ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1148

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

NATIONAL TREASURY EMPLOYEES UNION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the U.S. Department of Agriculture Food and Nutrition Service and the National Treasury Employees Union (the "Union"). In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. Ruling Under Review

The Union seeks review of the Authority's decision in *National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service*, 71 FLRA (No. 113) 703 (April 21, 2020) (Member DuBester dissenting in part).

C. Related Cases

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

/s/ Noah Peters
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GLOSSARY OF ABBREVIATIONS

Agency	U.S. Department of Agriculture, Food and Nutrition Services
Authority	Respondent, the Federal Labor Relations Authority
Pet'r Br.	Petitioner's opening brief
CBA	Collective bargaining agreement
Decision	The decision of the Authority in this case, *National Treasury Employees Union and U.S. Department of Agriculture, Food and Nutrition Service*, 71 FLRA (No. 113) 703 (April 21, 2020) (Member DuBester dissenting in part).
JA	The Joint Appendix
NTEU	Petitioner, the National Treasury Employees Union
The Proposal	The Union's proposal to expand Article 20 of the parties' CBA
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Union	Petitioner, the National Treasury Employees Union

INTRODUCTION

The underlying decision of the Federal Labor Relations Authority ("Authority")[1] is based on a simple and sound conclusion: A contractual provision that allows employees to telework four days a week affects the ability of managers to set those employees' work schedules and supervise those employees. Under the proposal at issue in this case, a manager who wishes to schedule employees for telework less than four days a week, or who prefers to supervise employees using non-virtual methods such as drop-ins and spot checks, would face a gauntlet of employee grievances and arbitrations. (JA 227-28, JA 232-33). That is because the proposal requires that four-days-a-week telework not be "unreasonably denied" to what the proposal deems "eligible employees," and the determination as to whether a manager's preference for in-person supervision is "reasonable" would be left to grievance arbitrators. (JA 228.)

The Authority rationally concluded that, in "dictat[ing] to management how often the Agency can require an employee to perform work at the duty station," the Union's "proposal effectively (1) *requires* management to employ computer- and telephone-based supervision techniques and, correspondingly, (2) *precludes* management from regularly using in-person methods of supervision, such as

[1] *Nat'l Treasury Emps. Union and U.S. Dep't of Agric., Food and Nutrition Serv.*, 71 FLRA (No. 133) 703, 703 (2020) (Member DuBester dissenting in part) (the "Decision"), which is in the Joint Appendix ("JA") at 226-40.

unannounced visits or spot checks." (JA 232 (emphasis in original).) In light of this conclusion, the Authority reasonably determined that the proposal affected management's right to assign work and direct employees.

In its brief, the National Treasury Employees Union (the "Union") finely slices the Authority's Decision, attempting to create contradictions where none exist. When the actual language of the Decision is considered, however, those supposed contradictions disappear. For example, the Union's claim that the Authority has misinterpreted the proposal is illusory. In reality, the Authority's understanding of the meaning of the proposal is the same as the Union's, only the Authority's conclusion concerning the practical results of that proposal is different.

Moreover, notwithstanding the Union's arguments (Pet'r Br. 30-39), Authority precedent as to whether telework proposals affect management's rights to assign work and direct employees is decidedly mixed. *Compare Nat'l Treasury Emps. Union, Chapter 6*, 1 FLRA 896, 901 (1979) (affirming that the management right to assign work includes the right to determine where employees perform work, and noting that "the union tacitly concedes that the existence and continuation of this practice [of allowing employees to work from home] is a matter solely reserved for management's discretion."), *Am. Fed'n of Gov't Emps., Local 1712*, 62 FLRA 15, 17 (2007) ("proposals that, in effect, preclude management from auditing employees' work by the use of unannounced visits and spot checking of employees' work directly affect management's right to direct employees" and are not negotiable), *and Prof'l Airways*

Sys. Specialists, 59 FLRA 485, 487-88 (2003) (proposal that would allow employees to take work home to complete was nonnegotiable); *with Food & Drug Admin.*, 59 FLRA 679 (2004) (suggesting that telework schedules are negotiable). To the extent that the Authority did change its interpretation of the Statute in the instant case, the Authority acknowledged the departure and explained that it did so in light of its conflicting precedent and its conclusion that the telework proposal in this case affected management's right to determine when work assignments will occur and how work will be supervised. (JA 231-33.)

That is all that was required of the Authority under this Court's precedent, which allows agencies to amend their interpretations of their enabling statutes so long as they provide adequate explanations for doing so. *Nat'l Fed'n of Fed. Emps. v. FLRA*, 369 F.3d 548, 553 (D.C. Cir. 2004). This Court has also recognized that the management rights provision of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute") is broad in its scope and encompasses proposals, like that at issue here, that limit a supervisor's ability to decide where work will occur and how that work will be supervised. *See Nat'l Fed'n of Fed. Emps., Local 615 v. FLRA*, 801 F.2d 477, 481 (D.C. Cir. 1986) ("A proposal is . . . nonnegotiable if it determines *whether* [management rights] may be exercised," as the Statute's goal is to "leav[e] management in substantial control of those matters denominated 'management rights.'") (emphasis in original).

Similarly unavailing is the Union's argument that the Authority inappropriately considered whether its proposal affected the right of the U.S. Department of Agriculture, Food and Nutrition Service (the "Agency") to direct its employees (Pet'r Br. 19-24). That is because the Agency substantively raised the issue of whether the proposal affected management's right to direct employees, a right this Court has found to be "co-extensive" with the management right to assign work. *Nat'l Treasury Emps. Union v. FLRA*, 943 F.3d 486, 492 (D.C. Cir. 2019). Nothing in the Authority's regulations prohibit the Authority from considering arguments made by the parties in proceedings before it. Thus, there is no contradiction between Authority's consideration of the Agency's argument concerning the right to direct employees and the Authority's refusal to consider potential exceptions to management rights that the Union mentioned only in passing.

Finally, there is nothing contradictory in the Authority's determination that while federal government agencies do not have unfettered discretion over telework under the Telework Enhancement Act of 2010, the specific proposal in this case would have affected management's rights to assign work and direct employees under § 7106(a)(2)(A) and (B) of the Statute. The laws are separate and the issues considered by the Authority with respect to each was distinct, which is why the Authority rationally came to the conclusions it did.

The Authority's careful, thoughtful, and pragmatic decision was neither arbitrary nor capricious. This Court should therefore deny the Union's Petition for Review.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about the negotiability of the Union's proposal to expand Article 20 (the "Proposal") of the parties' successor collective bargaining agreement ("CBA"), which deals with employee telework. The Proposal would have allowed an "eligible bargaining-unit employee to report to the office as little as once per week and telework up to eight days per pay period." (JA 227.)

The Agency asserted that the Proposal was nonnegotiable because it affected the Agency's management rights to assign work and direct employees under § 7106(a) of the Statute, and, therefore, was outside the Agency's duty to bargain.[2] The Authority agreed with the Agency and found that the ability to establish when employees must report to their duty stations was "an inherent" part of the management right to assign work. (JA 231.) It further found that the Proposal affected management's right to direct employees, which "includes the right to

[2] The Agency also argued that the Telework Enhancement Act of 2010 assigned sole and exclusive discretion to the Agency set telework schedules. (JA 228-29.) The Authority rejected this argument, and issues related to that determination are not relevant to the Union's petition for review.

supervise and guide employees in the performance of their job duties." (JA 232 (internal quotation and alteration omitted).)

The Union now seeks review of the Authority's Decision, arguing that the Authority erred in finding that the Proposal was nonnegotiable because it affected the Agency's management rights to assign work and direct employees. As the Authority correctly and reasonably determined that the Proposal was nonnegotiable, this Court should deny the Union's Petition for Review.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(E) of the Statute. The Authority Decision is included in the Joint Appendix at 226-40. The Union's Petition for Review was timely filed within 60 days of the Authority's decision. 5 U.S.C. § 7123(a).

STATEMENT OF THE ISSUE PRESENTED

Did the Authority reasonably determine that the Proposal was outside the duty to bargain because, in allowing what it defined as "eligible employees" to report to their duty stations only one day per work week, the Proposal affected the Agency's management rights to assign work and direct employees?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This matter concerns the negotiability of the Union's proposal to expand the Agency's telework program. (JA 227-28.) The Proposal would have prohibited the Agency from "unreasonably den[ying]" employees the right to telework eight days per two-week pay period if they met the following criteria:

1) They were eligible for telework;
2) They had teleworked six days per pay period during the previous year;
3) They had satisfactory performance (i.e. they were not on a performance improvement plan) during the past year; and
4) They had no disciplinary issues during the past year.

(*Id.*)

Under the Statute, an agency is required to bargain with the exclusive representative of its employees over certain matters. 5 U.S.C. § 7117(a). The Statute, however, excludes certain management rights, including the rights to assign work and direct employees, from the bargaining process. *Id.* § 7106(a)(2)(A), (B). Agencies do not have to bargain with unions concerning proposals that impermissibly affect management rights. *Nat'l Treasury Emps. Union v. FLRA*, 691 F.2d 553, 555 (D.C. Cir. 1982) ("*NTEU 1982*").

The Union filed a negotiability appeal with the Authority under § 7105(a)(2)(E) of the Statute after the Agency did not respond to the Union's request for a declaration of nonnegotiability. (JA 1-9; *see* 5 U.S.C. §§ 7105(a)(2)(E), 7117(c).) The

Agency filed a statement of position. (JA 41-78.) The Union filed a response and the Agency filed a reply. (JA 165-97, 212-25.) The Authority concluded that the Proposal was not within the Agency's statutory duty to bargain. (JA 226-27.) The Union now seeks review of the Authority's Decision.

STATEMENT OF THE FACTS

A. The Union proposes a vastly expanded telework scheme that would seriously affect the Agency's ability to set employee telework schedules and choose how it supervises employees

The Agency has had a telework program for many years. The parties' prior CBA includes an Article 20 with eligibility, application, and other requirements for employees to participate in the program. (JA 79-86.) The telework program had expanded gradually, from employees working one or two days a week, to numerous employees working fully remotely across the country. (JA 121-23, 127-35.) In CBA renegotiations, the Union proposed expanding Article 20 to require that "eligible employees" be allowed 100% telework. (JA 13, 58.)

In January 2018, the Agency announced changes to its telework program. (JA 138-56.) Shortly thereafter, the Agency informed the Union that its proposed version of Article 20 was nonnegotiable. (JA 30-31.) The Union disagreed and sent the Agency a revised proposal that allowed "eligible employees" to telework four out of five days per week:

A. Wording

(2) Employees must be in the office a minimum of one (1) workday each week and a minimum of eight (8) hours each work day, taking into consideration telework and alternative schedule arrangements. In order to telework more than six (6) days per pay period (i.e., expanded), an employee must proceed as follows:

(a) Regular Telework: Employees who telework six (6) days or fewer per pay period must be in the office a minimum of two (2) workdays each week and a minimum of eight (8) hours each work day, taking into consideration telework and alternative schedule arrangements. The eligibility requirements for regular telework are contained in Sections 20.02 and 20.03 above.

(b) Expanded Telework: Eligibility for expanded telework (i.e., seven (7) to eight (8) days per pay period or the equivalent for an alternate work schedule) will be based on the employee meeting the following criteria: (i) The employee has teleworked at least six (6) days per pay period (or the equivalent for an alternate work schedule) for a year; and (ii) The employee has not had any performance (i.e., a performance improvement plan) or disciplinary issues over the same period;

(d) Employee requests for expanded telework will not be unreasonably denied.

(JA 10-29.) The Agency did not respond to the Union's request for an additional statement of nonnegotiability. (JA 3.) The Union then filed a negotiability petition with the Authority. (JA 1-9.)

In its Statement of Position (JA 41-78), the Agency challenged the Union's explanation of the meaning of the Proposal, arguing that it would create a near-automatic right for employees who successfully complete one year of regular telework to move to the Union's proposed expanded telework schedule. (JA 57-58.) The

Agency maintained that it did not have an obligation to bargain over the Proposal because only management has the right to set maximum telework schedules. (JA 63.) The Agency continued that its management rights included the "right to determine the place where work is to be performed." (JA 64, 69, 77.)

The Agency further argued that Authority case law suggested that management had the right to set a maximum number of allowable telework days. (JA 68-72.) The Agency pointed to *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Big Spring, Texas*, 70 FLRA 442 (2018), where the Authority held an arbitrator's award dictating to the agency the floor assignments for employees impermissibly interfered with management's right to assign work. (JA 69.) The Agency argued that if the management right to "assign work" encompasses the right to determine the location of work assignments *within* a duty station, then it must also include the frequency with which an employee must report *to* a duty station. (*Id.*)

In response, the Union agreed that the Proposal was designed to expand the telework program to eight days per pay period. (JA 168-69.) It argued that the Proposal allowed the Agency to deny a telework request "if it is not reasonable to grant it" or where "approval would interfere with the Employer's ability to accomplish its work." (JA 167, 169.) The Union also suggested that telework requests could be denied where the Agency "could demonstrate that" an employee's telework request "would implicate any management rights," although it pointed to no wording in its proposed Article 20 that would support this construction. (JA 185.)

The Union argued additionally that a proposal to allow for regular full-time telework should also be negotiable. (JA 177-84.) The Union maintained such proposals were negotiable based on Authority decisions setting aside arbitration awards that improperly revoked or denied telework. (*Id.*)

The Union acknowledged that the Agency raised management rights issues, including the right of an agency to determine its mission and organization and right to assign work. (JA 189.) The Union, however, side-stepped the Agency's management rights argument, and merely stated that the Agency must negotiate concerning telework policies because those policies affect the employees' conditions of employment. (JA 186, JA 190.) Although the Union made passing references to exceptions to management rights, it did not offer any argument as to how those exceptions would apply in this case. (JA 178.)

The Agency replied that unless management had the right to set the maximum number of allowable telework days that employees could take, the work schedules of each individual employee would be subject to review by—and could be set by—arbitrators or the Authority itself, not the Agency. (JA 218-19.) It argued that, under the Proposal, every management denial "can be, and likely will be, contested by a Union grievance that leads to an arbitration process in which the final decision is outside management's hands." (*Id.*) The Agency further noted that agencies in other cases had not argued that setting telework schedules was a management right under § 7106(a), "and so the FLRA has never addressed it directly." (JA 222.)

B. The Authority reasonably found that the Proposal would affect the Agency's ability to set, rescind, and alter employees' telework schedules, thus affecting the Agency's rights to assign work and direct employees

After carefully considering the parties' arguments, the Authority held that management's rights to assign work and direct employees included the right to determine how frequently individuals could telework. (JA 231-34.) Specifically, the Authority found that the ability to determine "when an eligible employee may perform his or her duties away from the duty station and when the eligible employee must report to the duty station" implicated the Agency's management rights to direct employees and assign work. (JA 231 (internal quotation marks omitted).)

The Authority correctly determined that the Proposal "impose[s] substantive restraints on management's 'right to determine the methods used to evaluate and supervise its employees.'" (JA 232 (quoting *Am. Fed'n of Gov't Emps., Local 1712*, 62 FLRA 15, 17 (2007).) The Authority found that the Union's contrary explanation belied "the proposal's plain wording, which creates a presumptive entitlement to 80% telework for employees who have teleworked at least six days per pay period the previous year and have 'not had any performance (i.e., a performance improvement plan) or disciplinary issues over the same period.'" (JA 228.)

The Authority evaluated the Proposal in light of its precedent addressing management's rights to assign work and direct employees. It observed that it previously found "a proposal dictating the work schedules of three employees was

nonnegotiable because it affected management's right to assign work" in *International Association of Fire Fighters*, 59 FLRA 832, 833-34 (2004). (JA 231.) The Authority had also determined that a proposal allowing employees to take work home to complete it later "was nonnegotiable because it affected management's right to determine when work would be completed," and thus implicated management's right to assign work. (JA 231-32 (citing *Prof'l Airways Sys. Specialists*, 59 FLRA 485, 487-88 (2003)).)

While the Authority acknowledged that no previous case addressed directly whether the frequency of telework affects management's right to direct employees, previous Authority decisions held that the right includes the right to supervise and guide employees in the performance of their job duties, and proposals that preclude management from using a particular method of supervising employees' work performance affect management's right to direct employees. (JA 232 (internal quotation, citations, and alteration omitted).) The Authority found that the Proposal "*precludes* management from regularly using in-person methods of supervision, such as unannounced visits or spot checks" and "*requires* management to employ computer- and telephone-based supervision techniques." (JA 232 (emphases in original).) The Authority therefore determined that the Proposal was nonnegotiable because it affected management's right to use a "method that it deems 'most appropriate' for supervising employee performance." (*Id.* (quoting *Nat'l Fed'n of Fed. Emps., Local 1263*, 29 FLRA 61, 63 (1987)).)

Finally, the Authority observed that while the Union "asserts generally that the Authority may consider § 7106(b), it does not specifically argue, with supporting authorities, that its proposal" fell within an exception to management rights. (JA 233.) The Authority therefore concluded that, in accordance with its own regulations, it would not address any such exception when the Union had failed to do so. (*Id.*)

The Union's Petition for Review followed.

SUMMARY OF THE ARGUMENT

The Authority reasonably determined that the Proposal affected the Agency's management rights to assign work and direct employees. *See* 5 U.S.C. § 7106(a)(2)(A), (B). The Authority looked at the plain language of the Proposal and concluded that it:

> creates a presumptive entitlement to 80% telework for employees who have teleworked at least six days per pay period the previous year and have not had any performance (i.e., a performance improvement plan) or disciplinary issues over the same period

(JA 228 (internal quotation marks omitted).) It then assessed whether the Proposal affected the management rights to assign work and direct employees.

As to the right to assign work, the Authority noted that, in several previous cases, it had determined that the management right to assign work includes the right to determine *when* work assignments will occur. (JA 231.) It found that decisions concerning telework schedules involve both *when* employees must perform duties at their duty station and *when* they may perform those duties away from the duty station.

(JA 231-32.) It therefore concluded that proposals concerning telework are nonnegotiable because they affect management's right to assign work. Its conclusion on this point was reasonable.

The Union's argument that the Authority contradicted its own precedent by determining that the Proposal affects management's rights to assign work is unavailing. Authority precedent is not consistent as to whether telework proposals affect management's right to assign work, with some cases indicating they do and some that they do not. To the extent that the Authority overruled precedent, the Authority acknowledged the departure and reasonably explained that it was doing so in light of its conclusion that the telework proposal at issue affected management's ability to set employee work schedules (which it has repeatedly held to be a core component of the management right to assign work) and determine where work is performed. (JA 231-33.) That is all that is required of the Authority under this Court's precedent, which allows agencies to amend their interpretations of their enabling statutes so long as they provide adequate explanations for doing so.

With respect to the right to direct employees, the Authority relied on cases holding that right includes the right to supervise and guide employees and to determine the methods of supervision. (JA 232.) The Authority found that the Proposal would restrict management's supervision of work to computer- and telephone-based methods and would largely preclude management from using in-

person methods of supervision. (JA 232-33). The Authority therefore reasonably concluded that the Proposal affected management's right to direct employees.

The Union's arguments that the Authority should not have considered whether the Proposal affected the Agency's right to direct employees (Pet'r Br. 19-24) are without merit. *First*, the Agency substantively raised the issue of whether the Proposal affected the right to direct employees. Throughout its filings before the Authority, the Agency *repeatedly* mentioned the right to "direct employees" in conjunction with the right to "assign work," and substantively argued that the Proposal affected both. (JA 63-64, 66, 68-72.) *Second*, the Authority's decision to consider the Agency's substantive argument that the Proposal affected its right to direct employees, while not considering the Union's cursory reference to exceptions to management's right to direct employees, was not contradictory. In its submissions to the Authority, the Agency raised substantive arguments going directly to the heart of management's right to direct employees under the Statute. (JA 68-72.) The Union, however, merely gestured toward the broad proposition that "the Authority may consider whether the contract provision or proposal at issue falls within an exception to management's rights negotiated under § 7106(b) of the Statute," without providing any specifics on what exceptions it was referring to or how the Proposal fit those exceptions. (JA 178.) The Union never argued, substantively or otherwise, that the Proposal *did* fall under an exception to management's rights under § 7106(b)(2), or (3), i.e., that the Proposal constituted a "procedure" the Agency would observe in carrying out a

management right or an "appropriate arrangement" for employees adversely affected by management's exercise of a management right.

Finally, the Authority's determination that the Telework Enhancement Act does not give agencies unfettered discretion over telework policies does not conflict with its determination that the Proposal would affect management's rights to assign work and direct employees under the Statute. That is because the two different legal issues are subject to different analyses under two separate laws.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("*BATF*"). This Court defers to the Authority's construction of the Statute, which is entrusted by Congress to the FLRA's administration, *U.S. Department of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991) ("*Air Force*"), and upholds the Authority's decisions so long as they are "reasonable and defensible," *Department of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

"It is well established that the court's role in reviewing the [Authority]'s negotiability determinations is narrow." *Nat'l Treasury Emps. Union v. FLRA*, 943 F.3d 486, 492 (D.C. Cir. 2019) ("*NTEU 2019*"). This Court will uphold an Authority decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*") (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144

F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review).

The Authority's determination that the Proposal is nonnegotiable is reviewed under the two-step framework set forth in *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*"). *NTEU 2019*, 943 F.3d at 492. Where Congress "has directly spoken to the precise question at issue," this Court "give[s] effect to [its] unambiguously expressed intent," but if the Statute is silent or ambiguous, this Court defers to the Authority's interpretation so long as it is "based on a permissible construction of the [S]tatute." *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 57 (D.C. Cir. 2005) ("*NTEU 2005*") (quoting *Chevron,* 467 U.S. at 842–43); *see also Hosp. of Barstow, Inc., v. NLRB*, 897 F.3d 280, 286 (D.C. Cir. 2018); *NTEU 2014*, 754 F.3d at 1041.

The Authority, like other agencies, "is free to alter its past rulings and practices even in an adjudicatory setting" so long as it provides a "reasoned explanation" for doing so. *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985). "[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]" *Id.* (internal quotation marks omitted). The reason for this flexibility is that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . *must* consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863–64 (emphasis added). Indeed,

in *Chevron* itself, the Supreme Court deferred to an agency interpretation that was a recent reversal of agency policy. *Id.* at 857–58.

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

ARGUMENT

I. The Authority reasonably determined that the Agency's ability to control how often employees must report to their duty stations affected the Agency's management rights to determine when work is accomplished and how managers supervise their employees

The Authority reasonably interpreted § 7106(a) of the Statute when it determined that the Proposal is nonnegotiable because it would affect management's rights to assign work and direct employees.

The Statute requires agencies to bargain with the exclusive representatives of their employees concerning conditions of employment. 5 U.S.C. §§ 7103(a)(14), 7117(a); *Dep't of Defense, Army-Air Force Exch. Serv. v. FLRA,* 659 F.2d 1140, 1143 (D.C. Cir. 1981) ("*Dep't of Defense*"). That duty to bargain, however, has limits because the Statute reserves to agencies certain management rights that cannot lawfully become the subjects of negotiation. *Id.* Those management rights are listed under

§ 7106(a) of the Statute, and include the rights to "direct employees" and "assign work." 5 U.S.C. § 7106(a)(2)(A), (B); *see also Dep't of Defense*, 659 F.2d at 1145-46; *Nat'l Treasury Emps. Union v. FLRA*, 691 F.2d 553, 555-556 (D.C. Cir. 1982). Both the Authority and this Court treat the right to assign work as "co-extensive" with the right to direct employees. *NTEU 2019*, 943 F.3d at 493. The management rights to assign work and direct employees include the "right to decide what responsibilities to assign, to whom to assign them, and on what schedule." *Id.* The management rights section of the Statute is "broad." *U.S. Dep't of Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 688 (D.C. Cir. 1994). Congress delegated to the Authority the duty of determining the specific contours of management rights addressed by § 7106(a). *Air Force*, 949 F.2d at 480; *see also NTEU 1982*, 691 F.2d at 560. The Court therefore defers to the Authority's reasonable construction of § 7106. *Air Force*, 949 F.2d at 480.

In this case, the Authority considered the full effect that the Proposal would have on Agency operations in light of the Statute and Authority precedent concerning § 7106(a). (JA 231-33.) It reasonably interpreted the plain language of the Proposal and determined that it would affect management's right to determine when employees must report to their duty station and when they may work from home. (JA 232.) In doing so, the Authority determined that the Proposal would limit management's ability to engage in spot-checks and non-virtual methods of supervision. *Id.* It applied the Statute and determined that the Proposal infringed on management's right

to assign work and direct employees two ways. (JA 232-33.) *First*, the Proposal would affect management's right to set employee work schedules—that is, to determine when work is performed—which is a component of the right to assign work. (JA 228.) *Second*, the Proposal would affect management's right to supervise employees through its chosen method, which is a component of the right to direct employees. (JA 232.)

The Union's attempts to create contradictions where none exist are unavailing. The Decision is neither arbitrary nor capricious. This Court should therefore deny the Union's Petition for Review.

A. The Authority's interpretation of the language of the Proposal is the same as that of the Union–the Authority, however, reasonably acknowledged the practical effects that the Proposal would have on management's ability to assign work and direct employees

While the Union makes much of the Authority's alleged misinterpretation of the Proposal (Pet'r Br. 25-30), the reality is that both the Union and Authority agree on what the Proposal requires. What the Union obfuscates, and what the Authority recognized, is the practical effect the Proposal would have upon management rights.

Contrary to the Union's argument (Pet'r Br. 25-26), the Authority understood that the Proposal would affect only:

1) "Eligible employees;"

2) "who have teleworked at least six days per pay period the previous year," and

a. "and have not had any performance (i.e. a performance improvement plan)" issues during that year; or

b. "disciplinary issues" during that year.

(JA 227-28.) The Authority thus explicitly acknowledged that only a subgroup of employees would be presumptively entitled to expanded telework.

The Union's arguments that the Authority "misinterpreted" the Proposal by not considering the manner in which CBA subsections 20.02, 20.03, and 20.06 modified the provision (Pet'r Br. 24-30) are untrue. The term "eligible employee" is defined in the sections of the Proposal that the Authority laid out verbatim in the Decision. (JA 227-28.) The Proposal further states that employees must meet the eligibility requirements of 20.02 and 20.03 to qualify for regular telework. (JA 227.) Section 20.02 provides, *inter alia*, that individuals holding positions that "require the employee's physical presence to perform particular tasks that can only be performed at the worksite on a daily basis" are not eligible for telework. (JA 235 (quoting JA 79).) Similarly, Section 20.03 provides, *inter alia*, criteria that may be considered in determining whether an individual may be eligible for regular telework, including the individual's experience and whether the work the employee does can be measured. (JA 236 (quoting JA 80).)

The Authority's repeated references to "eligible employees" in its Decision demonstrates that it understood those caveats. (JA 228, 232.) What the Union seems unwilling to understand is that those caveats do not affect the validity of Authority's

conclusion. That is because the Authority's primary concern was that the Proposal would create a near-automatic right for "eligible employees" to move to 80% telework, and in doing so would define the methods by which managers could supervise those employees. (JA 228, 232-33.)

The Union's claim that Sections 20.02, 20.03, and 20.06 combined would allow management to deny telework requests on the specific grounds set forth in those sections does not change that conclusion. The Authority has long held that proposals that specify "substantive criteria governing management decisions pertaining to scheduling, staffing and overtime" are nonnegotiable. *NTEU 2005*, 414 F.3d at 59 (holding the substance of a proposal relating to overtime shift assignments was nonnegotiable). In setting forth the substantive criteria that management must use in evaluating and approving requests for telework schedules, including which employees are presumptively entitled to an 80% telework schedule, the Proposal dictates the "substantive criteria" pertaining to these management decisions and thus affects management rights. *Id.*

In addition, as the Authority correctly found, the Proposal would make it extremely difficult, if not impossible, for managers to require "eligible employees" to work in the office more than one day per week. (JA 228.) The Proposal states that "[e]mployee requests for expanded telework will not be unreasonably denied," which the Authority reasonably held to create a "strong presumption" that requests for four-day-a-week telework by "eligible employees" will be granted. (*Id.*) The Proposal

would thus make it nearly impossible for managers to use in-person methods of supervision more than one day a week, and would make it impossible for managers to direct where work will be performed (at the employee's home versus at the duty station). (JA 232-33.) Under the Proposal, any attempt by managers to require "eligible employees" to work in the office more than a single day a week would almost invariably be met with employee grievances, requiring managers to prove the reasonableness of their exercise of basic managerial rights in grievance and arbitration proceedings. (JA 228) (noting that, under the Proposal, "any manager who denies 80% telework to an eligible employee can expect to face a grievance alleging that the denial was unreasonable.") The Proposal does not define what it means by an "unreasonable deni[al]" of telework, leaving the definition and application of that term entirely to the discretion of arbitrators.

As the Agency urged, and the Authority agreed, under the Proposal, every management denial of a telework request "can be, and likely will be, contested by a Union grievance that leads to an arbitration process in which the final decision is outside management's hands." (JA 218-19.) That is, under the Proposal, grievance arbitrators would sit in judgment on such issues as whether a manager's preference for employees to work in the office or for in-person rather than virtual supervision was "reasonable" or not—matters going to the heart of the management right to assign work and direct employees. The Authority therefore reasonably held that the Proposal affected those management rights. *See Nat'l Fed'n of Fed. Emps., Local 615 v.*

FLRA, 801 F.2d 477, 481 (D.C. Cir. 1986) ("A proposal is . . . nonnegotiable if it determines *whether* [management rights] may be exercised," as the Statute's goal is to "leav[e] management in substantial control of those matters denominated 'management rights.").

As the Authority reasonably interpreted both the language and practical effect of the Proposal, the Union's claims that the Authority did not understand the proposal are without merit and this Court should reject them.

B. The Authority reasonably determined that the Proposal would affect the management right to assign work under Section 7106(a)(2)(B) of the Statute

This Court should defer to the Authority's reasonable conclusion that the Proposal would affect the Agency's right to assign work. In reaching that conclusion, the Authority appropriately acknowledged and resolved conflicting precedent concerning that management right. Nor do the Union's reliance interest claims render the Decision arbitrary and capricious, both because the Union could not have reasonably relied on conflicting precedent and because the Union has articulated no cognizable harm that resulted from the Decision.

1. The Decision clarifies conflicting Authority precedent concerning telework and the management right to assign work

From its very inception, the Authority has found that the management right to assign work includes the right to determine both *when* and *where* work will be performed. HENRY H. ROBINSON, NEGOTIABILITY IN THE FEDERAL SECTOR 78

(1981). In *National Treasury Employees Union, Chapter 6*, 1 FLRA 896 (1979) ("*NTEU 1979*"), the Authority "affirmed that section 7106(a) reserved to the agency the right to determine *where* employees would and would not perform work." ROBINSON, at 78 (emphasis added). The Authority further "observed that the matter being negotiated was not whether employees could perform agency work within their homes; the agency had already *exercised this reserved right* and made the basic decision that employees could do so." *Id.* (emphasis added); *see also NTEU 1979*, 1 FLRA at 901 (noting that "the union tacitly concedes that the existence and continuation of this practice [of allowing employees to work from home] is a matter solely reserved for management's discretion."). Rather, the question in *NTEU 1979* was whether a proposal concerning how employees would request and gain management approval for work-from-home arrangements was negotiable as a "procedure[] which management officials will observe in exercising" their management rights under 5 U.S.C. § 7106(b)(2). *Id.*; *see also NTEU 1979*, 1 FLRA at 902.

Since 1979, both the Authority and this Court have found that proposals dictating the work schedules of employees are nonnegotiable because they implicate the management right to assign work. For example, in *NTEU 2005*, this Court agreed with the Authority that proposals dictating the "substantive criteria governing management decisions pertaining to scheduling, staffing and overtime" are nonnegotiable because they affect management's right to assign work. 414 F.3d at 59. The Authority has similarly found that proposals dictating the schedules of individual

employees, as well as proposals that would allow employees to complete work at home, were nonnegotiable under § 7106(a) because they affected management's right to assign work—specifically, by dictating when work would occur. *See Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833-34 (2004) ("*Fire Fighters*") (proposal that would dictate three employees' work schedules was nonnegotiable); *Prof'l Airways Sys. Specialists*, 59 FLRA 485, 487-88 (2003) ("*Airways*") (proposal that would allow employees to take work home to complete was nonnegotiable). In *U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution Big Spring, Texas*, 70 FLRA 442, 443 (2018) ("*Big Spring*"), the Authority held that an arbitrator's award requiring the agency to staff the third floor of two housing units interfered with the management right to "assign work" by overriding management's determinations as to where employees must work within the duty station. In so holding, the Authority noted that, under the arbitrator's interpretation of the parties' contract, "[t]he [a]gency can no longer move officers to a different area of the institution." 70 FLRA at 443.

Thus, there is ample precedent for the proposition that proposals that dictate employee work schedules are nonnegotiable because they infringe on management's right to assign work. (JA 231-32 (citing *Fire Fighters*, *Airways*, and *Big Spring*, and noting that "the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned").) But some Authority decisions have come to a seemingly contrary conclusion where telework schedules are concerned. As the

Union notes (Pet'r Br. at 35), and as the Authority recognized in its Decision, a few Authority cases involving exceptions to arbitration awards suggest that telework schedules did not even *affect* management's right to "assign work"—creating a seemingly arbitrary distinction between proposals regarding *when* work occurs versus proposals concerning *where* work occurs. (*See* JA 232 (citing *Food & Drug Amin.*, 59 FLRA 679 (2004); *U.S. Dep't of Health and Human Servs. Ctrs. for Medicaid Servs.*, 57 FLRA 704 (2002))); *see also Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 17 (D.C. Cir. 2020) ("*Antilles*") (noting this "seemingly fine distinction" in the Authority's precedent and accepting it only because the parties did not raise it as an issue).

The Authority assessed the negotiability of the Proposal in light of this muddled precedent, and chose to clarify its interpretation of the law, not only for this case, but also for future cases. It did so by analyzing what—practically speaking—the Proposal does, which is to create a schedule of *when* employees must report to their duty station (one day a week) and *when* they may work remotely (four days a week). (JA 231.) The Authority then drew on clear precedent holding that the management right to assign work included the right determine *when* work is done, i.e. the right to set employee work schedules. (JA 231-32.) It noted its precedent holding that setting employee work schedules and determining where work is performed within the duty station fall within the management right to "assign work." (JA 231-232 (citing *Big Spring*, 70 FLRA at 443, *Fire Fighters*, 59 FLRA at 833-834, and *Airways*, 59 FLRA at 487-88).) The Authority reasoned, based on this precedent, that "the right to assign

work must also include the right to determine 'when' an employee is required to report to the duty station to fulfill his or her duties, here, the frequency of telework." (JA 232.) And it came to the rational conclusion that the Proposal in this case affects management's right to assign work because it would restrict "how often the Agency can require an employee to perform work at the duty station." (JA 232-33.)

This Court has similarly noted that any distinction between the negotiability of proposals involving "where employees will work" versus proposals involving "when employees will work" is "seemingly fine," and has accepted it only on the basis that neither party put it at issue. *Antilles*, 977 F.3d at 17. The negotiability petition in this case, however, required the Authority to tackle the issue head-on, and the Authority reasonably chose to discard this "seemingly fine distinction" and hold that, going forward, proposals involving "where employees will work" will be treated the same as proposals involving "when employees will work." (JA 231-32.) In doing so, the Authority acknowledged past cases suggesting that telework schedules were negotiable, but concluded, in light of conflicting precedent and careful analysis of the practical effect of the Proposal on management's right to assign work, that the Authority "will no longer follow [such] cases." (JA 232.)

Thus, the Authority's determination that telework policies and schedules fall under the management right to assign work clarified the law in light of conflicting precedent. But even if the Decision was a full departure from past Authority precedent (and it was not), that departure would not diminish the deference owed to

the Authority's interpretation. *Local 32, Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 774 F.2d 498, 502 (D.C. Cir. 1985) ("*Local 32*"). The Court will still afford the Authority's interpretation deference so long as it supplies "a reasoned analysis indicating that prior policies and standards are being deliberately changed not casually ignored." *NFFE 2004*, 369 F.3d at 553. Ultimately, "the Authority must provide a rational explanation for its decision but in reviewing [Authority orders] . . .the court recognizes that such determinations are best left to the expert judgment of the Authority." *Nat'l Treasury Emps. Union v. FLRA*, 745 F.3d 1219, 1224 (D.C. Cir. 2014); *see also Ass'n of Civilian Techs. v. FLRA*, 353 F.3d 46, 60 (D.C. Cir. 2004) ("We therefore . . . defer to the Authority's reasonable interpretations of the Statute and its resulting negotiability determinations."). In so doing, the Authority (like other agencies) is not always required to provide a more detailed justification than would suffice for a new policy created on a blank slate. *Fed. Commc'n. Comm'n v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009).

As described above, the Authority provided such a "reasoned explanation" for departing from precedent by analyzing, in practical terms, what telework is (the ability of an individual to work away from a workstation) and the effect the Proposal would have on management's "right to determine 'when' an employee is required to report to the duty station to fulfill his or her duties." (JA 232-33.) The Decision explicitly acknowledged that it was departing from some previous cases, and explained why it

was doing so. *Id.* The Decision thus fulfilled the standards that this Court has set for an agency to depart from past precedent.

Contrary to the Union's claims (Pet'r Br. 31-33), *National Association of Government Employees, Local R1-144 Federal Union of Scientists & Engineers*, 65 FLRA 552, 553, 554-55 (2011) ("*NAGE*") neither supports nor undercuts the proposition that the Proposal affects the Agency's management rights to "assign work" and "direct employees." The proposal in *NAGE* contained no language that employee requests for telework must not be "unreasonably denied" to "eligible employees." *See id.* at 553-54; *compare* JA 228. That language, present in the Proposal, dictates the "substantive criteria" management must use in making "decisions pertaining to scheduling" of telework, and thus renders the proposal non-negotiable. *NTEU 2005*, 414 F.3d at 59.

Moreover, the Authority's reasoning in *NAGE* for finding that the proposal at issue in that case (that "[u]p to 5 full-time and/or part-time union officials" would be "eligible for telework to perform union-related duties on official time at their home worksite") was negotiable consisted of two conclusory sentences: "we find that the proposal does not require the Agency to allow Union officials to telework," and "we find that the proposal does not require the Agency to allow Union officials to work exclusively on representational duties while teleworking." *NAGE*, 65 FLRA at 554-55. These two sentences described findings that were specific to the proposal at issue in *NAGE* and suggested no broader rule regarding the negotiability of telework

proposals in general (much less the telework proposal at issue in this case). *NAGE* emphasized that the proposal at issue there created no obligation to grant *any* union official telework, and that any request to telework would be left to the total discretion of a union official's supervisor. *Id.* at 554. By contrast, the Authority here found that the Proposal created a "presumptive entitlement" to 80% telework for "eligible employees" and thus that it *would* effectively require the Agency to allow certain employees to telework. (JA 228, 232-33 (finding that, under the Proposal, "any manager who denies 80% telework to an eligible employee can expect to face a grievance alleging that the denial was unreasonable" and the Proposal "imposes substantive restraints on management's right to determine the methods used to evaluate and supervise its employees.") (internal quotation marks omitted).)

Thus, the Authority's failure to specifically distinguish *NAGE* does not render the Decision arbitrary or capricious. *See Nat'l Weather Serv. Emps. Org. v. FLRA*, 966 F.3d 875, 883 (D.C. Cir. 2020) (the Court "will permit agency action to stand without elaborate explanation where distinctions between the case under review and the asserted precedent are so plain that no inconsistency appears.") (internal formatting omitted); *Antelope Valley Bus Co. v. NLRB*, 275 F.3d 1089, 1092 (D.C. Cir. 2002) ("it is not necessary for the Board to distinguish a precedent expressly if the grounds for distinction are readily apparent."); *Gilbert v. NLRB*, 56 F.3d 1438, 1447 (D.C. Cir. 1995) ("the Board's failure to address these cases in its opinion can hardly be deemed an unexplained 'departure' from precedent, because the rule of these cases is simply

inapplicable to the case before us"). The proposal at issue in *NAGE* was much narrower both in its wording and scope than the proposal at issue in this case, and the Authority therefore reasonably interpreted the two proposals as having different effects on management rights.

In deciding that the Proposal affected the Agency's management rights, the Authority reasonably assessed the facts of this matter, weighed prior precedent, explained why employee telework schedules fall under the management right to assign work, and stated that to the extent prior cases had held to the contrary, it would not follow that precedent. (JA 232-33.) The Authority's conclusion that the Proposal infringed on management's right to assign work under § 7106(a)(2)(B) of the Statute was thoughtful and well-supported. This Court should therefore defer to the Authority's interpretation and application of its own statute. *See See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (holding that the Authority is entitled to "considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations"); *see also U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991). Denial of the Union's Petition with respect to the Authority's conclusion that the Proposal would affect management's right to assign work is therefore appropriate. *Patent Office Prof'l Ass'n v. FLRA*, 873 F.2d 1485, 1487 (D.C. Cir. 1989) (this Court "will uphold a negotiability decision if the Authority's construction of the Statute is reasonably defensible").

2. The Union has no "reliance interest" on conflicting precedent concerning the effect that telework proposals have on management's right to assign work

Not only does this Court lack subject matter jurisdiction over the Union's argument that it had a "reliance interest" on precedent concerning the effect that telework has on management's right to assign work, that argument is fatally flawed, both legally and factually.

This Court does not possess subject matter jurisdiction over any "objection that has not been urged before the Authority. . . ." 5 U.S.C. § 7123(c).[3] In spite of this clear jurisdictional bar, the Union for the first time argues to this Court that it had a reliance interest in prior Authority precedent that the Authority did not address. Unfortunately, the Union waived that argument by not raising it before the Authority. *Ga. State Chapter, Ass'n of Civilian Techs. v. FLRA*, 184 F.3d 889, 891 (D.C. Cir. 1999) (arguments raised for first time in Petition for Review are waived). Any argument the Union may make that the waiver should be excused because it could not have anticipated the Authority's decision is unavailing. The Union had the opportunity to raise its reliance argument to the Authority in a motion for reconsideration. It chose not to do so, and thus waived its right to have that argument heard by this Court. *NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993) (alleged surprise does not

[3] *See also Nat'l Treasury Emps. Union, Chapter 161 v. FLRA*, 64 F. App'x 245, 246 (D.C. Cir. 2003) (unpublished) (party waived theory argued first before Court where party failed to raise it below).

constitute extraordinary circumstance to excuse failure to raise argument below where party failed to seek reconsideration); *see also Nat'l Ass'n Of Gov't Emps., Local R5-136 v. FLRA*, 363 F.3d 468, 479-80 (D.C. Cir. 2004).

Even absent the jurisdictional bar on the Union's reliance claim, there is no legal or factual basis for the Union's claim that the Authority failed to consider its "reliance interest" on precedent indicating that telework had no effect on management's right to assign work. As demonstrated above, Authority precedent concerning telework proposals and the management right to assign work is mixed, and thus there was no clear precedent on which the Union could base such an interest.

Nor could the Union claim a reliance interest even if there *was* clear precedent concerning telework and the right to assign work. That is because the Union has articulated no specific harm or costs that it will incur as a result of the Decision. All that the Union can demonstrate is that the Agency is not required to negotiate provisions such as the Proposal without a showing that the provisions fall within an exception to management's rights to assign work and direct employees. *See* 5 U.S.C. § 7106(b)(2)-(3).

As noted above, agencies, such as the Authority, are allowed discretion in making policy decisions, and must provide only reasonable explanations for proposed policy changes. *Mingo Logan Coal Co. v. Envtl. Prot. Agency*, 829 F.3d 710, 719 (D.C. Cir. 2016) ("*Mingo*"). It is true that agencies must be aware of and address any serious

reliance interests engendered by longstanding policies. *Id.* But unidentified and unproven reliance interests are not a valid basis on which to undo agency action. *Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020). Petitioners must identify and prove a specific harm to reliance interests that has resulted or will result from a policy change. *See id.* If a petitioner does not explain which reliance interests are affected by a policy change, then the agency is not required to address any reliance interests. *See Mingo*, 829 F.3d. at 719 (refusing to consider reliance costs of EPA policy change because petitioner did not make reliance interests argument to district court or agency).

Here, the Union argues that the Authority did not consider reliance interests affected by the Decision, and its failure to do so was arbitrary and capricious. (Pet'r. Br. 37-8.) It then claims that the Authority's decision to depart from precedent concerning telework was akin to ignoring serious reliance interests. *Id.* But the Union has not pointed to any specific costs it has incurred or would incur—currently or historically—as a result of the Authority's decision that the Proposal affects the management rights to assign work and direct employees. It has not done so presumably because it cannot articulate such costs. Since the Union has not articulated a reliance interest either before the Authority or this Court, its arguments on this point are unavailing.

The connection that the Union is attempting to make between the COVID-19 pandemic and its reliance interest theory is unclear. (Pet'r Br. 38.) This lack of clarity

may stem from the fact that there is no connection between the two. The Union proposed, and the Agency objected to, the expanded telework schedule in the Proposal long before the outbreak of the coronavirus pandemic. (JA 109.) Further, the parties filed their briefs with the Authority well before they had any notion of the disruption that the pandemic would bring. (JA 1 (Union's Petition filed July 2018), JA 41 (Agency's Statement filed August 2018), JA 207 (Union's Response filed September 2018), JA 218 (Agency's Reply September 2018).)

Moreover, the Statute explicitly excludes from bargaining any actions that agencies need to take in response to emergency situations—such as the pandemic. *See* 5 U.S.C. § 7106(a)(2)(D); *see also U.S. Dep't of Veterans Affairs, Reg'l Office, St. Petersburg, Fla.*, 58 FLRA 549, 551 (2003) (holding that § 7106(a)(2)(D)'s exclusion from bargaining includes both the agency's right to independently assess whether an emergency exists and to decide what actions are need to address any emergency). That is why so many federal government agencies have so quickly been able to shift to nearly full telework in response to the public health and safety threat posed by COVID-19. Exigencies like the COVID-19 pandemic are specifically addressed in § 7106(a)(2)(D) the Statute itself and have no bearing on the negotiability of the proposal at issue with respect to the management rights to "assign work" and "direct employees" set forth in § 7106(a)(2)(A).

C. The Authority reasonably determined that the Proposal would affect the management right to direct employees under Section 7106(a)(2)(A) of the Statute

No prior negotiability appeal has asked the Authority to determine whether a proposal setting telework schedules violates management's right to direct employees under 5 U.S.C. § 7106(a)(2)(A).[4] When presented with this new argument, the Authority correctly determined that the Proposal interfered with a management right because it would "interfere[] with the Agency's right to choose the method that it deems 'most appropriate' for supervising employee performance." (JA 232-33.) The Union's argument that the Authority contradicted itself by considering this issue but not the issue of whether the Proposal fell within an exception to a management right is without merit. That is because the Agency substantively raised the issue of whether the Proposal violated management's right to direct employees. (JA 63, 64, 66, 68-72.) The Union, however, did not substantively argue whether the Proposal fell within an exception to a management right. (JA 178.) Denial of the Petition for Review is therefore appropriate with respect to the Decision's conclusion that the Proposal affected management's right to direct employees.

[4] The Authority has decided several cases regarding telework disputes where the parties failed to raise management rights arguments, and thus the Authority did not address the issue. *See e.g.*, *Nat'l Treasury Emps. Union Chapter 299*, 68 FLRA 835, 837 (2015); *U.S. Dep't of Educ.*, 61 FLRA 307, 310 (2005); *U.S. Dep't of Hous. and Urban Dev.*, 66 FLRA 106 (2011); *Soc. Sec. Admin.*, 69 FLRA 208, 209 (2016); *U.S. Dep't of Treasury, Internal Revenue Serv.*, 69 FLRA 122, 124 (2015); *Soc. Sec. Admin. Office of Hearing Operations*, 71 FLRA 177 (2019).

1. The Decision correctly found that the Proposal affects management's right to direct employees

This Court has long agreed that the § 7106(a) right to direct employees encompasses "the ability to supervise and guide employees," which includes the right to choose an appropriate method of supervision. *Nat'l Treasury Emps. Union v. FLRA*, 691 F.2d 553, 562 (D.C. Cir. 1982); *see also* FEDERAL LABOR RELATIONS AUTHORITY, GUIDE TO NEGOTIABILITY UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE 34 (Apr. 22, 2013) (available at https://go.usa.gov/x73k9). The Authority has further found "proposals that, in effect, preclude management from auditing employees' work by the use of unannounced[, and in-person,] visits and spot checking of employees' work directly affect management's right to direct employees." *Am. Fed'n of Gov't Emps., Local 1712*, 62 FLRA 15, 17 (2007) ("*Local 1712*"); *Nat'l Ass'n of Gov't Emps., Local R1-203*, 55 FLRA 1081, 1085 (1999) ("*Local R1-203*") ("Proposals that preclude management from using a particular method of monitoring employees' work performance affect management's right to direct employees . . . under [S]ection 7106(a)(2)(A). . . .").

The Authority's determination that the Proposal would infringe on the management right to direct work flows logically from this precedent. The Proposal would give what it deems "eligible employees" the nearly automatic right to telework 80% of the time, and would require supervisors who deny 80% telework to prove in grievance proceedings that their denial was "reasonable." (JA 228, 232-33.) That

would effectively prevent Agency managers from using in-person methods of supervision. (JA 232-33). Attempts by supervisors to limit telework among "eligible employees" to less than 80% would almost invariably be subject to grievances, because the Proposal "creates a strong presumption that all such requests will be granted by mandating that telework requests from eligible employees will not be 'unreasonably denied.'" (JA 228.) Under the Proposal, Agency managers would thus have to repeatedly defend their choice of supervision methods in grievance arbitration proceedings. *See* 5 U.S.C. § 7121(a); JA 228.

The Authority's holding that the Proposal was nonnegotiable avoided that result and ensured that Agency managers could exercise the right to direct their employees by the means they prefer—be it virtual or in-person—without repeated scrutiny and reversal by arbitrators. As the Authority noted, "[b]y allowing eligible employees to spend up to 80% of each pay period outside of the office, the proposal effectively (1) *requires* management to employ computer- and telephone-based supervision techniques and, correspondingly, (2) *precludes* management from regularly using in-person methods of supervision, such as unannounced visits or spot checks." (JA 232 (emphasis in original).) Accepting the Union's position that the Proposal is negotiable would thus eviscerate management's ability to choose the methods by which it supervises employees, something the Authority has long held to be a core component of the management right to "direct employees." (*Id.* (citing *Local 1712*, 62 FLRA at 17; *Local R1-203*, 55 FLRA at 1085).)

As the Authority correctly interpreted the § 7106(a) right to direct employees to include the right to set telework policies and schedules, the Union's Petition for Review should be denied.

2. The Agency substantively raised the issue of whether the Proposal affected the management right to direct employees and the Authority properly considered that issue

The Authority properly considered whether the Proposal affected the management right to direct employees under § 7106(a)(2)(A), notwithstanding the Union's allegation that the Agency never raised that argument and that the Authority was thus precluded from doing so. (Pet'r Br. 19-24.) That is because the Agency substantively raised the issue of whether the Proposal affected its right to direct its employees. (JA 65.)

Throughout its filings before the Authority, the Agency repeatedly mentioned the right to "direct employees" in conjunction with the right to "assign work." (JA 63-64, 66.) It stated that explicitly it was "asserting . . . its right to assign work and direct employees under 5 U.S.C. § 7106(a)(2)(B)." (JA 64, 66.) It substantively argued that the right to determine work location implicates both the right to assign work and the right to direct employees. (JA 68-72.) Specifically, the Agency stated that the right to assign work includes the right to tell employees how often they must come into the office. (JA 69.) "Right to tell employees" is semantically indistinguishable from "right to direct employees." Indeed, the Union on several occasions

acknowledged that the Agency was arguing that the Proposal affected its management right to "direct employees." (JA 87, JA 173, JA 190).

This Court has, on numerous occasions, noted that the management rights to "assign work" and "direct employees" are "co-extensive." *See, e.g.*, *Nat'l Treasury Emps. Union v. FLRA*, 943 F.3d 486, 493 (D.C. Cir. 2019); *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 819 (D.C. Cir. 1987); *Nat'l Treasury Emps. Union v. FLRA*, 793 F.2d 371, 373 n.1 (D.C. Cir. 1986). This Court has interpreted these rights together to mean that agencies have a nonnegotiable right to determine what work will be done, by whom, and when. *NTEU 2019*, 943 F.3d at 493. And this Court has noted approvingly that many Authority cases treat the two rights (to "direct employees" and "assign work") together. *Id.* (citing *Bureau of Public Debt*, 3 FLRA 768, 775-76 (1980) and *Nat'l Treasury Emps. Union,* 39 FLRA 27, 56 (1991)). Indeed, this Court has noted that "the Authority often fails to distinguish between the right to direct employees and the right to assign work. This may be because the FLRA sees little daylight between them." *Id.*

Given what this Court has acknowledged to be the indistinct line between the rights to "assign work" and "direct employees," the Agency's extensive and substantive argument pertaining to what it called "these overlapping management rights" to assign work and direct employees (JA 63, 68-72), and the Union's own repeated acknowledgment that the Agency arguing that the Proposal affected its right to "direct employees" (JA 87, JA 173, JA 190), the Authority reasonably determined

that the Agency had argued that the Proposal affected its right to direct employees and reasonably considered whether the Proposal affected this management right. The Union's argument that the Authority violated 5 C.F.R. § 2424.32(b) by considering *sua sponte* an argument not raised by a party is thus without merit.

3. The Union did not make a substantive argument to the Authority as to whether the Proposal fell within any exception to management rights, consequently, the Authority could not consider that argument and this Court is precluded from it

The Statute provides that, barring extraordinary circumstances, this Court does not possess subject matter jurisdiction over any "objection that has not been urged before the Authority. . . ." 5 U.S.C. § 7123(c); *see also Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n.5 (2005) (argument before the Court that does not appear in cited record pages is waived); *Ga. State Chapter, Ass'n of Civilian Techs. v. FLRA*, 184 F.3d 889, 891 (D.C. Cir. 1999) (arguments raised for first time in Petition for Review are waived where party had opportunities to argue them below); *NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993) (surprise does not constitute extraordinary circumstance to excuse failure to raise argument below where party failed to seek reconsideration). Nevertheless, the Union argues that the Authority should have considered whether the Proposal falls within an exception to management rights and that the Authority's failure to do so was arbitrary and capricious. The problem with the Union's argument is that it did nothing more than allude to exceptions to

management rights in its briefing before the Authority, and did not ask the Authority to reconsider this subject after the Authority issued its Decision.

The Union argued the Proposal was negotiable based solely on the grounds that it did not require management to actually grant or alter any employee's telework schedule and that the overall proposal would be beneficial to the Agency as well as employees. (JA 1-40, 165-211.) It contended that Authority case law already supported the finding that telework schedules were negotiable. (JA 165-211.) The Union, however, did no more than note in passing that proposals that affect management's rights may be negotiable if they are relate to a "procedure" or "appropriate arrangement" concerning the exercise of a management's right. (JA 178); *see also* 5 U.S.C. § 7106(b)(2)-(3) (setting forth these exceptions to the non-negotiability of proposals that implicate management rights). The Union did not provide *any* specific or substantive argument that the Proposal could be considered a "procedure" or "appropriate arrangement." *Id.*

It was the Union's responsibility to raise and support any arguments it wanted the Authority to consider. 5 C.F.R. § 2424.25(c)(1). Absent any argument that the Proposal fell within the exceptions in § 7106(b), the Authority reasonably and correctly found that the Union did not establish that the Proposal was negotiable under this section. (JA 233.) As the Union did "not specifically argue, with supporting authorities, that the Proposal constitutes a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3)," the Authority could not have

considered any such argument. (JA 233.) As a result, this Court is also precluded from considering the Union's objections on this point. *See* 5 U.S.C. § 7123(c).

Although the Union could have attempted to clarify, in a motion to the Authority for reconsideration, why the Proposal fell within an exception to a management right, it never did so—even *after* the Authority issued its decision holding that the point was never argued by the Union. Absent extraordinary circumstances, a petitioner must request reconsideration by the Authority before presenting an argument to the D.C. Circuit that it failed to urge before the Authority. *See U.S. Dep't of the Treasury, Bureau of the Pub. Debt Wash., D.C. v. FLRA*, 670 F.3d 1315, 1319-21 (D.C. Cir. 2012); *U.S. Dep't of Commerce, Nat. Oceanic & Atmospheric Admin., Nat. Weather Serv., Silver Spring, Md. v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993). There is one exception to this rule. If a request for reconsideration would be "patently futile" in light of recent Authority decisions that address the issue, then an appellate court can hear the objection. *Nat'l Ass'n of Gov't Emps., Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004).

There are no extraordinary circumstances in this case, and filing the request would not have been patently futile because there is no recent Authority decision that has addressed whether a proposal like the Union's proposed Article 20 is negotiable as a "procedure" or an "appropriate arrangement" under 5 U.S.C. § 7106(b)(2)-(3). Since the Union failed to file a motion for reconsideration raising this issue, any objection to the Authority's refusal to consider whether the Proposal was a

"procedure" or an "appropriate arrangement" is beyond this Court's jurisdiction to consider. *See* 5 U.S.C. § 7123(c).

II. Although not properly before this Court, the Authority's determination that the Telework Enhancement Act did not provide the Agency with unfettered discretion to set telework policies does not conflict with the Authority's decision that the Proposal affected management rights under the Statute

The Authority's conclusion that the Agency did not have "sole and exclusive" discretion to determine telework policies under the Telework Enhancement Act is not properly before this Court. The Agency raised that issue before the Authority, which then unanimously rejected it, and the Agency has not sought review of that ruling. (JA 230.) This Court thus has no jurisdiction over it.

To the extent that the Union attempts to argue that the Decision is arbitrary and capricious because the Authority both concluded that the Agency did not have "unfettered discretion" under the Telework Enhancement Act and that the Proposal affects management's rights under the Statute (Pet'r Br. 39-40), the Union's argument should be rejected. There is no contradiction between the two holdings.

Although the Authority is not entitled to *Chevron* deference for its interpretation of the Telework Enhancement Act, the Authority reasonably concluded that Congress did not intend to exclude all matters related to that law from processes under the Statute. (*See* JA 230 (under the Telework Enhancement Act, "Congress clearly delegated to each Agency head the role of determining telework policy; however, we

could not find—nor did the Agency identify—a particular word or phrase that evoked unfettered discretion" over telework policies).)

The question of Agency discretion under the Telework Enhancement Act, however, is different from the question of whether the Proposal affects management rights under the Statute. That is because the Authority's holding that the Proposal affects the management rights to "assign work" and "direct employees" does not mean the issue of telework is totally beyond bargaining. Telework proposals may still be negotiable under § 7106(b)(2) of the Statute as "procedure which management officials will observe" in exercising their management rights. *See U.S. Dep't of Homeland Sec. U.S. Customs and Border Prot. Laredo Field Office*, 70 FLRA 216, 219 (2017) (finding that a union proposal to use agency-created lists of eligible candidates for certain positions as the lists of employees qualified for overtime pools for those same positions was negotiable under § 7106(b)(2) as a "procedure"). Indeed, in one of the Authority's earliest cases, it held that a proposal pertaining to "the procedures which management will observe in determining whether to grant, deny or, having once granted, to continue or withdraw permission for a bargaining unit member to work from his or her home" was indeed negotiable under § 7106(b)(2) as a "procedure which management officials will observe" in exercising their management rights. *Nat'l Treasury Emps. Union, Chapter 6*, 1 FLRA 896, 902 (1979).

So too, a telework proposal might be negotiable as an "appropriate arrangement." *See Nat'l Treasury Emps. Union Chapter 243*, 49 FLRA 176, 186 (1994)

(finding a proposal regarding what level of review would be available for a first-line manager's determination that an employee's attire was inappropriate for the office was negotiable as an "appropriate arrangement").

But as noted above, the Union did not substantively argue before the Authority that the Proposal was negotiable as a "procedure" or an "appropriate arrangement" under 5 U.S.C. § 7106(b)(2)-(3). It has thus waived this argument before this Court.

CONCLUSION

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

Respectfully submitted,

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 11,780 words excluding exempt material.

/s/ Noah Peters
NOAH PETERS
Solicitor
Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Noah Peters
NOAH PETERS
Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statutes and Regulations

TABLE OF CONTENTS

5 U.S.C. § 7103(a)(14)

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(a)(2)

Powers and duties of the Authority

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

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

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

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

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

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

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

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

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

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

5 U.S.C. § 7106

Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency--

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

(2) in accordance with applicable laws--

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

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

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

(ii) any other appropriate source; and

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

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating--

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

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

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

5 U.S.C. § 7117(a), (c)

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.

(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.

5 U.S.C. § 7121(a)

Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

5 U.S.C. § 7123(a), (c)

Judicial review; enforcement.

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

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

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

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

***

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of

the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. § 2424.25(c)

Response of the exclusive representative; purpose; time limits; content; severance; service.

(c) Content. You must file your response 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 response electronically through use of the eFiling system on the FLRA's Web site at www.flra.gov. That Web site also provides copies of response forms. With the exception of a request for severance under paragraph (d) of this section, you must limit your response to the matters that the agency raised in its statement of position. You must date your response, unless you file it electronically through use of the FLRA's eFiling system. And, regardless of how you file your response, you must ensure that it includes the following:

(1) Any disagreement with the agency's bargaining obligation or negotiability claims. You must: State the arguments and authorities supporting your opposition to any agency argument; include specific citation to any law, rule, regulation, section of a collective bargaining agreement, or other authority on which you rely; and provide a copy of any such material that the Authority may not easily access (which you may upload as attachments if you file your response electronically through use of the FLRA's eFiling system). You are not required to repeat arguments that you made in your petition for review. If not included in the petition for review, then you must state the arguments and authorities supporting any assertion that the proposal or provision does not affect a management right under 5 U.S.C. 7106(a), and any assertion that an exception to management rights applies, including:

(i) Whether and why the proposal or provision concerns a matter negotiable at the election of the agency under 5 U.S.C. 7106(b)(1);

(ii) Whether and why the proposal or provision constitutes a negotiable procedure as set forth in 5 U.S.C. 7106(b)(2);

(iii) Whether and why the proposal or provision constitutes an appropriate arrangement as set forth in 5 U.S.C. 7106(b)(3); and

(iv) Whether and why the proposal or provision enforces an "applicable law," within the meaning of 5 U.S.C. 7106(a)(2).

(2) Any allegation 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.

5 C.F.R. § 2424.32(b)

Parties' responsibilities; failure to raise, support, and/or respond to arguments; failure to participate in conferences and/or respond to Authority orders.

(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.