ORAL ARGUMENT SCHEDULED FOR OCTOBER 16, 2003

No. 02-1311

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
NATIONAL VETERANS AFFAIRS COUNCIL 53,

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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ORAL ARGUMENT NOT SCHEDULED

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, National Veterans Affairs Council 53 (AFGE) and United States Department of Veterans Affairs, Vista Clinic, Vista, California (VA). AFGE is the petitioner in this court proceeding; and the Authority is the respondent.

1. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *American Federation of Government Employees, National VA Council 53 and United States Department of Veterans Affairs, Vista Clinic, Vista, California*, Case No. 0-NG-2624, decision issued on August 12, 2002, reported at 58 F.L.R.A. 8

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

ACT	*Association of Civilian Technicians, Volunteer Chapter 103*, 55 F.L.R.A. 562 (1990)
AFGE or union	*American Federation of Government Employees, National Veterans Affairs Council 53*
ATF	*Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 857 F.2d 819 (D.C. Cir. 1988)
Br.	Brief
Dover	*Department of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003)
FLRA or Authority	Federal Labor Relations Authority
HPDM	High Performance Development Model
JA	Joint Appendix
KANG	*Nat's Ass'n of Gov't Employees, Local R14-87*, 21 F.L.R.A. 24 (1986)
Local 2094	*Am. Fed'n of Gov't Employees, Local 2094 v. FLRA*, 833 F.2d 1037 (D.C. Cir. 1987)
Local 3354	*American Federation of Government Employees, Local 3354 v. FLRA*, 34 F.L.R.A. 919 (1990)
NFFE	*Nat'l Fed'n of Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834 (D.C. Cir. 1987)
NTEU I	*Nat'l Treasury Employees Union*, 28 F.L.R.A. 647 (1987)

GLOSSARY
(Continued)

NTEU II	*Nat'l Treasury Employees Union*, 55 F.L.R.A. 1174 (1999)
POPA	*Patent Office Prof'l Ass'n v. FLRA*, 47 F.3d 1217 (D.C. Cir. 1995)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
VA or agency	United States Department of Veterans Affairs, Vista Clinic, Vista, California

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STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on August 12, 2002. The decision and order is published at 58 F.L.R.A. (No. 4) 8, a copy of which is found at Joint Appendix (JA) 66-69. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and order pursuant to § 7123(a) of the Statute.

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

STATEMENT OF THE ISSUE

Whether the Authority reasonably determined that a collective bargaining proposal permitting union observers at performance-based job interviews was outside the agency employer's obligation to bargain.

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under section 7117(c) of the Statute. The American Federation of Government Employees, National Veterans Affairs Council 53 ("AFGE" or "union"), the exclusive representative of a unit of employees of the United States Department of Veterans Affairs, Vista Clinic, Vista, California ("VA" or "agency"), submitted a collective bargaining proposal that would provide the union the opportunity to observe performance-based job interviews (PBIs) conducted with bargaining unit employees. The agency declared the proposal to be outside its obligation to bargain under the Statute. AFGE then appealed the agency's allegations of nonnegotiability to the Authority under section 7117(c) of the Statute.

The Authority held the proposal to be outside the agency's obligation to bargain because the proposal affects the agency's right to make selections for appointments under § 7106(a)(2)(C) of the Statute. Pursuant to section 7123(a) of the Statute, AFGE seeks review of the Authority's decision and order in the case.

STATEMENT OF THE FACTS

I. Background

AFGE demanded to bargain over the VA's implementation of its High Performance Development Model (HPDM), an important element of which is the use of PBIs. (JA 42). PBIs incorporate job-related examples, such as dealing with an irate customer, in the interviewing process. (*Id.*)

> During negotiations over HPDM, AFGE submitted the following proposal: When performance-based-interviewing is used for Title 5 bargaining unit positions, the local Union will be given the opportunity for an observer throughout the interviewing process.

(JA 66). The agency declared the proposal to be outside its obligation to bargain under the Statute (JA 13) and AFGE appealed the agency's declaration to the Authority pursuant to § 7117(c)(1) of the Statute (JA 7).

II. The Authority's Decision and Order

The Authority held (Member Pope dissenting) that the proposal was outside the agency's obligation to bargain. Relying on well-established precedent, the Authority first observed that proposals providing for union participation in discussions and deliberations leading to decisions involving the exercise of management's reserved rights affect those rights. With regard to PBIs, the Authority focused on their dynamic, interactive character, finding that these interviews enable agency management to gather information about job candidates and evaluate the candidate based on that information. According to the Authority, these information gathering and evaluative aspects of PBIs constitute an integral part of the deliberations that lead to selection decisions. The Authority therefore found that AFGE's proposal, which would inject the union into the PBI process, affects the agency's right to make selections under § 7106(a)(2)(C) of the Statute. (JA 67-68).

The Authority also rejected AFGE's argument that the proposal constitutes a negotiable procedure under § 7106(b)(2). First, the Authority noted that under its precedent, proposals calling for union participation in discussions

and deliberations pertaining to the exercise of management's rights concern management's substantive decision-making process and therefore are not procedures under § 7106(b)(2) of the Statute (citing *Nat'l Treasury Employees Union*, 28 FLRA 647, 649 (1987) . (JA 68).

Second, the Authority found meritless AFGE's contention that the proposal is a negotiable procedure because it is consistent with § 7114(a)(2) of the Statute. Section 7114(a)(2) of the Statute provides unions the opportunity to be present at certain discussions between representatives of the agency and bargaining unit employees. The Authority held that although unions may negotiate rights exceeding those set out in § 7114(a)(2), such proposals must be consistent with law, including § 7106 of the Statute. In addition, the Authority rejected AFGE's claim that the proposal concerns only the "mechanics" of selection and, therefore, is a negotiable procedure. (JA 68).

Lastly, the Authority held that the proposal does not constitute an appropriate arrangement for employees adversely affected by the exercise of a management right.

Rejecting AFGE's contention that the proposal would ameliorate adverse effects such as stress, the Authority found that the union had not demonstrated that the presence of an observer would necessarily alleviate stress. The Authority also found meritless AFGE's claim that the proposal would ameliorate the adverse effects from inappropriate and/or inconsistent questions, noting that the agency had agreed to provide AFGE an advance copy of PBI questions and that AFGE would always be able to consult with candidates after PBIs to ensure that appropriate questions were asked.

Because AFGE failed to demonstrate that the proposal ameliorates adverse effects flowing from the exercise of a management right, the Authority concluded that the proposal is not an appropriate arrangement under § 7106(b)(3) of the Statute. (JA 68).

For the reasons discussed above, the Authority dismissed the union's negotiability appeal. (JA 68).

STANDARD OF REVIEW

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

The negotiability of the proposal at issue here is determined by consideration of the appropriate scope of collective bargaining under the Statute. "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Patent Office Prof'l Ass'n v. FLRA*, 47 F.3d 1217, 1220 (D.C. Cir. 1995) (*POPA*) (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)). Further, 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 & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (citation omitted).

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

SUMMARY OF ARGUMENT

In addressing a matter of first impression, the Authority reasonably held that the presence of a union observer at performance-based job interviews would affect an employer agency's reserved right under § 7106(a)(2)(C) of the Statute to make selections for appointments. Accordingly, the Authority determined that a collective bargaining proposal providing for such observers was outside the agency's obligation to bargain.

1. It is well established that bargaining proposals that affect the rights reserved to management in § 7106(a) of the Statute are outside the agency's obligation to bargain. Equally well established is the principle that the enumerated management rights include more than merely the right to decide to take the final actions specified. As this Court has stated with respect to the right to make selections for appointments, the right "extends to the entire selection process." *Nat'l Fed'n of Fed. Employees, Local 1745 v. FLRA*, 828 F.2d 834, 838 (D.C. Cir. 1987) (*NFFE*).

Job interviews are an integral part of the selection process. The presence of a union observer in the interview room could affect management's ability to conduct the interview freely and without constraints. In arguing that an observer can have no effect on management's right to select because interviews do not involve "deliberations" or "discussions," the union mischaracterizes the nature of a selection interview. Job interviews, and particularly PBIs, are dynamic, interactive exercises. Follow up questions are formulated based on the interviewers evaluation of the candidate's responses. The presence of a union observer could affect the natural give and take of the interview.

AFGE's other arguments are also meritless. First, the fact that the interviews are not "wholly management-related meetings" (Brief (Br.) 9) does not open the meeting to union officials. The candidate will, of course, be in the interview. However, that some non-management individual participates in an activity integrally related to a management right does not remove the activity from the protection from *union* interference provided by § 7106.

Second, that the agency has agreed to permit union involvement in some circumstances, *i.e.,* at the candidate's request, does not affect the reasonableness of the Authority's determination as to the union's current proposal. In negotiability appeals the Authority only examines whether the specific union proposal at issue in this case is, as a matter of law, outside the agency's obligation to bargain. Other provisions that may have been agreed to by an agency are irrelevant to that determination.

2. The Authority also reasonably determined that the union's proposal was not a negotiable procedure under § 7106(b)2) of the Statute. Both the Authority and this Court have held that proposals, like the one at issue here, that involve unions in the decision-making processes concerning the exercise of management rights directly interfere with those rights and do not constitute negotiable procedures. Further, AFGE's reliance on cases that expand the union representational rights set forth in § 7114 of the Statute was properly rejected by the Authority. Although the Authority has found some such proposals to be negotiable, the Authority noted that in order to be negotiable these proposals must not affect the management rights set forth in § 7106(a) of the Statute. As discussed above, the proposal here undeniably affects the § 7106(a) right to make selections.

Finally, *Association of Civilian Technicians, Volunteer Chapter 103*, 55 F.L.R.A. 562 (1999) (*ACT*), cited for the proposition that proposals that affect only the "mechanics" of the selection process are negotiable procedures, is clearly distinguishable from the instant case. The proposal in *ACT* provided for first consideration of bargaining unit employees and documentation of

non-selection decisions. Unlike the instant proposal that provides for union participation in the substantive aspects of the selection process, the proposal in *ACT* had no effect on management's ultimate determinations with respect to selections.

3. Because the union failed to meet its burden under the relevant Authority precedent to demonstrate that the proposal would ameliorate adverse effects of the exercise of management rights, the Authority properly found that the proposal was not an appropriate arrangement under § 7106(b)(3) of the Statute. In that regard, the Authority reasonably found that the presence of a third-party in a job interview would not necessarily tend to reduce the stress associated with the interview. The Authority also reasonably found that the proposal was not intended to protect against the use of improper questions at the interview. In that regard the Authority properly noted that other safeguards were present to assure that appropriate questions were asked at the interviews.

Having reasonably held that the union's proposal affected management's reserved rights and that the proposal constituted neither a negotiable procedure nor an appropriate arrangement, the Authority properly dismissed the union's negotiability appeal.

ARGUMENT

THE AUTHORITY REASONABLY DETERMINED THAT A COLLECTIVE BARGAINING PROPOSAL PERMITTING UNION OBSERVERS AT PERFORMANCE-BASED JOB INTERVIEWS WAS OUTSIDE THE AGENCY EMPLOYER'S OBLIGATION TO BARGAIN

In the decision under review, the Authority addressed a matter of first impression, namely, whether the presence of a union observer at job interviews of bargaining unit employees would affect the agency's reserved right under the Statute to select employees. As demonstrated below, the Authority reasonably concluded that it would and accordingly held that a union bargaining proposal requiring such observers was outside the agency's obligation to bargain.

I. The Authority Reasonably Determined That the Proposal Affects the Agency's Right to Select

Section 7106(a) of the Statute makes nonnegotiable, *i.e.*, outside an agency's obligation to bargain, any proposal that would affect the authority of the agency to exercise any of the rights enumerated therein. *See POPA*, 47 F.3d at 1220. Among these rights reserved to management is the right "with respect to filling positions, to make selections for appointments." 5 U.S.C. § 7106(a)(2)(C). For the reasons that follow, the Authority reasonably held that the union's proposal to permit union observers during job interviews was nonnegotiable because the proposal affected the agency's right to make selections.

It is well established and recognized by this Court that "the enumerated management rights include more than merely the right to decide to take the final actions specified." *Am. Fed'n of Gov't Employees, Local 2094 v. FLRA*, 833 F.2d 1037, 1042, (D.C. Cir. 1987) (*Local 2094*) (internal quotations

omitted). As this Court has noted, management's rights include the right to take those steps necessary to the exercise of those rights, including the discussions and deliberations on the various factors on which a determination will be made. *Id.* With specific reference to the right to select under § 7106(a)(2)(C), this Court has stated that the right "extends to the entire selection process." *NFFE*, 828 F.2d at 838.

The Authority reasonably found that the information-gathering and evaluative aspects of PBIs demonstrate that the PBIs are an integral part of the deliberative process that leads to selection decisions. AFGE argues before this Court (Br. 10-11), as it did before the Authority, that the presence of a passive observer at PBIs does not affect the agency's deliberations associated with the right to select, because "deliberations simply do not occur at PBIs." However, AFGE's contentions are meritless.

In general, AFGE misdescribes the nature of a selection interview. According to the union, the PBI is a method for obtaining input for later use in deliberations; the PBI "is not the deliberations themselves." (Br. 10). Thus, AFGE divides the selection process into wholly discrete parts -- first, a passive information-gathering phase during which no deliberation or evaluation takes place; and second, a subsequent independent phase involving deliberations on, and an evaluation of, the information gathered in the first phase. However, AFGE's view does not square with reality.

Implicit in the Authority's decision is the common sense understanding that employer interviewers are not passive collectors of information, merely asking predetermined questions and mechanically recording the responses

for later use. Rather, job interviews, and particularly PBIs, are dynamic, interactive exercises. Agency interviewers react to the candidates' responses -- ignoring some, following up on others. Such interviews thus have an undeniable evaluative component. This evaluative aspect may be evident through the nature and extent of follow-up questions, as well as in interviewers' reactions to interviewee answers. As the Authority recognized in its decision, it is reasonably foreseeable that the presence of a union observer in the interview room could affect management's ability to conduct the interview freely and without constraints. *See Amer. Fed. of Gov't Employees, Local 2094*, AFL-CIO, 22 F.L.R.A. 710, 713 (1986), *aff'd* 833 F.2d 1037 (D.C. Cir. 1987) (presence of union observer inhibits free and open deliberations); *see also Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988) (*ATF*) (Authority should not examine proposals in a theoretical vacuum, but must pay attention to real life circumstances).

As noted above, whether union observers at job interviews would affect the agency's right to make selections was a matter of first impression. Accordingly, the Authority reasonably looked to precedent involving union participation in other facets of the selection process. In a closely analogous situation, the Authority has consistently held that union participation, even as a passive observer, in rating and ranking panels affects the agency's right to select. *See, e.g., Nat'l Treasury Employees Union*, 28 F.L.R.A. 647, 648-499 (1987) (*NTEU I*); *Nat'l Fed'n of Fed Employees, Local*

1437, 35 F.L.R.A. 1052, 1061-62 (1990). The Authority's position has been upheld by this Court. *See NFFE*, 828 F.2d at 838-39.

AFGE's attempt to distinguish rating and ranking panels from selection interviews should be rejected. Both rating panels and interviews are integral parts of the evaluative process management uses to make selections. *See NFFE*, 828 F.2d at 838 (the right to select "extends to the entire selection process"). AFGE argues (Br. 9), however, that unlike rating panels, there is no "dialogue" between management officials at interviews, or to the extent there is, such dialogue would occur in the presence of the candidate. As discussed above, although management officials may not actually "discuss" the candidates' qualifications during the interview, the interviews nonetheless have an evaluative aspect and assessments made during the course of the interview may influence the manner the interview is conducted. The presence of a union observer will inevitably affect the ability of the interviewers to interact with the candidate as the interviewers' needs at the interview require.

Further, the fact that the interviews are open to at least one non-management employee, namely the interviewee, does not, in and of itself, support the union's position that a union observer does not affect the deliberative process associated with the agency's right to select. *See* Petitioner's brief at 9. Section 7106 insulates certain management activities from *union* involvement. Management may open its activities to non-management personnel as it chooses or needs. *See NTEU I*, 28 F.L.R.A. at 650. However, where an activity is protected by § 7106,

management cannot be compelled to bargain over union participation in the activity.

Finally, the fact that the agency agreed to a contract provision permitting a union observer when requested by the interviewee does not affect the reasonableness of the Authority's determination as to the union's current proposal. The only question before the Authority was whether the specific union proposal at issue in this case was, as a matter of law, outside the agency's obligation to bargain. Matters agreed to by an agency in prior contracts are irrelevant. *See Amer. Fed'n of Gov't Employees, Local 3434*, 49 F.L.R.A. 382, 388 (1994) (inclusion of identical provision in previous contract is irrelevant to determination of whether proposal at issue interferes with a § 7106(a) right). The legality of the previously-agreed-to provision had never been challenged and, therefore, was never ruled upon by the Authority.[2] The Authority, like other adjudicative bodies, decides only matters placed before it by litigants. *See United States Gov't Printing Office, Washington, D.C.*, 53 F.L.R.A. 17, 18 (1997) (Authority will not decide matter not before it, citing 5 C.F.R. § 2429.10, which prohibits the Authority from issuing advisory opinions.).

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[2] The legality of an agreed-upon provision could come before the Authority in a variety of ways. For example, the Authority could rule on a provision's legality when ruling on exceptions to an arbitration award enforcing the provision. Where it is asserted that an arbitration award is contrary to a management right, the Authority will examine whether the provision, as interpreted and applied by the arbitrator, constitutes an arrangement for adversely affected employees under § 7106(b)(3). The Authority will then enforce the award only if the arrangement is appropriate, *i.e.*, if it does not excessively interfere with the affected management right. *See United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Oklahoma City, Okla.*, 58 F.L.R.A. 109, 110 (2002).

II. The Authority Reasonably Determined That the Proposal Was Not a Negotiable Procedure under § 7106(b)(2) of the Statute

It is well established that bargaining proposals that directly interfere with management's reserved rights do not constitute negotiable proposals under § 7106(b)(2). *United States Dep't of the Treasury, Office of Chief Counsel, Internal Revenue Serv. v. FLRA*, 960 F.2d 1068, 1070 (D.C. Cir. 1992); *Patent Office Prof'l Ass'n*, 48 F.L.R.A. 129, 136 (1993), *pet. for review denied*, 47 F.3d 1217 (D.C.Cir. 1995). Applying this principle, both the Authority and this Court have held that proposals, like the one at issue here, that involve unions in the decision-making processes concerning the exercise of management rights directly interfere with those rights and do not constitute negotiable procedures. *See NTEU I*, 28 F.L.R.A. at 649; *Local 2094*, 833 F.2d at 1043.

AFGE's contention (Br. 11, citing *American Federation of Government Employees, Local 3354*, 34 F.L.R.A. 919 (1990) (*Local 3354*)) that substantially similar proposals have been held to be negotiable procedures is without merit. In this regard, AFGE argues that the Authority has upheld the negotiability of proposals providing for union representational rights that expand on those granted by § 7114 of the Statute.

As the Authority has noted, however, although union proposals may expand on the representational rights found in § 7114 of the Statute, in order to be negotiable such proposals may not run afoul of § 7106(a). Thus, in *Local 3354*, the Authority found negotiable a proposal permitting union representation at meetings where agency management presented employees with "opportunity to improve performance" letters. This determination was based in part on the specific finding

that the proposal did not interfere with the agency's right to evaluate employees' performance.[3] *Local 3354*, 34 F.L.R.A. at 925-26.

[3] The right to establish performance standards and evaluate employees under those standards is part of the agency's right to direct employees and assign work under § 7106(a)(2)(A) and (B). *See Nat'l Treasury Employees Union v. FLRA*, 691 F.2d 553, 562 (D.C. Cir. 1982).

The Authority recognized in *Local 3354* that the proposal had nothing to do with the agency's substantive evaluation of employees. Instead, the proposal only affected the circumstances under which the evaluation was communicated to the employee. In that regard, the Authority emphasized that the "opportunity to improve performance" letters were presented only *after* management had exercised its right, *i.e.*, *after* the agency determined that the employee's performance was not "fully successful," and had created a performance improvement plan. *Id.* In contrast, the proposal in this case injects the union into the selection process itself, well in advance of the agency's selection decision.[4]

[4] The union's reliance on this Court's recent decision in *Department of the Air Force, 436th Airlift Wing, Dover AFB v. FLRA*, 316 F.3d 280 (D.C. Cir. 2003) (*Dover*) is also misplaced. *Dover* concerned the scope of the express *statutory* right to union representation at formal discussions pursuant to § 7114(a)(2)(A) of the Statute. Nothing about the scope of bargaining, particularly as it involves § 7106(a), can be gleaned from the Court's *Dover* decision.

Reliance on *Association of Civilian Technicians, Volunteer Chapter 103*, 55 F.L.R.A. 562 (1999) (*ACT*) (Br. 13-14) is no more helpful to the union, as that case is clearly distinguishable from the instant case. The disputed provision in *ACT* provided that the selecting official would: 1) after interviewing and considering all candidates referred by the human resources office, give first consideration to bargaining unit employees; and 2) provide a written justification for the non-selection of employees on the promotion certificate. *ACT*, 55 F.L.R.A. at 562-63. With regard to the first clause, the Authority relied on long-established precedent holding that proposals requiring an agency to consider unit employees first, but not preventing management from timely considering other applicants, do not interfere with the right to select. *Id.* at 565; *see also Laurel Bay Teachers Ass'n, OEA/NEA*, 49 F.L.R.A. 679, 687 (1994); *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 119-71 (D.C. Cir. 1988).[5] As the Authority stated, the proposal in *ACT* only prescribes the mechanics of the process and the order in which the selecting official will consider candidates. In contrast, the proposal here is not about the mechanics management officials will employ. Rather, this proposal requires that the union be permitted to participate in an integral part of the selection process.

Concerning the second clause of the disputed proposal in *ACT*, the Authority has consistently held that proposals requiring agencies to document the reasons for their

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[5] *Cf. ATF*, 857 F.2d at 822. There the Court held that a proposal that required consideration of unit employees before other candidates were even solicited or ranked, although technically not preventing the agency from considering other candidates, practically prevented the agency from looking beyond the agency for candidates, thus significantly impairing the agency's right to select. *Id.* The Authority has adopted this reasoning as its own. *See, e.g., Fed. Employees Metal Trades Council of Charleston*, 44 F.L.R.A. 683, 703 (1992).

determinations regarding management rights do not interfere with the exercise of those rights. *See, e.g., Nat'l Treasury Employee Union*, 43 F.L.R.A. 1279, 1293 (1992). Disclosure of the agency's rationale *after* the determination is implemented does not interfere with the deliberative process associated with that determination. *Id.* In contrast, the proposal in the instant case requires the agency to open the selection process to the union before the selection decision is made.

III. The Authority Reasonably Determined That the Proposal Was Not an Appropriate Arrangement under § 7106(b)(3) of the Statute

Applying the analysis first announced in *National Association of Government Employees, Local R14-87*, 21 F.L.R.A. 24 (1986) (*KANG*), the Authority properly held that the proposal was not an appropriate arrangement under § 7106(b)(3) of the Statute. As this Court has noted, the two-part *KANG* analysis was developed in response to the Court's decision in *American Federation of Government Employees, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983).[6] *See Nat'l Labor Relations Bd. v FLRA*, 2 F.3d 1190, 1192 (D.C. Cir. 1993).

Under the *KANG* analysis, the Authority first examines "whether a proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights." *KANG*, 21 F.L.R.A. at 31. At this stage of the analysis, the burden is on the union to articulate how employees are adversely affected by management's action and how the matter proposed for bargaining is intended to compensate for the actual or anticipated adverse effects. *Id.* Proposals that address only speculative or hypothetical concerns do not constitute arrangements. *Nat'l Treasury Employees Union*, 55 F.L.R.A. 1174, 1187 (1999)

[6] The union mistakenly characterizes the *KANG* analysis as "three prong." (Br. 16).

(*NTEU II*). Assuming the proposal qualifies as an arrangement, the second step of the *KANG* analysis is to determine whether the arrangement is appropriate. An arrangement is appropriate if it does not excessively interfere with the exercise of management's rights. *Id.*

Applying the *KANG* analysis to the disputed proposal here, the Authority reasonably found that the union did not meet its burden of demonstrating that the proposal was an arrangement.[7] The Authority properly rejected the union's contentions that the proposal would ameliorate adverse effects such as stress and improper consideration for selection as a result of improper and inconsistent interview questions. As the Authority found with regard to reducing stress, it is not evident that the presence of a third party at a job interview would reduce the interviewee's level of stress. Indeed, the presence of a third party could, just as likely, increase the stress level.

The Authority also properly held that the union did not meet its burden of demonstrating that the proposal would protect against improper questions. There is nothing in the record to substantiate that improper questions are a reasonably foreseeable problem. *See NTEU II*, 55 F.L.R.A. at 1187 (provision intended to prevent agency from misrepresenting employee testimony was not an arrangement because union had not demonstrated such misrepresentation was reasonably foreseeable). In addition, and as the Authority noted, to the extent the union has concerns in this area, other safeguards are in place. In that regard, the agency has

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[7] Accordingly, the Authority never reached the second part of the *KANG* analysis. As the union properly states (Br. 18), in the event the Court finds the proposal to be an arrangement, the Court should remand the case to the Authority to conduct the excessive interference analysis in the first instance.

agreed to provide the union with the opportunity to review in advance questions to be used in the PBIs. Further, the union may conduct exit interviews with bargaining unit employees who have participated in PBIs. (JA 45); *see Amer. Fed'n of Gov't Employees, Local 2280, Iron Mountain, Mich.*, 57 F.L.R.A. 742, 743 (2002) (Authority found purported adverse effects to be speculative in light of existing safeguards).

Because the union has failed to demonstrate that its proposal was intended to ameliorate any reasonably foreseeable harms, the Authority properly determined that the proposal was not an arrangement.

CONCLUSION

The Union's petition for review should be denied.

Respectfully submitted,

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL VETERANS AFFAIRS COUNCIL 53,	)	
Petitioner	)	
v.	)	No. 02-1311
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority have been served upon the following counsel:

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