ORAL ARGUMENT SCHEDULED FOR JANUARY 16, 2014
Nos. 12-1457 & 13-1073

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

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
U.S. CUSTOMS AND BORDER PROTECTION,
Petitioner/Cross-respondent,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent/Cross-petitioner,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A DECISION OF THE FEDERAL LABOR RELATIONS AUTHORITY

CORRECTED 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/cross-respondent, United States Department of Homeland Security U.S. Customs and Border Protection; the respondent/cross-petitioner, the Federal Labor Relations Authority; and the intervenor, National Treasury Employees Union. There are no amici before this Court.

B. Ruling Under Review

The ruling under review is the Decision and Order of the Federal Labor Relations Authority in *National Treasury Employees Union (Union) and United States Department of Homeland Security U.S. Customs and Border Protection (Agency),* Case No. 0-NG-3073, issued on August 22, 2012, and reported at 66 FLRA (No. 165) 892. The Agency moved for reconsideration of the Authority's original decision, and the Authority denied that motion in an Order, issued on September 25, 2012, and reported at 66 FLRA (No. 184) 1028.

C. Related Cases

Respondent is not aware of any related cases.

/s/ Rosa M. Koppel
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GLOSSARY

Agency	United States Department of Homeland Security, U.S. Customs and Border Protection
Authority	Federal Labor Relations Authority
DHS	United States Department of Homeland Security
DHS-OIG	United States Department of Homeland Security, Office of the Inspector General
FLRA	Federal Labor Relations Authority
IG	Inspector General
IG Act	Inspector General Act of 1978, 5 U.S.C. § 1 *et seq.*
JA	Joint Appendix
NTEU	National Treasury Employees Union
PB	Brief of the Petitioner/Cross-Respondent United States Department of Homeland Security, U.S. Customs and Border Protection
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	National Treasury Employees Union

ORAL ARGUMENT NOT YET SCHEDULED

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STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on August 22, 2012. The Authority's decision is published at 66 FLRA (No. 165) 892. A copy of the

decision is included in the Joint Appendix ("JA") 104. 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 ISSUE

Whether the Authority reasonably and correctly concluded that the statutory independence of Inspectors General (IGs) under the Inspector General Act of 1978 ("IG Act") is not so absolute as to make illegal any and all collective-bargaining agreements affecting IG-investigation procedures.

STATEMENT OF THE CASE

When parties execute a collective-bargaining agreement under the Statute, the agency head has 30 days to review the agreement, and must approve it if it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." 5 U.S.C. § 7114(c)(2). If the agency head disapproves the agreement, then the union may appeal to the Authority. 5 U.S.C. § 7117(c); 5 C.F.R. § 2424.21(a)(2).

The U.S. Department of Homeland Security, U.S. Customs and Border Protection (Agency) and the National Treasury Employees Union (Union) renegotiated a term collective-bargaining agreement and submitted it for agency-

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

head review under § 7114(c) of the Statute. The agency head disapproved one of the agreement's provisions, finding it contrary to federal law. The Union appealed. The Authority found that the Agency failed to meet its burden of proving that the provision was contrary to law, and ordered the Agency to rescind its disapproval.

The Agency now seeks review, and the Authority cross-applies for enforcement, of the Authority's Decision and Order.

STATEMENT OF THE FACTS

A. Background

The Agency and the Union renegotiated a term collective-bargaining agreement and submitted it to the agency head for review under § 7114(c) of the Statute. The agency head disapproved one of the agreement's provisions, Article 22, Section 2. JA014. In the agency head's view, the provision improperly affected the investigation procedures of the Department of Homeland Security Office of Inspector General (DHS-OIG). *Id*. The Union appealed to the Authority. JA008-13.

Article 22, Section 2 provides that:

> An employee being interviewed by a representative of the Agency (e.g., Department of Homeland Security Office of Inspector General) in

> connection with either a criminal or non-criminal matter has certain entitlements/rights regardless of who is conducting the interview.

JA053.

The Union and the Agency agree that this provision is "intended to ensure that bargaining unit employees are afforded the full negotiated protections of Article 22 whenever they are interviewed regarding a criminal or noncriminal matter by any [Agency] representative . . . , regardless of the identity of the representative conducting the investigation." JA011. The sections of the provision that the Agency cited before the Authority include certain aspects of advance notice to the Union, the location of investigatory interviews, giving employees general information, and giving employees forms to sign and date. JA053-54. The Union and the Agency further agree that these IG-investigation procedures materially affect the conditions of employment of Agency employees. JA108 n.5.

B. The Authority's Decision

The Authority rejected the Agency's claim that the IG Act completely bars collective bargaining concerning IG-investigation procedures. JA108-09.

Before the Authority, the Agency made the same all-or-nothing argument it makes before this Court: that IGs have virtually absolute independence from their parent agencies under the IG Act, and that this alleged independence wholly invalidates any and all collective-bargaining agreements regarding the procedures

that IGs will follow when investigating employees, no matter what those agreements provide. JA104-05. The Agency's only support for this sweeping proposition was the United States Court of Appeals for the Fourth Circuit's decision in *U.S. Nuclear Regulatory Commission v. FLRA*, 25 F.3d 229 (4th Cir. 1994) ("*NRC*"). JA104-05.

The Authority rejected the Agency's argument. First, the Authority noted that, after *NRC*, the United States Supreme Court held that IG authority to conduct independent investigations under the IG Act is not absolute and may be limited by rights set forth in other laws, including § 7114(a)(2)(B) of the Statute, which provides the "*Weingarten*" right to representation for employees.[2] JA107 (citing *NASA v. FLRA*, 527 U.S. 229 (1999)).

Second, the Authority found that the right to bargain collectively under the Statute is just as weighty a right as the *Weingarten* right – and, in fact, is one of the Statute's primary purposes. JA107-08.

Third, the Authority found that the Statute sets forth specific limitations on the right to bargain collectively, including that parties may not reach unlawful agreements. JA108. But, applying well-established law, the Authority declined to

[2] Section 7114(a)(2)(B) was patterned after *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), in which the Supreme Court held that an employer's denial of an employee's request for union representation at an investigatory interview was an unfair labor practice under the National Labor Relations Act.

find an additional limitation, not set forth in the Statute, for IG-investigation procedures. JA108. So, taking its customary approach in legality-of-contract-provision cases, the Authority assessed whether the Agency had proven its claim that all agreed-upon IG-investigation procedures are unlawful, regardless of their terms. The Authority did so by reviewing the wording of both the Statute and the IG Act. JA108-09.

As for the Statute, the Authority found nothing in the Statute's plain wording to support the Agency's claim. JA108. The Authority also noted that Congress enacted the Statute only one day after the IG Act, without indicating that parties could not reach agreements about IG-investigation procedures. JA108.

As for the IG Act, the Authority noted that when Congress intends laws outside the Statute to preclude bargaining over subject matters, it makes that intent clear through statutory wording or legislative history. JA109. The Authority found that the Agency did not cite any wording or legislative history of the IG Act to support its sweeping claim. JA108. And the Authority found further that even though IGs have the legal authority to conduct "independent investigations," various authorities (including the Supreme Court) establish that there are limits on this authority. JA108-09. In addition, the Authority cited both the Supreme Court's holding that an agency's IG investigators are representatives of the agency

(here the Department of Homeland Security), JA109 n.7, and well-established precedent that one component of an agency can reach agreements involving matters within the control of a different component of the agency, JA109.

On these grounds, the Authority held that the Agency did not show that the IG Act bars all agreements concerning IG-investigation procedures. JA109.

Finally, the Authority considered whether the Agency met its burden – expressly adopted in the Authority's regulations – to prove that any of the fifteen individual sections (or the appendices) of the agreed-upon contract article conflicted with any specific sections of the IG Act. JA110-12. Noting that the Agency provided *no argument* as to how any specific contract provision was inconsistent with any specific section of the IG Act, the Authority concluded that the Agency did not meet this regulatory burden. JA111. The Authority additionally found that the Agency had waived its argument that the DHS-OIG could not be bound by a contract to which it was not a party, given that the Agency had not raised this argument until its reply brief. JA111-12. The Authority therefore ordered the Agency to rescind the agency head's disapproval. JA112.

The Authority subsequently denied the Agency's motion for reconsideration. JA135-36.

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). The scope of such review is narrow. *See, e.g., AFGE, 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 Authority is tasked with interpreting and administering its own Statute. *See BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Accordingly, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the Authority]." *Chevron*, 467 U.S. at 844. Along the same lines, when the Authority fills a gap in its authorizing statute through rulemaking, "the court must accept [the Authority's] position if it is based on a 'permissible' interpretation of the statute." *Menkes v. Dep't of Homeland Security*, 637 F.3d 319, 322-23 (D.C. Cir. 2011). And the Authority's

interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with" the regulations. *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 709 (D.C. Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)).

This negotiability appeal arises under § 7117(a)(1) of the Statute, which states that federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." Since Section 7117 is part of the Authority's enabling statute, this Court "owe[s] deference to the FLRA's interpretation of the kind of inconsistency contemplated by 5 U.S.C. § 7117(a)(1)." *NTEU v. FLRA*, 30 F.3d 1510, 1515 (D.C. Cir. 1994). *See also BATF*, 464 U.S. at 97.

Since the FLRA does not administer the IG Act, however, that deference does not extend to the Authority's interpretation of what the IG Act does and does not require. *See, e.g., OPM v. FLRA*, 864 F.2d 165, 171 (D.C. Cir. 1988). But the Agency also does not administer the IG Act. Thus, this Court owes no deference to the Agency's interpretation of that statute either.

SUMMARY OF ARGUMENT

When the Authority rejected the Agency's claim that an IG's independence under the IG Act renders illegal any and all collective-bargaining agreements

concerning IG-investigation procedures, the Authority correctly and reasonably rejected the Agency's only basis for its all-or-nothing approach: the Fourth Circuit's decision in *NRC v. FLRA*, 25 F.3d 229 (4th Cir. 1994). The Authority properly concluded that the Agency's claim was negated by the Supreme Court's (post-*NRC*) holding in *NASA v. FLRA*, 527 U.S. 229 (1999), that IG independence already is constrained by employees' *Weingarten* right under the Statute. The Authority held that employees' right under the Statute to bargain collectively over conditions of employment was just as weighty as their *Weingarten* right and, as a result, agreements reached through collective bargaining also could constrain IG independence, absent a demonstration that a specific negotiated provision conflicted with a particular section of the IG Act.

Having properly rejected the Agency's *NRC* claim, the Authority provided a correctly reasoned, point-by-point analysis of why the Agency failed to establish that all agreed-upon IG-investigation procedures are necessarily contrary to law under the grounds set forth in the Statute and recognized by this Court. The Authority examined both the Statute and the IG Act and correctly found nothing in the plain wording or legislative history of either to support the Agency's claim. With regard to the IG Act in particular, the Authority noted that when Congress intends laws outside the Statute to preclude bargaining over subject matters, it

makes that intent clear in ways that are not present in this case. And the Authority also noted that Congress enacted the Statute only one day after the IG Act, without any indication that parties could not reach agreements about IG-investigation procedures. As for IGs' independence, the Authority properly found that various authorities, including the Supreme Court, establish that there are limits on that independence. In addition, the Authority reasonably cited and relied on well-established precedent that one component of an agency can reach collective-bargaining agreements involving matters within the control of a different component of the same agency.

In sum, the Authority correctly and reasonably rejected the Agency's claim that any and all collectively bargained IG-investigation procedures – no matter what they provide – are illegal. And applying its regulations that establish parties' burdens in cases like these, the Authority reasonably concluded that the Agency failed to meet its burden of establishing that any individual section (or any of the appendices) of the agreed-upon contract provision conflicted with any specific section of the IG Act. Indeed, the Authority noted that the Agency provided no argument in this regard.

The Agency's arguments before this Court do not demonstrate that the Authority erred. And several of those arguments are not properly before this Court

because they either were not raised, or not timely raised, to the Authority. Accordingly, the Court should deny the petition for review and grant the Authority's cross-application for enforcement.

ARGUMENT

THE AUTHORITY REASONABLY AND CORRECTLY CONCLUDED THAT THE STATUTORY INDEPENDENCE OF IGs UNDER THE IG ACT IS NOT SO ABSOLUTE AS TO MAKE ILLEGAL ANY AND ALL COLLECTIVE-BARGAINING AGREEMENTS AFFECTING IG-INVESTIGATION PROCEDURES

A. The Supreme Court's Decision in *NASA* Contradicts the Agency's Claim that IGs' Independence From Their Parent Agencies Is Virtually Absolute

The Agency's claim that the IG Act wholly invalidates any and all collective-bargaining agreements affecting IG-investigation procedures is based on the claim that IGs' independence from their parent agencies is virtually absolute. The Supreme Court's decision in *NASA v. FLRA*, 527 U.S. 229 (1999), contradicts the Agency's claim.

The *NASA* Court acknowledged that IGs "enjoy a great deal of autonomy." *NASA*, 527 U.S. at 230. But it was the interdependence between IGs and their parent agencies, not IGs' independence from their parents, that drove the Court's decision.

The Court focused on the expectation and importance of "honest cooperation between an IG and management-level agency personnel" in IG investigatory matters. *Id.* at 242. Cooperation can be expected, in the Court's view, because an IG and its parent agency often have a joint interest in the IG's conduct of an investigation. *Id.*; s*ee also* S. Rep. No. 95-1071, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2684 (envisioning a "close" and "smooth working relationship" between an IG and its parent agency).

And cooperation is important, the Court found, because the IG Act limits IGs' authority over matters that have a practical impact on IGs' effective conduct of their operations. *See NASA*, 527 U.S. at 242. The IG Act fails to grant several investigative powers to IGs, including the authority to seize agency property, wiretap telecommunications devices, or otherwise intercede in agency affairs. *See id.* at 238-39. And the IG Act does not grant IGs the independent power to conduct compulsory employee interviews: "There may be other incentives for employee cooperation with OIG investigations, but formal sanctions for refusing to submit to an interview cannot be pursued by the OIG alone." *Id.* at 242. Thus, if an IG commands an employee to appear for an investigatory interview, then the IG must invoke the power of agency management, not the IG's "independent" authority under the IG Act. *Id.*

Accordingly, rather than being almost entirely independent of the parent agency, IG investigators are "unquestionably 'representatives' of [the agency] when acting within the scope of their employment." *Id.* at 240. "[U]nlike the jurisdiction of many law enforcement agencies, an OIG's investigative office is performed with regard to, and on behalf of, the particular agency in which it is stationed." *Id.* Specifically, IG investigators are "employed by, act on behalf of, and operate for the benefit of [the agency]." *Id.* at 241. Consequently, the Court rejected the claim that the IG Act confers virtually absolute independence on IGs.

The Supreme Court's decision in *NASA* requires rejecting the Agency's claim of unfettered IG independence in the instant case. Employees' right to bargain is at least as weighty as their "*Weingarten*" right under § 7114(a)(2)(B) of the Statute, whose application the Court upheld: both rights derive from explicit provisions of the (same) Statute.[3] It follows that, just as the "independence" granted IGs by the IG Act is insufficient to nullify employees' § 7114(a)(2)(B) right, *see NASA*, 527 U.S. at 243, so too is that independence insufficient to nullify their right to bargain collectively over conditions of their employment. Thus, IGs'

[3] *See NASA*, 527 U.S. at 237 (finding that Congress gave "specific endorsement of a Government employee's right to union representation by incorporating it in the text of the [Statute]").

"independence" is not a basis for wholly invalidating any and all collective-bargaining agreements affecting IG-investigation procedures.

The Agency objects (PB 13) to *NASA*'s applicability, claiming that the *NASA* Court "expressly limited" its holding that the IG is a "representative of the agency" to § 7114(a)(2)(B) of the Statute. The Agency claims that the Authority therefore erred by relying on *NASA*.

The Agency's objection misses the point. The disputed contract provision in this case concerns how DHS-OIG investigators will act when they conduct *Weingarten* interviews. *NASA* clearly held that, when conducting such interviews, IG investigators are "representatives of the agency." 527 U.S. at 231, 237. And while the Supreme Court did not expressly address whether parties could engage in collective bargaining over IG-investigation procedures, 527 U.S. at 244 n.8 – a point that the Authority expressly acknowledged in its underlying decision in this case, JA107 – the Court also gave no indication that *only* the Statute's *Weingarten* provision can limit IGs' independence. Instead, *NASA* supports the proposition that the Statute limits the IGs' authority under the IG Act, which negates the Agency's claim in this case that IGs' authority is unfettered. This Court should therefore reject the Agency's cramped reading of *NASA*.

And, for the same reasons, this Court should decline to follow the Fourth Circuit's decision in *NRC*, to the extent that it stands for the proposition that all collective bargaining over IG-investigation procedures is unlawful. The Fourth Circuit's decision relied upon the same sweeping idea of IG independence that the *NASA* Court rejected. *Compare NRC*, 25 F.3d at 234, *with NASA*, 527 U.S. at 240-43. The Fourth Circuit also failed to acknowledge that IGs do not possess the authority to independently conduct compulsory employee interviews. The Authority correctly declined to adopt the Fourth Circuit's reasoning in *NRC*, concluding that *NASA* had vitiated the Fourth's Circuit's analysis. JA106. This Court should do the same.[4]

B. The Authority Reasonably and Correctly Found that the Agency Failed To Demonstrate that the Statute or the IG Act Bars Any and All Agreements Regarding IG-Investigation Procedures

The Authority examined the Statute and the provision of the IG Act cited by the Agency, seeking any indication that Congress intended to entirely preclude collective bargaining over IG-investigation procedures. JA108-09. The Authority found none and rejected the Agency's claim. *Id*. On appeal, the Agency challenges this finding (PB 16-30), arguing that the "independence" granted by the IG Act renders the results of any collective bargaining illegal. But the Supreme

[4] The *NRC* Court also misapprehended the import of § 7112(b)(7) of the Statute, which is discussed further *infra*, *see* pp. 28-30.

Court's decision in *NASA*, and the Agency's failure to cite any provisions of the Statute or the IG Act that support its argument, require rejecting that argument. The Authority's decision should be enforced.

1. The Agency Has Not Proven that All Agreements Regarding IG-Investigation Procedures Are Inconsistent with the Statute

The Authority examined the Statute for indications that Congress intended to completely preclude collective bargaining over all IG-investigation procedures. It found none. JA108. Quoting this Court's decision in *Library of Congress*, the Authority noted that the Statute "impos[es] a broadly defined duty to bargain over conditions of employment that is only subject to the express statutory exceptions." JA108 (quoting *Library of Congress v. FLRA*, 699 F.2d 1280, 1285 (D.C. Cir. 1983)). And the Authority found that these express statutory exceptions did not mention IG-investigation procedures, even though Congress passed the Statute one day after it enacted the IG Act, and clearly could have included such an additional exception. JA108. The Authority concluded that "Congress did not give any indication in the Statute that IG-investigation procedures should receive special treatment and be excluded from the scope of bargaining." *Id*.

Further, the Authority noted the Supreme Court's holding in *NASA* that DHS-OIG's investigators are "representatives" of DHS, JA109 n.7, and applied well-established Authority precedent – not challenged, or even discussed, by the

Agency in its Statement of Position – regarding one component of an agency's ability to bargain over conditions of employment, even when the power to establish those conditions lies in another component of the same agency, JA109. Applying this unchallenged precedent, the Authority found that because both the Agency and DHS-OIG are components of DHS, the Agency was obligated to bargain over conditions of employment that allegedly were controlled by DHS-OIG – and there was no basis for finding the result of such bargaining unlawful merely because DHS-OIG allegedly had such control. *Id*.

Before this Court, the Agency still fails to cite any sections of the Statute that support either carving out a special category – IG-investigation procedures – from the statutory duty to bargain, or finding that the fruits of such bargaining always are unlawful. Further, as stated above, to the extent that the Authority's decision is based on an interpretation of the Statute, that interpretation is entitled to deference under *Chevron*. *See BATF*, 464 U.S. at 97; *Ass'n of Civilian Techs.*, 22 F.3d at 1153 (citing *Chevron, U.S.A.*, 467 U.S. at 842-43).

2. The Agency Has Not Proven that All Agreements Regarding IG-Investigation Procedures Are Inconsistent with the IG Act

The Authority also correctly found that collective bargaining over IG-investigation procedures is not "inconsistent" with the IG Act. 5 U.S.C. § 7117(a)(1).

Citing both its own precedent and the precedent of this Court, the Authority noted that when Congress has intended to completely preclude bargaining over subject matters, it has made that intent clear, either through statutory text or legislative history. JA108. For example, this Court has found bargaining precluded where federal statutes granted an agency the power to prescribe the hours of duty for technicians "[n]otwithstanding . . . any other provision of law," *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1401 (D.C. Cir. 1988); the sole authority to determine employees' conditions of employment "[n]otwithstanding any law," *Colo. Nurses Ass'n v. FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988); and the right to determine employee compensation "without regard to the provisions of other laws applicable to officers or employees of the United States," *AFGE, Local 3295 v. FLRA*, 46 F.3d 73, 75 (D.C. Cir. 1995).

The Authority found that the Agency did not cite any similar wording in the IG Act or its legislative history. JA108. The only provision of the IG Act that the

Agency cited to the Authority – and, even then, cited only indirectly, see JA041[5] – was § 6(a)(2). Section 6(a)(2) empowers IGs "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the [IG], necessary or desirable." 5 U.S.C. App. 3 § 6(a)(2). The Agency claims (PB 16-27) that § 6(a)(2) gives IGs the power to conduct "independent" investigations, and this power impliedly renders all collective bargaining over IG-investigation procedures "inconsistent" with the IG Act.

But the wording of § 6(a)(2) says nothing about IGs' ability to conduct their investigations without regard to other laws, such as the Statute. This wording does not purport to vest IGs with a prerogative so independent that it nullifies all other federal laws. The Agency's claim vastly overstates the independence granted IGs by that section.

Given the Agency's failure to cite any statutory wording or legislative history of the IG Act that entirely precludes bargaining over IG-investigation procedures, the Authority correctly rejected the Agency's all-or-nothing argument.

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[5] The Agency cited § 6(a)(2) only indirectly; the Authority assumed *arguendo* that the Agency had properly raised the section. JA111.

Further, the Supreme Court's decision in *NASA* forecloses the Agency's interpretation of § 6(a)(2). As discussed above,[6] the Supreme Court held that IGs' independence is not absolute: IGs work with, under, and for agency management, and they cannot perform certain investigatory acts independently, including conducting compulsory employee interviews. *NASA*, 527 U.S. at 240-42. Therefore, IGs' power to conduct investigations is not per se "inconsistent" with all collective-bargaining agreements that their agencies enter into regarding the procedures to be followed in such investigations.

The Agency's strained interpretation of the IG Act leads to a paradoxical result. As noted, among other powers that Congress declined to give to IGs, Congress did not grant IGs the power to conduct compulsory employee interviews – the subject matter of the disputed provision. *See NASA*, 527 U.S. at 242. The interpretation of the IG Act urged by the Agency therefore would have the paradoxical result of granting IGs unfettered control over employee interviews that the IG Act does not even empower IGs to perform. This is untenable as a matter of statutory construction.

In sum, the Authority correctly found that the Agency failed to cite any provisions of the Statute or the IG Act indicating that Congress intended to bar all

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[6] *See* pp. 12-16, *supra.*

collective bargaining over IG-investigation procedures. The Agency urges a sweeping interpretation of the "independence" conferred by § 6(a)(2) that the Supreme Court has already rejected. The Agency thus falls well short of demonstrating that § 6(a)(2) preempts the "important bargaining rights" that Congress gave federal employees, *Library of Congress*, 699 F.2d at 1289, or that the results of such bargaining are necessarily unlawful merely because they concern IG-investigation procedures. The Authority's decision so finding should be enforced.

C. The Agency's Remaining Contentions Were Not Raised Before the Authority; § 7123(c) of the Statute Therefore Bars this Court from Considering Them

The Agency raises several additional contentions, arguing that collective bargaining over IG procedures is prohibited by (1) additional sections of the IG Act besides § 6(a)(2) (PB 17-22); (2) subsequent statutory amendments to the IG Act (PB at 22-26); and (3) § 7112(b)(7) of the Statute (PB 5-6, 14, 30). The Agency failed to raise any of these contentions in its submissions to the Authority. Section 7123(c) of the Statute therefore bars this Court from considering them.

Under § 7123(c) of the Statute, "[n]o objection that has not been urged before the Authority . . . shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

5 U.S.C. § 7123(c). And as this Court has held, such "extraordinary circumstances" must truly be "extraordinary":

> With certain inapplicable exceptions, we have only found they exist when the newly raised arguments implicate constitutional issues like "separation of powers," or "sovereign immunity." And we have consistently found they do *not* exist when, as here, the new argument is based on statutory inconsistency alone.

U.S. Dep't of the Air Force v. FLRA, 680 F.3d 826, 829-30 (D.C. Cir. 2012) ("*U.S.A.F.*").

As discussed below, the Agency has failed to identify "extraordinary circumstances" excusing its failure to raise any of these contentions before the Authority. Pursuant to § 7123(c), those contentions are accordingly not cognizable in this proceeding.

1. The Agency Failed To Properly Urge Before the Authority Any Argument Based Upon Sections of the IG Act Besides § 6(a)(2); § 7123(c) of the Statute Therefore Bars this Court from Considering Them

The Agency's submissions to the Authority did not identify, much less discuss, any section of the IG Act besides § 6(a)(2). JA037-43, 081-91, 116-22.

The Agency has identified no "extraordinary circumstances" excusing its failure to discuss these portions of the IG Act in its submissions to the Authority, and in fact no such circumstances exist. The issue before this Court concerns an

alleged inconsistency between the IG Act and the parties' collective-bargaining provision. There is no constitutional dimension whatsoever. *See U.S.A.F.*, 680 F.3d at 829-30. Section 7123(c) therefore bars the Court from considering the Agency's arguments based upon sections of the IG Act besides § 6(a)(2).

The Agency attempts to avoid this result by arguing (PB 31) that, even though its submission to the Authority did not mention or identify any section of the IG Act besides § 6(a)(2), its citation to a portion of the Fourth Circuit's decision in *NRC* "put the Authority on notice" of the entirety of the analysis in that opinion.

The Authority's negotiability regulations foreclose this dubious argument. These regulations require that the Agency's initial Statement of Position ("SOP") "set forth in full the agency's position on any matters relevant to the petition it wishes the Authority to consider . . . , including . . . specific citation to any law, rule, regulation, section of a collective[-]bargaining agreement, or other authority relied on by the agency." 5 C.F.R. § 2424.24(c)(2). *See also id.* § 2424.24(a). The same regulations warn that "failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument." 5 C.F.R. § 2424.32(c)(1). *See also NLRB v. FLRA*, 313 Fed. App'x 328, 329 (D.C. Cir. 2009) (citing 5 C.F.R. § 2424.32(c)(1)). As the Authority discussed in its decision

in this case, these regulations were amended in 1999 in order to "set forth the parties' burdens and la[y] out the consequences for failing to satisfy those burdens." JA110. And the Authority has determined that "agencies fail to meet their regulatory burden when they merely cite a law or regulations without explaining how a particular proposal or provision conflicts with that law or regulation." *Id.* (collecting cases).

The Agency does not challenge these regulations, and they are entitled to deference under *Chevron*.[7] And to the extent that the Agency's argument – that its citation to *NRC* sufficiently raised any of the sections of the IG Act cited in that court decision – challenges the Authority's interpretation of the Agency's burdens under the Authority's regulations, that challenge fails. In this regard, as stated previously, the Authority's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with" the regulations. *Blackmon-Malloy*, 575 F.3d at 709 (quoting *Auer*, 519 U.S. at 461). The Agency does not explain

[7] In promulgating these regulations, the Authority reasonably exercised its rulemaking power under the Statute. The Statute empowers the Authority to hear and decide negotiability disputes but leaves largely unspecified the procedures to be followed in such proceedings. *See generally* 5 U.S.C. § 7117(c). The regulations promulgated by the Authority provide those procedural specifics while remaining fully consistent with the text of the Statute. As such, the regulations constitute "a reasonable choice within a gap left open by Congress," owed deference under *Chevron*. *Chevron, U.S.A.*, 467 U.S. at 866. *See also Menkes v. Dep't of Homeland Security*, 637 F.3d 319, 322-23 (D.C. Cir. 2011).

how – or even assert that – the Authority's interpretation is deficient under this standard.

Relying on its regulations, the Authority determined that the Agency had waived any argument based on sections of the IG Act besides § 6(a)(2).[8] This reasonable interpretation by the Authority of its own regulations – which clearly require that the Agency provide "specific citation to any law, rule, regulation . . . or other authority relied on by the agency," 5 C.F.R. § 2424.24(c)(2) – is owed deference by the Court. *See, e.g., Blackmon-Malloy*, 575 F.3d at 709.

The Agency also makes an argument (PB 33) that the Authority found untimely raised below: specifically, that the IG cannot be bound by a collective-bargaining agreement that the Agency had no authority to negotiate on the IG's behalf. The Authority noted that the Agency argued, for the first time in its reply – rather than in its SOP, as the Authority's regulations required it to do, 5 C.F.R. § 2424.24(c)(2) – that the DHS-OIG cannot be bound to a contract to which it is not a party. JA111-12.[9] *See also* 5 C.F.R. §2424.26(c) (an agency reply "is specifically limited to the matters raised for the first time in the exclusive

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[8] As noted above, the Agency cited § 6(a)(2) only indirectly; the Authority assumed *arguendo* that the Agency had properly raised the section. JA111.

[9] The Authority also found (JA112 n.11) that, even assuming the claim was properly raised, it lacked merit for some of the reasons discussed earlier in this brief. *See* pp. 17-18, *supra*.

representative's response"). Although the Agency claims (PB 33) that the Authority "misunderstands" the point of the Agency's argument, the Agency does not dispute that it did not raise this specific argument until its reply. And, as stated above, the Authority's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with" the regulations. *Blackmon-Malloy*, 575 F.3d at 709. The Court should not allow the Agency to circumvent the Authority's clear regulatory requirements by raising this claim on appeal.

Further, assuming *arguendo* that DHS-OIG did not participate in collective bargaining – a claim that is unsupported by the record – nothing prevented the Agency and DHS-OIG from conferring during the course of collective-bargaining negotiations and jointly considering the Union's proposals.[10] Such circumstances do not excuse the Agency's failure to timely raise these arguments before the Authority and do not constitute "extraordinary circumstances." Therefore, in addition to the deference that the Authority should receive in interpreting its own regulations, § 7123(c) of the Statute bars this Court from considering the Agency's arguments.

[10] That nothing prevents the Agency and DHS-OIG from conferring is further demonstrated by their collaboration on the petitioner's brief. *See* PB at 2 n.1.

2. Section 7123(c) Similarly Bars this Court from Considering Subsequent Amendments to the IG Act that the Agency Did Not Identify or Discuss When It Was Before the Authority

Before this Court, the Agency also cites (PB 22-26) several statutory amendments to the IG Act that the Agency neither discussed nor identified in its submissions to the Authority. JA037-43, 081-91, 116-22. The Agency presents no explanation for its failure to raise these amendments before the Authority. Section 7123(c) therefore bars this Court from considering the Agency's arguments based on them.

3. This Court Lacks the Jurisdiction To Consider the Agency's Argument Based Upon § 7112(b)(7) of the Statute, Which the Agency Never Presented to the Authority; In Any Event, the Agency's Argument Lacks Merit

The Agency contends (PB 5-6, 14, 30) that § 7112(b)(7) of the Statute categorically precludes collective bargaining over IG-investigation procedures.

Once again, § 7123(c) bars the Court from considering this argument. Before the Authority, the Agency relied solely on the IG Act in arguing that collective bargaining over IG-investigation procedures is per se prohibited. JA037-45, 081-91, 116-22. And the Agency has presented no explanation to justify its failure to present any argument concerning § 7112(b)(7) to the Authority.

In any event, the Agency's argument fundamentally misapprehends the scope and purpose of § 7112 of the Statute, which establishes the Authority's

power to recognize units of employees appropriate for collective bargaining, and, as relevant here, identifies certain specific criteria that render units per se inappropriate for bargaining. Among the units considered per se inappropriate are units that include employees performing audit and investigative functions for their agency.[11] As § 7112(b)(7) precludes such employees from being included in bargaining units, they are effectively unable to engage in collective bargaining.

The Agency's logic is confused, at best. That IG employees may not be included in an appropriate unit, *see U.S. Dep't of Justice v. FLRA*, 39 F.3d 361, 365 n.5 (D.C. Cir. 1995), does not mean that IG employees cannot be required to comply with the result of the collective bargaining of *others*. To the contrary, many employees can be, and are (every day), affected by collective bargaining even though they may not be included in collective-bargaining units themselves. For example, § 7112(b)(1) precludes managers and supervisors from forming part of any collective-bargaining unit. Nevertheless, it is both obvious and natural that collective-bargaining agreements covering the employees they oversee will constrain the discretion that these managers and supervisors otherwise would

[11] 5 U.S.C. § 7112(b)(7) ("A unit shall not be determined to be appropriate . . . if it includes . . . any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.").

enjoy. As an example, a collective-bargaining agreement concerning promotion or transfer procedures will dictate procedures to the managers and supervisors who implement such promotions and transfers.

Thus, § 7123(c) of the Statute precludes this Court from considering the Agency's § 7112(b)(7) argument. But even if the Court were to consider that argument, the Agency illogically construes § 7112(b)(7), and the argument fails.

CONCLUSION

The Agency has not demonstrated that *all* collective bargaining over IG-investigation procedures is unlawful, or that the Authority erred in finding that the Agency failed to meet its regulatory burden to demonstrate otherwise. The Agency's petition for review should therefore be denied, and the Authority's petition for enforcement should be granted.

Respectfully submitted,

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May 10, 2013

CERTIFICATE OF COMPLIANCE

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 6,159 words excluding exempt material.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December 2013, I caused eight (8) hard copies of the foregoing Corrected 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

Relevant Statutes and Regulations

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§ 7105. Powers and duties of the Authority

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

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

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

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

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

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

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

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

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

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

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

§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes--

(1) except as provided under section 7135(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization--

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 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.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges

that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 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.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

§ 2424.21. Time limits for filing a petition for review.

(a) A petition for review must be filed within fifteen (15) days after the date of service of either:

(1) An agency's written allegation that the exclusive representative's proposal is not within the duty to bargain, or

(2) An agency head's disapproval of a provision.

(b) If the agency has not served a written allegation on the exclusive representative within ten (10) days after the agency's principal bargaining representative has received a written request for such allegation, as provided in § 2424.11(a), then the petition may be filed at any time.

5 C.F.R. § 2424.24 -Agency's statement of position; purpose; time limits; content; severance; service

(a) Purpose. The purpose of an agency statement of position is to inform the Authority and the exclusive representative why a proposal or provision is not within the duty to bargain or contrary to law, respectively. As more fully explained in paragraph (c) of this section, the agency is required in the statement of position to, among other things, set forth its understanding of the proposal or provision, state any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's petition for review, and supply all arguments and authorities in support of its position.

(b) Time limit for filing. Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, the agency must file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review.

(c) Content. The agency's statement of position must be on a form provided by the Authority for that purpose, or in a substantially similar format. It must be dated and must:

(i) The allegation that the duty to bargain in good faith does not extend to the exclusive representative's proposal, or

(ii) The disapproval of the provision under 5 U.S.C. 7114(c); or

(2) Set forth in full the agency's position on any matters relevant to the petition that it wishes the Authority to consider in reaching its decision, including a statement of the arguments and authorities supporting any bargaining obligation or negotiability claims, any disagreement with claims made by the exclusive representative in the petition for review, specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority relied on by the agency, and a copy of any such material that is not easily available to the Authority. The statement of position must also include the following:

(i) If different from the exclusive representative's position, an explanation of the meaning the agency attributes to the proposal or provision and the reasons for disagreeing with the exclusive representative's explanation of meaning;

(ii) If different from the exclusive representative's position, an explanation of how the proposal or provision would work, and the reasons for disagreeing with the exclusive representative's explanation;

(3) A statement as to whether the proposal or provision is also involved in an unfair labor practice charge under part 2423 of this subchapter, a grievance pursuant to the parties' negotiated grievance procedure, or an impasse procedure under part 2470 of this subchapter, and whether any other petition for review has been filed concerning a proposal or provision arising from the same bargaining or the same agency head review; and

(4) Any request for a hearing before the Authority and the reasons supporting such request.

(d) Severance. If the exclusive representative has requested severance in the petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) Service. A copy of the agency's statement of position, including all attachments, must be served in accord with § 2424.2(g).

§ 2424.26. Agency's reply; purpose; time limits; content; service.

(a) Purpose. The purpose of the agency's reply is to inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative's response. As more fully explained in paragraph (c) of this section, the Agency is required in the reply to, among other things, provide the reasons why the proposal or provision does not fit within any exceptions to management rights that were asserted by the exclusive representative in its response, and to explain why severance of the proposal or provision is not appropriate.

(b) Time limit for filing. Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) days after the date the agency receives a copy of the exclusive representative's response to the agency's statement of position, the agency may file a reply.

(c) Content. You must file your reply on a form that the Authority has provided for that purpose, or in a substantially similar format. You meet this requirement if you file your reply electronically through use of the eFiling system on the FLRA's Web site at www.flra.gov. That Web site also provides copies of reply forms. You must limit your reply to matters that the exclusive representative raised for the first time in its response. Your reply must: State the arguments and authorities supporting your position; cite with specificity any law, rule, regulation, section of a collective bargaining agreement, or other authority that you rely on; and provide a copy of any material that the Authority may not easily access (which you may upload as attachments if you file your reply electronically through use of the FLRA's eFiling system). You must date your reply, unless you file it electronically through use of the FLRA's eFiling system. And, regardless of how you file your reply, you must ensure that it includes the following:

(1) Any disagreement with the exclusive representative's assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter included in section 7106(b)(1) of the Federal Service Labor–Management Relations Statute;

(ii) Whether and why the proposal or provision does not constitute a negotiable procedure as set forth in section 7106(b)(2) of the Federal Service Labor–Management Relations Statute;

(iii) Whether and why the proposal or provision does not constitute an appropriate arrangement as set forth in section 7106(b)(3) of the Federal Service Labor–Management Relations Statute;

(iv) Whether and why the proposal or provision does not enforce an “applicable law,” within the meaning of section 7106(a)(2) of the Federal Service Labor–Management Relations Statute; and

(2) Any arguments in reply to an exclusive representative's allegation in its response that agency rules or regulations relied on in the agency's statement of position violate applicable law, rule, regulation or appropriate authority outside the agency; that the rules or regulations were not issued by the agency or by any primary national subdivision of the agency, or otherwise are not applicable to bar negotiations under 5 U.S.C. 7117(a)(3); or that no compelling need exists for the rules or regulations to bar negotiations.

(d) Severance. If the exclusive representative requests severance for the first time in its response, or if the request for severance in an exclusive representative's response differs from the request in its petition for review, and if the agency opposes the exclusive representative's request for severance, then the agency must explain with specificity why severance is not appropriate.

(e) Service. A copy of the agency's reply, including all attachments, must be served in accord with § 2424.2(g).

5 C.F.R. § 2424.32. Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.

(a) Responsibilities of the exclusive representative. The exclusive representative has the burden of raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency's election, or not contrary to law, respectively, and, where applicable, why severance is appropriate.

(b) Responsibilities of the agency. The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively, and, where applicable, why severance is not appropriate.

(c) Failure to raise, support, and respond to arguments.

(1) Failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument. Absent good cause:

(i) Arguments that could have been but were not raised by an exclusive representative in the petition for review, or made in its response to the agency's statement of position, may not be made in this or any other proceeding; and

(ii) Arguments that could have been but were not raised by an agency in the statement of position, or made in its reply to the exclusive representative's response, may not be raised in this or any other proceeding.

(2) Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.

(d) Failure to participate in conferences; failure to respond to Authority orders. Where a party fails to participate in a post-petition conference pursuant to § 2424.23, a direction or proceeding under § 2424.31, or otherwise fails to provide timely or responsive information pursuant to an Authority order, including an Authority procedural order directing the correction of technical deficiencies in filing, the Authority may, in addition to those actions set forth in paragraph (c) of this section, take any other action that, in the Authority's discretion, is deemed appropriate, including dismissal of the petition for review, with or without prejudice to the exclusive representative's refiling of the petition for review, and

granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c), with or without conditions.