ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1069

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1929, AFL-CIO,
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 (the "Authority") were the U.S. Department of Homeland Security, Customs and Border Protection (the "Agency") and the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO (the "Union"). In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. Ruling Under Review

The Union seeks review of the Authority's decision in *U.S. Department of Homeland Security, Customs and Border Protection and American Federation of Government Employees, National Border Patrol Council, Local 1929,* 70 FLRA (No. 102) 501 (April 30, 2018) (Member DuBester dissenting); *reconsideration denied*, 71 FLRA (No. 10) 49 (Feb. 14, 2019) (Member DuBester dissenting).

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/ Noah Peters
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Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	Customs and Border Protection, a component of the U.S. Department of Homeland Security
ALJ	Administrative Law Judge
Authority	Respondent, the Federal Labor Relations Authority
Border Patrol	Customs and Border Protection, a component of the U.S. Department of Homeland Security
Br.	Petitioner's opening brief
CBA	Collective Bargaining Agreement
Decision	The decision of the Authority in this case, dated April 30, 2018
JA	The Joint Appendix
SA	The Supplemental Appendix
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Petitioner, the American Federation of Government Employees, National Border Patrol Council, Local 1929, AFL-CIO

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute.") The Authority's Decision was issued on April 30, 2018, and is published at 70 FLRA (No. 102) 501 (2018). A copy of the Decision is included in the Joint Appendix ("JA") at JA 48-54. The Authority denied reconsideration on February 14, 2019. (*See* JA 55-57.) The Authority's reconsideration decision is published at 71 FLRA (No. 10) 49 (2019). The Union's Petition for Review was timely filed on March 19, 2019, within 60 days of the Authority's decision on reconsideration. 5 U.S.C. § 7123(a).

STATEMENT OF THE ISSUE PRESENTED

Whether the Authority reasonably determined that a change in inspection procedures did not constitute a bargainable change in employees' "conditions of employment" under 5 U.S.C. § 7103(a)(14).

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This case concerns whether the U.S. Department of Homeland Security, Customs and Border Protection (the "Agency" or "Border Patrol") was required to

bargain with the American Federation of Government Employees, Local 1929, AFL-CIO (the "Union") before issuing a supervisory memorandum regarding inspection procedures at Border Patrol checkpoints.

On October 29, 2014, the Agency sent a memorandum to supervisory personnel in the El Paso Sector (the "Secondary Inspection Memo") directing that, in cases where a non-U.S. citizen traveling in a multi-occupant vehicle presents an immigration document at a Border Patrol checkpoint, agents were to send the vehicle "to the secondary inspection area for a more thorough immigration inspection." (JA 1.) The Union contends that the Secondary Inspection Memo changed the "conditions of employment" for Border Patrol agents, and thus it was an unfair labor practice ("ULP") for the Agency to implement it without providing the Union notice and an opportunity to bargain.

A grievance arbitrator agreed with the Union. (JA 8-47.) The Authority, however, carefully reviewed the record and law and set aside the arbitrator's award. It first took the opportunity to clarify the distinction between the statutory terms "conditions of employment" and "working conditions." (JA 48-54.) Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). Previous Authority decisions had held that "there is no substantive difference between [the terms] 'conditions of employment' and 'working conditions.'" (JA 49 (quoting *U.S. Dep't of the Air Force,*

355th MSG/CC, Davis-Monthan Air Force Base, Ariz., 54 FLRA 85, 90 (2009) ("*Davis-Monthan*").) The Authority noted, however, that this interpretation ran afoul of "accepted rules of statutory interpretation" by defining "conditions of employment" in a circular manner and disregarding the statutory text. (JA 50.)

Having clarified that "conditions of employment" bears a narrower meaning than "working conditions," the Authority applied its precedent to the facts of the case. The Authority noted that its previous decisions had held that "mere increases or decreases in normal duties do not constitute changes over which an agency must bargain." (*Id.* (citing *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customes & Border Patrol, Tucson Sector Tucson, Ariz.*, 60 FLRA 169 (2004) ("*CBP Tucson*").) Applying *CBP Tucson*, the Authority held that the Secondary Inspection Memo did not change the nature or type of duties the agents performed and thus did not change their "conditions of employment." (JA 50.) Instead, it only affected workflow between primary and secondary inspection points. (JA 51.)

The Union now seeks review of the Authority's Decision, arguing that the Authority erred in finding that the change in inspection procedures did not constitute a bargainable change in employees' conditions of employment. (Statement of Issues, *Am. Fed'n Gov't Emps., AFL-CIO, Local 1929 v. FLRA*, No. 19-1069, Doc. 1784735 (Apr. 25, 2019).) As the Authority correctly and reasonably interpreted the Statute and applied its precedent in determining that the Secondary Inspection Memo did not

constitute a change in the agents' conditions of employment, this Court should deny the Union's Petition for Review.

STATEMENT OF THE FACTS

For many decades, the Border Patrol has used traffic checkpoints "to examine the occupants of vehicles on roads and highways as to their right to be or remain in the United States." (SA 59.) "The primary purpose of a traffic checkpoint is to apprehend illegal aliens and smugglers who have managed to evade apprehension at the border and are attempting to travel to interior locations." (SA 59.) "Checkpoints greatly enhance the Border Patrol's ability to carryout the mission of securing the Nation's borders against terrorists, smugglers of weapons of terrorism, other contraband and illegal aliens." (*Id.*); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (recognizing the "the substantiality of the public interest in the practice of routine stops for inquiry at permanent checkpoints, a practice which the Government identifies as the most important of the traffic-checking operations."). They "are an integral part of the border enforcement strategy and provide a level of authority that is not replicated in any other enforcement tool outside the ports of entry." (SA 45.)

Over the years, the Border Patrol has developed a system of primary and secondary checkpoints to regulate the flow of traffic in checkpoints. Each checkpoint has lanes where vehicles enter, stop, and are then inspected. (SA 143-53, SA 46-51.)

A "primary inspection area" within a Border Patrol checkpoint is "the location of the initial point of contact where a Border Patrol Agent inspects a vehicle or conveyance and its occupants." (SA 138.) After vehicles have stopped, agents "identify themselves as Border Patrol Agents and announce that they are performing an immigration inspection." (SA 51.) The agents then question the occupants of the vehicle. (SA 139; *see also* SA 024.)

"Anytime the questioning goes beyond the routine, vehicles should be directed out of the lane of traffic and into the secondary inspection area." *Id.* "Referrals [to the secondary inspection area] are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy." *Martinez-Fuerte*, 428 U.S. at 560.

A "secondary inspection area" is "an isolated and/or controlled area out of the lane of traffic where, following a primary inspection, further inspections of vehicles or conveyances and their occupants may occur." (SA 138.) "The purpose of the secondary inspection area is to move the suspect vehicle and its occupants to a location more appropriate for further investigation." (SA 102.) "The primary legal distinction between primary and secondary is the duration of the seizure and the singling out of a vehicle as opposed to whether an agent asks questions in the traffic lane or the parking lot." (SA 102-03.) "[A] Border Patrol agent may take all of the enforcement actions [at the secondary inspection area] that he could have taken at the primary inspection area." (SA 103.)

In 2014, the Border Patrol's El Paso Sector conducted internal performance assessments in an effort "to improve overall effectiveness and efficiency in fraudulent document detection, imposter detection and radiation detection." (SA 82.) The assessments determined that the Border Patrol was "failing very badly" at a core part of its mission: "intercepting fraudulent or imposter immigration documents." (SA 3.) In addition, the Border Patrol had received "intelligence and other information indicating that people were using imposter cards, fraudulent cards in order to gain entry into the United States through the ports of entry and then . . . on north through our checkpoints." (*Id.*)

To address those issues, on October 29, 2014, the Border Patrol's El Paso Sector issued the Secondary Inspection Memo. (JA 1.) That memo stated, in part:

> Understanding that there is not sufficient time to conduct a full document inspection, interview and proper records check on the documents and the presenter(s) of the document(s) in the primary inspection area, agents are hereby directed to send vehicles with more than one occupant when at least one of the occupants is a non U.S. citizen who present some form of immigration document, to the secondary inspection area for a more thorough review, and if needed to conduct a records check. Agents are also instructed to request a second form of identification from non[-]U.S. citizens in order to further identify the identity of the presenter.

(*Id.*) The Secondary Inspection Memo further provided that officers could "modify this direction in order to accommodate local residents, daily commuters, and other trusted travelers who regularly pass through the checkpoint," and "when safety to the

public and/or our agents may be an issue, i.e. traffic is backed up, weather related issues, etc." (*Id.*)

The Secondary Inspection Memo did not require Border Patrol agents to perform any new duties, nor did it alter their conditions of employment. The Agency's Division Chief for the El Paso region, Michael Przybyl, who oversaw the drafting of the Secondary Inspection, stated, "I didn't invent secondary inspection with this memo. That was a tool we already had that I chose to utilize maybe more efficiently by [sending to the secondary line] those folks that have immigration documents." (SA 17-18 (alterations added).) After the Secondary Inspection Memo, Border Patrol agents remained free to refer single-occupant vehicles to secondary areas based on their discretion, to suspend the policy in order to manage traffic flow and for other public safety reasons, and to allow trusted travelers to pass through the checkpoint without being referred to secondary areas. (SA 39, SA 25-26, SA 20, JA 1.)

Issuing and revising supervisory instructions regarding the procedures to be used by agents at immigration checkpoints was not a new practice for the Border Patrol. Between 2003 and 2014, the Agency routinely issued similar instructions, guidelines and directives clarifying how the checkpoint inspections should be conducted and prioritized. (*See* SA 43-57; SA 58-71; SA 112-14; SA 115-28; SA 129-31; SA 132-33; SA 136-42.)

For example, in November 2003, the Border Patrol updated its policies governing checkpoints "to reflect our priority mission of antiterrorism within [the Agency] as well as technology advancements." (SA 44.) In January 2008, the Agency issued a detailed new policy concerning the use of license plate readers at Border Control checkpoints. (SA 136-42.) In February 2013, the Agency issued a directive setting forth situations where it would not be "operationally feasible" at the Las Cruces checkpoint to have a second agent present to help watch traffic and "provide a safe environment for the primary agent conducting inspections." (SA 112-14.) Also in February 2013, the Agency set forth detailed requirements as to how Border Patrol agents were to treat non-compliant motorists they encounter, including how to respond when a motorist refuses an agent's request to move to secondary inspection. (SA 129-31.) There is no record of the Agency providing notice or engaging in pre-implementation bargaining with the Union as to any of these directives.

Nonetheless, the Union filed a grievance on or about November 28, 2014, arguing that the Agency had violated the parties' collective bargaining agreement ("CBA") by issuing the Secondary Inspection Memo without giving the Union notice and an opportunity to engage in pre-implementation bargaining. (SA 104-09.) Article 3A of the CBA requires bargaining over "changes [the Agency] wishes to make to existing rules, regulations and existing practices," but states "[n]othing in this article shall require either party to negotiate on any matter it is not obligated to negotiate under applicable law." (JA 6.)

An arbitrator agreed with the Union, finding that the Agency violated Article 3A of the CBA and 5 U.S.C. § 7116(a)(1) and (5) of the Statute by failing to provide notice or an opportunity to engage in pre-implementation bargaining over the Secondary Inspection Memo. (JA 42-43.) The arbitrator found that the Secondary Inspection Memo imposed "significant and foreseeable changes includ[ing] primary lane change agents[']duties, additional and new changes for agents[] assigned to the secondary inspection area, and an increase in traffic in the secondary inspection area." (JA 44). She held that "[s]uch changes clearly constituted a change in working conditions or employment" and thus gave rise to a duty for the Agency to engage in pre-implementation bargaining with the Union. (*Id.*)

After carefully examining the case, the Authority set aside the arbitrator's award. (JA 48-54.) In the decision, the Authority first clarified the distinction between the statutory terms "conditions of employment" and "working conditions." (JA 49.) Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). Previous Authority decisions had held that "there is no substantive difference between [the terms] 'conditions of employment' and 'working conditions.'" (JA 49 (quoting *Davis-Monthan*, 54 FLRA 85 at 90).) The Authority found, however, that the previous interpretation ran afoul of "accepted rules of statutory interpretation" by defining

"conditions of employment" in a circular manner and disregarding the statutory text. (JA 50.)

The Authority then applied the phrase "conditions of employment" to the facts of the case before it, guided by its precedent. It noted that its previous decisions had held that "mere increases or decreases in normal duties do not constitute changes over which an agency must bargain." (JA 50.)

For example, in *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customes & Border Patrol, Tucson Sector Tucson, Ariz.*, 60 FLRA 169 (2004) ("*CBP Tucson*"), the Authority considered an agency-initiated change in procedures for processing illegal aliens similar to the one at issue here. The agency in *CBP Tucson* began transporting about half of the aliens apprehended at its Casa Grande Station to its Tucson Station for processing. *Id.* Previously, aliens apprehended at Casa Grande Station had been processed there. *Id.* The union filed a ULP charge arguing that the agency's new practice constituted a change in conditions of employment over which the agency was required to bargain. *Id.* at 170. An Administrative Law Judge agreed, noting that "before March 2002, a condition of employment had been that each Station process[es] the aliens it arrested," and that the change "affected the entire Tucson Station by imposing an enormous new workload on" it. *Id.* at 181-182. But the Authority dismissed the complaint, holding that "[e]ven if we were to consider" the increased workload for Tucson agents "to be attributable to the Respondent, we would find, based on our precedent, that dismissal of the complaint is warranted

because there was no change in unit employees' conditions of employment." *Id.* at 174.

As in *CBP Tucson*, the Authority in this case held that the Secondary Inspection Memo did not change the nature or type of duties the agents performed and thus did not change their "conditions of employment." (JA 50). Instead, the Authority found that the change merely affected workflow between primary and secondary inspection points. "Both before and after the memorandum, the agents continued to perform vehicular inspections at either the primary or secondary inspection areas using the same techniques." (JA 51.) Moreover, the Agency had a longstanding practice of varying checkpoint inspection procedures in this manner: "Between 2003 and 2014, [the Agency] routinely issued similar instructions, guidelines, and directives to clarify how the checkpoint inspections should be conducted and prioritized." (JA 49.)

The Authority denied the Union's motion for reconsideration on February 14, 2019. (JA 55-57.) The Union's Petition for Review in this case followed.

SUMMARY OF THE ARGUMENT

In its Decision, the Authority reasonably interpreted 5 U.S.C. § 7103(a)(14) consistent with the surplusage canon. Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). The Authority's previous interpretation of the phrase "conditions of employment" rendered it synonymous with "working conditions," thus making the

words "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting . . ." meaningless. *Davis-Monthan*, 54 FLRA at 90. The interpretation of the phrase "conditions of employment" adopted by the Authority in this case gives meaning and significance to the terms "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting . . ." in 5 U.S.C. § 7103(a)(14). The Decision further distinguishes "conditions of employment" from "working conditions," thus avoiding a "completely circular" definition that "explains nothing." *Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 444 (2003) (internal quotation marks omitted). Under the surplusage canon, the Authority's interpretation of these terms is to be preferred over its previous, circular definition that rendered a large part of 5 U.S.C. § 7103(a)(14) as mere surplusage. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012) ("courts avoid a reading [of a statute] that renders some words altogether redundant."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used.").

The Authority's interpretation also avoids the anomalous consequences that flow from reading "conditions of employment" as synonymous with "working conditions." The Statute states that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C. § 7101(b). Requiring agencies to engage in bargaining before

a manager does anything to change an employee's "working conditions" creates vast and unworkable obligations, seriously impeding the "efficient accomplishment of the operations of the Government" that the Statute is intended to protect. 5 U.S.C. § 7101(a)(2).

The Supreme Court has recognized that the statutory phrase "conditions of employment" is ambiguous and that the Authority's interpretation of that term is entitled to *Chevron, U.S.A. Inc. v. National Resources Defense Council.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*") deference. *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644 (1990) ("[i]n construing [the term conditions of employment], the Authority was interpreting the [S]tatute that it is charged with implementing . . . . We must therefore review its conclusions under the standard set forth in" *Chevron*) (internal citations omitted). As a result, this Court upholds the Authority's interpretation "even if a court could conceivably come out the other way on de novo review of the issue." *Dep't of Def. v. FLRA*, 685 F.2d 641, 648 (D.C. Cir. 1982) ("*Dep't of Def.*"); *accord U.S. Dep't of Air Force, Griffiss Air Force Base, Rome, N.Y. v. FLRA*, 949 F.2d 1169, 1173 (D.C. Cir. 1991) ("*Griffiss Air Force Base*") (citing *Dep't of Def.* and reiterating that it defers to the Authority's interpretation of the phrase "conditions of employment" so long as it is reasonable). Holding that the Authority is tied in perpetuity to an irrationally broad reading of "conditions of employment" would require overruling this Court's precedent in *Dep't of Def.* and *Griffiss Air Force Base.*

That the Authority adopted a reasonable interpretation of the phrases "conditions of employment" and "working conditions" below is confirmed by the Supreme Court's reading of those terms in *Fort Stewart*. In that case, the Supreme Court stated that the term "working conditions" in § 7103(a)(14) "more naturally refers, in isolation, only to the 'circumstances' or 'state of affairs' attendant to one's performance of a job," while the term "conditions of employment" refers to the "qualifications demanded of, or obligations imposed upon, employees." *Fort Stewart*, 495 U.S. at 645, 646. *Fort Stewart* thus recognized that the terms "working conditions" and "conditions of employment" in § 7103(a)(14) are, as the Authority put it, "related, but not synonymous." (JA 50.)

Having clarified that "conditions of employment" does not mean the same thing as "working conditions," the Authority reasonably applied its precedent to the facts of the case before it. (JA 50-51.) The Authority noted that its previous decisions had held that "mere increases or decreases in normal duties do not constitute changes over which an agency must bargain." (JA 50 (citing *CBP Tucson*, 60 FLRA 169 (2004).) Applying *CBP Tucson*, the Authority held that the Secondary Inspection Memo did not change the nature or type of duties the agents performed and thus did not change their "conditions of employment." (JA 50). *CBP Tucson* built, in turn, on the Authority's decision in *U.S. Department of the Air Force, Headquarters, 96th Air Base Wing, Eglin Air Force Base, Florida*, 58 FLRA 626 (2003) ("*Eglin AFB*") which, like *CBP Tucson*, is factually similar to this case. Both *CBP*

Tucson and *Eglin AFB* involved changes to agency policies that changed the "working conditions" of employees, but did not change their "conditions of employment." Similar to *CBP Tucson* and *Eglin AFB*, the record in this case establishes that the Secondary Inspection Memo merely affected workflow between the Primary Inspection Area and the Secondary Inspection Area, but "did not change the nature of or the type of duties the officers performed." (JA 50.) "In effect, the memorandum conveyed instructions from the division chief to his agents detailing how they were to perform inspections when it came to referring vehicles from the primary to secondary lane for additional scrutiny." *Id.* As in *CBP Tucson* and *Eglin AFB*, the record reflects that the Agency had a consistent practice of "[c]ommunicating supervisory instructions in this manner." (JA 49.)

As the Authority reasonably interpreted the phrase "conditions of employment" in 5 U.S.C. § 7103(a)(14) and reasonably applied the interpretation to the facts of this case, the Court should deny the Petition for Review.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 842-43). This Court defers to the Authority's construction of the Statute, which Congress entrusted to the FLRA's administration. *U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991). The Authority is entitled to

"considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97 (internal quotation marks omitted).

Courts uphold Authority decisions unless they are "'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) ("*Weingarten Rights*") (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. 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 Supreme Court has determined that the Authority's interpretation of the statutory phrase "conditions of employment" is entitled to *Chevron* deference. *Fort Stewart*, 495 U.S. at 644-47. 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." *Id.* at 645 (quoting *Chevron,* 467 U.S. at 842–43); *see also Weingarten Rights*, 754 F.3d at 1041.

Both the Supreme Court and this Circuit have found that the phrase "conditions of employment" is ambiguous. *Fort Stewart*, 495 U.S. at 644-45; *see also*

Dep't of Def., 685 F.2d at 647–48 ("[T]he phrase 'conditions of employment' is not a model of precision," and "reasonable persons could reach opposite results in specific cases"). Thus, this Court will uphold the Authority's interpretation of the phrase "conditions of employment" if it is "reasonable," and "even if a court could conceivably come out the other way on *de novo* review of the issue." *Dep't of Def.*, 685 F.2d at 648.

Moreover, the Authority, like other agencies, "is free to alter its past rulings and practices even in an adjudicatory setting" so long as it provides a "reasoned explanation" for doing so. *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985) ("*AFGE 1985*"). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Id.* (internal quotation marks omitted).

Ultimately, "the Authority must provide a rational explanation for its decision but in reviewing unfair labor practice determinations, the court recognizes that such determinations are best left to the expert judgment of the Authority." *Nat'l Treasury Emps. Union v. FLRA*, 745 F.3d 1219, 1224 (D.C. Cir. 2014) (internal formatting omitted). The Authority's factual findings are "conclusive" if they are "supported by substantial evidence on the record considered as a whole." 5 U.S.C. § 7123(c).

Finally, under § 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 Weingarten Rights*, 754 F.3d at 1040 ("[w]e have enforced [S]ection 7123(c) strictly"); *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n. 5 (D.C. Cir. 2005).

ARGUMENT

In the Decision, the Authority performed one of its core statutory functions: interpreting phrase "conditions of employment." *Dep't of Def.*, 685 F.2d at 647–48. Because both the Supreme Court and this Court have determined that phrase to be ambiguous, *Chevron* deference to the Authority's determination is required. *Fort Stewart*, 495 U.S. at 644-47; *Dep't of Def.*. 685 F.2d at 648 ("[G]reat deference is owed to an interpretation of a statute by the agency entrusted with its administration.") (internal quotation marks omitted.)

The fact that the Authority has adjusted its prior interpretation of the term "conditions of employment" does not vitiate the deference owed to Authority's revised interpretation of that term. The Authority may reassess such "past rulings and practices" so long as it acknowledges that it is doing so and "provides a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *AFGE 1985*, 774 F.2d at 502. The Authority provided such an analysis in this case. This Court should therefore deny the Union's Petition for Review.

I. Interpreting the phrase "conditions of employment" as synonymous with "working conditions" violates the surplusage canon

In accordance with its statutory responsibility, the Authority in its Decision assessed the meaning of the statutory phrases "conditions of employment" and "working conditions," taking into account the plain language of 5 U.S.C. § 7103(a)(14), accepted rules of statutory construction and the manner in which the Authority has interpreted those terms in the past. The Authority reasonably concluded that its prior interpretation ran afoul of "accepted rules of statutory interpretation" by defining "conditions of employment" in a circular manner and disregarding the statutory text. (JA 50.) It therefore adjusted its interpretation to give effect to the plain language of 5 U.S.C. § 7103(a)(14) and well-accepted interpretive canons. It acted reasonably in doing so.

The Authority has held that the Statute to requires an agency to provide notice and an opportunity to bargain when it changes the "conditions of employment" of bargaining-unit members. *U.S. Immigration & Naturalization Serv. N.Y.C., N.Y.*, 52 FLRA 582, 585 (1996) ("*INS*"); *see* 5 U.S.C. § 7102(2) (employees have "the right . . . to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter."). "The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis." *INS*, 52 FLRA at 585.

Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). Previous Authority decisions had held that "there is no substantive difference between [the terms] 'conditions of employment' and 'working conditions.'" (JA 49 (quoting *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 54 FLRA 85, 90 (2009).) Under this view, the statutory terms "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting . . ." are mere surplusage, having no independent significance and adding nothing to the Statute's meaning.

In its Decision, the Authority correctly found that this interpretation ran afoul of "accepted rules of statutory interpretation." (JA 50.) "The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012). Thus, "courts avoid a reading [of a statute] that renders some words altogether redundant." *Id.* Instead, "we must give effect to every word that Congress used in the statute." *Lowe v. Sec. Exchange Comm'n*, 472 U.S. 181, 207 n. 53 (1985); *accord Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we obliged to give effect, if possible, to every word Congress used.")

The Authority's previous interpretation of the phrase "conditions of employment" rendered it synonymous with "working conditions," thus making the

words "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting . . ." meaningless. *Davis-Monthan*, 54 FLRA at 90. But "[t]hese words cannot be meaningless, else they would not have been used." *United States v. Butler*, 297 U.S. 1, 65 (1936). The more natural reading of the term "conditions of employment" is that an agency is not obligated to bargain over "working conditions" as such, but only a more limited subset of "personnel policies, practices, and matters," "established by rule, regulation or otherwise," that "affect[] working conditions." *See* 5 U.S.C. § 7103(a)(14). Thus, as the Authority correctly found, "[t]he terms are related, but they are not synonymous." (JA 50.)

In a series of concurring and dissenting opinions, the Authority's former Chairman, Dale Cabaniss, articulated the plain-language distinction between the terms "conditions of employment" and "working conditions." The Authority cited several of these opinions in its Decision. (JA 50 at n.33.) In her dissenting opinion in *Social Security Administration*, 55 FLRA 970, 985 (1999), then-Member Cabaniss noted that under the definition of "conditions of employment" in 5 U.S.C. § 7103(a)(14), "[a]n employee's 'working conditions' are not . . . the same as the 'conditions of employment' of that same employee." "Changing 'conditions of employment' would be, for example, the decision to create a policy to discipline employees for a certain type of conduct, while a change to 'working conditions' would be the effect on an employee of being disciplined for having engaged in that same type of conduct." *Id.*

In her concurring opinion in *U.S. Department of Veterans Affairs Medical Center Sheridan, Wyoming*, 59 FLRA 93, 95 (2003), then-Chairman Cabaniss offered further examples of the difference in meaning between the two terms:

> "[W]orking conditions" would be an employee's work starting and stopping times, or whether the employee has the ability to take home a government owned vehicle (GOV): "conditions of employment" would be the "rules, regulations, or otherwise" that define the hours of work for the bargaining unit, or determine whether or what employees have the right to take that GOV home.

This interpretation of the phrase "conditions of employment," adopted by the Authority below, gives meaning and significance to the terms "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting . . ." in 5 U.S.C. § 7103(a)(14). And it distinguishes "conditions of employment" from "working conditions," thus avoiding a "completely circular" definition that "explains nothing." *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 444 (2003) (internal quotation marks omitted). Consistent with the surplusage canon, the Authority's interpretation in its Decision below is to be preferred over its previous, circular definition that rendered a large part of the definition of "conditions of employment" in 5 U.S.C. § 7103(a)(14) mere surplusage.

II. Holding that "conditions of employment" is synonymous with "working conditions" is contrary to the Statute's purpose and yields unworkable results

The definition the Authority adopted in its Decision is consistent with the purposes of the Statute because it avoids the unwieldy consequences that flow from reading "conditions of employment" as synonymous with "working conditions."

The Statute states that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient government." 5 U.S.C § 7101(b). Requiring agencies to engage in bargaining before a manager does anything to change an employee's "working conditions" imposes vast and unworkable obligations on federal agencies, seriously impeding the "efficient accomplishment of the operations of the Government" that the Statute protects. 5 U.S.C. § 7101(a)(2).

For example, in *General Services Administration Eastern Distribution Center Burlington, New Jersey*, 68 FLRA 70, 71 (2014) (Member Pizzella dissenting), the Authority applied its previous, overly-broad reading of "conditions of employment" to hold that an employee's unauthorized use of a scooter that he did not need to perform his job functions was nonetheless a "condition of [his] employment." The grievant in that case had "appropriated" an agency scooter without asking permission and started using it to perform his job duties, even though "the grievant's job description did not require him to use a scooter." *Id.* at 70. The Authority held that the agency had changed the grievant's "conditions of employment" in reclaiming the scooter he had taken. *Id.* at 75-76. As the dissent in that case noted, it is unlikely that

"Congress ever envisioned" that the Statute would be invoked in service of "an employee who gets mad because his supervisor takes away a scooter to which he was never entitled, and did not need, to do his job." *Id.* at 78.

If the Union's position in this case were to prevail, the Authority would perpetually be wedded to an interpretation of "conditions of employment" so broad that it would require bargaining before a federal manager could do anything to alter even a single employee's working conditions—including something as trivial and straightforward as reclaiming a scooter that the employee had taken without permission. The range of management actions subject to bargaining under that interpretation is limitless: moving an employee to an interior office, changing the location of a copying machine, or requiring an employee who had been accustomed to making deliveries in a pickup truck to start using a jeep. *Cf. Marine Corps Logistics Base Barstow, Cal.*, 46 FLRA 782 (1992), *reconsideration denied*, 47 FLRA 807 (1993) (five-cent increase in price of soft drinks at vending machines changed unit members' "conditions of employment"); *Dep't of Veterans Affairs Veterans Admin. Med. Ctr. Veterans Canteen Serv. Lexington, Ky.*, 44 FLRA 179 (1992) (two-week absence of microwave from employee break room changed unit members' "conditions of employment"). Contrary to the Union's contentions (Br. at 13, 26), the Statute was not intended to grant unlimited bargaining rights in this manner. Instead, the Statute recognizes "the special requirements and needs of government" and must "be interpreted in a manner consistent with the requirement of an effective and efficient

government." 5 U.S.C. § 7101(b). Denial of the Union's Petition for Review is therefore appropriate.

III. The Authority's interpretation of the phrase "conditions of employment" is strongly supported by *Fort Stewart*

The reasonableness of the Authority's interpretation of the phrases "conditions of employment" and "working conditions" below is confirmed by the Supreme Court's reading of those terms in *Fort Stewart*. In that case, the Supreme Court considered whether an agency was required to bargain with a union over a proposal relating to wages and fringe benefits. *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 643 (1990). The agency argued that it was not so obligated "because [5 U.S.C.] § 7103(a)(14) defines 'conditions of employment' as matters affecting 'working conditions,' and because the latter term most naturally connotes 'the physical conditions under which an employee labors.'" *Fort Stewart*, 495 U.S. at 645.

In a unanimous opinion authored by Justice Scalia, the Court rejected the agency's attempt to read "working conditions" as referring only to "physical conditions." The Court noted that the carve-outs in § 7103(a)(14) for matters relating to partisan political activities and "the classification of any position" would not make sense if "working conditions" referred only to "the physical conditions of the workplace." *Id.* at 646.

In interpreting § 7103(a)(14), the Court distinguished between the terms "conditions of employment" and "working conditions" in a manner that supports the

Authority's reading of those terms below. It stated that the term "working conditions" in § 7103(a)(14) "more naturally refers, in isolation, only to the 'circumstances' or 'state of affairs' attendant to one's performance of a job." *Fort Stewart*, 495 U.S. at 645. And it stated that the term "conditions of employment" refers to the "qualifications demanded of, or obligations imposed upon, employees." *Id.* at 646. *Fort Stewart* thus recognized that the terms "working conditions" and "conditions of employment" in § 7103(a)(14) are, as the Authority put it, "related, but not synonymous." (JA 50.)[1]

The Court's distinction between the two terms in *Fort Stewart* mirrors the distinction drawn by then-Chairman Cabaniss in her concurring opinions in *U.S. Department of Veterans Affairs Medical Center Sheridan, Wyoming*, 59 FLRA 93, 95 (2003) and *U.S. Department of Labor Occupational Safety & Health Administration Region 1 Boston, Massachusetts*, 58 FLRA 213, 216 (2002) ("*OSHA*"). "'[W]orking conditions' would be an employee's work starting and stopping times," while "'conditions of employment' would be the 'rules, regulations, or otherwise' that define the hours of work for the bargaining unit." *OSHA*, 58 FLRA at 216. It also supports the Authority's conclusion in the Decision that "mere increases or decreases in normal duties do not constitute changes over which an agency must bargain," where they do not change the

[1] The Union's statements that the Authority interpreted the terms to "refer to two completely different concepts" and to "bear substantially different meanings" (Br. at 12) thus mischaracterize the Authority's Decision.

"nature of or type of duties" that employees perform. (JA 50.) Instead, agencies are only required to bargain where they change the "qualifications demanded of, or obligations imposed upon, employees." *Fort Stewart*, 495 U.S. at 646.

IV. The Authority's holding that the Secondary Inspection Memo did not change 'conditions of employment' is supported by the Authority's precedent and substantial record evidence

Having clarified that "conditions of employment" bears a narrower meaning than "working conditions," the Authority reasonably applied its precedent to the facts of the case before it. (JA 50-51.) The Authority noted that its previous decisions had held that "mere increases or decreases in normal duties do not constitute changes over which an agency must bargain." (JA 50 (citing *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, U.S. Customes & Border Patrol, Tucson Sector Tucson, Ariz.*, 60 FLRA 169 (2004).) Applying *CBP Tucson*, the Authority held that the Secondary Inspection Memo did not change the nature or type of duties the agents performed and thus did not change their "conditions of employment." (JA 50.) Instead, it only affected workflow between primary and secondary inspection points. (JA 51.)

CBP Tucson built, in turn, on the Authority's decision in *U.S. Department of the Air Force, Headquarters, 96th Air Base Wing, Eglin Air Force Base, Florida*, 58 FLRA 626 (2003) ("*Eglin AFB*") which, like *CBP Tucson*, is factually similar to this case. Both *CBP Tucson* and *Eglin AFB* involved changes to agency policies that changed the "working conditions" of employees, but did not change their "conditions of employment." In *CBP Tucson*, the agency changed its policy and practice that "each

Station process[es] the aliens it arrested," leading to an "enormous new workload on the Tucson Station." 60 FLRA at 181-182. In *Eglin AFB*, the agency issued a Maintenance Instruction Letter that changed the agency's practice that "crew chiefs worked on their assigned aircraft," except on infrequent occasions when they were directed by the shop chief to assist with other aircrafts. 58 FLRA at 628, 630.

Similar to *CBP Tucson* and *Eglin AFB*, in this case the record establishes that the Secondary Inspection Memo merely affected workflow between the Primary Inspection Area and the Secondary Inspection Area, but "did not change the nature of or the type of duties the officers performed." (JA 50.) "In effect, the memorandum conveyed instructions from the division chief to his agents detailing how they were to perform inspections when it came to referring vehicles from the primary to secondary lane for additional scrutiny." *Id.* As in *CBP Tucson* and *Eglin AFB*, the record reflects that the Agency had a consistent practice of "[c]ommunicating supervisory instructions in this manner." (JA 49.) Thus, "there was no change to the underlying personnel policy, practice, or matter affecting what work assignments [Border Patrol agents] had to do." *Eglin AFB*, 58 FLRA at 626 (Chairman Cabaniss, concurring.) As a result, "there was no change to bargain over." *Id.*

The Union urges that the Court apply an "unadorned" reading of 5 U.S.C. § 7103(a)(14) to reverse the Authority's holding that the Secondary Inspection Memo did not change the agents' "conditions of employment." (Br. at 12.) However, as this

Court has found, "the phrase 'conditions of employment' is not a model of precision" and "[t]he definition in 5 U.S.C. § 7103(a)(14) does not really help matters much." *Dep't of Def. v. FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982) ("*Dep't of Def.*"). "Plainly the duty to bargain is expressed on such a level of generality that reasonable persons could reach opposite results in specific cases." *Id.* This reality means that the Authority must look to its precedent and the evidence in the record, including witness testimony and past agency practice, to determine whether "conditions of employment" were changed. *See U.S. Immigration & Naturalization Serv. N.Y.C., N.Y.*, 52 FLRA 582, 585 (1996) ("The determination of whether a change in conditions of employment has occurred involves a case-by-case analysis."). The Authority did just that in this case.

Section 7103(a)(14) defines "conditions of employment" as "*personnel* policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14) (emphasis added). Determining what constitutes a "personnel policy, practice or matter" that "affects working conditions" is a matter entrusted to the Authority, and its interpretation and application of the Statute (and, in particular, the statutory phrase "conditions of employment") will be upheld so long as they are reasonable. *Dep't of Def.*, 685 F.2d at 647–48; *U.S. Dep't of Air Force, Griffiss Air Force Base, Rome, N.Y. v. FLRA*, 949 F.2d 1169, 1173 (D.C. Cir. 1991) . Here, the Authority reasonably interpreted § 7103(a)(14) of the Statute to hold that there was not a change in a "personnel policy, practice or matter" where a

new policy varied the sites at which work was performed, but not the nature or type of duties employees perform at those sites. (JA 50.) Both the Authority's precedent and record evidence strongly support the Authority's determination.

A. The Authority's holding is supported by *CBP Tucson*

In *CBP Tucson*, 60 FLRA 169 (2004), the Authority considered an agency-initiated change in procedures for processing illegal aliens similar to the one at issue here. In March 2002, the agency in *CBP Tucson* began transporting about half of the aliens apprehended at its Casa Grande Station for processing at its Tucson Station. *Id.* Previously, aliens apprehended at Casa Grande Station had been processed there. *Id.* The union filed a ULP charge arguing that the agency's new practice constituted a change in conditions of employment over which the agency was required to bargain. *Id.* at 170. The union noted that the new policy "created an overload of processing duties, in turn creating a shortage of available agents assigned to the Tucson Station" and forcing Tucson Station agents to work overtime to process the aliens transferred from Casa Grande Station. *Id.*

An Administrative Law Judge ("ALJ") agreed, noting that "before March 2002, a condition of employment had been that each Station process[es] the aliens it arrested." *Id.* at 181. That "was the policy and the practice." *Id.* However, in March 2002, the Chief of the Tucson Section "directed that aliens apprehended by Casa Grande be transported to the Tucson Station for processing." *Id.* This change "affected the entire Tucson Station by imposing an enormous new workload on the

Tucson Station." *Id.* at 182. Thus, the ALJ found that the agency "changed a condition of employment of Tucson Station employees." *Id.* at 181.

But the Authority dismissed the complaint, holding that "[e]ven if we were to consider" the increased workload for Tucson agents "to be attributable to the Respondent, we would find, based on our precedent, that dismissal of the complaint is warranted because there was no change in unit employees' conditions of employment." *Id.* at 174. That is because "nothing in the record establishes that the Respondent changed the 'type' of aliens that were being processed, the type of work that bargaining unit employees performed or, in any manner, the processing of alien apprehensions." *Id.* "[T]he increase in the amount of work (i.e., individuals to be treated or processed) did not constitute a change in conditions of employment." *Id.*

So too, the "agents were not assigned new duties, nor were they required to perform any duties not previously required of them." *Id.* at 175. Instead, "processing is one of the duties that all agents perform as part of their normal, rotational duties." *Id.* "[T]he Tucson Station agents continued to perform the same processing procedures when processing aliens apprehended by Casa Grande Station that they performed when processing aliens that were apprehended by Tucson Station." *Id.* at 173-174. In both cases, "processing entails questioning, identifying, fingerprinting an apprehended alien," and "[i]t is undisputed that Tucson Station agents already performed these duties as a part of their job." *Id.* at 175.

Like the change in transfer practices between Tucson and Casa Grande in *CBP Tucson*, the Secondary Inspection Memo in this case did not change the nature or type of duties the agents performed and thus did not change their "conditions of employment." (JA 50.) Just as the changed practice in *CBP Tucson* only affected workflow between Tucson Station and Casa Grande Station, the Secondary Inspection Memo here only affected workflow between the primary and secondary inspection points, not the actual work that the agents were doing at those points. (SA 16-18, 102-103.) "Both before and after the memorandum, the agents continued to perform vehicular inspections at either the primary or secondary inspection areas using the same techniques." (JA 51.)

B. The Authority's holding is supported by *Eglin AFB*

CBP Tucson built, in turn, on the Authority's decision in *Eglin AFB*. In *Eglin AFB*, each crew chief "was assigned to a specific airplane for which he [wa]s responsible for its maintenance and pre-flight inspections." 58 FLRA at 628. The agency had a practice that "crew chiefs worked on their assigned aircraft unless called to assist on other aircraft." *Id.* Prior to April 2000, crew chiefs were called away from their assigned aircraft only infrequently, and only at the direction of the shop chief or another crew chief (when the shop chief was not available). *Id.*

However, in April 2000, the agency issued a Maintenance Instruction Letter stating that "crew chiefs would work their assigned aircraft 'only when workload and mission allows'," and that aircraft assignments would henceforth be made by an

"expediter," not the shop chief. *Id.* Even though "consistent testimony demonstrated that the crew chiefs were pulled off their aircraft more often after the implementation of the Instruction," the Authority nonetheless found that "such change was merely a variation of existing assignment practices, not a bargainable change in conditions of employment." *Id.* at 630. The Instruction Letter "did not change the nature of the crew chiefs['] assignments"—that is, it did not change the nature of the work they performed. *Id.* Moreover, the agency had "an established practice of modifying work assignments in response to mission and workload fluctuations." *Id.*

The Maintenance Instruction Letter in *Eglin AFB* certainly changed the "working conditions" of employees: "consistent testimony demonstrated that the crew chiefs were pulled off their aircraft more often after the implementation of the Instruction," and the crew chiefs' workload was now being managed by the "expediter," not the shop chief. *Id.* At the meeting where the Maintenance Instruction Letter was announced, "the crew chiefs expressed their disapproval of the creation of the expediter position and one crew chief walked out of the meeting." *Id.* at 628.

Nonetheless, the Authority held that the Maintenance Instruction Letter did not change the crew chiefs' "conditions of employment." In her concurring opinion in *Eglin AFB*, then-Chairman Cabaniss explained why: "As there was no change here to the underlying personnel policy, practice, or matter affecting what work

assignments crew chiefs had to do, there was no change to bargain over, even though (as here) the crew chiefs' work assignments (i.e., their 'working conditions') had been changed." *Id.* at 626.

This case is on all-fours with *Eglin AFB*. The Maintenance Instruction Letter in that case resulted in crew chiefs spending less time maintaining their assigned aircraft, and more time assisting with other aircrafts. That change is similar to the change asserted in this case: more facial comparison tests being conducted in the secondary inspection area, and fewer in the primary inspection area. But just like in *Eglin AFB*, the actual duties being conducted by the employees did not change: "Both before and after the memorandum, the agents continued to perform vehicular inspections at either the primary or secondary inspection areas using the same techniques." (JA 51.) As in *Eglin AFB*, "there was no change to the underlying personnel policy, practice, or matter affecting what work assignments [Border Patrol agents] had to do." 58 FLRA at 626 (Chairman Cabaniss, concurring.) Thus, "there was no change to bargain over." *Id.*

The evidence in this case is clear. "Referrals [to the secondary inspection area] are made for the sole purpose of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). "The primary legal distinction between primary and secondary is the duration of the seizure and the singling out of a vehicle as opposed to whether an agent asks questions in the traffic

lane or the parking lot." (SA 102-103.) Division Chief Przybyl testified that he issued the Secondary Inspection Memo solely to give agents more time to conduct facial comparison tests without backing up traffic by directing that more such tests be conducted in the secondary inspection area, as opposed to the primary inspection area. (SA 16.) In the secondary inspection area, "[y]ou're not worried about traffic backing up, and you can do the facial comparison. You can do that punch-out test and really compare the picture on the card to the person who is standing in front of you." *Id.* The punch-out test takes "seconds. You take the card. You go like this. You're done." *Id.* Border Patrol agents had always had a secondary inspection area. The Secondary Inspection Memo simply directed that agents refer more vehicles there so that they could have more time to perform the same sort of facial comparison tests they had always performed. (SA 17-18.) *CBP Tucson* and *Eglin AFB* teach that changes in the workflow between two different areas do not change employees' "conditions of employment" when they are performing the same types of duties in both places.

Moreover, just as the agency in *Eglin AFB* had "an established practice of modifying work assignments in response to mission and workload fluctuations," 58 FLRA at 630, the Agency in this case "routinely issued similar instructions, guidelines, and directives to clarify how the checkpoint inspections should be conducted and prioritized." (JA 49.) Between 2003 and 2014, the Agency issued several sets of instructions, guidelines and directives similar to the Secondary Inspection Memo

concerning how checkpoint inspections should be conducted and prioritized. (*See* SA 43-57; SA 58-71; SA 112-14; SA 115-28; SA 129-31; SA 132-33; SA 136-42.) In November 2003, the Border Patrol updated its policies governing checkpoints "to reflect our priority mission of antiterrorism within [the Agency] as well as technology advancements." (SA 44.) In January 2008, the Agency issued a detailed new policy concerning the use of license plate readers at Border Control checkpoints. (SA 136-42.) In February 2013, the Agency issued a directive setting forth situations where it would not be "operationally feasible" at the Las Cruces checkpoint to have a second agent present to help watch traffic and "provide a safe environment for the primary agent conducting inspections." (SA 112-14.) Also in February 2013, the Agency set forth detailed requirements as to how Border Patrol agents were to treat non-compliant motorists they encounter, including how to respond when a motorist refuses an agent's request to move to secondary inspection. (SA 129-31.) Just as in *CBP Tucson* and *Eglin AFB*, there is no record of the Agency providing notice or engaging in pre-implementation bargaining with the Union as to any of these directives.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court deny the Petition for Review.

Respectfully submitted,

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October 22, 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 8,857 words excluding exempt material.

/s/ Noah Peters
NOAH PETERS
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CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of October, 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/ Noah Peters
NOAH PETERS
Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statues and Regulations

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5 U.S.C. § 7101

Findings and purpose

(a) The Congress finds that—

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

(A) safeguards the public interest,

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

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

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

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

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

5 U.S.C. § 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. § 7103(a)(12) and (14)

Definitions; application

(a) For the purpose of this chapter--

* * * * *

(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;

* * * * *

(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[.]

5 U.S.C. § 7105(a)(2)(G)

Powers and duties of the Authority

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

* * * * *

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

5 U.S.C. § 7116(a)(1) and (5)

Unfair labor practices

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

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

* * * * *

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

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.

(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.