agency shall continue to pay an employee premium pay on an annual basis under § 550.141 or § 550.151 while he is on leave with pay during a period in which premium pay on an annual basis is payable under paragraphs (a), (b), and (c) of this section.

(f) Unless an agency discontinues authorization of premium pay under § 550.141 or § 550.151 for all similar positions, it may not discontinue authorization of such premium pay for an individual employee's position—

(1) During a period of paid leave elected by the employee and approved by the agency in lieu of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.), following a job-related injury;

(2) During a period of continuation of pay under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.);

(3) During a period of leave without pay, if the employee is in receipt of benefits under the Federal Employees' Compensation Act, as amended (5 U.S.C. 8101 et seq.). (Note: No premium pay is payable during leave without pay; however, the continued authorization may prevent a reduction in an employee's retirement benefits if the leave without pay period occurs during the employee's high–3 average salary period.)

(g) Notwithstanding paragraph (c)(1) of this section, an agency may continue to pay premium pay under § 550.151 to an employee during a temporary assignment that would not otherwise warrant the payment of AUO pay, if the temporary assignment is directly related to a national emergency declared by the President. An agency may continue to pay premium pay under § 550.151 for not more than 30 consecutive workdays for such a temporary assignment and for a total of not more than 90 workdays in a calendar year while on such a temporary assignment.

5 C.F.R. § 550.163 Relationships to other payments.

(a) An employee receiving premium pay on an annual basis under § 550.141 may not receive premium pay for regular overtime work or work at night or on a holiday or on Sunday under any other section of this subpart. An agency shall pay the employee in accordance with §§ 550.113 and 550.114 for irregular or occasional overtime work.

(b) An employee receiving premium pay on an annual basis under § 550.151 may not receive premium pay for irregular or occasional overtime work under any other section of this subpart. An agency shall pay the employee in accordance with other sections of this subpart for regular overtime work, and work at night, on Sundays, and on holidays.

(c) Overtime, night, holiday, or Sunday work paid under any statute other than subchapter V of chapter 55 of title 5, United States Code, is not a basis for payment of premium pay on an annual basis under § 550.141 or § 550.151.

(d)(1) Except as provided in paragraph (d)(2) of this section, premium pay on an annual basis under § 550.141 or § 550.151 is not base pay and is not included in the base used in computing foreign and nonforeign allowances and differentials, or any other benefits or deductions that are computed on base pay alone.

(2) Premium pay on an annual basis under § 550.141 is base pay for the purpose of section 5595(c), section 8114(e), section 8331(3), and section 8704(c) of title 5, United States Code.

(e) Premium pay on an annual basis under § 550.141 or § 550.151 may not be paid to a criminal investigator receiving availability pay under § 550.181.

5 C.F.R. § 550.164 Construction and computation of existing aggregate rates.

(a) Pursuant to section 208(b) of the act of September 1, 1954 (68 Stat. 1111), nothing in this subpart relating to the payment of premium pay on an annual basis may be construed to decrease the existing aggregate rate of pay of an employee on the rolls of an agency immediately before the date section 5545(c) of title 5, United States Code, is made applicable to him by administrative action.

(b) When it is necessary to determine an employee's existing aggregate rate of pay (referred to in this section as existing aggregate rate), an agency shall determine it on the basis of the earnings the employee would have received over an appropriate period (generally 1 year) if his tour of duty immediately before the date section 5545(c) of title 5, United States Code, is made applicable to him had remained the same. In making this determination, basic pay and premium pay for overtime, night, holiday, and Sunday work are included in the earnings the employee would have

received. Premium pay for irregular or occasional overtime work may be included only if it was of a significant amount in the past and the conditions which required it are expected to continue.

(c) An agency shall recompute an employee's rate of pay based on premium pay on an annual basis when he received subsequent increases in his rate of basic pay in order to determine whether or not the employee should continue to receive an existing aggregate rate or be paid premium pay on an annual basis.

(d) Except as otherwise provided by statute, an agency may not use subsequent increases in an employee's rate of basic pay to redetermine or increase the employee's existing aggregate rate. However, these increases shall be used for other pay purposes, such as the computation of retirement deductions and annuities, payment of overseas allowances and post differentials, and determination of the highest previous rate under part 531 of this chapter.

(e) When an agency elects to pay an employee premium pay on an annual basis, he is entitled to continue to receive hourly premium pay properly payable under sections 5542, 5543, 5545 (a) and (b), and 5546 of title 5, United States Code, until his base pay plus premium pay on an annual basis equals or exceeds his existing aggregate rate. When this occurs, the agency shall pay the employee his base pay plus premium pay on an annual basis.

(f) Except when terminated under paragraph (e) of this section, an agency shall continue to pay an employee an existing aggregate rate so long as:

(1) He remains in a position to which § 550.141, § 550.151, or § 550.162(c) is applicable;

(2) His tour of duty does not decrease in length; and

(3) He continues to perform equivalent night, holiday, and irregular or occasional overtime work.

(g) If an employee who is entitled to an existing aggregate rate moves from one position to another in the same agency, both of which are within the scope of section 5545(c) of title 5, United States Code, he is entitled to be paid an existing aggregate rate in the new position such as he would have received had he occupied that position when the agency elected to make section 5545(c) applicable to it.