ORAL ARGUMENT NOT YET SCHEDULED
NO. 18-1239

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

NATIONAL TREASURY EMPLOYEES UNION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS AND BORDER PROTECTION

Intervenor for Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

REBECCA J. OSBORNE
ACTING DEPUTY SOLICITOR

TABITHA G. MACKO
ATTORNEY

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
WASHINGTON, D.C. 20424 (202) 218-7986

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the U.S. Department of Homeland Security, Customs and Border Protection (the "Agency") and the National Treasury Employees Union (the "Union"). In this Court proceeding, the Union is the petitioner, the Authority is the respondent, and the Agency is the intervenor.

B. Ruling Under Review

The Union seeks review of the Authority's decision in *National Treasury Employees Union and U.S. Department of Homeland Security, Customs and Border Protection,* 70 FLRA (No. 139) 701 (July 11, 2018).

C. Related Cases

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

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

TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

GLOSSARY OF ABBREVIATIONS vii

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION...... 1

STATEMENT OF THE ISSUE PRESENTED 2

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

STATEMENT OF THE FACTS 4

A. The parties agreed that Proposal 1 sought to limit the rating levels that the Agency could use in evaluating employee performance to Successful, Unacceptable, or a level between those ratings 4

B. The Authority reasonably found that Proposal 1 is nonnegotiable because it would restrict the Agency's determination of performance-evaluation-system rating levels, thus impermissibly affecting the Agency's rights to direct employees and assign work...................................... 5

SUMMARY OF THE ARGUMENT 7

STANDARDS OF REVIEW.. 9

ARGUMENT 11

I. The Authority's determination that Proposal 1 impermissibly affected the Agency's rights to direct employees and assign work is based upon a permissible interpretation of the Statute 11

A. The management rights to direct employees and assign work under the Statute.. 12

B. This Court's precedent reserves to management the right to establish performance evaluation levels and standards above a mere passing grade 14

C. Authority precedent reserves to management the right to establish performance evaluation levels and standards above a mere passing grade 18

II. Arguments the Union failed to make to the Authority cannot be considered by this Court 21

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE 24

STATUTORY ADDENDUM

TABLE OF AUTHORITIES

Cases **Pages**

AFSCME, Council 26,
13 FLRA 578 (1984) 6, 19, 20

Am. Fed'n of Gov't. Emps., Council 238,
62 FLRA 350 (2008) 20

Am. Fed'n of Gov't Emps., Local 12,
60 FLRA 533 (2004) 20

Am. Fed'n of Gov't. Emps., Local 1858,
26 FLRA 102 (1987) 20

Am. Fed'n of Gov't Emps., Local 1968 v. FLRA,
691 F.2d 565 (D.C. Cir. 1982) 8, 14, 15, 16, 17

Am. Fed'n of Gov't Emps., Local 2303 v. FLRA,
815 F.2d 718 (D.C. Cir. 1987) 10

Am. Fed'n of Gov't Emps., Local 2343 v. FLRA,
144 F.3d 85 (D.C. Cir. 1998) 10

Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA,
22 F.3d 1150 (D.C. Cir. 1994) 9

Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,
419 U.S. 281 (1974) 10

Bureau of Alcohol, Tobacco & Firearms v. FLRA,
464 U.S. 89 (1983) 9

Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 9, 10

Dep't of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA,
857 F.2d 819 (D.C. Cir. 1988) 10

Dep't of Air Force, Lowry Air Force Base, Colo.,
22 FLRA 464 (1986)..20

Dep't of Defense, Army-Air Force Exch. Serv. v. FLRA,
659 F.2d 1140 (D.C. Cir. 1981) 12, 14

Equal Emp't Opportunity Comm'n v. FLRA,
476 U.S. 19 (1986)..11

Georgia State Chapter, ACT v. FLRA,
184 F.3d 889 (D.C. Cir. 1999) 21

Hosp. of Barstow, Inc., v. NLRB,
897 F.3d 280 (D.C. Cir. 2018) 11

N.Y. Rehab. Care Mgmt., LLC v. NLRB,
506 F.3d 1070 (D.C. Cir. 2007) 12

Nat'l Fed'n of Fed. Emps., Local 29,
14 FLRA 283 (1984) 20

Nat'l Treasury Emps. Union,
3 FLRA 768 (1980) 13

Nat'l Treasury Emps. Union,
13 FLRA 325 (1983) 8, 18, 19

Nat'l Treasury Emps. Union v. FLRA,
691 F.2d 553 (D.C. Cir. 1982) 3, 12, 13, 15, 16, 17

Nat'l Treasury Emps. Union v. FLRA,
793 F.2d 371 (D.C. Cir. 1986) 7, 9, 12, 14, 16, 17, 21

Nat'l Treasury Emps. Union v. FLRA,
414 F. 3d 50 (D.C. Cir. 2005) 10, 11, 21

Nat'l Treasury Emps. Union v. FLRA,
754 F.3d 1031 (D.C. Cir. 2014) 10, 11, 22

Nat'l Treasury Emps. Union, Chapter 161 v. FLRA,
64 F. App'x 245 (D.C. Cir. 2003).. 21

NLRB v. FLRA,
2 F.3d 1190 (D.C. Cir. 1993) 21

Overseas Educ. Assoc., Inc. v. FLRA,
872 F.2d 1032 (D.C. Cir. 1988) 9, 17

Serv. & Hosp. Emps. Int'l Union, Local 150,
35 FLRA 521 (1990) 20

U.S. Dep't of Air Force v. FLRA,
949 F.2d 475 (D.C. Cir. 1991) 10

Weinstein v. Islamic Republic of Iran,
831 F.3d 470 (D.C. Cir. 2016) 11

STATUTES

5 U.S.C. § 4302 13

5 U.S.C. § 7103 .... 12, 22

5 U.S.C. § 7105 .... 2, 3

5 U.S.C. § 7106 .... 1, 2, 3, 11, 12, 13, 14, 15, 17, 22, 23

5 U.S.C. § 7117 .... 3, 12

5 U.S.C. § 7123 .... 2, 10, 11, 21, 22

GLOSSARY OF ABBREVIATIONS

Agency	Intervenor, Customs and Border Protection, a component of the U.S. Department of Homeland Security
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's opening brief
Decision	The decision of the Authority in this case, dated July 11, 2018
JA	The Joint Appendix
NTEU	Petitioner, the National Treasury Employees Union
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Union	Petitioner, the National Treasury Employees Union

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about the negotiability of one proposal[1] that the National Treasury Employees Union (the "Union") offered during negotiations with the United States Department of Homeland Security, Customs and Border Protection (the "Agency"). The proposal provided that the Agency would have no performance appraisal rating levels above the successful rating level for purposes of the annual appraisal process.

As relevant here, the Agency contended that the proposal was nonnegotiable because it affected the Agency's management rights to direct employees and assign work under Section 7106(a)(2)(A) and (B) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute"), and, therefore, was outside the Agency's duty to bargain under the Statute. The Authority agreed with the Agency and found in its final order (the "Decision") that the proposal impermissibly affected the Agency's management rights. In reaching that conclusion, the Authority considered and rejected the Union's argument that the Authority overrule decades of precedent on the issue of management rights to direct employees and assign work.

The Union now seeks review of the Authority's Decision, arguing that the Authority erred in finding that the proposal was nonnegotiable because it

[1] The Union's appeal to this Court seeks review only as to Proposal 1. (Br. 1, 2.) Therefore, the Union has not challenged any of the other holdings reached in the Decision, including those related to Proposal 2. (JA 229-230, 233-236.)

impermissibly affected the Agency's management rights to direct employees and assign work. As the Authority correctly and reasonably determined that the proposal was nonnegotiable based on the arguments raised before the Authority, this Court should deny the Union's Petition for Review.

The Authority had subject matter jurisdiction over this case pursuant to Section 7105(a)(2)(E) of the Statute. 5 U.S.C. § 7105(a)(2)(E). The Authority's Decision is published at 70 FLRA (No. 139) 701 (2018). A copy of the Decision is included in the Joint Appendix ("JA") at JA 228-237. 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 Authority reasonably determined that a proposal that would have barred the Agency from establishing performance evaluation levels above the "successful" level was outside the duty to bargain because the proposal impermissibly affected the Agency's management rights to direct employees and assign work under Section 7106(a)(2)(A) and (B) of the Statute.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This matter concerns the negotiability of a Union-advanced proposal that would require the Agency to continue its existing employee performance evaluation system that consists of only two levels, "successful" and "unacceptable," and permitting the Agency to only add additional levels between "successful" and "unacceptable." (JA 231.) Under the Statute, an agency is required to bargain with the exclusive representative of its employees over certain matters. 5 U.S.C. § 7117(a). The Statute, however, reserves certain agency management rights, including the right to direct employees and assign work. 5 U.S.C. § 7106(a)(2)(A), (B). Agencies do not have to bargain with unions concerning matters that impermissibly affect management rights. *Nat'l Treasury Emps. Union v. FLRA*, 691 F.2d 553, 555 (D.C. Cir. 1982).

In this case, the Union filed a negotiability appeal with the Authority under Section 7105(a)(2)(E) of the Statute after the Agency failed to respond to the Union's request for a declaration of nonnegotiability. (JA 229; *see* 5 U.S.C. §§ 7105(a)(2)(E), 7117(c).) The Agency filed a statement of position. (JA 229.) The Union filed a response, to which there was no Agency reply. (*Id.*) The Authority concluded that the proposal was not within the Agency's statutory duty to bargain. (JA 235.) The Union now seeks review of the Authority's Decision. The Agency has intervened on the side of the Authority.

STATEMENT OF THE FACTS

A. The parties agreed that Proposal 1 sought to limit the rating levels that the Agency could use in evaluating employee performance to Successful, Unacceptable, or a level between those ratings

This matter arose from 2016 negotiations between the parties about Article 19 of their collective-bargaining agreement, which concerned employee performance evaluations. (JA 7.) During those negotiations, the Union put forward the proposal that would limit the rating levels in the Agency's performance evaluation system to "successful" (equivalent to a performance "pass"), "unacceptable" (equivalent to a performance "fail"), or a gradient between the two.

On April 10, 2016, the Union requested a response from the Agency as to whether it would negotiate over the proposal or contest its negotiability. *Id.* The Agency did not respond. (JA 229.) On May 3, 2016, the Union filed a Petition for Review for the proposal with the Authority. (JA 1-51.)

At the Post-Petition Conference, held with all parties and representatives of the Authority on June 27, 2016, the parties agreed to the following wording for "Proposal 1":

> There will be no performance appraisal rating levels above the Successful rating level for purposes of the annual appraisal process. Nothing in this proposal prevents the employer from establishing performance levels between the Successful and Unacceptable rating levels. In the event that the Agency decides to establish a performance level(s) it will notify and provide NTEU the opportunity to bargain at the national level in accordance with law and the procedures contained in Article 26: Bargaining. (JA 65.)

During that conference, the parties also agreed on the proposal's meaning. (JA 65-66, 229, 231.)

The parties disagreed, however, as to the likely impact of the proposal. (JA 66.) The Union argued that it would not adversely impact the Agency and that it would actually spare officials from having to make difficult, and often grieved, distinctions between employees. (*Id.*) The Agency, however, contended that the proposal would have a negative effect on employee morale. (*Id.*) It argued that the proposal would prevent the establishment of a more structured evaluation system that would help employees meet performance expectations and recognize employees based on their performance. (*Id.*)

On July 19, 2016, the Agency submitted its Statement of Position. (JA 70-103.) In its August 16, 2016 response (JA 108-227), the Union agreed with the information as contained in the Post-Petition Conference report and requested clarifications only as to issues not before this Court. (JA 109, 115 n.2.)

B. The Authority reasonably found that Proposal 1 is nonnegotiable because it would restrict the Agency's determination of performance-evaluation-system rating levels, thus impermissibly affecting the Agency's rights to direct employees and assign work

In the Decision the Authority found that Proposal 1 impermissibly affected the Agency's management rights to direct employees and assign work. (JA 228-237.) The Authority first found that the parties did not dispute the meaning of the proposal and that their agreed-upon meaning was consistent with the proposal's wording. (JA 231.)

The Authority observed that the parties agreed that the proposal's "fundamental purpose" was to require the Agency to retain its existing two-level performance evaluation system ("successful" and "unacceptable"), while permitting the Agency to add additional rating levels between a "successful" pass and an "unacceptable" fail. (*Id.*) Ultimately, however, the proposal would not permit the Agency to create any performance level above a "successful" pass. (*Id.*)

The Authority found that the proposal impermissibly affected the Agency's management rights to direct employees and assign work under the Statute. (JA 232-233). Citing *AFSCME, Council 26,* 13 FLRA 578 (1984), and Authority decisions issued in 2004 and 2008, the Authority reaffirmed that the rating levels in performance evaluation systems "directly affect[] the degree of precision with which management can establish and communicate job requirements." (JA 232 n.28.) In other words, the Authority found that determining ratings levels affects performance standards. It concluded that the number of rating levels for both individual job elements and overall performance were essential aspects of the management rights to direct employees and assign work. (JA 232.)

Applying its precedent to the proposal, the Authority found that by barring the Agency from establishing ratings above "successful," the proposal limited the Agency's performance evaluation system to a "pass" and varying degrees of failure. (*Id.*) Therefore, the proposal sought to negotiate performance-level determinations that the Statute reserved to the Agency alone.

The Authority then considered the Union's request that it overrule judicial and Authority precedent and stretch the reasoning of *National Treasury Employees Union v. FLRA*, 793 F.2d 371 (D.C. Cir. 1986) ("*NTEU 1986*") to find that Proposal 1 does not affect management rights. (*Id.*) First, the Authority discussed the proposal before the Court in *NTEU 1986*, namely, one that set the level of incentive pay that employees should receive as part of a trial-pay program. (JA 233.) The Authority concluded that the proposal before the Court in *NTEU 1986* was one about only incentive pay, not rating *levels*. The Authority further distinguished *NTEU 1986* because it emphasized that incentive payments were "a means 'for getting the agency's work done.'" (*Id.*) In contrast, the Authority found that determining the number of rating levels is one way that an agency actually directs employees and assigns work and not simply an alternative means to get already assigned work done. (*Id.*) Accordingly, the Authority declined to overrule its precedent. (*Id.*) After further analysis not at issue here, the Authority concluded that Proposal 1 impermissibly affected the Agency's management rights to direct employees and assign work, and so, was outside the Agency's duty to bargain. (JA 235.)

The Union's Petition for Review in this case followed.

SUMMARY OF THE ARGUMENT

The Agency was not required to negotiate with the Union over a proposal that would have restricted its ability to change a performance evaluation system that is limited to pass or fail rating levels. Decades of judicial and Authority precedent

establish that the development of performance standards and evaluation levels is a nonnegotiable management right.

From the very first applications of the Statute, this Court and the Authority have rejected calls to permit negotiation of proposals that would limit the management right to direct employees and assign work by setting performance evaluation standards. *See Am. Fed'n of Gov't Emps., AFL-CIO, Local 1968 v. FLRA*, 691 F.2d 565, 570 (D.C. Cir. 1982); *Nat'l Treasury Emps. Union*, 13 FLRA 325, 327-28 (1983). Indeed, in 1983 the Authority explicitly rejected the rationale advanced by the Union in this case and found to be nonnegotiable a proposal that would have required bargaining over all performance standards above a performance level required for "job retention." *Nat'l Treasury Emps. Union*, 13 FLRA at 327-28. Since that decision, the Authority has determined, not less than eight times, that proposals to set performance evaluation levels – both above and below a passing level – are nonnegotiable infringements on the management rights to direct employees and assign work.

This Court's conclusions are consistent with those drawn by the Authority, into whose care Congress entrusted administration of the Statute. The Union's claim that management rights are limited to setting performance evaluation standards below a satisfactory level is a vain attempt to repackage an argument that this Court and the Authority have repeatedly rejected. The tenuous nature of the Union's argument is demonstrated by the fact that the only legal support that the Union offers to advance

its argument is a single 1986 case that addressed pay practices, not performance evaluations. (Br. 6-7, 12-22 (citing *NTEU 1986*, 793 F.2d 371).) The Union's reliance on that case is unavailing. Not only is *NTEU 1986* factually distinguishable from this case, but it also specifically declined to express an opinion on the issue for which the Union cites it: whether an agency's ability to establish performance standards above a pass was included in a management right. *Id.* at 304 n.4. To the extent that *NTEU 1986* created any confusion as to whether management has the right to establish performance standards above and below a pass level, this Court dispelled those questions in *Overseas Education Association, Inc. v. FLRA*, 872 F.2d 1032, 1034 (D.C. Cir. 1988). In that case, this Court reaffirmed, without reservation as to performance level, that "[i]t is well established that the content of performance standards is nonnegotiable." *Id.* (citations omitted).

In the face of such overwhelming precedent the Court should reject the Union's attempt to recycle a legal position that the Court refused to adopt over three decades ago and deny the Petition for Review.

STANDARDS OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*")). This Court defers to the Authority's construction of the Statute, which is

entrusted by Congress to the FLRA's administration, *U.S. Department of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991), and upholds the Authority's decisions so long as they are "reasonable and defensible," *Department of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

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

The Union's challenge to the Authority's determination that Proposal 1 is nonnegotiable is reviewed under the two-step *Chevron* framework. Where Congress "has directly spoken to the precise question at issue," this Court "give[s] effect to [its] unambiguously expressed intent," but if the statute is silent or ambiguous this Court defers to the Authority's interpretation so long as it is "based on a permissible construction of the statute." *Nat'l Treasury Emps. Union v. FLRA*, 414 F. 3d 50, 57 (D.C. Cir. 2005) ("*NTEU 2005*") (quoting *Chevron,* 467 U.S. at 842–43); *see also Hosp. of*

Barstow, Inc., v. NLRB, 897 F.3d 280, 286 (D.C. Cir. 2018); *NTEU 2014*, 754 F.3d at 1041.

Further, under Section 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee," unless "the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord NTEU 2014*, 754 F.3d at 1040 ("[w]e have enforced [S]ection 7123(c) strictly"); *NTEU 2005*, 414 F.3d at 59 n.5.

ARGUMENT

I. The Authority's determination that Proposal 1 impermissibly affected the Agency's rights to direct employees and assign work is based upon a permissible interpretation of the Statute

In its Decision, the Authority weighed the facts of the case, considered the parties' arguments, interpreted its Statute, and applied its own and this Court's precedent. The Authority then reasonably concluded that Proposal 1 impermissibly affected the Agency's management rights to direct employees and assign work and was consequently outside the duty to bargain.[2]

---

[2] In its brief, the Union raised no arguments as to the Authority's "appropriate arrangement" analysis (JA 234-235; *see also* 5 U.S.C. § 7106(b)(3)), preferring instead to focus on the narrow argument that the Proposal 1 did not affect any management rights. (Br. 5-7, 11-12, 19.) The Union has therefore waived any argument that it may have had as to whether the proposal constituted an appropriate arrangement. *See Weinstein v. Islamic Republic of Iran*, 831 F.3d 470, 484 (D.C. Cir. 2016) (a party's "failure to brief the issues in [its] opening brief amounts to forfeiture"); *N.Y. Rehab. Care*

The Union's truncated analysis of the Decision and its attempt to ignore the decades of judicial and Authority precedent upon which the Decision relies do not render the Decision arbitrary or capricious. Nor does the Union's attempt to stretch *NTEU 1986* beyond the context of incentive pay render the Authority's analysis of that decision contrary to law. The Union's Petition for Review should therefore be denied.

A. The management rights to direct employees and assign work under the Statute

The Statute requires agencies to bargain with the exclusive representatives of their employees concerning conditions of employment. 5 U.S.C. §§ 7103(a)(14), 7117(a); *Dep't of Defense, Army-Air Force Exch. Serv. v. FLRA,* 659 F.2d 1140, 1143 (D.C. Cir. 1981)("*Department of Defense*"). That duty to bargain, however, has limits because the Statute reserves to agencies certain management rights that cannot become the lawful subjects of substantive negotiation. *Id.* Those management rights are listed under Section 7106(a) of the Statute, and include the rights to "direct employees" and "assign work." 5 U.S.C. § 7106(a)(2)(A), (B); *see also Department of Defense*, 659 F.2d at 1145-46; *Nat'l Treasury Emp.'s Union v. FLRA*, 691 F.2d 553, 555-556 (D.C. Cir 1982) ("*NTEU 1982*").

Mgmt., LLC v. NLRB, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("[B]y failing to address the failure to give proper notice issue in its opening brief, [the petitioner] has forfeited any right to challenge" an issue not addressed in the opening brief).

This Court and the Authority have extensively considered the nature of performance appraisal systems following the enactment of the Civil Service Reform Act (the "Act"), of which the Statute is Chapter 71. In *National Treasury Employees Union and Department of the Treasury, Bureau of Public Debt*, 3 FLRA 768, 772-775 (1980) ("*Public Debt*"), the Authority considered how the management right to assign work related to the requirement, found in Section 4302 of the Act, that all agencies develop performance appraisal systems. While Section 4302 required every agency to establish standards to permit the accurate evaluation of job performance, the Authority found that the Statute controlled the identification of the critical elements for those standards and that the contents of those standards fell outside the duty to bargain. *Id.* at 773-774 (citing 5 U.S.C. § 4302 (1982)).

The Authority's reasoning in *Public Debt* was echoed by this Court in *NTEU 1982*, which discussed the Statute's legislative history at length. *See NTEU 1982,* 691 F.2d at 559-561. In *NTEU 1982*, this Court found that the legislative history of the Act reflected Congress's desire to preserve the government's ability to operate in an "effective and efficient manner" by not requiring the government to bargain over "every conceivable topic." *NTEU 1982*, 691 F.2d at 560. Hence, the Court determined that the management right in Section 7106(a)(2) to "assign work" had been reasonably interpreted by the Authority to include the right to establish performance standards. *Id.* at 562. Indeed, in a companion case issued the same day as *NTEU 1982*, this Court further found no "congressional intent to impart

negotiability to performance standards in the performance appraisal context." *Am. Fed'n of Gov't Emps., AFL-CIO, Local 1968 v. FLRA*, 691 F.2d 565, 571 (D.C. Cir. 1982) ("*AFGE, Local 1968*").[3]

Notwithstanding the Union's argument, only partially raised below, *NTEU 1986* does not change this authority, nor does it require agencies to negotiate about the content of performance-management systems. That conclusion is buttressed by a subsequent decision of this Court and many Authority decisions that found comparable proposals to be nonnegotiable.

B. This Court's precedent reserves to management the right to establish performance evaluation levels and standards above a mere passing grade

Analyzing the legislative history and text of the Statute, this Court has developed a robust body of case law addressing agency obligations to bargain and the scope of management rights to direct employees and assign work. That precedent, which is largely ignored by the Union, supports the Decision's conclusion that the Agency's ability to establish performance standards above a mere "pass" is encompassed in the management rights to direct employees and assign work under Section 7106(a).

---

[3] This Court, in *Department of Defense*, had also discussed the Statute's role as part of the Act and the flexibility that the Statute provided to agencies to manage employees. *Department of Defense*, 659 F.2d at 1160.

This Court recognized that management's right to assign work extended to an agency's ability to rate the performance of its employees in *NTEU 1982* and *AFGE, Local 1968*, a pair of companion cases that further examined the appropriate application of Section 7106(a).

At issue in *NTEU 1982* was a proposal to define a minimal performance level for clerks. *NTEU 1982*, 691 F.2d at 556. The Court found that the proposal was nonnegotiable because it would determine a critical job element for those employees, as well as substantive components of their performance standards. The Court found that permitting employees to overrule management determinations on such issues conflicted with the agency's rights to direct employees and to assign work. *Id.* at 564.

In *AFGE, Local 1968*, this Court made a similar determination concerning a proposal that would have required an agency to use only specified critical elements in assessing employee performance. *AFGE, Local 1968*, 691 F.2d at 567. The Court concluded that the formulation of performance standards and designation of critical job elements for performance appraisal purposes are within the agency's "statutorily-reserved prerogative to direct employees and assign work, and therefore outside the obligation to bargain." *Id.* at 570. Again, the Court found no "congressional intent to impart negotiability to performance standards in the performance appraisal context." *Id.* at 571.

This consistent interpretation of the Statute reinforces the conclusion that Congress meant what it said in the Statute, namely, that management rights were

privileges reserved to management that it does not have to bargain. Those rights include the rights to direct employees and assign work. In turn, the rights to direct employees and assign work include the right to establish job requirements – including performance standards and levels of performance. The Authority's Decision in this case is nothing more than an application of those principles.

The *NTEU 1986* decision does not provide a basis for overturning prior or subsequent precedent. Instead, it marked a moment when this Court found that the Authority had stretched the meaning of management rights too far by finding a proposal concerning incentive pay to be nonnegotiable. *NTEU 1986*, 793 F.2d at 374-376.

The proposal in *NTEU 1986* was part of a new incentive pay program. *Id.* at 372. The proposal anticipated that the agency would continue to evaluate employee performance according to its own standards. *Id.* The proposal would have required the agency to pay incentive awards to employees who performed more than satisfactory work, i.e., employees with superior performance. *Id.* at 373. This Court found that incentive pay proposal to be negotiable. *Id.* at 375.

The Court distinguished incentive-pay from the performance-element and performance-standard cases of *NTEU 1982* and *AFGE, Local 1968*. The Court observed that while Congress had rendered work "assignments" nonbargainable, Congress had not intended to make nonbargainable "any activity" that had the same effect as a work assignment – i.e., "whatever is useful for getting the agency's work

done." *Id.* at 374. In so holding, the Court did not question the logic of *NTEU 1982* and *AFGE, Local 1968,* but only distinguished the proposals at issue in those cases. *Id.* at 375.

This Court's decision that an incentive pay proposal was negotiable was thus not intended to apply to performance-evaluation systems. Indeed, the Court expressly refused to make the leap of logic advanced by the Union in this case:

> We express no opinion on whether the rights to assign work and direct employees include establishment of performance standards that do not have to be met to avoid disciplinary action, nor on whether such standards fall within a separate management right, such as the right "to make selections for appointments," 5 U.S.C. § 7106(a)(2)(C). *Cf. NTEU v. FLRA*, 691 F.2d at 563-64 n.95 (establishment of performance standards that must be met to avoid discipline arguably within management right to "lay off[ ] and retain employees," 5 U.S.C. §7106(a)(1) (Supp. IV 1980)).

Id. at 375 n.4.

The conclusion that *NTEU 1986* did not extend to performance appraisals or performance evaluation systems is supported by this Court's decision in *Overseas Education Association Inc. v. FLRA*, 872 F.2d 1032 (1988). The union in *Overseas* represented teachers. *Id.* at 1033. It proposed barring the agency's use of student test results to evaluate the bargaining-unit employee performance. *Id.* The Court's analysis in *Overseas* can and should be applied to this case as well: "[t]he union's proposal . . . goes to formulation of the content of performance standards, not to their application, and is therefore nonnegotiable." *Id.* at 1034.

Multiple rulings by this Court have already addressed the interpretation and application of the management rights to direct employees and assign work. Nothing in the Decision or in the Union's arguments warrant reversal of that precedent. The Union's Petition for Review should therefore be denied.

C. Authority precedent reserves to management the right to establish performance evaluation levels and standards above a mere passing grade

The Union's argument that a proposal seeking to limit "only" ratings for "superior performance" is a case of "first impression" for the Authority (Br. 20) ignores over three decades of Authority precedent. Moreover, the Union's assertion that this case concerns only a means for "recognize[ing] or reward[ing]" work already performed (Br. at 16) ignores that, throughout a performance year, performance-evaluation levels "affect[] the degree of precision with which management can establish and communicate" performance standards. (JA 232 n.28.)

In 1983, the Authority considered and rejected an argument similar to the one advanced by the Union in this case. In *National Treasury Employees Union*, 13 FLRA 325, 327-28 (1983) ("*NTEU 1983*"), the union's proposal would have required bargaining over all performance standards above a minimum performance level required for "job retention." The Authority determined that an agency is not limited to "merely" prescribing a minimum level of performance necessary to keep a job. *NTEU 1983*, 13 FLRA at 327. It reasoned that in passing the Act, Congress explicitly stated its intention that federal employee performance appraisals should be developed

for multiple purposes, including rewarding, promoting, reducing in grade and retaining, or removing employees. *Id.* at 328.

The Decision now before the Court is directly supported by the many Authority cases that followed *NTEU 1983* and similar judicial precedent. For example, the Decision cited *AFSCME, Council 26*, 13 FLRA 578 (1984) ("*AFSCME*"), which assessed whether the right to direct employees and assign work included the right to determine the number of rating levels and content of a performance evaluation system, both above and below a passing grade. (JA 232 n.27.) The Authority found that an essential aspect of management's assignment of work was the establishment of job requirements for various levels of performance so that agencies could achieve the quality and quantity of work necessary to fulfill the agency's mission. *AFSCME*, 13 FLRA at 579-580 (*citing NTEU 1983*, 13 FLRA at 327-328). The Authority further determined that the number of levels in a performance evaluation system is integrally related to the "effectiveness" of an agency's use of performance standards. *Id.* at 581. Ultimately, it concluded that the proposal, which would have, *inter alia*, required an agency to issue overall ratings of "outstanding" or "unsatisfactory" if certain criteria were met, to be nonnegotiable. *Id.* at 580.

No less than six cases addressing these issues followed. In each case, the Authority found proposals restricting performance rating levels – both above and below a pass level – to be outside the duty to bargain. *See Am. Fed'n of Gov't. Emps.,*

Council 238, 62 FLRA 350, 351-352 (2008) (applying *AFSCME* to find proposals and contract terms outside the duty to bargain because they restricted the number of rating levels the agency could use in evaluating employee performance); *Am. Fed'n of Gov't Emps., Local 12*, 60 FLRA 533, 536 (2004) (proposal requiring supervisors to rate employees using one of four rating levels affected management rights to direct employees and assign work); *Serv. & Hosp. Emps. Int'l Union, Local 150*, 35 FLRA 521, 531-533 (1990) (finding nonnegotiable proposal that restricted the number of performance rating levels and limited the agency's discretion to establish criteria for performance ratings); *Am. Fed'n of Gov't Emps., Local 1858*, 26 FLRA 102, 104-105 (1987) (proposal determining number of performance rating levels not negotiable even though the proposal merely restated existing agency policy); *Dep't of Air Force, Lowry Air Force Base, Colo.*, 22 FLRA 464, 467 (1986) (finding proposals that prescribed performance rating levels to be outside duty to bargain); *Nat'l Fed'n of Fed. Emps., Local 29*, 14 FLRA 283, 286-287 (1984) (finding proposal that identified five rating levels for each critical element to have the same effect as proposals at issue in *AFSCME*).

Those Authority decisions applied a reasonable interpretation of the Statute to recurring proposals over several decades. That precedent led directly to the Decision at issue in this case. A proposal that bars an Agency from using any performance evaluation levels above a "pass" or "successful" is no different in its effect on management rights than proposals that limit the number of performance levels an agency can use. Such a proposal also ignores the fact that management's ability to use

a range of performance evaluation levels affects the precision with which management can regulate performance standards throughout the year. The proposal in this case therefore infringes on managements rights and is outside the duty to bargain.

The Union clearly disagrees with the Authority's long-held interpretation of the management rights to direct employees and assign work. Its disagreement – and strained application of *NTEU 1986* – do not, however, establish that decades of Authority precedent concerning this issue is indefensible, unreasonable, arbitrary or capricious, or in violation of law.

II. Arguments the Union failed to make to the Authority cannot be considered by this Court

The Statute provides that, barring extraordinary circumstances, this Court does not possess subject matter jurisdiction over any "objection that has not been urged before the Authority. . . ." 5 U.S.C. § 7123(c).[4] Despite this clear jurisdictional bar, the Union presents to this Court arguments that were not advanced to the Authority. Those arguments include the contentions that:

---

[4] S*ee also Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n.5 (2005) (argument before the Court that does not appear in cited record pages is waived); *Nat'l Treasury Emps. Union, Chapter 161 v. FLRA*, 64 F. App'x 245, 246 (D.C. Cir. 2003) (unpublished) (party waived theory argued first before Court where party failed to raise it below); *Georgia State Chapter, ACT v. FLRA*, 184 F.3d 889, 891 (D.C. Cir. 1999) (arguments raised for first time in Petition for Review are waived where party had opportunities to argue them below); *NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993) (surprise does not constitute extraordinary circumstance to excuse failure to raise argument below where party failed to seek reconsideration).

1) there is an "implicit" management right to "sanction inferior performance," because Section 7106(a)(2)(A) lists the right to "take action against '*poor performers*'" (Br. 15-16 (emphasis added));

2) the Section 7106(a)(2)(A) "right" to sanction "inferior work" is the operative Statutory language that permits agencies to establish ratings between successful and unacceptable (Br. 17); and

3) Congress explicitly failed to provide a "separate" management right under Section 7106(a) to reward employees for superior performance (Br. 18).

The arguments above were neither fairly brought below, nor do they logically grow out of arguments made below. *See Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (party must have "fairly brought the argument to the Authority's attention"). The Union cites no extraordinary circumstances excusing its failure to make the arguments to the Authority. Consequently, this Court lacks subject matter jurisdiction to hear them now under Section 7123(c).[5]

[5] Even if that was not the case, the Union's arguments should be rejected for the reasons described at greater length above. The Statute does not provide that management rights apply only to "poor performers" or "superior performers." The Statute defines an "employee" as "an individual employed in an agency" or one whose employment has ceased because of an unfair labor practice. 5 U.S.C. § 7103(a)(2)(A), (B). Congress did not qualify that definition other than by listing individuals who may not be considered "employees" under the Statute, e.g., supervisors, members of the uniformed services, and those who strike. *See* 5 U.S.C. § 7103(a)(2)(B)(i)-(v). Thus Congress's reference to "such employees" in Section 7106(a)(2)(A), was a reference back to the term it had just defined. The plain text of the Statute therefore undercuts the Union's novel attempt to create a performance-based qualifier on management's rights.

CONCLUSION

The Authority respectfully requests the Court to deny the Petition for Review.

Respectfully submitted,

/s/Rebecca J. Osborne
REBECCA J. OSBORNE
Acting Deputy Solicitor

/s/Tabitha G. Macko
TABITHA G. MACKO
Attorney

Federal Labor Relations Authority
1400 K Street, NW
Washington, DC 20424
(202) 218-7986

March 19, 2019

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 5,468 words excluding exempt material.

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

CERTIFICATE OF SERVICE

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

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

ADDENDUM 1

STATUTORY PROVISIONS

5 U.S.C. § 4302 (1982) Establishment of performance appraisal systems

(a) Each agency shall develop one or more performance appraisal systems which--

(1) provide for periodic appraisals of job performance of employees;

(2) encourage employee participation in establishing performance standards; and

(3) use the results of performance appraisals as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining, and removing employees.

(b) Under regulations which the Office of Personnel Management shall prescribe, each performance appraisal system shall provide for--

(1) establishing performance standards which will, to the maximum extent feasible, permit the accurate evaluation of job performance on the basis of objective criteria (which may include the extent of courtesy demonstrated to the public) related to the job in question for each employee or position under the system;

(2) as soon as practicable, but not later than October 1, 1981, with respect to initial appraisal periods, and thereafter at the beginning of each following appraisal period, communicating to each employee the performance standards and the critical elements of the employee's position;

(3) evaluating each employee during the appraisal period on such standards;

(4) recognizing and rewarding employees whose performance so warrants;

(5) assisting employees in improving unacceptable performance; and

(6) reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance.

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

(a) For the purpose of this chapter--

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

(2) "employee" means an individual--

(A) employed in an agency;

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

but does not include--

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

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

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

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

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

(A) the Government Accountability Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

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

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

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

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

(C) an organization sponsored by an agency; or

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

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

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

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

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

(9) "grievance" means any complaint--

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

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

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

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

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

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

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

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

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

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

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

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

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

(15) "professional employee" means--

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

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

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

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

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

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

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

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

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

(i) on the basis of an election, or

(ii) on any basis other than an election,

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

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

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

§ 7105. 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.

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

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

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an

exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

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

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

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

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

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

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary

circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.