ORAL ARGUMENT SCHEDULED FOR MARCH 19, 2012
No. 11-1281

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

UNITED STATES DEPARTMENT OF THE AIR FORCE,
LUKE AIR FORCE BASE, ARIZONA,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547,
Intervenor.

ON PETITION FOR REVIEW OF A FINAL DECISION 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 and Amici

The parties to this petition for review are the petitioner, United States Department of the Air Force, Luke Air Force Base, Arizona ("agency"), the respondent, Federal Labor Relations Authority ("Authority" or "FLRA"), and the intervenor, American Federation of Government Employees, Local 1547 ("union"). There are no amici before this Court.

B. Ruling Under Review

The ruling under review is the Decision and Order on Negotiability Issues of the Authority in *American Federation of Government Employees, Local 1547(Union) and United States Department of the Air Force, Luke Air Force Base, Arizona (Agency),* Case No. 0-NG-2924, issued on June 15, 2011, reported at 65 F.L.R.A. (No. 192) 911.

C. Related Cases

Respondent is not aware of any related cases pending in this Court or in any other court.

/s/ Rosa M. Koppel
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Attorney for the Respondent

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GLOSSARY

AFGE	American Federation of Government Employees, Local 1547
Agency	United States Department of the Air Force, Luke Air Force Base, Arizona
Authority	Federal Labor Relations Authority
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
OPM	Office of Personnel Management
PB	Petitioner's Brief
RIF	Reduction-in-Force
SOP	Agency's Statement of Position
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	American Federation of Government Employees, Local 1547
VRA	Veterans Recruitment Appointments

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STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("Authority" or "FLRA") on June 15, 2011. The Authority's decision is published at 65 FLRA (No. 192) 911. A copy of the decision is included in the Joint Appendix ("JA") 255. The Authority exercised jurisdiction

over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1]

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction under § 7123(c) of the Statute to consider the agency's argument, advanced for the first time before this Court, that the union's proposals are outside the duty to bargain because they are inconsistent with the legislation governing Veterans Recruitment Appointments.

2. Assuming, *arguendo*, that the Court has jurisdiction to consider the agency's new argument, whether the agency has demonstrated that the proposals conflict with the legislation.

3. Whether the proposals are within the duty to bargain.

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under § 7117 of the Statute. The union advanced proposals addressing aspects of the reduction-in-force (RIF) process contained in an agency initiative to reduce personnel. JA 255. The agency declared that three of the proposals were nonnegotiable. JA 52. In response, the union filed a negotiability appeal under § 7105(a)(2)(E) of the Statute. JA 9. The agency filed a statement of position (SOP), JA 65, to which the union filed a

[1] Pertinent statutory provisions, regulations, and rules are set forth as Addendum A to this brief.

response. JA 250. The Authority found two of the proposals to be within the duty to bargain, and the third proposal to be outside the duty to bargain. JA 255. The agency now seeks review of the Authority's decision that two of the proposals are within the duty to bargain.

STATEMENT OF THE FACTS

A. Background

The agency implemented several initiatives to reduce personnel. JA 256. One of these initiatives was Air Force Program Budget Decision 720 (PBD), which was an agency decision to reduce personnel to raise money for new defense systems. JA 12. The union advanced proposals intended to lessen the adverse impact on competitive service bargaining unit employees of the RIF process contained in the PBD. JA 256, 260. Two of these proposals, summarized below, are at issue.

Proposal 1 is intended to make more positions available for bump and retreat[2] for bargaining unit employees in the competitive service. This would be accomplished by converting appointments held by probationary excepted service

[2] "Bump and retreat" refers to the process whereby employees released from their competitive levels displace employees with lower retention standings. The process is set forth in 5 C.F.R. § 351.701.

Veterans Recruitment Appointment (VRAs)[3] employees, who also are in the bargaining unit, JA 12-13, 21-22, to term appointments that would expire before the effective date of a RIF. JA 256.[4] The vacated VRA positions would be included in the RIF retention register. *Id*. Under the proposal, the conversion of VRA appointments to term appointments would take place only when the agency determines - - through a mock RIF prior to conducting an actual RIF - - that a competitive service employee in the same job series as the probationary employee will be displaced in a RIF. JA 258.

Proposal 2 is intended, in the event of a RIF, to protect bargaining unit employees in the competitive service by suspending the filling of vacant positions with excepted service VRA employees until the RIF is completed. JA 260. However, the agency could fill a position with a VRA employee if it demonstrates to the union that the position is in a job series not affected by the RIF. *Id*.

The Authority found that Proposals 1 and 2 are within the duty to bargain and ordered the parties to negotiate over the proposals. JA 265.

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[3]VRA appointments are excepted service appointments, made without competition, to positions otherwise in the competitive service. 5 C.F.R. § 307.103. Upon successful completion of a two-year probationary period, these positions automatically convert to competitive service positions. *Id.*

[4] The full text of the proposals appears in Addendum B to this brief. It also is set out in the Authority's decision. JA 256, 260.

B. The Authority's Decision

Proposal 1

In its SOP, the agency argued that Proposal 1 is contrary to government-wide regulations governing RIFs. JA 66, 72-73. The Authority rejected that argument finding that because the actions required by Proposal 1 would take place before any RIF is conducted, there is no inconsistency with the regulations governing RIFs. JA 258.

Next, the agency claimed that Proposal 1 is contrary to government-wide regulations governing term employment, and that 5 C.F.R. § 6.3 does not authorize agencies to convert VRA excepted service appointees to term appointees. JA 72-73. The Authority, noting that these claims were unsupported by any arguments, rejected them. JA 258.[5]

Finally, the agency argued that Proposal 1 interferes with its management rights to assign and layoff employees under § 7106(a)(2)(A) of the Statute. JA 66, 68. However, the Authority found that Proposal 1 does not affect management's right to assign employees because it does not require the assignment or reassignment of employees to any position; it does not affect what position an employee occupies. JA 259. Also, the Authority found that the proposal, which

[5] The agency presents to the Court neither this claim nor its claim that Proposal 1 is contrary to RIF regulations.

does not involve determining which positions will be abolished and which retained in a RIF, does not affect management's right to layoff employees. *Id*. Instead, the Authority explained, the proposal operates only when management determines that competitive service employees will be displaced by a RIF. *Id*.

In a dissenting opinion, Member Beck concluded that Proposal 1 affects and excessively interferes with management's rights to assign and layoff employees. JA 270.

Proposal 2

In its SOP, the agency argued that Proposal 2 excessively interferes with management's right to hire employees under § 7106(a)(2)(A) of the Statute. JA 67. Assuming that Proposal 2 affects that management right, the Authority determined that it does not excessively interfere with it but, instead, is an appropriate arrangement within the duty to bargain pursuant to § 7106(b)(3) of the Statute. JA 261. The Authority, applying the standards set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*), stated that to constitute an appropriate arrangement, a proposal: (1) must be intended as an arrangement; and (2) must be appropriate because it does not excessively interfere with the exercise of management's rights. *Id*.

The Authority explained that the union, in order to meet the first requirement, must: (1) identify the adverse effects on employees that flow from the exercise of management's rights, and (2) show that the arrangement is sufficiently tailored to compensate employees suffering the adverse effects. *Id*.

The Authority found that the first requirement was met because a RIF would have a severe, negative impact on an employee who undergoes it. *Id*. As for the second requirement, the Authority found that Proposal 2 is sufficiently tailored because it mitigates the adverse effect of a RIF on affected employees. *Id*. at 262. More specifically, the Authority explained that the purpose of suspending the filling of vacancies by VRA excepted service employees unless the positions are not in a job series affected by the RIF, or until after all of the RIFs are completed, is to prevent any decrease during the RIF in the number of positions available to competitive service employees for bump and retreat purposes. *Id*.

Turning to the second *KANG* requirement, the Authority determined that Proposal 2 is an appropriate arrangement. *Id*. In so concluding, the Authority found that the proposal's substantial benefit to employees - - protection against the reduction of employee bump and retreat opportunities during a RIF- - outweighs the burden on management of the proposal's hiring restriction. *Id*. That hiring restriction, the Authority explained, is not absolute. Instead, it applies only to RIF-affected positions, it permits the agency to fill vacancies from sources other than

the VRA program, and the restriction is effective only until the agency terminates the RIF. *Id*.

In his dissenting opinion, Member Beck concluded that Proposal 2 excessively interferes with management's right to hire employees. JA 270.

STANDARD OF REVIEW

The Court's review of a decision of the Authority is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771(D.C. Cir. 1988).

With regard to a negotiability decision like the one under review in this case, such a decision "will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). "Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

This standard of review presupposes that the Court has jurisdiction to consider the appellant's arguments. Here, the agency, by its own admission, presents an argument before the Court that it had not presented to the Authority. Absent extraordinary circumstances, the Court is without jurisdiction to entertain that argument. 5 U.S.C. § 7123(c); *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (*EEOC*). The agency does not demonstrate any extraordinary circumstances that would excuse its failure to raise before the Authority its argument that the union's proposals are outside the duty to bargain because they conflict with the legislation governing VRAs. Thus, the agency is barred from making that argument now.

SUMMARY OF ARGUMENT

The agency claims that Proposals 1 and 2 are outside the duty to bargain because they conflict with the legislation governing Veterans Recruitment Appointments. However, because the agency did not present this argument to the Authority, § 7123(c) of the Statute precludes the Court from considering this new argument. Section 7123(c) precludes judicial consideration of objections that a party raises for the first time in court unless extraordinary circumstances exist. The agency, in an attempt to overcome the jurisdictional bar of § 7123(c), claims that extraordinary circumstances exist here because of the nature of its new argument, that is, that the proposals conflict with the VRA legislation. Further, the agency argues, in essence, that extraordinary circumstances exist for purposes of

§ 7123(c) whenever an agency raises before the Court a new argument that a proposal is inconsistent with a federal law other than the Statute. The agency offers no support for these arguments which, if the Court adopts them, would enable other agencies to bypass the Authority and raise arguments before the courts for the first time. As a result, the role that Congress assigned to the Authority as the first line decisionmaker in determining whether a proposal is negotiable under the Statute would effectively be reassigned to the courts.

Even assuming that the Court has jurisdiction to entertain the agency's new argument, the agency has not demonstrated that the proposals conflict with the VRA legislation. Specifically, the agency is unable to identify any language in 38 U.S.C. § 4214 that prohibits either proposal.

Finally, the Authority reasonably determined that the proposals are within the duty to bargain. Regarding Proposal 1, the Authority reasonably found that it does not affect management's right to layoff employees because it does not involve determining which positions are to be abolished in a RIF. As for Proposal 2, the Authority reasonably found it to be an appropriate arrangement based on its determination that the proposal's substantial benefit to employees affected by a RIF outweighs the burden on management of the proposal's limited hiring restriction**.** Thus, the Authority's decision, not being arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, should be upheld.

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER 5 U.S.C. § 7123(c) TO CONSIDER THE AGENCY'S NEW ARGUMENT THAT THE PROPOSALS ARE OUTSIDE THE DUTY TO BARGAIN BECAUSE THEY CONFLICT WITH THE LEGISLATION GOVERNING VETERANS RECRUITMENT APPOINTMENTS.

The agency claims before the Court that Proposals 1 and 2 are outside the duty to bargain because they conflict with 38 U.S.C. § 4214, the statute governing VRAs.[6] Petitioner's Brief (PB) 18-23. According to the agency, the proposals concern matters that either are "inconsistent with any Federal law or any Government-wide rule or regulation" under § 7117(a)(1) of the Statute or are "specifically provided for by Federal statute" under § 7103(a)(14)(C) of the Statute. *Id*. at 19. As the agency readily concedes (PB 13, 23) it did not make this argument before the Authority. Therefore, the Court lacks jurisdiction under § 7123(c)[7] to entertain this argument.

Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in court. As this Court held, its

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[6] Section 4214 provides that "qualified covered veterans" "shall be eligible, in accordance with regulations which the Office of Personnel Management shall prescribe, for veterans recruitment appointments, and subsequent career-conditional appointments, under the terms and conditions specified in Executive Order Numbered 11521." 38 U.S.C. § 4214(b)(1) and (2). The statute is set out, in its entirety, in Addendum A.

[7] Section 7123(c) provides: "[n]o 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."

"jurisdiction to review the Authority's decisions does not extend to an 'objection that has not been urged before the Authority.'" *Am. Fed'n of State, Cnty. & Mun. Employees Capital Area Council 26 v. FLRA*, 395 F.3d 443, 451-52 (D.C. Cir. 2005) (*AFSCME*), citing 5 U.S.C. § 7123(c) and *EEOC*, 476 U.S. at 23. The Supreme Court explained that, in promulgating § 7123(c), Congress intended that the FLRA should be the first to analyze issues arising under the Statute, "thereby bringing its expertise to bear on the resolution of those issues." *EEOC*, 476 U.S. at 23.

In *EEOC*, the agency raised for the first time before the Supreme Court several arguments in support of its claim that a union proposal, under which the agency would agree to comply with OMB Circular A-76, was nonnegotiable. One of the agency's arguments was that the Circular is a "Government-wide rule or regulation" for purposes of § 7117(a)(1) and, therefore, the proposal was outside the duty to bargain. The Supreme Court held that the agency was barred from raising the arguments because it had not raised them before the Authority.

Likewise, here, the issue that the agency raises for the first time before this Court - - whether the proposals are nonnegotiable under § 7117(a)(1) or § 7103(a)(14)(C) of the Statute because they conflict with 38 U.S.C. § 4214 - - plainly arises under the Statute and, thus, should have been heard first by the Authority. Contrary to what the agency avers PB (25-26), that the federal law with

which the proposals purportedly conflict concerns the VRA program, a matter on which the Authority has no special expertise, does not prevent the jurisdictional bar of § 7123(c) from applying. Indeed, in *EEOC*, the Supreme Court declined to consider the agency's new arguments even though the purported "Government-wide rule or regulation" at issue was Circular A-76, also a matter on which the Authority has no special expertise. The Supreme Court found in *EEOC* that § 7123(c) precluded it from considering the agency's new arguments because they raised issues arising under the Statute. Here too, the agency's new argument raises an issue under the Statute - - whether the proposals are outside the duty to bargain as inconsistent with a federal law - - and, thus, should not be considered for the first time by this Court. The Authority, as the expert on the Statute, is "statutorily entitled to first crack at arguments about how to exercise its authority." *AFSCME*, 395 F.3d at 452.

As this Court has recognized, "Congress designated the FLRA as the sole fact finder and first line decisionmaker in determining whether a proposal is negotiable under the [Statute]." *Dep't of the Treasury v. FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983) (*Treasury*). If, as this Court explained, agencies were permitted to routinely ask the courts to entertain arguments in the first instance, then "the initial adjudicatory role Congress gave to the Authority would be transferred in large measure to this court, in plain departure from the statutory plan." *Id*. at 580. For

this reason, absent extraordinary circumstances, the Court is precluded from considering an objection if the petitioner has not raised the objection before the Authority in a request for reconsideration. *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004); *United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 245-46 (D.C. Cir. 1993). The agency fails to show that any extraordinary circumstances excused its failure to have raised its argument before the Authority before presenting it to the Court.

The agency asserts that "extraordinary circumstances" exist here because the nature of its new argument, which it claims is based on a concern over jeopardizing the VRA program, may, itself, be an "extraordinary circumstance [s]". PB 23.[8] According to the agency, if the Court finds that § 7123(c) bars it from considering the argument, that would mean that "Congress's objective in enacting [the VRA] program could be thwarted by the inadvertent omission of a government agency to bring a proposal's conflict with the program to the FLRA's attention." PB 24-25.

[8] In support of its claim that the nature of an argument, in and of itself, could constitute "extraordinary circumstances," the agency cites *United States Department of the Air Force, Seymour Johnson Air Force Base v. Federal Labor Relations Authority*, 648 F.3d 841 (D.C. Cir. 2011). However, in that case, unlike in this one, the agency's argument concerned a conflict with a constitutional requirement, specifically, the Appropriations Clause. In addition, in *Seymour Johnson*, this Court held that the Authority owed deference to the Department of Defense's reasonable interpretation of one of the statutes at issue because the Department administers that statute. Here, the statute in question is administered by the Office of Personnel Management (OPM). Therefore, *Seymour Johnson* is not dispositive.

Yet, as this Court has held, § 7123(c) bars it from considering arguments that had not been raised before the Authority even if, had the argument been correct, the Authority's decision would have undercut congressional policy. *United States Dep't of Housing and Urban Dev. v. FLRA*, 964 F.2d 1, 4 (D.C. Cir. 1992) (*HUD*) (Court declined to consider new argument that a proposal would impermissibly grant grievance procedures to probationary employees); *United States Dep't of the Air Force, Griffiss Air Force Base v. FLRA*, 949 F.2d 1169, 1174-75 (D.C. Cir. 1991) (*Griffiss*) (Court declined to consider new argument that Authority's order conflicted with agency's statutory obligation to report to the Attorney General information regarding criminal violations by agency employees).

The agency attempts to distinguish this case from *Griffiss* in several ways. First, the agency contends that "more is at stake here than a simple reporting requirement." PB 24. But, the agency cites no support for its proposition that the applicability of the jurisdictional bar in §7123(c) depends on the nature of the federal program that the agency raises in its objection to the Authority's decision or, as relevant here, that the bar doesn't apply when the objection concerns veterans' rights.

Further, the agency contends that *Griffiss* is distinguishable because, there, the agency's objection was to a remedy that the Authority ordered in response to an unfair labor practice, whereas, here, the agency's objection is that proposals are

outside the duty to bargain because they conflict with a federal law. *Id*. In essence, the agency asks the Court to find "extraordinary circumstances" waiving initial Authority review whenever an agency raises before the Court a new argument that a proposal is inconsistent with a federal law other than the Statute. If the Court were to adopt such an approach, nothing would stop other agencies from doing what the agency has done here, that is, make certain arguments before the Authority and, when those don't prevail, make new arguments before the Court that the Authority was not given a chance to consider. That would seriously undermine the Authority's role as the "first line decisionmaker in determining whether a proposal is negotiable." *Treasury*, 707 F.2d at 579 and n.16, citing 5 U.S.C. §§ 7105(a)(2)(E) and 7117. And, it would become ordinary, rather than "extraordinary," for the Court to serve as the tribunal of first resort for negotiability arguments that an agency, whether inadvertently or by design, fails to present to the Authority.

Even when such an omission is inadvertent, this Court has held that neither inadvertence nor unawareness of a statute provides a waiver from "the clear congressional directive" in § 7123(c). *HUD*, 964 F.2d at 5. *See also Griffiss*, 949 F.2d at 1175 (unawareness of a statute when a case is before the Authority is not an "extraordinary circumstance"). Nor should an agency's failure to present to the Authority an argument of which the agency *was* aware provide a waiver. Here, the

record shows that when the agency was before the Authority, it was aware enough of the VRA legislation to attach a copy of it to its SOP. See JA 217-218 (Attachment 6e to the SOP). In any event, "[a]n agency's legal strategy or, arguably, deficient lawyering by agency counsel cannot provide a waiver from" § 7123(c). *HUD*, 964 F.2d at 5.

Finally, the agency suggests that it was excused from first raising the VRA argument with the Authority because it "can[not] be supposed that had the conflict with the VRA program first been placed before the FLRA, that would somehow have usefully enhanced the record upon which the Court could assess that conflict." PB 26. To the extent that the agency is suggesting that Authority review of the VRA argument would have been futile, it provides no support for such an argument except for its own speculation as to the "supposed" effect of the Authority's actions on the state of the record before the Court. And, to the extent that the agency is arguing that it needs the Court, rather than the Authority, to review the merits of its argument so that the agency might prevail, that argument, too, lacks merit. *HUD*, 964 F.2d at 5.

Based on the foregoing, the Court lacks jurisdiction to consider the agency's new argument that Proposals 1 and 2 are outside the duty to bargain because they conflict with the VRA legislation.

II. ASSUMING, ARGUENDO, THAT THE COURT HAS JURISDICTION TO CONSIDER THE AGENCY'S NEW ARGUMENT, THE AGENCY HAS NOT DEMONSTRATED THAT THE PROPOSALS CONFLICT WITH THE VRA LEGISLATION.

By raising, for the first time before the Court, its argument that the proposals conflict with the VRA legislation, the agency places the Court in a difficult position. The Court is forced to choose between accepting a *post hoc* rationalization from the Authority that the proposals are not inconsistent with the VRA legislation, and not considering any arguments on this issue except for those raised by the agency in its brief. As to the former option, the Court may not consider *post hoc* rationalizations for agency action. *Ass'n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1117 (D.C. Cir. 2001), citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). As to the alternative, the Authority (and the union as well) would be unfairly denied an opportunity to respond to the agency's VRA argument. Although the Authority has not had the opportunity to consider the agency's argument that the proposals are not negotiable because they conflict with the VRA legislation at 38 U.S.C. § 4214, nonetheless, the agency has not demonstrated that a conflict exists.

The agency argues that Proposal 1 conflicts with 38 U.S.C. § 4214 because it precludes veterans from successful completion of the prescribed probationary period and, thus, from acquiring a competitive status. PB 21, citing 38 U.S.C.

§ 4214(b)(1)(D)(ii). However, the agency points to no language in section 4214 or, for that matter, in any other statute or regulation, that prohibits the agency from changing an excepted service employee's position to a term appointment. Notably, the agency does not now claim, as it did before the Authority, that 5 C.F.R. § 6.3(b), which allows agencies, "[t]o the extent permitted by law," to make position changes "in accordance with such regulations and practices as the head of the agency concerned finds necessary," does not apply to VRA appointments. See JA 72. The Authority dismissed that claim as unsupported by any argument. JA 258.

Nor has the agency demonstrated that Proposal 2, under which the agency would temporarily, during the pendency of a RIF, suspend the filling of vacant positions with excepted service VRA employees, conflicts with section 4214. PB 22-23. Section 4214 "authorizes" agencies to fill competitive service positions via VRA appointments. 5 C.F.R. § 307.101. It gives agencies the discretion to make VRA appointments by providing that "[a] qualified covered veteran *may* receive [a VRA] appointment at any time." 38 U.S.C. § 4214(b)(3)) (emphasis added). Nothing in the statute indicates that agencies are prohibited from temporarily not making VRA appointments, such as in anticipation of a RIF.

By contrast, the statute provides that a "qualified covered veteran" "*shall* be eligible . . . for veterans recruitment appointments." 38 U.S.C. § 4214(b)(1) and

(2) (emphasis added). As this Court held, it is a settled rule of construction that when the same statute "uses both 'may' and 'shall' , the normal inference is that each is used in its usual sense the one act being permissive, the other mandatory." *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 662 (D.C. Cir. 1975), quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947). Thus, Proposal 2 does not conflict with any mandate in section 4214.[9]

III. THE AUTHORITY REASONABLY DETERMINED THAT THE PROPOSALS ARE WITHIN THE DUTY TO BARGAIN.

A. The Authority Reasonably Determined That Proposal 1 Does Not Affect Management's Right to Layoff Employees.

As the Authority explained, Proposal 1 does not affect management's right to layoff employees under § 7106(a)(2)(A) of the Statute. JA 259. The right to layoff includes the right to conduct a RIF and to exercise discretion in determining which positions will be abolished and which retained. *Id*. Proposal 1 does not

[9] The agency's claim to the contrary, PB 18-19, the Supreme Court's decision in *Fishgold v. Sullivan Drydock & Repair Corporation*, 328 U.S. 275 (1946), does not support the agency's position that Proposals 1 and 2 are outside the duty to bargain because they conflict with the VRA legislation. *Fishgold* did not concern the VRA legislation but, instead, section 8(c) of the Selective Training and Service Act of 1940, pursuant to which an employee who returns from service in the armed forces to his civilian job is guaranteed for one year against discharge from his position without cause. *Fishgold*, 328 U.S. at 282, 285. The agency points to no similar guarantee against discharge without cause in the VRA legislation.

involve determining which positions will be abolished and which retained in a RIF. Instead, Proposal 1 operates only after management has made these decisions.

Nonetheless, the agency argues that the Authority should have found that Proposal 1 excessively interferes with management's right to layoff employees, based on the proposal's purported similarity to an earlier union proposal that the Authority found did excessively interfere. PB 27-28. The earlier proposal required that a RIF be delayed until all VRA employees were converted to the competitive service and became subject to RIF procedures. *AFGE, Local 1547*, 64 FLRA 813, 816 (2010). As the Authority found, and the agency acknowledges (PB 29 n.5), that proposal could have delayed a RIF for up to two years, which would have been incompatible with the purposes for which agencies conduct RIFs. *Id*. at 818.

But, unlike the earlier proposal, Proposal 1 has no effect whatsoever on the timing of a RIF, which is left entirely up to management. The Authority reasonably found that Proposal 1 does not affect any management rights and, thus, is within the duty to bargain.[10]

[10] The agency does not argue before the Court, as it did before the Authority, that Proposal 1 affects management's right to assign employees. Indeed, according to the agency, the Authority "correctly points out" that Proposal 1 does not affect that right. PB 27. However, the agency raises, for the first time before the Court, the argument that Proposal 1 affects management's right to retain VRA employees. For the reasons discussed, pp. 11-17, the agency is barred from making this argument by 5 U.S.C. § 7123(c).

B. The Authority Reasonably Determined That Proposal 2 is an Appropriate Arrangement.

The Authority found that Proposal 2 is an appropriate arrangement under § 7106(b)(3) of the Statute and, thus, within the duty to bargain because its substantial benefit to employees affected by a RIF, that is, protection against the reduction of employee bump and retreat opportunities, outweighs the burden on management of the proposal's limited hiring restriction. JA 261-262. As the Authority explained, the restriction in Proposal 2 against hiring during a RIF applies only to one source of employees (VRA applicants), only to positions affected by the RIF, and only until the RIF ends, which is ultimately a matter under the agency's control. JA 262. Even during the RIF, the proposal would not preclude management from hiring VRA applicants if it "shows to the [u]nion that the particular position being filled will be a job series not affected by the RIF." JA 260.[11] Thus, the Authority, based on a careful weighing of Proposal 2's benefits to employees against the burdens it would impose on the exercise of management rights, reasonably determined that Proposal 2 is an appropriate arrangement.

As the agency acknowledges, this Court reversed a decision in which the Authority found that a broader hiring restriction than that imposed by Proposal 2 was nonnegotiable. PB 30. The proposal involved in *Association of Civilian*

[11] Therefore, the agency's assertion that "[f]or the designated period of time, *no* veteran may be hired under the government's VRA program," PB 31 (emphasis in original) is not accurate.

Technicians, Montana Air Chapter v. Federal Labor Relations Authority, 756 F.2d 172, 178 (D.C. Cir. 1985), would have required the agency to impose a freeze on hiring from any outside sources until a RIF was completed.[12] Unlike Proposal 2, the proposal in *ACT* contained no restriction on the types of positions subject to the freeze. The agency's assertion that "there is a different dimension to Proposal 2" because it restricts both when and from what sources the agency may fill a position, PB 30, is inaccurate. The proposal in *ACT* contained both restrictions, except that the restriction as to source pertained to all outside sources including, presumably, VRA appointees.

Finally, the agency argues, for the first time, that the Authority's analysis of whether Proposal 2 is an appropriate arrangement was deficient because it failed to factor in Congress's solicitude for veterans' rights. PB 30. For the reasons discussed, pp. 11-17, § 7123(c) of the Statute bars the Court from considering this argument when the Authority has not been given an opportunity to do so. Also, assuming, *arguendo*, that this factor could be relevant to an appropriate arrangement analysis, had the agency raised it before the Authority, the union would have had an opportunity to establish whether any of the competitive service employees that Proposal 2 was intended to protect obtained their positions via the

[12] The disputed portion of the proposal in *ACT* provided that: "Upon posting of the [RIF] Notice, the Air or Army Unit will be in a temporary hiring freeze until all RIF actions have been completed except for internal placement." *ACT, Montana Air Chapter*, 11 FLRA 505, 505 (1983).

VRA program or another special hiring program for veterans. For these reasons, the Court should not consider this new argument.

CONCLUSION

The petition for review should be denied.

Respectfully submitted.

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D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 5,466 words excluding exempt material.

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Certificate of Service

I hereby certify that on this 12th day of January, 2012, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Agency by way of the Court's ECF notification system and by hand delivery of hard copies to:

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ADDENDUM A

Relevant Statutes and Regulations

Page No.

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

(a) For the purpose of this chapter—

* * * * *

(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. Powers and duties of the Authority

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

* * * * *

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

5 U.S.C. § 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
(2) in accordance with applicable laws—
(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
(C) with respect to filling positions, to make selections for appointments from—
(i) among properly ranked and certified candidates for promotion; or
(ii) any other appropriate source; and
(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—
(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. § 7117. 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. 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.

38 U.S.C. § 4214. Employment within the Federal Government

(a)(1) The United States has an obligation to assist veterans of the Armed Forces in readjusting to civilian life. The Federal Government is also continuously concerned with building an effective work force, and veterans constitute a uniquely qualified

recruiting source. It is, therefore, the policy of the United States and the purpose of this section to promote the maximum of employment and job advancement opportunities within the Federal Government for qualified covered veterans (as defined in paragraph (2)(B)) who are qualified for such employment and advancement.

(2) In this section:

(A) The term "agency" has the meaning given the term "department or agency" in section 4211(5) of this title.

(B) The term "qualified covered veteran" means a veteran described in section 4212 (a)(3) of this title.

(b)(1) To further the policy stated in subsection (a) of this section, veterans referred to in paragraph (2) of this subsection shall be eligible, in accordance with regulations which the Office of Personnel Management shall prescribe, for veterans recruitment appointments, and for subsequent career-conditional appointments, under the terms and conditions specified in Executive Order Numbered 11521 (March 26, 1970), except that—

(A) such an appointment may be made up to and including the level GS–11 or its equivalent;

(B) a veteran shall be eligible for such an appointment without regard to the number of years of education completed by such veteran;

(C) a veteran who is entitled to disability compensation under the laws administered by the Department of Veterans Affairs or whose discharge or release from active duty was for a disability incurred or aggravated in line of duty shall be given a preference for such an appointment over other veterans;

(D) a veteran receiving such an appointment shall—

(i) in the case of a veteran with less than 15 years of education, receive training or education; and

(ii) upon successful completion of the prescribed probationary period, acquire a competitive status; and

(E) a veteran given an appointment under the authority of this subsection whose employment under the appointment is terminated within one year after the date of such appointment shall have the same right to appeal that termination to the Merit Systems Protection Board as a career or career-conditional employee has during the first year of employment.

(2) This subsection applies to qualified covered veterans.

(3) A qualified covered veteran may receive such an appointment at any time.

(c) Each agency shall include in its affirmative action plan for the hiring, placement, and advancement of handicapped individuals in such agency as required by section 501(b) of the Rehabilitation Act of 1973 (29 U.S.C. 791 (b)), a separate specification of plans (in accordance with regulations which the Office of Personnel Management shall prescribe in consultation with the Secretary, the Secretary of Labor, and the Secretary of Health and Human Services, consistent with the purposes, provisions, and priorities of such Act) to promote and carry out such affirmative action with respect to disabled veterans in order to achieve the purpose of this section.

(d) The Office of Personnel Management shall be responsible for the review and evaluation of the implementation of this section and the activities of each agency to carry out the purpose and provisions of this section. The Office shall periodically obtain (on at least an annual basis) information on the implementation of this section by each agency and on the activities of each agency to carry out the purpose and provisions of this section. The information obtained shall include specification of the use and extent of appointments made by each agency under subsection (b) of this section and the results of the plans required under subsection (c) of this section.

(e)(1) The Office of Personnel Management shall submit to the Congress annually a report on activities carried out under this section. Each such report shall include the following information with respect to each agency:

(A) The number of appointments made under subsection (b) of this section since the last such report and the grade levels in which such appointments were made.

(B) The number of individuals receiving appointments under such subsection whose appointments were converted to career or career-conditional appointments, or whose employment under such an appointment has terminated, since the last such report, together with a complete listing of categories of causes of appointment terminations and the number of such individuals whose employment has terminated falling into each such category.

(C) The number of such terminations since the last such report that were initiated by the agency involved and the number of such terminations since the last such report that were initiated by the individual involved.

(D) A description of the education and training programs in which individuals appointed under such subsection are participating at the time of such report.

(2) Information shown for an agency under clauses (A) through (D) of paragraph (1) of this subsection—

(A) shall be shown for all veterans; and

(B) shall be shown separately (i) for veterans who are entitled to disability compensation under the laws administered by the Secretary or whose discharge or release from active duty was for a disability incurred or aggravated in line of duty, and (ii) for other veterans.

(f) Notwithstanding section 4211 of this title, the terms "veteran" and "disabled veteran" as used in subsection (a) of this section shall have the meaning provided for under generally applicable civil service law and regulations.

(g) To further the policy stated in subsection (a) of this section, the Secretary may give preference to qualified covered veterans for employment in the Department as veterans' benefits counselors and veterans' claims examiners and in positions to provide the outreach services required under section 6303 of this title, to serve as veterans' representatives at certain educational institutions as provided in section 6305 of this title, or to provide readjustment counseling under section 1712A of this title.

5 C.F.R. § 6.3. Method of filling excepted positions and status of incumbents.

(a) The head of an agency may fill excepted positions by the appointment of persons without civil service eligibility or competitive status and such persons shall not acquire competitive status by reason of such appointment: *Provided,* That OPM, in its discretion, may by regulation prescribe conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status in accordance with the Civil Service Rules and Regulations.
(b) To the extent permitted by law and the provisions of this part, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.

5 C.F.R. Part 307 Veterans Recruitment Appointments

5 C.F.R. § 307.101 Purpose

This part implements 38 U.S.C. 4214 and Executive Order 11521, which authorizes agencies to appoint qualified covered veterans to positions in the competitive service under Veterans Recruitment Appointments (VRAs) without regard to the competitive examining system.

5 C.F.R. § 307.103 Nature of VRAs

VRAs are excepted appointments, made without competition, to positions otherwise in the competitive service. The veterans' preference procedures of part 302 of this chapter apply when there are preference eligible candidates being considered for a VRA. *Qualified covered veterans* who were separated *under honorable conditions* may be appointed to any position in the competitive service at grade levels up to and including GS-11 or equivalent, provided they meet the qualification standards for the position. To be eligible for a VRA as a *covered veteran* under paragraph (2) or (3) of the definition of that term in § 307.102, the veteran must be in receipt of the appropriate campaign badge, expeditionary medal, or AFSM. For purposes of a VRA, any military service is qualifying at the GS-3 level or equivalent. Upon satisfactory completion of 2 years of substantially continuous service, the incumbent's VRA must be converted to a career or career conditional appointment. An individual may receive more than one VRA

appointment as long as the individual meets the definition of a *covered veteran* at the time of appointment.

Addendum B

Pertinent Provisions of the Collective Bargaining Agreement

Proposal 1:

When the Employer determines that a Competitive Service employee will be displaced by RIF, through Mock RIF2 or otherwise, the Employer will cross-reference all of the displaced Competitive Service employees experience brief job series with the job series held by the Employer. If a position encumbered by a probationary Excepted Service employee matches, in accordance with 5 CFR § 6.3, the Employer will change the probationary employee's position to a "Term" that will expire prior to the effective day of the applicable RIF, providing the Competitive Service employee has a higher Service Computation Date [(SCD)] than the probationary employee; the final RIF Retention Register [(RIF RR)] will include those vacated positions. These processes do not include temporary student positions identified in 5 CFR § 213.3202 and 5 CFR § 213.3102.

Proposal 2:

When the Employer determines to fill positions from an external source because of mission requirements, and after a notice of proposed RIF has been presented to the Union, unless the Employer shows to the Union that the particular position being filled will be a job series not affected by the RIF, no positions will be filled with the discretionary VRA appointments until after all of the RIFs are completed. All "Temporary" and "Term" positions will be included in the RIFs.