ORAL ARGUMENT SCHEDULED FOR FEBRUARY 28, 2000

No. 99-1244

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

_____

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
COUNCIL OF GSA LOCALS, COUNCIL 236,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

_____

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the American Federation of

Government Employees, Council of GSA Locals, Council 236 (union) and the General Services Administration (agency). The union is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order on a Negotiability Issue in American Federation of Government Employees, Council of GSA Locals, Council 236 and General Services Administration, Case No. 0-NG-2387-0001, issued on April 30, 1999. The Authority's decision is reported at 55 FLRA (No. 73) 449.

C. Related Cases

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

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GLOSSARY

Agency	General Services Administration
Br.	Brief for the Petitioner
Customs Service	National Treasury Employees Union and U.S. Customs Serv., Region VIII, San Francisco, Cal., 2 FLRA 255 (1979)
DOJ	American Federation of State, County, and Municipal Employees, AFL-CIO, Council 26 and U.S. Dep't of Justice, 13 FLRA 578 (1984)
FLRA or Authority	Federal Labor Relations Authority
GSA	General Serv. Admin. and American Fed'n of Gov't Employees, Council of GSA Locals, Council 236, 54 FLRA 1582 (1998)
JA	Joint Appendix
NASA	National Aeronautics and Space Admin., Washington, D.C. and NASA, Office of the Inspector General v. FLRA, 119 S.Ct. 1979 (1999)
NTEU II	National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. III 1997)
SSA, New Bedford	American Federation of Government Employees, Local 1164 and Social Security Administration, District Office, New Bedford, Mass., 54 FLRA 1327 (1998)

Union American Federation of Government Employees,
Council of GSA Locals, Council 236

U.S. Forest Service National Federation of Federal Employees, Local 1979
and U.S. Forest Service, San Dimas Equipment Development
Center, 16 FLRA 369 (1984)

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") in 55 FLRA (No. 73) 449 (April 30, 1999). The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. III 1997) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to section 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority properly determined that the summary performance rating levels for employees proposed by the union in this case are not "methods" or "means" of performing work under section 7106(b)(1) of the Statute.

STATEMENT OF THE CASE

This case arose as a negotiability proceeding under section 7117(c) of the Statute. The American Federation of Government Employees, Council of GSA Locals, Council 236 (union), which represents employees at the General Services Administration (agency), submitted a bargaining proposal that prescribed the number of rating levels the agency would use when it gave employees summary performance appraisals, and that designated each of those levels. The agency declared the proposal nonnegotiable. The union appealed the agency's declaration of nonnegotiability to the Authority under section 7117(c) of the Statute.

The union did not dispute that the proposal affected management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. Turning to whether the proposal was nevertheless electively negotiable, the Authority determined that the proposal could not be bargained because it did not concern "methods" or "means" of performing work within the meaning of section 7106(b)(1) of the Statute, and dismissed the union's negotiability appeal. Pursuant to section 7123(a) of the Statute, the union seeks review of the Authority's decision.

STATEMENT OF THE FACTS

A. Background

After the agency completed a final draft of its performance appraisal system, it began bargaining with the union concerning that system. The draft appraisal system was a two tier (pass/fail) system. (Joint Appendix (JA) 26-28.)[2]In response, the union proposed four overall performance rating levels. (JA 42.) The union's proposal provided that: The measures of rating for over-all performance shall be one (1) of the (4)

ratings defined below. The rating shall be:

- Unsatisfactory
- Successful
- Highly Successful
- Outstanding

(JA 51). The agency claimed the proposal was outside the duty to bargain because it was inconsistent with management's rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. (JA 24-25.) The union did not dispute the agency's claim and argued only that the proposal was negotiable at the agency's election under section 7106(b)(1). (JA 53-57.)

[3]

B. The Authority's Decision

The Authority first explained its analysis for resolving an agency's claims that a proposal affects a management right under section 7106(a), and a union's claims in response that the proposal is nevertheless permissively negotiable under section 7106(b)(1). In this regard, even if a bargaining proposal interferes with the exercise of management rights set forth in section 7106(a), the agency may nevertheless elect to bargain on the proposal if the proposal concerns a matter listed in section 7106(b)(1), including, as pertinent here, the "methods" or "means" of performing the agency's work.

Under the Authority's analysis, the Authority first resolves whether a proposal would ordinarily be excluded from the agency's duty to bargain because of the proposal's effect on the agency's section 7106(a) management rights. If the proposal would fall outside the agency's duty to bargain for this reason, the Authority then determines whether the proposal is nevertheless negotiable at the agency's election, because the proposal falls within section 7106(b)(1). (JA 85.)

The union did not dispute that the proposal affected management's right to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. Accordingly, reaching the aspect of its decision that is at issue in this proceeding, the Authority considered the union's claim that the proposal concerns matters that the agency may elect to negotiate under section 7106(b)(1), because the proposal concerns "methods" or "means" of

performing work. (JA 86-87.) As the Authority discussed, a two prong test is applicable. Under the first prong of the test, it must be established that the proposal concerns "methods" or "means" as defined by the Authority. In this connection, the Authority construes the term "methods" to refer to "how an agency performs its work." (JA 86.) The Authority construes the term "means" to refer to "what an agency uses to perform its work." (JA 87.) Under the second prong of the test, it must be shown that: (1) there is a direct and integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.[4]

The Authority determined that the union's proposal did not concern either a method or means under section 7106(b)(1). The Authority indicated at the outset that, apart from the bare assertion that the proposal constituted some sort of "measure," the union had not offered any explanation of how the proposal satisfied the Authority's definition of "methods" or "means." The Authority also found no basis upon which to bring the proposal within its own definitions of those terms. (JA 87.) Rather, the Authority held, the proposal concerned how an agency evaluates employees' performance of their assigned work, and also concerned employees' work objectives. In the Authority's view, this contrasted with the matters encompassed within the terms "methods" and "means." As the Authority reiterated, for a proposal to concern "methods" or "means," it must concern "how employees will do their work," and "what they will use," to accomplish their assigned objectives. (JA 87.) Accordingly, the Authority held that the proposal did not concern a method or means of performing work within the meaning of section 7106(b) (1) of the Statute, and dismissed the union's petition for review.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." American Fed'n

of Gov't Employees, Local 2343 v. FLRA, 144 F.3d 85, 88 (D.C. Cir. 1998).

Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); Overseas Educ. Ass'n, Inc. v. FLRA, 858 F.2d 769, 771-72 (D.C. Cir. 1988); EEOC v. FLRA, 744 F.2d 842, 847 (D.C. Cir. 1984). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. See id. at 845.

Considerable deference is warranted here since the Court is reviewing a determination that Congress delegated to the Authority as a primary function and responsibility. See, e.g., National Aeronautics and Space Admin., Washington, D.C. and NASA, Office of the Inspector General v. FLRA, 119 S. Ct. 1979, 1984 (1999) (NASA). "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations" in section 7105(a)(2)(E) of the Statute. Library of Congress v. FLRA, 699 F.2d 1280, 1289 (D.C. Cir. 1983) (footnote omitted). The negotiability of the proposal at issue is determined by consideration of the appropriate scope of collective bargaining under sections 7105(a)(2)(E) and, in turn, 7117(c). As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." Bureau of Alcohol, Tobacco, and Firearms v. FLRA, 464 U.S. 89, 97 (1983) (citation omitted); see also NASA, 119 S. Ct. at 1984. Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." National Treasury Employees Union v. FLRA, 30 F.3d 1510, 1514 (D.C. Cir. 1994), citing National Treasury Employees Union v. FLRA, 848 F.2d 1273, 1278 (D.C. Cir. 1988).

SUMMARY OF ARGUMENT

The Authority properly construed and applied the "methods" and "means" provisions of section 7106(b)(1) of the Statute, in deciding this case. The Authority's basic definitions of "methods" and "means" are undisputed.

"Methods" refers to "how" or "the way in which" an agency and its employees perform agency work and thus addresses matters involved in accomplishing assigned work. "Means" refers to "what" an agency and its employees use to perform agency work. As construed and applied by the Authority, the term "means" refers to "any instrumentality, including an agent, tool, device, measure, plan or policy used by an agency for the accomplishment or furtherance of the performance of its work."

The performance rating level matters that are the subject of the union's proposal are conceptually distinct from "methods" and "means" of performing work under section 7106(b)(1). As the Authority has held, determinations concerning rating levels concern how an agency will evaluate employee performance of assigned work, and the setting of work objectives. To the extent that the union's rating level proposal concerns the evaluation of employee performance, it is conceptually distinct from "methods" and "means" of performing work because such evaluation matters only have significance and application after work has been performed when employees are being evaluated regarding their performance. Insofar as the union's rating level proposal concerns the setting of work objectives, it is also conceptually distinct from "methods" and "means" under section 7106(b)(1). Work objectives are neither the "ways" agencies determine to do their assigned work and attain those objectives, nor the instrumentalities employed by an agency and its employees when actually engaged in that process.

The Court should reject the union's reasons for challenging the Authority's decision. The union's first and third objections, that its rating level proposal must be covered by section 7106(b)(1) because it fell within the scope of certain management rights in section 7106(a), and that the proposal

constituted an incentive, were never presented to the Authority and are therefore not within the Court's jurisdiction. The union's second objection, that the proposal constitutes a measure and thus is a "means" of performing work, is unfounded.

Further, none of the union's objections has merit. As to its first objection, there is no necessary connection between the rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute and the "methods" and "means" provisions of section 7106(b)(1). As to the union's second objection, although the rating levels the union proposes may be a "measure" of how employees perform their work, it is not a "measure" as the Authority used the word in defining the term "means." Finally, the union has not demonstrated how the mere establishment of rating levels are, by themselves, either incentives or disincentives to greater employee productivity. Even if the rating levels proposed by the union were deemed to be incentives, under Authority and judicial precedent they would still not qualify as "methods" or "means" of performing work under section 7106(b)(1) of the Statute.

ARGUMENT

THE AUTHORITY PROPERLY DETERMINED THAT THE SUMMARY PERFORMANCE RATING LEVELS FOR EMPLOYEES PROPOSED BY THE UNION IN THIS CASE ARE NOT "METHODS" OR "MEANS" OF PERFORMING WORK UNDER SECTION 7106(b)(1) OF THE STATUTE

The Authority reasonably construed and applied section 7106(b)(1)'s "methods" and "means" provisions in this case. As discussed by the Authority, the summary performance rating levels proposed by the union concern employees' work objectives and the agency's evaluation of employees' performance of that assigned work, not "how" or "with what" that work is to be accomplished. Because the Statute's "methods" and "means" provisions refer to these latter two matters, i.e., "how" and "with what" work is to be accomplished, and because the Authority determined that the union's proposal did not concern either of them, the Authority accordingly concluded that the union's proposal did not concern "methods" or "means" of performing work.

As discussed below, these Authority determinations are consistent with the Statute's language and legislative history, and with Authority precedent.

The Authority's determinations should therefore be affirmed.

A. The Authority Properly Construed and Applied, Consistent With its Decisional Precedent, the "Methods" and "Means" Provisions of Section 7106(b)(1) in Deciding This Case

1.The Authority's construction of "methods" is consistent with the Statute's language and legislative history, and with Authority precedent

The Authority's basic definitions of "methods" and "means" under section 7106(b)(1) are undisputed.[5] Turning first to "methods," the Authority in this case applied its general construction of the term, interpreting it to refer to "how" or "the way in which" an agency and its employees perform agency work. JA 86; see, e.g., General Serv. Admin. and American Fed'n of Gov't Employees, Council of GSA Locals, Council 236, 54 FLRA 1582, 1589-90 & n.6 (1998) (GSA).

This construction of "methods" accords both with dictionary definitions and with the Statute's own legislative history. For example, "method" is defined as, among other things, "a way . . . of or for doing something." Webster's Ninth New Collegiate Dictionary (1986). Similarly, the Statute's legislative history refers to management's right to determine "the methods (how) . . . by which agency operations will be conducted . . . ." S. Rep. No. 95-969, at 768-69 (1978), reprinted in 1978 U.S.C.C.A.N. 2830, 2831.

The Authority's application of section 7106(b)(1)'s "methods" provision in its case law illustrates the provision's identification with the processes by which employees perform assigned work. For example, in American Federation of Government Employees, Local 1164 and Social Security Administration, District Office, New Bedford, Mass., 54 FLRA 1327 (1998) (SSA, New Bedford), a case on which the Authority relied in the decision on review, the Authority considered a system for assigning SSA claims representatives in rotation among various entitlement programs administered in the SSA district office. Id. at 1350-51. The rotational assignment system's primary impact was to distribute employees' time differently, to increase the time claims representatives were available for client

interviews. Id. at 1328-29. Focusing on this aspect of the system, the Authority found that it "was designed to change the method of performing [the agency's] work," and thus fell within the scope of the "methods" provision of section 7106(b)(1). Id. at 1351-52.

Process considerations were also key when the Authority decided National Federation of Federal Employees, Local 1979 and U.S. Forest Service, San Dimas Equipment Development Center, 16 FLRA 369 (1984) (U.S. Forest Service). As pertinent here, the case dealt with a system for reporting to agency management on the results of research and testing projects. Id. at 373. The proposal at issue would have required the agency to accept technical dissents as part of the reports submitted by employees. Id. at 372. Directing its attention to the process at issue, the Authority held that the proposal concerned the "methods" by which the agency performed its work because it represented "one of a number of ways in which the Agency could take into account differing opinions in compiling its technical reports." Id. at 373.

In sum, by addressing "how" or "the way in which" an agency and its employees perform work, the "methods" provision of section 7106(b)(1) focuses on the work process. As discussed below, the Authority correctly applied this construction of the Statute when it resolved this case.

2.The Authority properly applied the "methods" provision of the Statute in this case

The Authority correctly determined that the union's rating level proposal in this case does not concern a "method" of performing work. The Authority reached this conclusion on the basis of two findings, both of which are clearly correct; first, that the union's proposal concerns how the agency evaluates employees' performance of their assigned work; second, that the proposal concerns employees' work objectives. Because these two matters are conceptually distinct from the matters with which the "methods" provision of section 7106(b)(1) is concerned, the proposal does not fall within the coverage of that provision of the Statute.

Regarding the Authority's first basis, the proposal's wording makes evident that the proposal concerns how the agency evaluates employees' performance of their assigned work. As the Authority held, "[t]he proposal, on its

face, prescribes the number of rating levels that will be used to evaluate employees' overall performance and designates those levels." (JA 85.)

Rating levels are conceptually distinct from"methods" of performing work under section 7106(b)(1). As discussed in the preceding section, the Statute's "methods" provision concerns "how" or "the way in which" the agency and its employees perform agency work and thus addresses matters involved in the accomplishment of assigned work. In contrast, the rating levels proposed by the union in this case, to the extent they concern evaluation matters, only have significance and application after work has been performed when employees are being evaluated regarding their performance. "Methods" of performing work, and the rating levels applied to evaluate the work performed using those "methods," therefore relate to distinctly different aspects of agency operations.

The Authority's second reason also identifies a reasonable distinction between rating levels and "methods" of performing work. It is well established in the Authority's case law that determinations regarding rating levels concern employees' work objectives. E.g., American Fed'n of State, County, and Municipal Employees, AFL-CIO, Council 26 and U.S. Dep't of Justice, 13 FLRA 578, 580-81 (1984). Determining work objectives, including such things as the quantity, quality, and timeliness of work expected, can reasonably be distinguished from determining "how" to accomplish those objectives. For example, in the SSA, New Bedford case cited previously, the agency's determination to provide same-day service to its clientele whenever possible was distinct from its determination to use an expanded rotational assignment system as a method of achieving that objective. Similarly, in U.S. Forest Service, the union's proposal to include technical dissents with reports was one of a number of possible methods the agency could have used to "take into account differing opinions in compiling its technical reports." U.S. Forest Service, 16 FLRA at 373. Thus, although determinations concerning work objectives and determinations of the appropriate "methods" for reaching those objectives are not unrelated functions, they also are not the same, and may reasonably be distinguished.

This consideration reinforces the correctness of the Authority's

determination that the union's proposal does not concern "how" or the "way in which" employees go about the accomplishment of their assigned work. The Authority's conclusion to this effect should be upheld.

3.The Authority's construction of "means" is consistent with the Statute's language and legislative history, and with Authority precedent

Turning to "means" under section 7106(b)(1), the Authority in this case applied its general construction of the term, interpreting it to refer to "what" an agency and its employees use to perform agency work. JA 87; see, e.g., GSA, 54 FLRA at 1590 n.6. This understanding of "means" has its roots in early Authority precedent, where the Authority held that "in the context of section 7106(b)(1), ["means"] refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or the furthering of the performance of its work." National Treasury Employees Union and U.S. Customs Serv., Region VIII, San Francisco, Cal., 2 FLRA 255, 258 (1979) (Customs Service).

This construction of "means," based on its ordinary dictionary definition,[6] also comports with the Statute's legislative history. That legislative history, cited previously with regard to the definition of "methods," also addresses the term "means," clarifying that "means" of performing work was intended to refer to "with what" an agency conducts its operations. S. Rep. No. 95-969, at 768-69 (1978), reprinted in 1978 U.S.C.C.A.N. 2830, 2831.

The Authority's consistent application of the term "means" in its case law has identified a variety of instrumentalities that agencies and their employees have used to accomplish agency work. Qualifying as "means" of performing work have been such "instrumentalities" as nameplates for Customs Service officers;[7]badges and firearms, handcuffs, and leather gear for Immigration and Naturalization Service officers;[8] and vehicles for an agency's security personnel.[9] Thus, as construed and applied by the Authority, the "means" provision of section 7106(b)(1) pertains to specific instrumentalities that contribute directly to accomplishing or furthering the performance of the agency's work. As discussed below, the Authority

correctly applied this construction of "means" in the instant case.

4.The Authority correctly applied the "means" provision of the Statute in this case

Comparable to its conclusion regarding the "methods" provision of section 7106(b)(1), the Authority correctly determined that the union's rating level proposal does not concern a "means" of performing work. The analysis is similar. As discussed previously, the union's proposal relates primarily to evaluating employees' performance of their assigned work and setting employees' work objectives. These activities, to which the proposal pertains, are conceptually distinct from "means" of performing work. These performance appraisal-related and goal-setting functions are not themselves the instrumentalities which the agency and its employees use during the time they are endeavoring to accomplish the work that the rating levels proposed by the union will later be applied to evaluate. Therefore, they are not within the scope of the "means" provision of section 7106(b)(1) of the Statute.

B. The Union's Arguments for Overturning the Authority's Decision Are Without Merit

The union challenges the Authority's decision on three bases, none of which have merit. First, the union contends (Br. 22-34) that because its rating level proposal affects the agency's management rights to direct employees and assign work under section 7106(a)(2)(A) and (B) of the Statute, the proposal must also concern a "method" or a "means" of performing work under section 7106(b)(1). Second, the union argues (Br. 34-39) that the Authority in this case has departed from its precedent holding that "means" of performing work include "measures," because the Authority held that the union's proposal, which is assertedly a "measure," is not a "means" of performing work. Third, the union claims (Br. 39-43) that its rating level proposal provides an incentive for greater productivity, and therefore constitutes a "method" or "means" of performing work under section 7106(b)(1) of the Statute. For the reasons discussed below, the union's contentions are not well-founded and should be rejected.

1. There is no necessary connection between the rights to direct employees and

assign work under section 7106(a)(2)(A) and (B) and the "methods" and "means"
provisions of section 7106(b)(1)

a.The Court does not have jurisdiction to consider the union's argument

Pursuant to section 7123(c) of the Statute, the Court lacks jurisdiction to consider the union's argument because it was not urged in proceedings before the Authority. It is well-established that a party may not raise before the Court an argument not presented to the Authority. Pursuant to 5 U.S.C. § 7123(c), "[n]o objection that has not been urged before the Authority . . . shall be considered by the court [of appeals] . . . ." The Supreme Court has applied the plain words of this section and held that "under section 7123(c), review of 'issues that [a party] never placed before the Authority' is barred absent extraordinary circumstances." EEOC v. FLRA, 476 U.S. 19, 23 (1986) (citation omitted). Thus, the Court will refuse to consider even arguments that encompass a "somewhat different twist" to the argument advanced before the Authority. Overseas Educ. Ass'n, Inc. v. FLRA, 827 F.2d 814, 820 (D.C. Cir. 1987). The requirements of section7123(c) apply even as to issues that the Authority raises sua sponte. See U. S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA, 7 F.3d 243, 245-46 (D.C. Cir. 1993) (noting that the party should have filed a motion for reconsideration concerning an issue raised by the Authority sua sponte).

The union's argument (Br. 22-34) concerning the relationship between the rights to direct employees and assign work on the one hand, and "methods" and "means" on the other, was never presented to the Authority in this case and, accordingly, this Court lacks jurisdiction to consider it. Indeed, the only argument offered by the union in this case was that its proposal constituted a "measure." (JA 56-57.) In addition, the union failed to move the Authority to reconsider the case in light of this argument. 5 C.F.R. § 2429.17. Furthermore, there is no indication that a request by the union for reconsideration would necessarily have been futile. See Georgia State

Chapter Assoc. of Civilian Technicians v. FLRA, 184 F.3d 889, 892 (D.C. Cir.
1999). Therefore, because the union did not make this argument to the
Authority in this case, and because there do not appear to be any
extraordinary circumstances that would excuse the union's failure, the union
may not present its argument here.
b. The fact that the union's rating level proposal affects management's rights to
direct employees and assign work does not imply that the proposal also
constitutes a "method" or a "means" of performing work
Even if this Court were to find that it had jurisdiction to consider the
union's argument concerning the relationship between the rights to direct
employees and assign work, and "methods" and "means," the Court should
reject the argument because it has no merit. In essence, the union argues
that because the Authority has held that rating levels, in conjunction with
performance standards, are used by agencies to accomplish agency work, it
must follow that rating levels concern "how" an agency performs its work.
The union is wrong. The fact that an agency's management rights contribute
in one way or another to the accomplishment of the agency's work does not
imply that the exercise of those rights necessarily implicates a "method" or
"means" of performing work.
The case law cited by the union in support of its argument is
distinguishable, and provides no support for the proposition that rating
level proposals constitute "methods" or "means" of performing work under
section 7106(b)(1). In particular, American Federation of State, County,
and Municipal Employees, AFL-CIO, Council 26 and U.S. Department of Justice,
13 FLRA 578 (1984) (DOJ), upon which the union relies heavily, does not
address "methods" and "means" issues at all. The Authority's discussion in
DOJ is limited to an explanation of why rating level proposals affect
management's rights to direct employees and assign work. Nothing in that
discussion controverts the Authority's rationale in this case, discussed
previously in section A., that rating level proposals deal with performance
appraisal-related and goal-setting functions that are conceptually distinct

from the practical, work-related decisions an agency makes in determining which "methods" and "means" to employ to accomplish assigned work. Thus, although the matters with which rating level proposals deal also relate to the agency's accomplishment of its work, they do not necessarily involve actions that employees take while actually engaged in the performance of the work assigned to them.

That there is no necessary inconsistency in a matter affecting the rights to direct employees and assign work, but not the "methods" or "means," is confirmed by an examination of the NTEU II[10]decision cited by the union (e.g., Br. 23). In NTEU II, the D.C. Circuit upheld the Authority's determination that performance standards for employees are within the coverage of management's rights to direct employees and assign work. The Court agreed with the Authority that such performance standards, which the Authority held to be integrally related to rating levels in its later DOJ decision,

> are more than mere ex post facto measures of employee performance; they mark out beforehand the amount, quantity and timeliness of the work employees are to perform.

NTEU II, 691 F.2d at 562.

This passage from the Court's NTEU II decision makes precisely the same point that the Authority adverted to in its decision at issue here, when it explained why the union's rating level proposal did not concern "methods" or "means." As explained by the Court, performance standards (and, by extension in DOJ, rating levels) have an impact on employees' performance of work in two ways: First, by "mark[ing] out beforehand the amount, quality and timeliness of the work employees are to perform," they communicate work objectives; second, they are "ex post facto measures of employee performance," i.e., they relate to performance appraisal matters. As discussed previously, because neither of these two areas is directly concerned with the actions employees take in actually performing their assigned duties, the rating level determinations that underlie them are conceptually distinct from "methods" or "means" of performing work.

Accordingly, jurisdictional considerations aside, the Court should reject the union's argument that the effect of rating level proposals on

management's rights to direct employees and assign work necessarily implies that rating level proposals also concern "methods" and "means" of performing work.

2. The Authority's decision in this case is consistent with its definition of "means" under section 7106(b)(1)

The union's claim (Br. 34-39) that its proposal constitutes a "measure," and should therefore have been held to be a "means" of performing work, is based on a simple linguistic error. In this regard, the union points out, accurately, that the Authority has included the word "measure" in its definition of "means" of performing work under section 7106(b)(1). E.g., Customs Service, 2 FLRA at 258. However, the union fails to recognize that "measure" itself has a variety of definitions, and that the definition adopted by the Authority is not the same as that relied upon by the union in this case.

The union appears to be using the word "measure" in a evaluative sense. In this connection, the union claims (Br. 18-19) that its rating level proposal "constitutes a 'measure' of job performance by an employee." This use accords with dictionary definitions of "measure" as, for example, "a device used for measuring" or "an evaluation or a basis of comparison." The American Heritage College Dictionary, Third Edition (1997).

The Authority used the word "measure" in a different sense when it defined the statutory term "means." Repeating that definition, quoted previously, to provide context, the Authority defined "means" as "any instrumentality, including an agent, tool, device, measure, plan, or policy used by the agency for the accomplishing or the furthering of the performance of its work." Customs Service, 2 FLRA at 258 (emphasis added). This use of "measure" accords with dictionary definitions of the word as, for example, "an action taken as a means to an end; an expedient." The American Heritage College Dictionary, Third Edition, supra. The Authority has previously used the term in this sense. See, e.g., American Fed'n of Gov't Employees, Local 1920 and U.S. Dep't of Defense, Army and Air Force Exchange Serv., Fort Hood Exchange, Fort Hood, Tex., 47 FLRA 340, 343 (1993) (holding that the amount

of space and the arrangement of that space for displaying goods and services
at a post exchange "are among the measures used by the Agency to facilitate
its sales mission," and that "therefore, . . . the design and layout of the
store constitutes a 'means' within the meaning of section 7106(b)(1) of the
Statute.")
This definition of "measure" is plainly different from the evaluative
definition relied upon by the union. Because the union's proposal is not a
"measure" in the sense in which the Authority used the term, there is
nothing inconsistent in the Authority's conclusion that the kind of
"measure" proposed by the union in this case is not a "means" of performing
work under section 7106(b)(1). Therefore, the union's contention that the
Authority has neglected its precedent and ruled inconsistently should be
rejected.
3. The union's assertion that its rating level proposal provides employees with
an incentive for greater productivity does not establish that the proposal is a
"method" or "means" of performing work under section 7106(b)(1)
a. The Court does not have jurisdiction to consider the union's argument
As discussed in section B.1.a., above, the Court lacks jurisdiction to
consider the union's incentive argument because it was not urged in
proceedings before the Authority.
b. The union's incentive argument lacks merit
Even if this Court were to find that it had jurisdiction to consider the
union's incentive argument, the Court should reject it. The union
erroneously claims that its rating level proposal is a "method" or "means"
of performing work because, the union contends, implementation of the
proposal may provide employees with an incentive for greater productivity.
The union's argument is flawed for two reasons. First, the union has not
demonstrated that mere establishment of rating levels provides employees
with any type of incentive for greater productivity. Second, even if the
union's rating level proposal provided employees with an incentive, it still
would not qualify as a "method" or "means" under section 7106(b)(1) of the
Statute.
As to the first point, analytically, it cannot be said as a general matter
that the mere establishment of rating levels provides employees with any

type of incentive. Rating levels are neither inherently beneficial nor detrimental to employees. As discussed previously, rating levels are part of the system for communicating to employees the quantity, quality, and timeliness of work that is required, as well as providing categories for classifying employee performance when that performance is appraised. Incentives, on the other hand, relate to the particular rewards (or penalties) for particular levels of performance. Cf., e.g., National Ass'n of Gov't Employees, Local R14-52 and U.S. Dep't of Defense, Defense Finance and Accounting Serv., Washington, D.C., 45 FLRA 910, 914 (1992) (distinguishing performance award proposals from proposals that would establish productivity requirements). The instant case involves only rating levels. Even if one were to view the union's rating level proposal as providing an incentive for greater employee productivity, it would still not qualify as a "method" or "means" under section 7106(b)(1). As the Authority and the courts have held, "to include everything that contributes generally to employee motivation"[11] within the ambit of matters that are negotiable only at the agency's election under section 7106(b)(1), would "stretch[] the plain meaning of [that section's] words to the breaking point." Federal Employees Metal Trades Council v. FLRA, 778 F.2d 1429, 1431 (9th Cir. 1985).

Such a ruling would sweep within section 7106(b)(1)'s coverage "any benefit to employees [used as] a means of retaining a stable and committed workforce," including, arguably, "all wages, hours, and working conditions." Id. Accordingly, if the Court reaches the issue, it should reject the union's over broad argument that its proposal constitutes an incentive relating to employee productivity, and as such, is a "method" or "means" of performing work under the Statute.

CONCLUSION

The union's petition for review should be denied.

Respectfully submitted.

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DECEMBER 16, 1999

CERTIFICATION PURSUANT TO FRAP RULE 32
AND D.C. CIRCUIT RULE 28(d) FORM OF BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 and D.C. Circuit Rule
28(d), I certify that the attached brief is written in a proportionally-
spaced 14-point font and contains 6247 words.

December 16, 1999

_____
Pamela P. Johnson

SERVICE LIST

I certify that copies of the Brief For The Federal Labor Relations Authority have been served this day, by mail, upon the following:

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December 16, 1999

STATUTORY AND REGULATORY ADDENDUM

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§ 7105. Powers and duties of the Authority

(a)

* * * * * * * * * * * * * * * *

(2) The Authority shall, to the extent in this chapter and in accordance with regulations prescribed by the Authority -

* * * * * * * * * * * * * * * *

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

* * * * * * * * * * * * * * * *

§ 7106. Management rights

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

* * * * * * * * * * * * * * * *

(2) in accordance with applicable laws -

* * * * * * * * * * * * * * * *

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

* * * * * * * * * * * * * * * *

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

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

* * * * * * * * * * * * * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

* * * * * * * * * * * * * * *

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by -

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall -

(A) file with the Authority a statement -

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to

the agency a written decision on the allegation and specific reasons therefore at the earliest practicable date.

§ 7123. Judicial review; enforcement

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

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

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

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

* * * * * * * * * * * * * * *

(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.

§ 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 -

* * * * * * * * * * * * * * *

(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;

TITLE 5--ADMINISTRATIVE PERSONNEL

CHAPTER XIV--FEDERAL LABOR RELATIONS AUTHORITY, GENERAL COUNSEL OF THE FEDERAL
LABOR RELATIONS AUTHORITY AND FEDERAL SERVICE IMPASSES PANEL

PART 2429--MISCELLANEOUS AND GENERAL REQUIREMENTS--Table of Contents

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Sec. 2429.17 Reconsideration.

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.
[46 FR 40675, Aug. 11, 1981]

[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.
[2] "JA" references are to the Joint Appendix submitted by the union with its opening brief.
[3] The Authority's earlier dismissal of the union's negotiability appeal for procedural reasons, and subsequent rescission of that dismissal (JA 76-78), are not relevant to the issues before the Court in this case, and will not be discussed further in this brief.
[4] Neither element of the second prong of the Authority's test is at issue in this proceeding; the second prong will not be discussed further herein.
[5] The only issue raised by the union relating to the Authority's definitions is whether the Authority consistently applied its definition of

"means" in this case. The union claims in this regard that its proposal is a "means" because it is a "measure" of how employees perform their work. See discussion, infra, in section B.2.

[6] See Webster's Third New International Dictionary (1976), cited by the Authority in Customs Service, 2 FLRA at 258 n.8.

[7] Customs Service, 2 FLRA at 257-59.

[8] American Fed'n of Gov't Employees, Local 1917 and U.S. Dep't of Justice, Immigration and Naturalization Serv., New York, N.Y., 55 FLRA 228, 236 (1999), petition for review dismissed, No. 99-1160 (D.C. Cir. July 1, 1999).

[9] Fraternal Order of Police Lodge IF (R.I.) Fed. and Veterans Admin., Veterans Admin. Med. Ctr., Providence, R.I., 32 FLRA 944, 959 (1988).

[10] National Treasury Employees Union v. FLRA, 691 F.2d 553 (D.C. Cir. 1982) (NTEU II).

[11] National Ass'n of Gov't Employees, Local R14-52 and U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex., 41 FLRA 1057, 1064 (1991) (rejecting the claim that a productivity gainsharing program constituted a "method" or "means" of performing work under section 7106(b)(1)), remanded for other reasons, U.S. Dep't of the Army, Red River Army Depot, Texarkana, Tex., 977 F.2d 1490 (D.C. Cir. 1992).