ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1301

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

UNITED STATES DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL COMPLEX
COLEMAN, FLORIDA
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

ON PETITION FOR REVIEW OF AN 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 ("Authority") were the U.S. Department of Justice, Federal Bureau of Prisons Federal Correctional Complex Coleman, Florida ("Agency") and the American Federation of Government Employees, Immigration and Customs Enforcement, Local 506 ("Union"). In this Court proceeding, the Agency is the petitioner and the Authority is the respondent.

B. Ruling Under Review

The Agency seeks review of the Authority's decision in *U.S. Department of Justice, Federal Bureau of Prisons Federal Correctional Complex Coleman, Florida and American Federation of Government Employees, Immigration & Customs Enforcement, Local 506*, 69 FLRA (No. 65) 447 (June 30, 2016).

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/ Fred B. Jacob
Fred B. Jacob
Solicitor
Federal Labor Relations Authority

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*Authorities on which the Authority primarily relies are marked with an asterisk.

GLOSSARY OF ABBREVIATIONS

Agency	Petitioner, the United States Department of Justice, Federal Bureau of Prisons Federal Correctional Complex, Coleman, Florida
ALJ	Administrative Law Judge
ALJ Dec.	The decision of the ALJ, dated September 30, 2015
Authority	The Federal Labor Relations Authority's three-member adjudicatory body
Br.	Petitioner's opening brief
Dec.	The decision of the Authority in this case, dated June 30, 2016
FLRA	Respondent, the Federal Labor Relations Authority
GC Ex.	Exhibit of the FLRA's General Counsel before the ALJ
JA	The parties' Joint Appendix
Jt. Ex.	Joint exhibit of the parties before the ALJ
R. Ex.	Exhibit of the Agency before the ALJ
SA	The FLRA's Supplemental Appendix
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Tr.	The transcript of the hearing before the ALJ on June 19-20, 2013
Union	The American Federation of Government Employees, Local 506

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BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about the failure of the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Complex, Coleman, Florida ("Agency") to bargain with the American Federation of Government Employees, Local 506 ("Union") over the impact and implementation of a change that assigned correctional officers to substitute for absent coworkers at prison facilities other than

their own. Under its new "inter-institutional assignment policy," the Agency assigned employees to relieve officers on the sick-and-annual-relief rosters at any of its four prison institutions—the two high-security facilities, the medium-security facility, and the low-security facility—rather than only at their home institution, as the Agency had done in the past. The Authority found that the Agency committed an unfair labor practice, in violation of § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the "Statute"), when it refused to bargain with the Union over this mid-contract change to the officers' terms and conditions of work. Because the Authority correctly found that the Agency committed an unfair labor practice, the Court should deny the Agency's petition for review.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(G) of the Statute. 5 U.S.C. § 7105(a)(2)(G). The Authority's decision is published at 69 FLRA (No. 65) 447 (2016) and is included in the Joint Appendix ("JA") at 1-14. The Authority's order is final with respect to all parties, and the Court has jurisdiction under 5 U.S.C. § 7123(a), which provides that petitions for review of final Authority orders may be filed in this Court. The Union's petition for review was timely filed within 60 days of the Authority's decision. 5 U.S.C. § 7123(a).

STATEMENT OF THE ISSUE PRESENTED

Whether the Agency failed to demonstrate that the Authority was arbitrary and capricious in holding that the Agency had a statutory duty to bargain with the Union

over its inter-institutional assignment policy under the Authority's "covered-by" doctrine.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att 1.

STATEMENT OF THE CASE

The Statute requires federal agencies to bargain in good faith with employees' representatives over conditions of employment, and a refusal to bargain over such matters constitutes an unfair labor practice. 5 U.S.C. § 7116(a)(1), (a)(5). After the Agency terminated bargaining with the Union and unilaterally implemented its inter-institutional assignment policy, the Union filed an unfair-labor-practice charge with the Authority's Atlanta Regional Director. The Regional Director investigated the charge and issued a complaint alleging that the Agency violated § 7116(a)(1) and (5) of the Statute when it refused to bargain. (Dec., JA 2; ALJ Dec., JA 15.) To resolve the complaint, the parties entered into a settlement agreement that required the Agency to bargain with the Union over inter-institutional assignments "until 'otherwise complete pursuant to the . . . Statute.'" (Dec., JA 2.)

The parties then resumed bargaining over the inter-institutional assignment policy. But, when the Agency terminated bargaining before it was complete, the Union filed a second unfair-labor-practice charge, the Regional Director issued a complaint, and an administrative law judge ("judge" or "ALJ") determined that the

Agency committed an unfair labor practice when it failed to bargain with the Union prior to implementing its inter-institutional assignment policy. (ALJ Dec., JA 2, 40.)

The Agency filed exceptions (JA 46-64) to the judge's decision with the Authority, which found that the judge did not err in concluding that the Agency breached its statutory duty to bargain, (Dec., JA 7). The Agency now seeks review of the Authority's decision that the Agency committed an unfair labor practice.

STATEMENT OF THE FACTS

A. The Agency's Evolution From a Single-Facility to a Multi-Institutional Prison and its Unilateral Implementation of the Inter-Institutional Assignment Policy

The Agency opened as a single medium-security prison in 1995. (ALJ Dec., JA 17; Tr., SA 48.) Around that time, the Agency and Union began negotiations for a nationwide collective-bargaining agreement. (ALJ Dec., JA 17-18; Tr., Supplemental Appendix ("SA") 45-51.) The parties bargained over the next three years, and they reached agreement on a collective-bargaining agreement in 1998. (ALJ Dec., JA 17; Master Agreement, Jt. Ex. 2, JA 79-86.) That collective-bargaining agreement is still in effect.

Article 18 of the agreement covers "Hours of Work." (Dec. 2-3, JA 2-3; Master Agreement, Jt. Ex. 2, JA 79-86.) Section 18(g) addresses the Agency's sick-and-annual-relief rosters, by which officers can bid on assignments to relieve their colleagues on sick or annual leave. (ALJ Dec. 17, JA 17; Master Agreement, Jt. Ex. 2, JA 83-84.) Article 18(g) provides that: (1) in the absence of volunteers, the Agency

will assign employees to the relief roster in a specified order; (2) working the relief roster is a quarterly assignment that will not impact other officers' rotations; (3) all employees will work the relief roster before any are reassigned to the duty; (4) employees on the relief rosters will receive at least eight hours of notice before any change in shift; and (5) the Agency will make reasonable efforts to keep sick-and-annual-relief officers assigned to a single shift during a quarter. (*Id.*)

According to the Union's Northeast Regional Vice President, the Agency "hadn't really developed a full idea of a Federal Correctional Complex [consisting of multiple institutions on a single site] when we were [negotiating]" Article 18. (Tr., SA 45.) While a few prisons with multiple institutions were operating at the time the parties were bargaining over Article 18, each institution was "functioning essentially as [a] separate prison[] . . . ." (*Id.* at 50.) "[W]hen you were hired, you were hired into a separate individual prison. You were hired into Allenwood Low. You were hired into Allenwood Medium. You didn't get hired into the federal complex at Allenwood." (*Id.* at 50-51.)

After the parties negotiated Article 18, the Agency grew from a single medium-security prison facility to a prison complex composed of four separate institutions: one housing low-security inmates; one housing medium-security inmates; and two housing high-security inmates. (Dec., JA 2; ALJ Dec., JA 19; Tr., SA 1-2, 48.) From 1998 through 2006, each of those four institutions maintained its own sick-and-annual-relief roster. (Dec., JA 2; ALJ Dec., JA 19; Tr., SA 37-38, 53, 67-68, 92.)

Employees on an institution's sick-and-annual-relief roster filled in for other employees who were on sick or annual leave at that same institution, and did not fill in for employees on leave at other institutions. (Dec., JA 2; ALJ Dec., JA 19, Tr., SA 2-3.)

In 2006, however, the Agency decided to assign officers on the relief rosters to cover vacant posts at any of the four institutions. (ALJ Dec., JA 19, Tr., SA 53, 69-70.) The Union and the Agency negotiated a local agreement to address the impact and implementation of this change. (ALJ Dec., JA 19.) The local agreement reaffirmed that each institution had its own Custody Department and provided that officers would be assigned first to institutions with security levels similar to their "home" institutions before they were assigned to institutions with more significant security differences. (*Id.*) Importantly, the agreement also ensured that "officers placed on the sick and annual roster would receive training on the operations at all of the institutions." (ALJ Dec., JA 19; Tr., SA 54-57.) The parties adhered to this agreement until 2008, when the practice of using inter-institutional relief rosters was discontinued by mutual consent. (*Id.*)

Then, in October 2009, the Agency notified the Union that it intended to consolidate the four institutions' relief rosters and to assign employees to relieve others at any of the four institutions. (Dec., JA 2; ALJ Dec., JA 19; Memorandum, Jt. Ex.4, SA 98; Tr., SA 39-41, 58, 72-73.) It simultaneously provided the Union with a set of 24 proposals and potential bargaining dates. (*Id.*) The Agency did not propose

that it would fill vacant posts from "like" institutions first, as the 2006-2008 local agreement provided. (ALJ Dec., JA 19; Memorandum, Jt. Ex. 4 at 2, SA 99.) The parties began bargaining, (Dec., JA 2; ALJ Dec., JA 19-20; Tr., SA 87-88), but in early 2010, before bargaining was complete, the Agency pulled out of negotiations and unilaterally implemented its inter-institutional assignment policy. (Dec., JA 2; ALJ Dec., JA 20; R. Ex. 3, SA 106; Tr., SA 21, 26, 59, 73-77 85-86, 89-91.) Although the parties had reached agreement on several issues, the Union desired to continue negotiations to address other significant concerns, such as the safety of officers assigned to institutions with which they were unfamiliar. (ALJ Dec., JA 20; Tr., SA 24-25.) These safety concerns emanated from the Union's belief that differences in facility layouts, key rings that officers must master, and officers' familiarity with individual prisoners and their specific risks would undermine effectiveness in an emergency. (ALJ Dec., JA 21-22; Tr., SA 60-61, 63-66, 78-81.) Following its implementation of the consolidated relief roster, the Agency did not provide an orientation to train officers assigned to institutions other than their "home" institution. (ALJ Dec., JA 22; Tr., SA 60-61.)

The Union filed an unfair-labor-practice charge with the FLRA's General Counsel, alleging that the Agency failed to bargain over the impact and implementation of the change. (Dec., JA 2; ALJ Dec., JA 22; Tr., SA 21.) After the Regional Director issued a complaint, the parties entered into a settlement agreement in September 2010 requiring them to "bargain over the institutional assignments until

otherwise complete pursuant to the Statute." (*Id.* (internal quotation marks and alteration omitted); ALJ Dec., JA 22; Jt. Ex. 6, SA 104.)

Pursuant to the settlement agreement, the parties intermittently bargained over the change in policy until the Agency again ended bargaining in August 2012. (Dec., JA 2; ALJ Dec., JA 22-25; GC Ex. 1(a) at 3-6, SA 122-25; GC Ex. 8, SA 124; Tr., SA 30-32.) In response, the Union filed the unfair-labor-practice charge at issue in this case, alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to bargain over the inter-institutional policy in good faith. (Dec., JA 2; ALJ Dec., JA 25; GC Ex. 1(b), SA 120-23.) After investigating the unfair-labor-practice charge, the Regional Director issued a complaint, which was submitted to an administrative law judge. (*Id.*)

B. The Judge Finds That the Agency Committed an Unfair Labor Practice

After a hearing, the judge concluded that the Agency committed an unfair labor practice when it failed to bargain in good faith with the Union over the impact and implementation of the inter-institutional assignment policy. (Dec., JA 4; ALJ Dec., JA 40.) The Agency argued before the judge that it had no duty to bargain because the inter-institutional assignment policy was covered by Article 18 of the parties' collective-bargaining agreement. (Dec., JA 2-3; ALJ Dec., JA 16-17.)

Accordingly, the judge analyzed the Agency's arguments under the Authority's covered-by doctrine. (Dec., JA 3; ALJ Dec., JA 37.) Under that doctrine, a party is

not required to bargain over a matter that has already been resolved by bargaining. (Dec., JA 4; ALJ Dec., JA 37.) The covered-by doctrine has two prongs: first, the Authority examines whether the subject matter of the change is expressly contained in the parties' agreement. (Dec., JA 5; ALJ Dec., JA 37.) Second, the Authority determines whether the subject of the change is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. (Dec., JA 5; ALJ Dec., JA 37.)

Applying prong one, the judge found that inter-institutional assignments are not "'expressly contained in'" Article 18, and the Agency did not dispute that finding. (Dec., JA 3 (quoting ALJ Dec., JA 39).) With respect to prong two, the judge determined that inter-institutional assignments are not inseparably bound up with the subject matter of Article 18. (Dec., JA 3; ALJ Dec., JA 39.) He found that, at the time they agreed to Article 18 in 1998, the parties "did not contemplate 'issues relating to multiple relief rosters at multi-institution complexes' because 'there were few, if any, large federal correctional complexes' at the time." (Dec., JA 3 (quoting ALJ Dec., JA 39); *see also* ALJ Dec., JA 17.) Moreover, the judge found that the parties' actions, including bargaining over inter-institutional assignments for several years, "indicated a mutual understanding that 'they needed to negotiate the impact and implementation'" of the inter-institutional assignment policy. (Dec., JA 4 (quoting ALJ Dec., JA 39).) The judge further determined that the Agency never understood Article 18 as covering inter-institutional assignments because the Agency first raised its covered-by

defense in its answer to the unfair-labor-practice complaint in this case, rather than at any earlier point "'during the six years in which the subject had been debated.'" (Dec., JA 4 (quoting ALJ Dec., JA 40).)

The judge also addressed the Agency's reliance on *Federal Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) ("*Federal BOP*"). He determined that *Federal BOP* was inapposite because it did not address the issue of how employees are assigned to specific posts after they have already been assigned to the relief roster. (Dec., JA 4; ALJ Dec., JA 38.)

C. Before the Authority, the Agency Fails to Establish That the Judge Erred in Finding That the Agency Committed an Unfair Labor Practice

Over the Agency's exceptions to the judge's decision, the Authority found that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate with the Union in good faith. (Dec., JA 7.) Before the Authority, the Agency argued again that it did not commit an unfair labor practice because the inter-institutional assignment policy is covered by Article 18(g) of the parties' agreement. (Dec., JA 4.) The Authority (Chairman Pope and Member DuBester, Member Pizzella dissenting) disagreed. (Dec., JA 7.)

The Authority first noted that the Agency did not contest the judge's prong-one finding: it conceded that inter-institutional assignments are not expressly contained in the language of Article 18(g). (Dec., JA 5.) On prong two, the Authority agreed with the judge that the Agency failed to show that inter-institutional

assignments were inseparably bound up with Article 18(g). (Dec., JA 5-6.) The Authority noted that the Agency did not dispute the judge's finding that multi-institution correctional complexes—though they existed—were "'rare'" at the time of bargaining, and, consequently, the parties did not contemplate inter-institutional assignments of bargaining unit employees on the relief rosters when they negotiated Article 18. (*Id.* at 6 (quoting ALJ Dec., JA 18).)

The Authority further explained that it has declined to find that a matter is covered by a collective-bargaining agreement when the agreement "specifically contemplates bargaining to resolve the matter." (Dec., JA 6.) The language of the parties' settlement agreement in this case, the Authority found, satisfies that standard. (*Id.*) Indeed, the Authority noted that the Agency did not dispute the judge's finding that the settlement agreement "specifically provides for bargaining over inter-institutional assignments 'until . . . otherwise complete pursuant to the . . . Statute.'" (*Id.* at 7 (quoting ALJ Dec., JA 35).)

The Authority also determined that the Agency's reliance on *Federal BOP* was misplaced. (Dec., JA 7.) In that case, this Court relied on the parties' bargaining history to hold that Article 18(d) and 18(g) of the national agreement "'represent the agreement of the [national] parties about the procedures by which the warden formulates a roster, assigns officers to posts, and designates officers for the relief shift." (Dec., JA 7 (quoting *Federal BOP*, 654 F.3d at 95).) The Court did not, however, "discuss inter-institutional assignments and did not resolve the issue that

this case presents," the Authority found. (*Id.*) Moreover, the Authority explained, the bargaining history of Article 18 further distinguishes *Federal BOP*. Accordingly, the Authority concluded that *Federal BOP* was not controlling.

The Authority therefore found that the record supported the judge's finding that inter-institutional assignments were not covered by the parties' agreement. (Dec., JA 7.) Based on the judge's other findings, which the Agency did not contest, the Authority determined that the Agency committed an unfair labor practice, in violation of § 7116(a)(1) and (5) of the Statute, when it refused to negotiate with the Union. (*Id.*)

The Agency's petition for review in this case followed.[1]

[1] The Authority is currently comprised of only two Members who were on the underlying decision in this case and then-Member Pizzella dissented. The President designated Member Pizzella as Acting Chairman of the Authority on January 23, 2017.

SUMMARY OF THE ARGUMENT

The Authority correctly applied its covered-by doctrine to find that, because the Agency's inter-institutional assignment policy was not covered by Article 18(g) of the parties' collective-bargaining agreement, the Agency violated § 7116(a)(1) and (5) of the Statute when it refused to bargain with the Union prior to implementing the policy. The Agency does not contest the judge's finding that the contract does not expressly address inter-institutional assignments, and the Authority properly upheld the judge's finding, supported by substantial evidence, that such assignments were not inseparably bound up with the contract because the parties had no reason to contemplate inter-institutional assignments when they negotiated Article 18. Applying that finding, the Authority reasonably interpreted the contract, in light of the policies effectuated by the Statute, to find that inter-institutional assignments were not inseparably bound up with Article 18.

The narrow ground on which the Agency bases its appeal is an overbroad reading of this Court's decision in *Federal BOP*. But that case concerned different subjects, different bargaining history, different record evidence. And, in *Federal BOP*, the Agency did not sign a settlement agreement promising to bargain over the change. The Authority's application of its covered-by doctrine properly demonstrated that this case does not involve the policy concerns that this Court voiced in *Federal BOP* about requiring parties to engage in impact-and-implementation bargaining over procedures that are *themselves* the result of impact-and-implementation bargaining. The Agency's

inter-institutional assignment policy was not the result of impact-and-implementation bargaining: to the contrary, substantial evidence supports the judge's finding that the parties did not contemplate inter-institutional assignments when they agreed to Article 18(g). In sum, *Federal BOP* cannot support the overbroad arguments the Agency makes in attempting to force this case under its umbrella. The Authority correctly found that the Agency violated § 7116(a)(1) and (5) when it refused to bargain with the Union over the inter-institutional assignment policy.

STANDARDS OF REVIEW

This Court grants broad deference to decisions of the Authority. *U.S. Dep't of Air Force, Griffiss Air Force Base, Rome, N.Y. v. FLRA*, 949 F.2d 1169, 1172 (D.C. Cir. 1991). This Court has recognized that "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." *Nat'l Ass'n of Gov't Emps., Inc. v. FLRA*, 179 F.3d 946, 950 (D.C. Cir. 1999) (quoting *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983)).

This Court reviews Authority decisions "in accordance with section 10(e) of the Administrative Procedure Act" and 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. § 706(2)(A), 5 U.S.C. § 7123(c) (incorporating Administrative

Procedure Act standards of review). The Authority's fact findings are conclusive so long as they are supported by substantial evidence on the record as a whole. 5 U.S.C. § 7123(c).

ARGUMENT

THE AGENCY HAS FAILED TO DEMONSTRATE THAT THE AUTHORITY WAS ARBITRARY AND CAPRICIOUS IN FINDING THAT THE INTER-INSTITUTIONAL ASSIGNMENT POLICY WAS NOT COVERED BY ARTICLE 18(g) OF THE PARTIES' COLLECTIVE-BARGAINING AGREEMENT

A. The Statute Gives the Authority the Power to Balance Federal-Sector Labor Policies and Define the Scope of Mid-Term Bargaining

The Statute vests federal employees with the right "to engage in collective bargaining with respect to conditions of employment." 5 U.S.C. § 7102(2). As this Court has recognized, "federal agencies [must] bargain in good faith with employees' representatives over 'conditions of employment,'" and § 7116(a)(1) and (5) of the Statute makes "a refusal to bargain over such matters . . . an unfair labor practice." *Dep't of Health & Human Servs., Indian Health Serv., Okla. City v. FLRA*, 885 F.2d 911,

913 (D.C. Cir. 1989) (citing 5 U.S.C. § 7116(a)(1), (a)(5)).[2] While the Statute grants agencies the right to assign work, 5 U.S.C. § 7106(a)(2)(B), it still requires bargaining over the "procedures which management officials of the agency will observe in exercising [their] authority" and "appropriate arrangements for employees adversely affected . . . ." *Id.* This latter type of bargaining is commonly referred to as "impact-and-implementation" bargaining. *See Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992).

Even when parties are bound to an existing collective-bargaining agreement, the Supreme Court has recognized that the Authority possesses "the power to determine—within appropriate legal bounds [of the Administrative Procedure Act and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)]—whether, when, where, and what sort of midterm bargaining is required" under the Statute. *Nat'l Fed. of Fed. Emps., Local 1309 v. Dep't of Interior*, 526 U.S. 86, 98-99 (1999). Balancing the Statute's competing goals of encouraging amicable resolution of disputes through collective bargaining and providing stability to those relationships during the term of a contract, the Authority has held that "agencies are obligated to

[2] Section 7116(a)(5) prohibits an agency from "refus[ing] to consult or negotiate in good faith with a labor organization as required by [the Statute]." 5 U.S.C. § 7116(a)(5). Section 7116(a)(1), in turn, makes it unlawful for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]." 5 U.S.C. § 7116(a)(1). It is well settled that a violation of § 7116(a)(5) results in a "derivative" violation of § 7116(a)(1). *See Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 417 (2004) ("A violation of § 7116(a)(1) is commonly found as a "derivative violation," that is, an interference with employee rights that flows from another violation of the Statute.").

bargain during the term of a collective-bargaining agreement on negotiable union proposals concerning matters that are not 'contained in or covered by' the term agreement." *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 51 (2000); *see also Nat'l Treasury Emps. Union v. FLRA*, 399 F.3d 334, 337 (D.C. Cir. 2005) (citing *Internal Revenue Serv.*, 29 FLRA 162, 166 (1987)). As the Authority explained, "by permitting unions to raise certain matters midterm, the term negotiations will . . . proceed more efficiently in addressing existing and primary problems, and there will be no requirement to bargain over remote and secondary issues that do not appear to raise immediate concerns." *Dep't of the Interior*, 56 FLRA at 52; *accord Nat'l Fed. of Fed. Emps., Local 1309*, 526 U.S. at 94.

In *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1018 (1993) ("*SSA*"), the Authority set forth the covered-by defense, "a legal doctrine developed to elucidate the mutual obligation to bargain mid-term." *Nat'l Treasury Emps. Union*, 64 FLRA 156, 158 (2009). The test "balances the need for stability and the flexibility to address new matters." *Dep't of the Interior*, 56 FLRA at 53. *SSA*, which followed and adopted this Court's decision in *Department of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992), announced a two-prong test to determine whether a disputed matter is covered by the contract. Under the first prong, the Authority examines whether the matter is "expressly contained" in the collective-bargaining agreement, finding the "requisite similarity if a reasonable reader would conclude that the provision settles the matter in

dispute." *SSA*, 47 FLRA at 1018. If the contract does not expressly contain the subject of the mid-term bargaining proposal, under the second prong, the Authority considers whether it is "inseparably bound up with, and thus plainly an aspect of," a subject contained in the parties' agreement. *Id.*

In applying prong two, the Authority "will determine whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the [agreement] that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the [agreement]." *Id.*; *see also Nat'l Treasury Emps. Union*, 66 FLRA 186, 189-90 (2011). Or, in other words, the Authority will evaluate whether the parties "reasonably should have contemplated" that their collective-bargaining agreement would foreclose further bargaining on the subject. *SSA*, 47 FLRA at 1019. An analysis of the parties' bargaining history and intent is a requisite component of this evaluation. *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000). "If the subject matter in dispute is only tangentially related to the provisions of the agreement and . . . it was not a subject that should have been contemplated as within the intended scope of the provision," the covered-by defense will fail and there will be an obligation to bargain. *SSA*, 47 FLRA at 1019.

The Authority's development and application of the covered-by test flows from its role as the expert agency "Congress has specifically entrusted . . . 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) (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983)). As the Authority explained, the test aims to balance the parties' interests:

> [W]e must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and . . . the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining. If we meet these goals, we will have supported "the delicate balance of power between management and labor . . . ." *National Treasury Employees Union v. FLRA*, 856 F.2d 293, 301 (D.C. Cir. 1988).

SSA, 47 FLRA at 1017-18. Under Authority precedent, the covered-by doctrine is an affirmative defense that a respondent has the burden of proving. *U.S. Dep't of the Treasury, Internal Revenue Serv.*, 63 FLRA 616, 617 n.2 (2009).

The Court has twice cited the Authority's covered by test with approval. *Nat'l Treasury Emps. Union v. FLRA*, 452 F.3d 793, 796 (2006); *Nat'l Treasury Emps. Union*, 399 F.3d at 337-38. It will affirm the Authority's "reasonable" applications of the *SSA* framework. *Nat'l Treasury Emps. Union*, 452 F.3d at 798 ("That conclusion, if not compelled, was eminently reasonable.").

B. The Authority Correctly Applied its Covered-by Doctrine to Determine That the Agency Failed to Show That Article 18(g) Covered the Inter-Institutional Assignment Policy

The Authority acted within its discretion in concluding that the Agency's inter-institutional assignment policy was not covered by Article 18(g) of the parties' collective-bargaining agreement.[3] Applying its *SSA* covered-by test, the Authority rightly held that the Union's request to bargain over inter-institutional assignments was neither expressly addressed by the contract nor inseparably bound up with its terms.

First, Article 18(g) does not expressly address inter-institutional assignments from the relief rosters, thus failing *SSA* prong one. The judge held that, while Article 18(g) establishes procedures for assigning employees *to* the relief roster, it is silent on whether officers *already on* the relief roster may be assigned to other institutions and silent on any process for doing so. (ALJ Dec., JA 39.) Moreover, as the judge observed, there is no conflict between the express terms of Article 18(g) and any matters arising out of the unilateral implementation of inter-institutional assignments. (*Id.*) That is, each operates entirely independently of the other. Accordingly, the judge held that the Agency failed to prove prong one of the *SSA* test. *See U.S. Dep't of the Treasury, Internal Revenue Serv. Denver, Colo.,* 60 FLRA 572, 574 (2005) (finding that

[3] Whereas the Agency cited Article 18(d) *and* 18(g) of the parties' agreement before the arbitrator, its arguments to the Authority were grounded only in Article 18(g). *See* Dec., JA 4. Accordingly, Article 18(g) is the only portion of the collective-bargaining agreement at issue in this case. *See* 5 U.S.C. § 7123(c) ("No objection that has not been urged before the Authority . . . shall be considered by the court . . . .").

union's proposal was expressly covered by the parties' collective-bargaining agreement); *cf. Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 313 (D.C. Cir. 2003) (holding that contract did not cover employer's unilateral action when "not embraced by the literal language of the management rights clause"). The Agency did not challenge that holding to the Authority (Dec., JA 5), and it is now uncontestable before the Court, *see* 5 U.S.C. § 7123(c).

Second, applying prong two of the *SSA* test, the Authority correctly evaluated the contractual language and undisputed record evidence in deciding that inter-institutional assignments were not inseparably bound up with, and thus plainly an aspect of, Article 18(g). (Dec., JA 5-7; ALJ Dec., 39-40.) As the Authority explained, "[t]he Judge found, and we agree, that the [Agency] has failed to establish that the parties, at either the national or local level, intended to foreclose bargaining over inter-institutional assignments" in Article 18(g). (Dec., JA 5-6.)

To begin, in finding that Article 18(g)'s provisions for placing employees on the sick-and-annual-relief rosters were not inseparably bound up with inter-institutional assignments, the Authority relied on evidence demonstrating that multi-institution correctional complexes were "rare" when the collective bargaining agreement was negotiated, and, as a result, the parties' negotiators never contemplated issues related to multiple relief rosters at multi-institution complexes at bargaining. (ALJ Dec., JA 39; *see also* Dec., JA 4, 6.) Philip Glover, the Northeast Regional Vice President of the Council of Prison Locals who participated in the 1995-1998 negotiations, testified that

the Agency had not "developed a full idea of a Federal Correctional Complex [with multiple institutions at different security levels] when we were" negotiating the contract. (Tr., SA 45.) Although some complexes were under development at the time, "they were not operational in the sense that they are now." (Tr., SA 49.) At the time, a permanent transfer was the only way that an employee could work at a different facility. (ALJ Dec., JA 39; Tr., SA 33-35.) Indeed, as correctional officer and Local Union Executive Vice President Ken Pike testified, even when the parties were negotiating the local supplemental agreement in 2000, they did not address inter-institutional relief roster transfers because "[t]here was no reason to[,] [w]e weren't doing that." (Tr., SA 35.)

Further bolstering the finding that the parties did not contemplate inter-institutional relief roster assignments in the 1998 collective-bargaining agreement, the parties' 2000 local supplemental agreement contemplates inter-institutional *overtime* assignments, but not inter-institutional assignments from the sick-and-annual-relief roster. (Dec., JA 6.) The Authority properly relied on the judge's factual finding, which the Agency did not dispute, that at the time the local supplemental agreement was negotiated, no Agency employees on the sick-and-annual-relief roster were assigned to posts at other institutions. (*Id.*; ALJ Dec., JA 39.) Thus, at the time of bargaining Article 18(g), as well as the local supplemental agreement, there was no

reason for the parties to contemplate that Article 18(g) would preclude negotiations over inter-institutional sick-and-annual-relief roster assignments.[4]

Substantial evidence therefore supports the Authority's finding that "the national parties did not contemplate inter-institutional assignments when bargaining the master agreement." (Dec., JA 6.) When parties do not contemplate a subject during negotiations, it is less likely to be inseparably bound up with the resulting agreement. *See Dep't of the Treasury, U.S. Customs Serv., El Paso, Tex.*, 55 FLRA 43, 46-47 (1998) (finding that video recording of employee interviews not covered by provision regarding audio tape, which parties negotiated before agency utilized video cameras); *U.S. Dep't of the Air Force, Air Force Materiel Command,* 54 FLRA 914, 921 (1998) (finding "VSIP program" not covered by the contract when there was no evidence that parties discussed the program during, or that Congress had even created the program before, negotiations).

Next, in concluding that the parties did not believe that inter-institutional assignments were covered by Article 18(g)'s procedures for assigning employees to the sick-and-annual-relief rosters, the Authority also reasonably relied on the Agency's willingness to bargain over the inter-institutional assignments and its failure to claim that Article 18(g) covered the policy (despite the fact that the covered-by doctrine has

[4] Although the Agency argued to the Authority that the local agreement covers relief roster bargaining (Dec., JA 6), it no longer makes that claim to the Court.

been a staple of Authority law since at least 1993, *see SSA*, 47 FLRA at 1004). (Dec., JA 4; ALJ Dec., JA 40.) As the judge found:

> [N]ot when the warden first experimented with inter-institutional relief assignments in 2006; not when management notified the Union of its intent to change the policy in 2009; not when it exchanged bargaining proposals and bargained partially in early 2010; not when it defended its conduct in response to the complaint in AT-CA-10-0172; not when it helped draft the Settlement Agreement; not when it returned to the bargaining table in the spring of 2011; and not when [the Agency] engaged [the Union] in a seven-month game of "kick the football"—did the Agency state that the issue of inter-institutional assignments from the relief rosters was covered by the Master Agreement.

(ALJ Dec., JA 40.) Thus, in the *six years* leading up to its answer to the Regional Director's complaint in this case, during which the parties alternated between bargaining over inter-institutional assignments and debating over whether the Agency was required to bargain over those assignments, the Agency never raised a covered-by defense. (Dec., JA 4; ALJ Dec., JA 40.) It was not until the Agency filed an answer to the complaint that the Agency claimed the policy was covered by Article 18(g). (Dec., JA 4; ALJ Dec., JA 40.) The Agency's failure to raise a covered-by defense "during the six years in which the subject had been debated at FCC Coleman is a significant indication that Agency officials had never previously understood Article 18 as covering [relief rosters]."[5] (ALJ Dec. JA 40.) *See Nat'l Treasury Emps. Union v. FLRA,* 466 F.3d 1079, 1081 (D.C. Cir. 2006) ("[C]ourts interpret labor agreements in light of

[5] While the Agency now suggests (Br. 8, 27) that the Court's 2011 *Federal BOP* decision helped it to see the covered-by light when it finally raised the defense in 2012, the covered-by analysis focuses on the deal the parties made in 1998, not a belated epiphany about the deal's meaning.

the practice, usage and custom of the parties" and "where the terms of a bargaining agreement are ambiguous, we look to evidence of the parties' contemporaneous understanding." (internal citations and quotation marks omitted)); *see also U.S. Dep't of the Treasury, Internal Revenue Serv., Plantation, Fla.*, 64 FLRA 777, 778 (2010) (rejecting covered-by argument Agency waited fourteen years to raise).

Furthermore, bargaining over the Agency's inter-institutional assignment policy would not "circumvent" the procedures set forth in Article 18(g) for assigning employees to the relief rosters, as the judge found and the Agency does not contest. *Nat'l Treasury Emps. Union*, 66 FLRA 186, 190 (2011) (internal quotation marks omitted). Inter-institutional assignments were only "tangentially related" to Article 18(g), in that both address issues related to sick-and-annual-relief rosters. *SSA*, 47 FLRA at 1019. Consequently, negotiating the impact and implementation of assigning employees on the sick-and-annual-relief roster to shifts at different institutions would not bar the Agency from following any of the procedures set forth in Article 18(g).[6]

[6] For example, the inter-institutional assignments policy would not prevent the Agency from: assigning employees to the sick-and-annual-relief roster based on when the employees were last on the roster, under Article 18(g)(1); ensuring that assignment to the sick-and-annual-relief roster will not affect the employee's progression through his or her other three quarterly shifts, under Article 18(g)(2); or notifying employees on the sick-and-annual-relief roster of changes in their shifts at least eight hours in advance, under Article 18(g)(4). (ALJ Dec., JA 17; Master Agreement, Jt. Ex. 2, JA 83-84.)

As the Court stated in 2006's *National Treasury Employees Union v. FLRA*, "the 'covered by' analysis is . . . analogous to the inquiry we make in order to determine whether a federal statute impliedly preempts related state law"—"[i]f the purpose of the [federal] act cannot otherwise be accomplished[,] . . . the state law must yield." 452 F.3d at 797 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Here, there is no question that Article 18(g)'s purposes can be accomplished even with bargaining over inter-institutional assignments. *See also United Am. Nurses D.C. Nurses Ass'n & United Am. Nurses Local 203*, 64 FLRA 879, 882 (2010) (contract provision about release of employees' names, grades, and salaries to union did not cover proposal regarding release of employee scheduling information to union); *U.S. Dep't of Homeland Sec., Customs & Border Prot.,* 63 FLRA 434, 438-39 (2009) (contract provision about re-assignments to other bargaining-unit positions did not cover re-assignments to supervisory, non-bargaining-unit positions).

Additionally, the Agency's 2010 unilateral implementation of inter-institutional assignments has serious ramifications for correctional officers unrelated to the Article 18(g) procedures the parties established in 1998. As the judge found, in "an unfamiliar environment, an officer may not have the knowledge to respond quickly and assist other staff in an emergency." (ALJ Dec., JA 21; *see also* Tr., SA 24-25, 60-61). For example, "officers carry different sets of keys at different institutions," and "[h]aving an unfamiliar key ring can affect an officer's ability to respond to an emergency or isolate an emergency situation." (*Id.*) They may not be familiar with

facility layout or with the specific risks of individual prisoners. This impact on employee safety is materially different than the matter the parties were negotiating when they agreed to Article 18(g), which addresses only how employees are assigned to be on the sick-and-annual relief roster.

The Authority reasonably concluded, therefore, that, under *SSA*, Article 18(g) does not cover inter-institutional assignments from the relief rosters because it neither expressly addresses them nor is inseparably bound up with them. "Application of the 'covered by' doctrine is an exercise in construction; it requires the adjudicator of a dispute over the meaning of a collective bargaining agreement to determine how broadly or narrowly the agreement should be read in view of the policies embodied in the [S]tatute." *Nat'l Treasury Emps. Union*, 452 F.3d at 797. In the words of the Authority, "a union should be secure in the knowledge that the agency may not rely on [the parties' collective-bargaining] agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining." *Nat'l Treasury Emps. Union*, 59 FLRA 217, 218 (2003) (internal quotation marks omitted).

Here, in light of federal labor-management policies embodied in its enabling statute, the Authority determined that Article 18(g) should not be read so broadly as to encompass a matter—inter-institutional assignments—that the parties had no reason to suspect the agreement would cover at the bargaining table. This Court should defer to that reasonable determination. *See Nat'l Treasury Emps. Union*, 452 F.3d at 798 (affirming Authority's "reasonable" application of the covered-by

doctrine, even if not "compelled"); *Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009, 1023-24 (D.C. Cir. 1979) ("[D]ue deference should be paid an agency's determination of how best to achieve the statutory policies Congress directs it to implement . . . .").

C. The Agency's Attempts to Force this Case Under the Umbrella of *Federal BOP* Fall Short

Ignoring the Authority's reasonable analysis of prongs one and two of the covered-by doctrine, the Agency focuses its brief on this Court's decision in *Federal BOP*. Arguing that *Federal BOP* controls because it also interpreted Article 18(g), the Agency overreads the case, hoping that "if the rationale or logic supporting a decision in one case is stated broadly enough to cover future cases not at issue, the latter cases are necessarily controlled by the earlier case." *UC Health v. NLRB*, 803 F.3d 669, 681 (D.C. Cir. 2015) (Edwards, J., concurring). But the Court should remember Chief Justice Marshall's reminder that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia,* 6 Wheat. 264, 399, 5 L.Ed. 257 (1821); *see also Landgraf v. USI Film Prods.,* 511 U.S. 244, 265 (1994) (calling this principle "a canon of unquestionable vitality").

Viewed in context, the Agency's position that *Federal BOP* controls must fail. *See* Br. at 14-19, 22-28. Following Chief Justice Marshall's maxim, the Authority properly recognized that "*Federal BOP* did not discuss inter-institutional assignments and did not resolve the issue that this case presents." (Dec., JA 7.) Rather, *Federal BOP* concerned the Agency's determination of the positions to which employees

would be assigned by a quarterly bidding system. *Federal BOP*, 654 F.3d at 93. Under Article 18(d), each institution would publish a roster of positions that would be available during the next quarter, correctional officers would bid for posts and shifts, and the Agency would make assignments based on seniority. *Id.* After the Agency made a change in the positions that would appear on the roster, the Union requested bargaining. *Id.* This Court, however, held that Article 18(d) covered that matter. It concluded that "the procedures prescribed in Article 18 cover the substance of all decisions reached by following those procedures," including the Agency's right to select the positions to place on the roster under Article 18(d)(2). *Federal BOP*, 654 F.3d at 95; *see also* Master Agreement, Jt. Ex. 2, JA 81-82. The Union thus attempted to bargain over procedures that were implicitly settled in the contract—as the Authority would say, inseparably bound up with the contract. Here, however, nothing in Article 18(g) expressly or implicitly addresses the question of assigning employees to different institutions, demonstrated by the Agency's concession that the Article does not expressly address the subject and the Authority's finding that the Agency did not make inter-institutional assignments at all, much less off the relief rosters, at the time of the contract negotiations.

The differences in the record evidence between *Federal BOP* and this case are dispositive. As the Authority observed (Dec., JA 7), the judge in this case made a factual finding, based on substantial evidence, that the parties did not contemplate inter-institutional assignments at bargaining, and, thus, that the inter-institutional

assignments were not inseparably bound up with Article 18(g)'s procedures for placing employees on the relief rosters. (Dec., JA 6-7, ALJ Dec., JA 39.) By contrast, in *Federal BOP*, this Court based its analysis on evidence that the parties *did* intend Article 18 to cover the matter at issue in that case: which positions at each institution would be available for bid. *Federal BOP*, 654 F.3d at 96. In fact, *Federal BOP* identified as the "best evidence" testimony from the Union's chief negotiator regarding the parties' intent to substitute job bidding for random assignments of employees to jobs like "a softball team being picked." *Id.* Thus, applying the same analysis that this Court used in *Federal BOP*—examining the parties' intent at bargaining—Article 18(g) does not cover inter-institutional assignments.

Moreover, unlike in *Federal BOP*, the Agency concedes that it signed a settlement agreement with the Union requiring it to bargain over inter-institutional assignments. (*See* Br. at 7-8.) And the Agency does not challenge the Authority's holding (Dec., JA 6) that the covered-by doctrine does not apply when the parties' agreement specifically contemplates bargaining over a matter. *See U.S. Dep't of Hous. & Urban Dev.*, 66 FLRA 106, 109 (2011); *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12 (2000).[7] The Agency only tries to twist the words of the settlement agreement to argue that it *did* complete bargaining with the Union by *ending*

[7] *See also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Williamsburg Salters, S.C.*, 68 FLRA 580, 582-83 (2015) (holding that the covered-by defense did not apply to Article 18(b), which provides that "requests for flexible and/or compressed work schedules may be negotiated at the local level").

bargaining after this Court issued its decision in *Federal BOP*. (Br. 27.) But that position is untenable: it would render the settlement agreement meaningless to interpret its language as merely requiring the Agency to bargain with the Union unless the Agency believed that the Statute did not require bargaining. The Agency's negotiations with the Union after signing the settlement agreement also demonstrate that the parties understood the agreement to require bargaining. The Court should give no weight to the Agency's attempt to hide behind a convoluted interpretation of the settlement agreement's language now.

The Agency demonstrates its misunderstanding of the covered-by doctrine by citing three Authority decisions in which arbitrators evaluated contractual grievances alleging that the Agency violated Article 18. (Br. 25-26.) The covered-by doctrine analyzes the existence of a *statutory* duty to bargain by "respect[ing] the bargain the parties struck," absolving parties of bargaining obligations when the contract covers a matter. *Broad. Bd. of Governors, Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 458 (D.C. Cir. 2014). In each of the Agency's cases, however, an arbitrator interpreted the parties' contract solely to determine whether an Agency action violated the "bargain the parties struck," *e.g.,* Article 18. *See U.S. Dep't of Justice, Fed. Bureau of Prisons Fed. Medical Ctr. Lexington, Ky.*, 69 FLRA 10, 12 (2015); *U.S. Dep't of Justice, Fed. Bureau of Prisons Fed. Detention Ctr. Miami, Fla.,* 68 FLRA 61, 63 (2014); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex Terra Haute, Ind.,* 67 FLRA 697, 699-700 (2014). As the Authority explained, "[u]nder the covered-by doctrine, questions about a party's

compliance with agreed-upon contract provisions are 'properly resolved through the contractual grievance procedure.'" *Detention Ctr. Miami*, 68 FLRA at 64 (quoting *Dep't of the Navy*, 962 F.2d at 61 (internal citations omitted)). In the context of grievance arbitration, *Federal BOP*'s covered-by analysis has no relevance: "It would make little sense to consider [a covered-by] defense when evaluating a purported contractual duty, since contractual duties are themselves products of the very bargaining the 'covered by' doctrine is designed to respect." *Broad. Bd. of Governors*, 752 F.3d at 458. Accordingly, these three cases are inapposite.

The policy concerns that underlie the Court's decision in *Federal BOP* also are inapplicable here. As noted above (p. 17), the Authority's *SSA* test for determining whether a matter is covered by the contract endeavors to balance the statutory interest in resolving disputes through collective bargaining against the equally important interest in repose. *Nat'l Treasury Emps. Union*, 399 F.3d at 337-38. This Court has approved the *SSA* test,[8] but it failed to cite or apply it in *Federal BOP*. The failure to tether the analysis to *SSA*'s focus on explicit and implicit negotiating expectations jettisoned *SSA*'s effort to balance flexibility and repose when evaluating whether a matter is appropriate for mid-term bargaining.

If the Court applies the Authority's *SSA* test here, including its fact-based elements, the Authority's order should be affirmed. Application of that test, as made

[8] *Nat'l Treasury Emps. Union*, 452 F.3d at 796; *Nat'l Treasury Emps. Union*, 399 F.3d at 337-38.

clear above, proves that the Authority has not "imposed upon the employing agency a duty to negotiate over the impact and implementation of a procedure that [was] itself the outcome of impact and implementation bargaining." *Federal BOP*, 654 F.3d at 96. Nor is the Authority, as the Agency claims (Br. 27), treating the collective-bargaining agreement "as but 'a starting point for constant negotiation over every agency action.'" *Federal BOP*, 654 F.3d at 95 (quoting *Dep't of the Navy*, 962 F.2d at 53). The duty to negotiate arises because Article 18(g)'s procedures for placing employees on the relief rosters neither expressly nor implicitly addressed inter-institutional assignments, a matter not on the parties' radar screen during contract negotiations. Negotiations over inter-institutional assignments would not constitute impact-and-implementation bargaining over the procedures in Article 18(g), which do not conflict with the proposals concerning inter-institutional assignments, (ALJ Dec., JA 39). Instead, it would constitute impact-and-implementation bargaining over an aspect of management's statutory right to assign not previously exercised or contemplated during the term contact negotiations.

To the extent the Agency argues (Br. 18 n.5, 24) that *Federal BOP* holds that Article 18(g) represents the sole opportunity to bargain impact and implementation of the management right to assign work for the full term of the contract, that holding is inconsistent with the policies underlying the Statute, as the Authority has interpreted them with judicial approval. Management's statutory right to assign may be exercised in myriad ways and parties may negotiate appropriate arrangements and procedures in

their contract. But, if a union only gets one shot to negotiate every permutation of a management right, term contract bargaining would be significantly impeded, as parties would be required to predict and negotiate every possible aspect of that right before signing the contract.

As the Authority has recognized, however, "requiring unions to raise matters that do not currently present problems, but might do so in the future, could unnecessarily and inefficiently broaden and prolong term negotiations." *Dep't of the Interior,* 56 FLRA at 51. And this Court, too, has criticized a restrictive approach to mid-term bargaining that would require the parties to foresee every possible implementation issue during contract negotiations. *See Dep't of the Navy,* 962 F.2d at 59 (rejecting the Authority's "clear and unmistakable" waiver test because it required employers to bargain unless the contractual management-rights clause was almost exactly congruent with proposal); *cf. NLRB v. U.S. Postal Serv.*, 8 F.3d 832, 838 (D.C. Cir. 1993) ("[I]t is naive to assume that bargaining parties anticipate every hypothetical grievance and purport to address it in their contract."). An interpretation of *Federal BOP* that imposes a duty of clairvoyance on parties would undermine the collective-bargaining process and the efficiency of the federal-sector labor relations program. *See Nat'l Fed. of Federal Emps., Local 1309*, 526 U.S. at 94; *Dep't of the Interior*, 56 FLRA at 52.

In this light, the Court should read *Federal BOP* in its specific factual and contractual context, recognizing that each case must be taken on its own. Here, the

contract and the record demonstrate that the parties did not foresee the issue of inter-institutional assignments at bargaining, and did not intend for Article 18(g) to cover it. The Court should respect the Authority's sound decision.

CONCLUSION

The Authority requests that the Court deny the petition for review.

Respectfully submitted,

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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 8,522 words excluding exempt material.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2017, 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/ Stephanie J. Fouse
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ATTACHMENT 1
STATUTORY 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. § 7102. Employees' Rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7105(a)(2). Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

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

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

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

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

5 U.S.C. § 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--

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(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;

(C) with respect to filling positions, to make selections for appointments from--

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(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;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7116. Unfair labor practices

(a) For the purpose of this chapter [5 USCS §§ 7101 *et seq.*], 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 [5 USCS §§ 7101 *et seq.*];

(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 USCS §§ 7101 *et seq.*];

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter [5 USCS §§ 7101 *et seq.*];

(6) to fail or refuse to cooperate in impasse procedures and

impasse decisions as required by this chapter [5 USCS §§ 7101 *et seq.*];

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title [5 USCS § 2302]) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter [5 USCS §§ 7101 *et seq.*].

(b) For the purpose of this chapter [5 USCS §§ 7101 *et seq.*], it shall be an unfair labor practice for a labor organization –

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 *et seq.*];

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter [5 USCS §§ 7101 *et seq.*];

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter [5 USCS §§ 7101 *et seq.*];

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter [5 USCS §§ 7101 *et seq.*];

(7) (A) to call, or participate in, a strike, work stoppage, or to call,

or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter [5 USCS §§ 7101 *et seq.*].

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter [5 USCS §§ 7101 *et seq.*] it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure –

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter [5 USCS §§ 7101 *et seq.*].

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title [5 USCS § 7121(e) and (f)], an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which –

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter [5 USCS §§ 7101 *et seq.*].

5 U.S.C. § 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.

(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.