ORAL ARGUMENT NOT YET SCHEDULED

No. 15-1122

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

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 ("Authority") were the U.S. Department of Agriculture, Food, Nutrition and Consumer Services ("Agency") and the National Treasury Employees Union ("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 order in *National Treasury Employees Union and U.S. Department of Agriculture, Food, Nutrition and Consumer Services*, 68 FLRA 334 (Mar. 6, 2015). As discussed below, the Authority contends that the Court does not possess subject matter jurisdiction to review the Authority's decision in this case.

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 Respondent is aware.

/s/ Fred B. Jacob
Fred B. Jacob
Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	The United States Department of Agriculture, Food, Nutrition, and Consumer Services
Authority	Respondent, the Federal Labor Relations Authority
Award	The decision of the arbitrator in this case
Br.	Petitioner's opening brief
Decision	The decision of the Authority in this case
FOIA	The Freedom of Information Act, 5 U.S.C. § 552
JA	The parties' Joint Appendix
OPM	The Office of Personnel Management
The proposal	A proposal that the Union advanced in negotiations with the Agency over a new collective-bargaining agreement
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Union	Petitioner, the National Treasury Employees Union

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is about the negotiability of a proposal ("the proposal") that the National Treasury Employees Union ("Union") advanced during negotiations with the United States Department of Agriculture, Food, Nutrition, and Consumer Services ("Agency") over a new collective-bargaining agreement. The Agency contended that the proposal was contrary to 5 C.F.R. § 300.201(c) and, therefore, outside the Agency's duty to bargain under the

Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2012) ("the Statute"). In its response before the Authority, the Union failed to counter the Agency's 5 C.F.R. § 300.201(c) argument. The Union now seeks review of the Authority's decision, raising only arguments that it failed to bring to the Authority's attention in the first instance. Because the Statute prohibits judicial review of objections that have not been urged before the Authority, 5 U.S.C. § 7123(c), this Court should dismiss the Union's petition for review for lack of jurisdiction. *See U.S. Dep't of the Treasury, Bureau of the Pub. Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315, 1316 (D.C. Cir. 2012) (dismissing petition for review where party only raised issues not previously brought to the Authority).

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(E) of the Statute. 5 U.S.C. § 7105(a)(2)(E). The Authority's decision is published at 68 FLRA (No. 59) 334 (2015). A copy of the decision is included in the Joint Appendix ("JA") at 132-42. 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 ISSUES PRESENTED

1. Whether the Court lacks jurisdiction under § 7123(c) of the Statute to consider the Union's arguments related to 5 C.F.R. § 300.201(c)

because they were not presented to the Authority, but rather advanced for the first time before this Court.

2. Assuming, arguendo, that the Court has jurisdiction to consider the Union's new arguments, whether the Union has failed to demonstrate that the Authority was arbitrary and capricious in accepting the Agency's argument, in the absence of any objection from the Union, that the proposal was contrary to 5 C.F.R. § 300.201(c).

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att. 1.

STATEMENT OF THE CASE

The case before the Authority concerned the negotiability of five proposals addressing merit promotions and details that the Union advanced during collective-bargaining negotiations. (Decision, JA 132.) Under § 7117(a)(1) of the Statute, federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." 5 U.S.C. § 7117(a)(1). On that basis, the Agency declared the proposals non-negotiable, and in response, the Union filed a negotiability appeal with the Authority under § 7105(a)(2)(E) of the Statute. (Union's Pet. for Review, JA 7.) The Agency filed a statement of position (JA 38-48), to which the Union filed a response (JA 49-122).

The Authority concluded that three of the Union's proposals were within, and two were outside, the Agency's statutory duty to bargain. (Decision, JA 132-33.) The Union now seeks review of the Authority's decision that one proposal is outside the duty to bargain.

STATEMENT OF THE FACTS

A. The Parties Agree that the Proposal Requires Notice Before Using Crediting Plans or Similar Rating Guides

It is undisputed that the proposal at issue here would require the Agency to provide notice to the Union before using "a crediting plan or similar rating guide" to evaluate applicants for a merit promotion. (Decision, JA 135 (internal quotation marks omitted).) The wording of the proposal, in full, is:

> Prior to the use of a crediting plan or similar rating guide[,] the [Agency] will provide [the Union] with specific notice of the plan/guide. However, once the plan/guide has been used and the Union so notified, the [Agency] is not required to notify the Union again unless there is a change in the plan. At the [Agency]'s discretion, it may limit disclosure of the plan/guide to a face-to-face briefing, rather than describe it in any written notice. The [Agency] may withhold any test questions or answers if needed to protect the integrity of the test; however, it will reveal the number of points or other impact the test results could have on the overall assessment. Otherwise, the Union will be informed of the criteria to be assessed and the potential points or impact of each in the total assessment.

(*Id.*) As the Authority described in its decision, under Authority precedent, a "crediting plan or rating guide" is the combination of knowledge, skills and abilities required to successfully perform in a position; the job criteria for a

position; and the weights to be used to evaluate whether a candidate possesses the necessary knowledge, skills and abilities. (*Id.* (citing *Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 240 (2000).)

B. In Its Decision, the Authority Accepts the Agency's Argument, Uncontested by the Union, that the Proposal Is Contrary to 5 C.F.R. § 300.201(c)

In its statement of position to the Authority, the Agency, among other things, argued that the proposal is contrary to 5 C.F.R. § 300.201(c), which, according to the Agency, "expressly forbids the release of crediting plans." (Decision, JA 135 (internal quotation marks omitted); Agency's Statement of Position, JA 43.) The Union did not specifically address the Agency's § 300.201(c) claim in its response. (Decision, JA 136; *see* Union's Resp., JA 72-89.) Instead, it responded to other arguments and relied on other authorities, contending, *inter alia*, that the proposal is consistent with the Freedom of Information Act ("FOIA") and the Office of Personnel Management's ("OPM") Delegated Examining Operations Handbook. (Union's Resp., JA 87-89.) While advancing those arguments, the Union made a general assertion that "[no] law creates an absolute bar against releasing crediting plans." (*Id.*, JA 87; *see also* Decision, JA 136.)

Evaluating the Agency's arguments, the Authority considered the plain language of 5 C.F.R. § 300.201(c), which provides that "[e]ach employee entrusted with test material has a positive duty to protect the confidentiality of

that material and to assure release only as required to conduct an examination authorized by the Office [of Personnel Management]." 5 C.F.R. § 300.201(c). The Authority also found relevant 5 C.F.R. § 300.201(a), which restricts OPM's release of "[t]esting and examination materials used solely to determine individual qualifications" or "test material, including test plans, item analysis data, criterion instruments, and other material the disclosure of which would compromise the objectivity of the testing process." 5 C.F.R. § 300.201(a); *see* Decision, JA 135. The Authority then concluded that the prohibition on the release of "test materials" in § 300.201(c) applies to "more than just test questions and answers." (Decision, JA 136.)

Relying on "the absence of any argument to the contrary from the Union," and given the "apparent conflict" between the proposal and § 300.201(c), the Authority concluded that the proposal was contrary to § 300.201(c). (Decision, JA 136.) The Authority found it unnecessary to address the Union's arguments that the proposal is a procedure or an appropriate arrangement under 5 U.S.C. § 7106(b)(2) or (3), respectively, because a proposal "that is contrary to law or government-wide regulation remains so regardless of whether it is a procedure or an appropriate arrangement." (*Id.*)

The Union's petition for review in this case followed.

SUMMARY OF THE ARGUMENT

Under 5 U.S.C. § 7123(c), the Union's failure to respond to the Agency's 5 C.F.R. § 300.201(c) argument precludes this Court from reviewing the Union's new arguments now. The Authority is only able to consider arguments the parties actually put before it. This limitation on the Authority's powers is acknowledged in its negotiability regulations, which require a union to raise objections to an agency's statement of position before the Authority with specificity in its response or concede the point. *See* 5 C.F.R. § 2424.25(a), (c)(1).

Here, the Union raised none of its objections to the Agency's argument that the proposal conflicts with 5 C.F.R. § 300.201(c) in its response to the Authority. The Union's claim that it preserved its 5 C.F.R. § 300.201(c) arguments by broadly stating that "'n[o] . . . law creates an absolute bar against the release of crediting plans'"[1] must fail, as it conflicts with this Court's precedent, which requires – like the Authority's regulations – parties to make their arguments with specificity to preserve them for judicial review. Because the Union failed to raise its objections before the Authority, this Court lacks jurisdiction to consider them under § 7123(c) of the Statute, and the Court must dismiss the Union's petition for review. *See* 5 U.S.C. § 7123(c). To do otherwise would propel the Court into the domain which Congress has set

[1] Br. at 7 (quoting Union's Resp., JA 87).

aside exclusively for the Authority. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

In any event, in the absence of specific rebuttal from the Union in its response, it was reasonable for the Authority to interpret § 300.201(c) as barring the release of crediting plans. For the reasons set out below, the cases the Union cites do not dictate otherwise.

STANDARDS OF REVIEW

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 Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . .").

When judicial review is permitted under § 7123(c), this Court reviews Authority decisions "in accordance with section 10(e) of the Administrative Procedure Act" and 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*, 754 F.3d at 1041 (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).

Negotiability appeals arise under § 7117(a)(1) of the Statute, which, as noted above, states that federal agencies have no duty to negotiate over proposals that are "inconsistent with any Federal law or any Government-wide rule or regulation." Because § 7117 is part of the Authority's enabling statute, this Court "owe[s] deference to the FLRA's interpretation of the kind of inconsistency contemplated by 5 U.S.C. § 7117(a)(1)." *Nat'l Treasury Emps. Union v. FLRA*, 30 F.3d 1510, 1515 (D.C. Cir. 1994). Finally, the Court reviews the Authority's interpretations of other agencies' regulations de novo. *Soc. Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000).

ARGUMENT

I. BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE UNION'S NEW 5 C.F.R. § 300.201(c) ARGUMENTS, IT MUST DISMISS THE PETITION FOR REVIEW

A cornerstone of judicial review of Authority decisions is the principle codified in 5 U.S.C. § 7123(c): barring extraordinary circumstances, "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). As this Court has recognized, § 7123(c) is not merely advisory, but is "jurisdictional in nature." *Nat'l Labor Relations Bd. v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993); *accord Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986).

As noted above, in its statement of position, the Agency explicitly argued that the Union's proposal to disclose crediting plans was contrary to 5 C.F.R. § 300.201(c). (Decision, JA 135; Agency Statement of Position, JA 43.) But the Union failed to address that argument – indeed, it did not make any mention of § 300.201(c) – before the Authority. (*See* Union's Resp., JA 49-122.) Consequently, under 5 U.S.C. § 7123(c), the Court is barred from considering the Union's objections now. *See, e.g., Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n.5 (D.C. Cir. 2005) (finding Union's argument waived); *Nat'l Treasury Emps. Union v. FLRA*, 810 F.2d 1224, 1228 (D.C. Cir. 1987) (same). Accordingly, as in *U.S. Dep't of the Treasury, Bureau of the Public*

Debt v. FLRA, 670 F.3d 1315, 1316 (D.C. Cir. 2012), the Court must dismiss the Union's petition because there is nothing before the Court to review.

The Union's claim that it *did* present its § 300.201(c) arguments to the Authority in the negotiability proceeding lacks credence. (*See* Br. at 7 (quoting Union's Resp., JA 87).) The Union's only response to the Agency's contrary-to-law argument before the Authority was its broad, general assertion that "'n[o] . . . law creates an absolute bar against the release of crediting plans.'" (Union's Resp., JA 87.) The Authority was not able to ascertain from that single sentence the Union's new § 300.201(c) arguments that span over nine pages of its brief to this Court, *see* Br. at 8-16. Indeed, the suggestion that a party could preserve every contrary-to-law, rule, or regulation argument for appeal by making a blanket statement to the Authority that "no law bars X" not only defies logic, it conflicts with this Court's precedent, Authority regulations, and congressional intent.

This Court has consistently required that parties raise their arguments before the Authority with specificity to preserve them on appeal under 5 U.S.C. § 7123(c). In *U.S. Department of Commerce, National Oceanic & Atmospheric Administration, National Weather Service v. FLRA*, for example, the Court made clear that a party must raise an argument *explicitly* with the Authority to preserve it under § 7123(c): raising an argument implicitly will not suffice. 7 F.3d 243, 245 (1993). The agency contended that it challenged a *sua sponte* Authority

conclusion regarding supervisory employees *implicitly* because it "objected to the proposals on the grounds that they included 'all employees.'" *Id.* at 245. The Court rejected that argument, reasoning that the agency's "generalized objection to the proposal's use of the phrase 'all employees'" did not "fairly" bring the supervisory issue to the Authority's attention. *Id.* Another negotiability case involving the same union here – *National Treasury Employees Union v. FLRA*, 810 F.2d 1224, 1228 (D.C. Cir. 1987) – is also instructive. There, the agency proffered two objections to a proposal, but the union did not address the agency's second claim. *Id.* Because the union "simply chose not to argue before the [Authority]" that the agency failed to support its second claim, the Court held that 5 U.S.C. § 7123(c) prevented the Union from doing so on appeal. *Id.*

The same is true here. The Union chose not to explicitly counter the Agency's argument that the Union's proposal was contrary to 5 C.F.R. § 300.201(c). It made none of the arguments regarding the regulation that it advances in its opening brief before the Authority. The Union claims that it "cited many of the same legal authorities before the FLRA that it cites here." (Br. at 8.) But a careful review of the Union's pleadings below reveals that, in fact, of the fifteen cases the Union cites in the argument section of its brief, only five of those cases appear in the Union's response to the Authority, *see* Union's Resp., JA 72-89. Notably, none of those five cases cites 5 C.F.R.

§ 300.201(c). To the extent the Union made any implicit assertion regarding § 300.201(c), that is insufficient to preserve its arguments on appeal under this Court's precedent. *See Dep't of Commerce*, 7 F.3d at 245. And, as in *National Treasury Employees Union v. FLRA*, 810 F.2d at 1228, the fact that the Union made *other* arguments before the Authority does not somehow preserve for review the new arguments it advances here. (*See* Union's Resp., JA 74-89 (arguing, *inter alia*, that the proposal is not contrary to the FOIA or the Privacy Act).) That is, even if the proposal were consistent with the FOIA and the Privacy Act, as the Union suggested, *see id.*, the Union did not address whether – let alone refute that – the proposal was contrary to 5 C.F.R. § 300.201(c).

Moreover, the Union's failure to comply with the Authority's negotiability regulations also forecloses the Union's arguments from judicial review. Those regulations provide that a union's response to an agency's statement of position "must include . . . the arguments and authorities supporting [the union's] opposition to *any* agency argument[] includ[ing] *specific citation* to any law, rule, [or] regulation . . . on which you rely." 5 C.F.R. § 2424.25(c)(1) (emphasis added); *see also id.* § 2424.25(a). Again, the Union did not respond to the Agency's § 300.201(c) claim, either generally or with

specificity.[2] As the Supreme Court has recognized, "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

In sum, the Union did not raise its 5 C.F.R. § 300.201(c) arguments before the Authority and cites no extraordinary circumstances to excuse its failure to do so. The Union also failed to file a motion for reconsideration, which potentially could have preserved its claims for review, arguing that the Authority: (1) erred in finding that the Union failed raise any § 300.201(c) arguments; or (2) misinterpreted § 300.201(c). Nor could the Union claim that a reconsideration request would have been "patently futile in light of recent Authority decisions squarely addressing the issue in question." *U.S. Dep't of the Treasury, Bureau of Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315, 1319 (D.C. Cir. 2012) (internal quotation marks omitted). Allowing the Union to seek initial review of its claims before this Court now would conflict with congressional intent in enacting the jurisdiction bar of 5 U.S.C. § 7123(c). As

[2] *See, e.g., Am. Fed'n of Gov't Emps., Local 2058,* 68 FLRA 676, 678-79 (2015) (rejecting union's claim under 5 C.F.R. § 2424.25(c)(1) because union failed to raise it with specificity); *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 452-53 (2009) (same); *Nat'l Labor Relations Bd. Union, Nat'l Labor Relations Bd. Prof'l Ass'n*, 62 FLRA 397, 402 (2008) (same).

the Supreme Court has recognized, Congress intended the Authority to "pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues." *Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *see also U.S. Dep't of Housing & Urban Dev. v. FLRA*, 964 F.2d 1, 5 (D.C. Cir. 1992) ("Section 7123 was designed to ensure that the Authority's expertise be used to dispose of all arguments relating to cases within its jurisdiction."). Accordingly, the Court is precluded from considering the Union's arguments under 5 U.S.C. § 7123(c) and should dismiss the petition for review.

II. IN ANY EVENT, THE UNION HAS FAILED TO DEMONSTRATE THAT THE AUTHORITY WAS ARBITRARY AND CAPRICIOUS IN ACCEPTING THE AGENCY'S ARGUMENT, IN THE ABSENCE OF ANY OBJECTION FROM THE UNION, THAT THE PROPOSAL WAS CONTRARY TO 5 C.F.R. § 300.201(c)

Even on the merits, the Union still fails to demonstrate that the Authority's ruling is arbitrary and capricious. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983). To the contrary, the Authority reasonably concluded that the proposal was nonnegotiable. As noted above, the Authority found that "the Union does not specifically address the Agency's claim that § 300.201(c) bars the disclosure of crediting plans in its response." (Decision, JA 136.) In turn, the Authority's regulations provide that "[f]ailure to respond to an argument or assertion raised by the other party will, where

appropriate, be deemed a concession to such argument or assertion." 5 C.F.R. § 2424.32(c)(2). The Authority therefore reasonably concluded, consistent with its regulations, that "in the absence of any argument to the contrary from the Union," the proposal was nonnegotiable, given its "apparent conflict" with § 300.201(c). (Decision, JA 136.)

Given the Union's concession under the Authority's rules, the Union is incorrect when it claims that the Authority departed from its precedent in finding the proposal non-negotiable. (*See* Br. at 14-16.) Only one of the cases the Union cites addresses whether the release of crediting plans is barred by 5 C.F.R. § 300.201(c). (*See id.* at 15 (citing *U.S. Dep't of the Army, Headquarters, XVIII Airborne Corps*, 26 FLRA 407 (1987) ("*Airborne Corps*").) But that case predates the Authority's passage of its concession regulation by almost twelve years. *See* 63 Fed. Reg. 66,405 (Dec. 2, 1998) (codified at 5 C.F.R. § 2424.32(c)(2)); *see also Nat'l Ass'n of Indep. Labor, Local 7*, 67 FLRA 654, 658 (2014) (noting that the Authority's 1999 negotiability regulations "set forth the parties' burdens and laid out the consequences for failing to satisfy those burdens"). Thus, the Authority could not have departed from its decision in *Airborne Corps* when it acted in accordance with its later-promulgated concession regulation in this case. Moreover, even if the Authority's concession regulation *had* applied in *Airborne Corps*, the parties in that case joined their arguments over the issue in the Authority proceeding. Thus, the

cases the Union cites do not conflict with the Authority's conclusion, consistent with its negotiability regulations, that the Union's failure to respond results in concession – nor does any of the other precedent that the Union cites with respect to federal labor law or the FOIA. (*See* Br. at 11-14.)

Indeed, in light of the Union's failure to respond to the Agency's 5 C.F.R. § 300.201(c) argument before the Authority, the Authority reasonably found an apparent conflict between the proposal and § 300.201(c). Section 300.201(c) provides that "[e]ach employee entrusted with test material has a positive duty to protect the confidentiality of that material and to assure release only as required to conduct an examination authorized by the Office [of Personnel Management]." 5 C.F.R. § 300.201(c). For purposes of Article 5, Chapter I of the Code of Federal Regulations, the definition of "employee" is "a civilian officer or employee" unless otherwise specified. 5 C.F.R. § 210.102(b)(6). Thus, "employee" in § 300.201(c) refers to any civilian employee of any agency, and is not limited to OPM employees. *Cf.* 5 C.F.R. § 300.201(d) (referring to an OPM employee as "an employee of the Office").

Regarding the conditions under which test material may be released under § 300.201(c), all competitive service examinations are authorized by OPM, either directly or via delegation. *See Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 495 (D.C. Cir. 1988) (5 U.S.C. § 3304(a)(1) authorizes the President, and thus, by delegation, OPM, to prescribe rules "which shall

provide . . . for . . . open, competitive examinations for testing applicants for appointment in the competitive service . . . ."); 5 C.F.R. § 300.104(b) (anticipating that OPM may delegate examining authority to agencies). Accordingly, by its plain wording, § 300.201(c) poses an apparent conflict with any proposal requiring a federal employee to release any competitive service test material other than as required to conduct an examination. And, as the Authority reasonably explained, this prohibition on the release of test material "applies to more than just test questions and answers," and includes crediting plans. (Decision, JA 136.)

The "statutory and regulatory history" of § 300.201(c) that the Union cites, Br. at 12-14, lends support to the Authority's determination, in the absence of a Union response, that the crediting plans are not releasable. The Authority agrees that OPM cited the FOIA as the authority for § 300.201(c). *See* 50 Fed. Reg. 3307, 3312 (Jan. 24, 1985); Br. at 12. But the courts of appeals have upheld agencies' refusals to disclose crediting plans under the FOIA, finding that the need for confidentiality trumps any presumption in favor of disclosure generally. (*See* Union's Resp., JA 76 (acknowledging that this Court has "found that crediting plans are not releasable under the [FOIA]").) In *National Treasury Employees Union v. U.S. Customs Service*, for example, this Court held that the U.S. Customs Service was not required to release crediting plans

to the Union under FOIA Exemption 2. 802 F.2d 525, 531 (D.C. Cir. 1986).[3] The Court reasoned that releasing the crediting plans would create "a significant risk" that the agency's process of evaluating applicants for employment would "be seriously compromised, in violation of a cornerstone of the congressionally mandated merit system principle: that selection and advancement in the federal civil service should be based solely on the basis of relative ability, knowledge, and skills, after fair and open competition 'which assures that all receive equal opportunity.'" *Nat'l Treasury Emps. Union*, 802 F.2d at 531(quoting 5 U.S.C. § 2301(b)(1)); *accord Kaganove v. Envtl. Prot. Agency*, 856 F.2d 884, 889 (7th Cir. 1988). Thus, in light of the Union's failure to respond, the regulatory language, and the case law surrounding crediting plans

[3] The Court's analysis in this decision was grounded in the two-prong test for analyzing FOIA Exemption 2 cases announced in *Crooker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1074 (D.C. Cir. 1981) (en banc). The Authority acknowledges that *Crooker* was abrogated by the Supreme Court's decision in *Milner v. Department of the Navy*, which held that *Crooker* had improperly expanded the scope of Exemption 2 beyond records related to "employee relations and human resources." 562 U.S. 562, 581 (2011); *see also id.* at 569-73. *Milner*, however, does not call into question this Court's decision in *National Treasury Employees Union v. U.S. Customs Service* because crediting plans fall squarely within the realm of human resources records. *See Milner*, 562 U.S. at 563 ("An agency's 'personnel rules and practices' . . . concern conditions of employment in federal agencies – such matters as hiring and firing, work rules and discipline, compensation and benefits"); *Nat'l Treasury Emps. Union*, 802 F.2d at 531 ("The crediting plans at issue here are indisputably concerned with 'personnel rules and practices' under even the narrowest reading of that phrase.").

under the FOIA, the Authority reasonably determined that the proposal conflicts with that regulation.

If the Court decides that the Union is not barred from bringing its new § 300.201(c) arguments, it should remand the case to the Authority so that the Authority may fairly consider them, along with the Agency's arguments that the proposal is "covered by" provisions of the parties' agreement, or that the proposal interferes with the Agency's rights to hire and select employees under 5 U.S.C. § 7106(a)(2). *See Baton Rouge Marine Contractors, Inc. v. Fed. Mar. Comm'n*, 655 F.2d 1210, 1211 n.2 (D.C. Cir. 1981)) (when an agency's decision "is overturned on review, remand is required; the [agency], not the court, must determine the relevant facts and initially explicate and apply the law thereto); *Synovus Fin. Corp. v. Bd. of Governors of Fed. Reserve System*, 952 F.2d 426, 433 (D.C. Cir. 1991) ("[C]ourts must not decide issues left open by the agency"); *see also* Decision, JA 136 (finding it unnecessary to consider the Agency's other arguments given the Union's concession that the proposal is contrary to § 300.201(c)). Remand is particularly appropriate here, where the case involves the interpretation of the parties' collective-bargaining obligations.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction.

Respectfully submitted,

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September 9, 2015

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

Pursuant to Fed. R. App. P. 32(a)(7)(C), 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 14,000 words. It contains 4,513 words excluding exempt material.

/s/ Stephanie J. Fouse
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2015, 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/ Stephanie J. Fouse
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ATTACHMENT 1
PERTINENT STATUTORY PROVISIONS

5 U.S.C. § 2301. The excepted service

(a) For the purpose of this title, the "excepted service" consists of those civil service positions which are not in the competitive service or the Senior Executive Service.

(b) As used in other Acts of Congress, "unclassified civil service" or "unclassified service" means the "excepted service".

5 U.S.C. § 7105(a)(2). Powers and duties of the Authority

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

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

> (A) determine the appropriateness of units for labor organization representation under section 7112 of this title;
>
> (B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;
>
> (C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;
>
> (D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;
>
> (E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;
>
> (F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

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

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

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

5 U.S.C. § 7106. Management rights

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

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

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

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

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

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

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

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

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

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

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

5 U.S.C. § 7123. Judicial review; enforcement

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

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

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

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

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of

the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. § 210.102(b)(6). Definitions

(a) The definitions in paragraph (b) of this section apply throughout this chapter, except when a defined term is specifically modified in or specifically defined for the purpose of a particular part.

(b) In this chapter:

> (1) Appointing officer means a person having power by law, or by lawfully delegated authority, to make appointments to positions in the service of the Federal Government or the government of the District of Columbia.

(2) OPM means the Office of Personnel Management.

(3) Days, unless otherwise defined or limited, means calendar days and not workdays. In computing a period of time prescribed in this chapter, the day of the action or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday.

(4) Demotion means a change of an employee, while serving continuously within the same agency:

(i) To a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedule; or

(ii) To a position with a lower rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or are in different pay method categories.

(5) Eligible means an applicant who meets the minimum requirements for entrance to an examination and is rated 70 or more in the examination by OPM.

(6) Employee means a civilian officer or employee.

5 C.F.R. § 300.201. Examinations

(a) The Office makes available information that will assist members of the public in understanding the purpose of, and preparing for, civil service examinations. This includes the types of questions and the categories of knowledge or skill pertinent to a particular examination. The Office does not release the following: (1) Testing and examination materials used solely to determine individual qualifications, and (2) test material, including test plans, item analysis data, criterion instruments, and other material the disclosure of which would compromise the objectivity of the testing process.

(b) The Office maintains control over the security and release of testing and examination materials which it has developed and made available to agencies for initial competitive appointment or inservice use unless the materials were developed specifically for an agency through a reimbursable contractual agreement. These testing and examination materials include, and are subject to the same controls as, those described in paragraphs (a)(1) and (a)(2) of this section.

(c) Each employee entrusted with test material has a positive duty to protect the confidentiality of that material and to assure release only as required to conduct an examination authorized by the Office.

(d) An applicant may review his or her own answers in a written test, but only in the presence of an employee of the Office or, for the convenience of the Office and requester, in the presence of an employee of another agency designated by OPM. The applicant may not review a test booklet in connection with this review.

(e) The Office will release information concerning the results of examinations only to the individual concerned, or to parties explicitly designated by the individual.

(f) The Office will not reveal the names of applicants for civil service positions or eligibles on civil service registers, certificates, employment lists, or other lists of eligibles, or their ratings or relative standings.

5 C.F.R. § 2424.25. Response of the exclusive representative; purpose; time limits; content; severance; service

(a) Purpose. The purpose of the exclusive representative's response is to inform the Authority and the agency why, despite the agency's arguments in its statement of position, the proposal or provision is within the duty to bargain or not contrary to law, respectively, and whether the union disagrees with any facts or arguments in the agency's statement of position. As more fully explained in paragraph (c) of this section, the exclusive representative is required in its response to, among other things, state why the proposal or provision does not conflict with any law, or why it falls within an exception to management rights, including permissive subjects under 5 U.S.C. 7106(b)(1), and procedures and appropriate arrangements under section 7106(b)(2) and (3). Another purpose of the response is to permit the exclusive representative to

request the Authority to sever portions of the proposal or provision and to explain why and how it can be done.

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

(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.

(d) Severance. If not requested in the petition for review, or if the exclusive representative wishes to modify the request in the petition for review, the exclusive representative may request severance in its response. The exclusive representative must support its request with an explanation of how the severed portion(s) of the proposal or provision may stand alone, and how such severed portion(s) would operate. The exclusive representative also must respond to any agency arguments regarding severance made in the agency's statement of position. The explanation and argument in support of the severed portion(s) must meet the same requirements for specific information set forth in paragraph (c) of this section.

(e) Service. A copy of the response of the exclusive representative, including all attachments, must be served in accord with § 2424.2(g).

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

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

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

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

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

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

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

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

(d) Failure to participate in conferences; failure to respond to Authority orders. Where a party fails to participate in a post-petition conference pursuant to § 2424.23, a direction or proceeding under § 2424.31, or otherwise fails to provide timely or responsive information pursuant to an Authority order, including an Authority procedural order directing the correction of technical deficiencies in filing, the Authority may, in addition to those actions set forth in paragraph (c) of this section, take any other action that, in the Authority's discretion, is deemed appropriate, including dismissal of the petition for review, with or without prejudice to the exclusive representative's refiling of the petition for review, and granting the petition for review and directing bargaining and/or rescission of an agency head disapproval under 5 U.S.C. 7114(c), with or without conditions.