No. 20-3908

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE OHIO ADJUTANT GENERAL'S DEPARTMENT, et al.

Petitioners,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3970, AFL-CIO

Intervenors.

ON PETITION FROM THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

NOAH PETERS
Solicitor

REBECCA J. OSBORNE
Deputy Solicitor

SARAH C. BLACKADAR
Attorney

Federal Labor Relations Authority
1400 K Street, N.W.
Washington, D.C. 20424
(202) 218-7906

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

GLOSSARY

Agency	U.S. Department of Defense, Ohio National Guard, Major General Mark E. Bartman (in his official capacity as the Adjutant General of the Ohio National Guard), and the Ohio Adjutant General's Department
ALJ	Administrative Law Judge
Authority	The Federal Labor Relations Authority's three-member adjudicatory body
Br.	Petitioner's opening brief
CBA	Collective Bargaining Agreement
Decision	The decision of the Authority in this case, dated June 30, 2020 (PA 1a-10a)
EO 11491	Executive Order 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969)
FLRA	Respondent, the Federal Labor Relations Authority
NLRA	The National Labor Relations Act
NLRB	The National Labor Relations Board
PA	Petitioner's Appendix
SA	Supplemental Appendix
SF 1187	Standard Form used for commencing employees' union dues allotments
SF 1188	Standard Form used by employees to terminate a union dues allotment

The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Intevenor, American Federation of Government Employees Local 3970, AFL-CIO

STATEMENT ON ORAL ARGUMENT

The FLRA believes that oral argument is unnecessary because this case involves a straightforward application of well-settled law.

INTRODUCTION

The U.S. Department of Defense, Ohio National Guard, the Major General Mark E. Bartman, in his official capacity as the Adjutant General of the Ohio National Guard, and the Ohio Adjutant General's Department (collectively, the "Agency") seek to revisit a question that several state National Guards have already asked, and the courts and the Federal Labor Relations Authority (the "Authority" or "FLRA") have already answered: Does the Authority have the power to protect the collective bargaining rights of dual-status technicians ("technicians") employed by state National Guard units?

Courts (including this Circuit) and the Authority have repeatedly answered this question "yes." Over and over again, they have found that the Statute covers technicians and that the Authority may remedy unfair labor practices ("ULPs") committed by technicians' employing agencies. *See, e.g.*, *FLRA v. Mich. Army Nat'l Guard*, 878 F.3d 171 (6th Cir. 2017) ("*MANG*"); *Lipscomb v. FLRA*, 333 F.3d 611 (5th Cir. 2003); *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 FLRA 657 (1999). As recently as 2017, this Court, after analyzing the Statute at length, concluded that it "clearly" provides federal collective-bargaining rights to

technicians. *MANG*, 878 F.3d at 178. The Agency's suggestion that this Court should second-guess *MANG*'s conclusion is unavailing. For one thing, "[i]t is firmly established that one panel of this court cannot overturn a decision of another panel; only the court sitting en banc can overturn such a decision." *United States v. Lanier*, 201 F.3d 842, 846 (6th Cir. 2000).

For another, many of the Agency's arguments for overturning *MANG* and similar precedential decisions were never raised with the Authority and thus are not properly before this Court. *See* 5 U.S.C. § 7123(c) (prohibiting parties from raising an "objection that has not been urged before the Authority" to an appellate court absent "extraordinary circumstances"); *Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) ("*EEOC*"); *Nat'l Labor Relations Bd. v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993) ("*NLRB*").

The Agency's position is little more than a request that this Court disregard decades of settled precedent and strip thousands of federal civilian employees of their collective-bargaining rights—rights that they have enjoyed since before the Statute was enacted. *See* H.R. Rep. No. 95-984, pt. 3, at 5 (1978).

Notably, the Agency concedes that its actions violated the Statute. (Br. at 22-48.) It has abandoned all the arguments it made before the ALJ and the Authority contending otherwise. (*See id.*; *see also* SA 712a-722a, 786a-801a.)[1]

This Court should deny the Agency's Petition for Review.

STATEMENT OF JURISDICTION

The Authority had subject matter jurisdiction pursuant to § 7105(a)(2)(G) of the Statute, which charges the Authority with resolving ULP complaints. The Agency, in directing and employing technicians, falls under the Authority's jurisdiction. *See, e.g.*, *MANG*, 878 F.3d at 174, 177-78; *Lipscomb*, 333 F.3d at 613; *U.S. Dep't of Def. Nat'l Guard Bureau*, 55 FLRA at 660-61.

On the other hand, the Court lacks jurisdiction to hear several arguments raised by the Agency in this appeal. Specifically, the Court may not consider any "objection that has not been urged before the Authority, or its designee." *See* 5 U.S.C. § 7123(c); *see also EEOC*, 476

[1] Petitioners' Appendix is cited as ("PA __") throughout this brief. Respondent's Supplemental Appendix is cited as ("SA __").

U.S. at 23. The Court lacks jurisdiction to consider the new arguments the Agency has raised for the first time in its Petition for Review.

STATEMENT OF ISSUES PRESENTED

1. Is the Agency, in directing and employing technicians, an "Executive agency" subject to the Authority's jurisdiction?

2. Can this Court, consistent with 5 U.S.C. § 7123(c), consider new arguments that the Agency raised for the first time in its Petition for Review?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

I. The Agency and Union's collective bargaining relationship predates the Statute

The collective bargaining relationship between the Agency and Union has existed for a half century. The Agency first recognized the Union in 1971 under Executive Order 11491, which preceded the Statute. *See* Exec. Order No. 11491, 34 Fed. Reg. 17605 (Oct. 29, 1969) ("EO 11491"); *Adjutant General Dep't, State of Oh., Air Nat'l Guard, et al.*, No. 53-2974, 1 A/SLMR 234, 234-36 (May 20, 1971); PA 15a-16a; SA

640a. In 1990, the Authority certified the Union as the exclusive representative of the Agency's technicians under the Statute. (PA 16a; SA 126.) The parties negotiated a CBA that expired in February 2014 but remained in force thereafter, as required by the Statute. (SA 640a, 661a (citing *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1004 (2015)).)

The Agency and Union had attempted to renegotiate their CBA in 2012 but failed. (PA 18a.) A month before the CBA expired in February 2014, the Agency informed the Union that it would continue to honor the mandatory terms of the agreement after expiration. (*Id.*)

II. The Agency unlawfully seeks to end its collective bargaining relationship with the Union

The Agency did not live up to its promise, however. It proceeded to violate numerous terms of the CBA that pertained to mandatory bargaining topics, committing several ULPs.

In September 2016, the Agency circulated a memorandum to hundreds of employees, including many bargaining-unit members, announcing that it was no longer bound by the CBA, that the Agency itself was not subject to the Statute, and that the Agency would no longer comply with several provisions of the CBA pertaining to

mandatory bargaining subjects. (SA 621a-622a.) Specifically, the Agency repudiated the CBA's grievance procedures, announced it would no longer grant official time, and said it would change the negotiated procedures for hiring, merit promotions, and evaluations. (*Id.*; PA 27a; PA 123a-24a; 126a.) All of these actions occurred without any negotiation between the Union and the Agency. (PA 256a-258a.)

Then, beginning in November 2016, the Agency informed bargaining-unit members that a large number of SF 1187s, by which unit members authorized the Agency to deduct union dues from their paychecks, had gone missing. (SA 568a-570a.) The Agency informed unit members that they had sixty days to submit new SF 1187s to continue dues allotment. (*Id.*) The Agency also told unit members that they could submit an SF 1188 to end their dues deductions. (*Id.*) The Agency had known of the missing forms for years, however, and never previously taken any action. (PA 29a.) The Agency did not offer to bargain with the Union over the issue before directly communicating with its members. (*Id.*)

Few Union members submitted a new form because they believed they had submitted one previously and a second form should not be

required. (PA 131a-13a; PA 159a-164a.) Some members viewed the Agency's actions as an excuse for the Agency to identify Union supporters and reduce the Union's financial support. (PA 211a.) When some members did attempt to submit new SF 1187s, it became clear that the Agency would not honor them. (PA 214a.) After most members submitted neither a SF 1187 nor SF 1188, the Agency prepared and submitted numerous SF 1188s, signed by a member of the human resources department and not the employees themselves, ending their dues deductions. (PA 204a-207a.)

In early 2017, the Agency sought to implement changes to its negotiated merit promotion and performance appraisal policies without affording the Union an opportunity to bargain. (PA 27a.)

III. The Union files multiple ULP charges against the Agency

In March 2017, the Union filed four ULP charges with the FLRA's General Counsel's Office. (PA 15a.) The FLRA's General Counsel investigated, found merit to the charges, and issued a complaint. (*Id.*) The General Counsel, through its Chicago Regional Office, alleged that the Agency "refused to negotiate in good faith" by telling "employees that is was no longer bound by the mandatory terms of the expired

[CBA] and that it was not obligated to comply with the Statute, and by unilaterally implementing new policies regarding union dues deductions, grievances, official time, and merit promotions." (*Id.*)

Initially, both the Agency and General Counsel moved for summary judgment. The ALJ rejected both motions and held a hearing. (SA 632a-633a.) After the hearing, both sides filed post-hearing briefs.

In its brief, the General Counsel noted that technicians have long enjoyed collective bargaining rights both under the Statute and Executive Orders that preceded it. (SA 652a-676a.) The General Counsel argued that the statutory scheme and the legislative history demonstrated Congress's clear intent to subject state National Guards and Adjutant Generals to the Authority's jurisdiction. (SA 654a-656a.) The General Counsel noted that the Agency had ignored the multitude of cases where the federal courts have affirmed the rights of technicians to organize and bargain collectively under the Statute. (SA 656a-659a.)

The General Counsel also argued that the Agency's actions amounted to a repudiation of mandatory terms of the parties' CBA and thus violated the Statute. (SA 659a-673a.) The General Counsel asked for several traditional and non-traditional remedies. (SA 674a-675a.)

Among other things, the General Counsel sought to compel the Agency to reinstate the dues allotments canceled after the September 2016 memorandum where the employee had not submitted an SF 1188. (SA 674a.)

In its brief, the Agency argued that the Authority lacked jurisdiction over it because the National Guard had not been called into service under Article I, Section 8, Clause 15 of the Constitution. (SA 707a-708a.) Further, the Agency urged that Title 32 of the U.S. Code does not define the Adjutant General as a federal employee, and § 7103 of the Statute does not specifically list the state National Guards as "agenc[ies]." (SA 708a.) The Agency also asked the ALJ to rely on the Federal Circuit's decision in *Singleton v. Merit Service Protection Board*, 244 F.3d 1331 (Fed. Cir. 2001) and hold that technicians do not have bargaining rights under the Statute. (SA 708a-709a.)

The Agency then argued that, if it is subject to the Statute, its actions did not constitute ULPs. (SA 712a-722a). While contesting liability, the Agency did not specifically challenge the remedies requested by the General Counsel. (SA 707a-722a.)

IV. The ALJ finds that the Agency committed the ULPs charged by the General Counsel and recommends several remedies

The ALJ found that the text of both the Technicians Act and the Statute, along with their legislative histories, indicate that the Authority has jurisdiction over the Agency insofar as the Agency supervises and directs technicians. (PA 44a.) The ALJ noted that the Technicians Act limits the Authority's jurisdiction regarding technician discipline, specifying that Adjutant Generals have the final say on the military aspects of technician employment, but otherwise contains no limitations on the Authority's jurisdiction over state National Guard units. (PA 44a-47a.) He further observed that the Technicians Act explicitly granted technicians federal civilian employee status with all the benefits and rights generally afforded to those employees. (PA 45a.)

The ALJ relied on *Lipscomb v. FLRA*, 333 F.3d 611, 613 (5th Cir. 2003), which held that technicians had collective bargaining rights under the Statute. (PA 47a-49a.) The ALJ also cited this Court's decision in *MANG*, which he found to have clearly and directly addressed the Authority's jurisdiction over the Michigan National Guard and Adjutant General. (PA 49a.)

In light of this precedent, the ALJ found that technicians had collective bargaining rights under the Statute and, in that regard, were subject to the Authority's jurisdiction. (PA 49a-53a.) The ALJ then determined that the Agency's actions were clear violations of the Statute. (PA 53a-68a.) The ALJ recommended several remedies, including reinstatement of dues allotments and reimbursement to the Union of dues that were improperly canceled. (PA 72a-73a.)

V. The Authority adopts the ALJ's Recommended Decision and denies the Agency's exceptions

The Agency filed exceptions to the ALJ's recommended decision. It argued that the Authority could not regulate state National Guards because Congress had not called the militia into the service of the United States. (SA 776a-779a.) The Agency also urged that the Authority should reject precedent holding that it has jurisdiction over technicians. (SA 781a-782a.) In support, the Agency cited the Federal Circuit's decision in *Singleton* regarding the jurisdiction of the Merit System Protection Board ("MSPB") over technicians. (SA 780a-786a.) That was the extent of the Agency's jurisdictional argument.

The Agency then argued that its actions were not ULPs. (SA 786a-801a). The Agency ended with a conclusory sentence where, for

the first time, it claimed that the ALJ's recommended remedies were inappropriate—despite the fact that the General Counsel had urged similar remedies before the ALJ, and the Agency had not specifically objected to them. (SA 801a, 807a-809a.)

In response, the General Counsel argued that Congress clearly intended that the Authority exercise jurisdiction over state National Guards. (SA 835a-839a.) The General Counsel cited precedent confirming the Authority's jurisdiction. (SA 840a-842a.) The General Counsel then argued that the ALJ correctly determined that the Agency committed the charged ULPs, and that on a number of critical issues the Agency did not even except to the ALJ's findings. (SA 845a-863a.)

Finally, the General Counsel noted that the Authority's regulations require parties to object to the General Counsel's requested remedy before the ALJ, but the Agency had failed to do so. (SA 863a-865a.)

The Authority adopted the ALJ's recommended decision in full and denied the Agency's exceptions. (PA 1a.) Member Abbott concurred, noting that he shared Chairman Kiko's concerns over judicial and Authority precedent articulated in her dissent, but that the

Fifth Circuit "has spoken quite decisively on the matter and at least four other Circuits have reached similar conclusions." (PA 6a.) Chairman Kiko dissented and raised several new arguments, not urged by the Agency, about the application of the Statute to state National Guards and Adjutant Generals. (PA 7a-9a.)

This Petition for Review followed.

SUMMARY OF THE ARGUMENT

The Agency's Petition for Review is based primarily on new arguments that it failed to raise in its exceptions briefs to the Authority. Those new arguments must fail because the Court lacks jurisdiction to consider them. *See* 5 U.S.C. § 7123(c); *see also EEOC*, 476 U.S. at 23. The only ground that the Agency presents to this Court in its Opening Brief that was actually raised to the Authority was its argument regarding *Singleton*. (SA 776a-786a.)

Specifically, the Agency failed to present the following arguments to the Authority in its exceptions briefing, and has thus waived them on appeal:

1) its arguments based on the text of the Statute (Br. 23-29),
2) its arguments based on the canon of constitutional avoidance (Br 31-34),

3) its arguments based on the federalism canon (Br. 34-36),

4) its contention that the Authority's order to reinstate the wrongfully-terminated dues allotments is unenforceable (Br. 38-39), and

5) its arguments based on the "uniformed services" exception (Br. 40-42).

The Agency has not argued that any extraordinary circumstances excused its failure to raise these arguments to the Authority. As § 7123(c) of the Statute is jurisdictional in nature, the Court cannot grant the Agency's Petition on any of these grounds. *EEOC*, 476 U.S. 23.

Even if the Court had jurisdiction to consider these new arguments, the Petition should still be denied on the merits. The Fifth Circuit's thorough and well-reasoned decision in *Lipscomb*, along with this Court's decision in *MANG*, govern. *See MANG*, 878 F.3d at 176-79 (citing *Lipscomb* approvingly). In *MANG*, this Court found that the Authority had jurisdiction over state National Guards and Adjutant Generals with respect to technician bargaining. *Id.* Circuit precedent demands that the holding in *MANG* be followed. *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019).

But even if *MANG* did not control, and even if the Agency's arguments had been raised below, the Agency has not presented a

compelling reason to depart from decades of precedent holding that technicians are covered by the Statute. The Agency's argument that the text of the Technicians Act exempts them from the Statute is without merit. That Act lists a number of Title 5 provisions that do not apply to technicians, but does not list the Statute, which is part of Title 5. *See* 32 U.S.C. § 709(f), (g).

The Agency's arguments also ignore that technicians were widely unionized under the Executive Orders that predated the Statute. *See* H.R. Rep. No. 95-984, pt. 3, at 5 (1978). Congress was aware of this fact but did not exempt technicians from the Statute's coverage. *See id.* Section 7135(b) of the Statute states that "[p]olicies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 . . . shall remain in full force and effect . . . unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter." *See* 5 U.S.C. § 7135(b). In passing the Statute, Congress specifically exempted several agencies from the Statute's coverage but did not list state National Guards. *See* 5 U.S.C. § 7103(a)(3). Thus, Congress intended that technicians' coverage under EO 11491, and the precedent upholding that coverage,

be carried over under the Statute. *See, e.g.*, *Ass'n of Civilian Technicians, Inc.*, No. 72A-47, 1 FLRC 615b, 615d (Dec. 27, 1973) (discussing the scope of technician bargaining under Section 11(a) of EO 11491).

Further, when Congress passed legislation explicitly banning unionization amongst members of the military, it specifically chose not to include technicians in that prohibition. *See* H.R. Rep. No. 95-894(I), reprinted in 1978 U.S. Code Cong. & Ad. News 7575, 7580.

In an effort to undermine the numerous court decisions from this and other circuits directly on point, the Agency turns to cases holding that technicians do not have MSPB appeal rights. *See, e.g.*, *Singleton*, 244 F.3d 1331. But here again the argument is unpersuasive. Those cases dealt with specific statutory language governing MSPB appeal rights and do not stand for the broad proposition that it is unlawful for the Authority to issue orders to protect technicians' bargaining rights. Moreover, Congress superseded *Singleton* when it passed the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016), which clarified that technicians have MSPB appeal rights. *See*

S. Rep. No. 114-255, at 139 (2016); H.R. Conf. Rep 114-840, at 1016-17 (2016)).

Similarly, the Agency's argument that technicians are not covered by the Statute because they are "members of uniformed services" is meritless. Not only did the Agency fail to raise that argument before the Authority, this Circuit has already adopted the view that employment as a dual-status technician is not wholly military in nature for purposes of the Social Security Act's windfall provisions. *Babcock v. Comm'r of Soc. Sec.*, 959 F.3d 210, 216 (6th Cir. 2020). Further, this Court has squarely rejected the view that cases dealing with the applicability of Title VII of the Civil Rights Act of 1964 to technicians should control whether the Statute covers technicians. MANG, 878 F.3d at 178-79 at 178-79.

Finally, the Agency' argument challenging the Authority's order to restore erroneously cancelled dues allotments is without merit. That argument was not presented to the Authority, and the Agency cites little support for it. Applicable regulations are clear that the employee, not the employing agency, must submit an SF 1188 to change or cancel an allotment. 5 C.F.R. § 550.312(c). In violation of those regulations,

the Agency submitted SF 1188s on behalf of numerous technicians for no other reason than its own recordkeeping failings. The Authority properly ordered the Agency to remedy its unlawful conduct in cancelling employees' dues revocations without their consent.

Thus, the Agency's Petition for Review must be denied.

STANDARD OF REVIEW

Congress gave the Authority responsibility for interpreting and administering the Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*")). Thus, this Court defers to the Authority's construction of the Statute. *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*") (quoting *Libr. of Cong. v. FLRA*, 699 F.2d 1280, 1284 (D.C. Cir. 1983)).

In particular, the Court "accord[s] considerable deference to the Authority when reviewing a ULP determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992)

(internal quotation marks omitted). In addition, the Authority receives *Chevron* deference when it interprets ambiguities in its organic statute that concern the scope of its own jurisdiction. *City of Arlington, Tex. v. Fed. Commc'n Comm'n*, 569 U.S. 290, 293 (2013).

Moreover, 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); *accord NTEU 2014*, 754 F.3d at 1040 ("[w]e have enforced [§] 7123(c) strictly"); *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n. 5 (D.C. Cir. 2005).

ARGUMENT

I. The Agency's new arguments are barred from this Court's review

Section 7123(c) of the Statute precludes consideration of the arguments that the Agency advances for the first time in its Opening Brief. Federal courts are courts of limited jurisdiction, possessing only that power authorized by the Constitution and statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Morris v. Off. of*

Compliance, 608 F.3d 1344, 1346 (Fed. Cir. 2010). Congress may limit federal court jurisdiction as it sees fit. *Kokkonen*, 511 U.S. at 1346.

In § 7123(c) of the Statute, Congress barred judicial review of objections not raised before the Authority. *See Ga. State Ch. Ass'n of Civilian Technicians v. FLRA*, 18 F.3d 889, 890 (D.C. Cir. 1999). Section 7123(c) of the Statute states in relevant part: "No objection *that has not been raised 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." *Id.* (emphasis added). The purpose of § 7123(c) is "to ensure 'that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues.'" *NLRB*, 2 F. 3d at 1195 (quoting *EEOC*, 476 U.S. at 23). Section 7123(c) is jurisdictional in nature, and this Court must consider its application in every case, even *sua sponte*. *Id.*

Courts "strictly interpret" § 7123(c) so as to preserve the Authority's initial adjudicatory role and the appellate nature of this Court's review. *See NTEU 2014*, 754 F.3d at 1040 (quoting *Dep't of Treasury v. FLRA*, 707 F.2d 574, 580 (D.C. Cir. 1983)). A "generalized,"

"imprecise," or "incoherent" objection will not preserve an issue for appeal. *Highlands Hosp. Corp., Inc. v. Nat'l Labor Relations Bd.*, 508 F.3d 28, 33 (D.C. Cir. 2007); *U.S. Dep't of Def. v. FLRA*, 982 F.2d 577, 580 (D.C. Cir. 1993). Instead, "the Petitioner must raise the *substance* of her argument below." *Springsteen-Abbott v. Sec. & Exch. Comm'n,* 989 F.3d 4, 8 (D.C. Cir. 2021) (emphasis in original).

Section 7123(c) is identical to § 10(e) of the National Labor Relations Act ("NLRA"). *EEOC*, 476 U.S. at 27 n. 5. Section 10(e) of the NLRA requires a party to put the National Labor Relations Board (the "Board") on notice of the specific grounds for its objections. *Temp-Masters, Inc. v. Nat'l Labor Relations Bd.*, 460 F.3d 684, 690 (6th Cir. 2006); *Alwin Mfg. Co. Inc. v. Nat'l Labor Relations Bd.*, 192 F.3d 133, 144 (D.C. Cir. 1999) (holding a passing objection to a remedy broadly was insufficient to put the Board on notice of the exception).

The *sua sponte* argument of a dissenting Authority member is not enough to preserve an issue for appeal under § 7123(c) of the Statute. Instead, a party seeking to preserve that argument for judicial review must first move for reconsideration before the Authority. *Cf. Contractors' Labor Pool, Inc. v. Nat'l Labor Relations Bd.*, 32 F.3d 1051,

1061-62 (D.C. Cir. 2003). That is, "[§] 7123(c) requires a *party* to present its own views to the Authority in order to preserve a claim for judicial review." *Nat'l Ass'n of Gov't Emps., Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004) ("*NAGE*") (emphasis in original); *see also NLRB*, 2 F.3d at 1195-96 (collecting cases); *U.S. Dep't of the Treasury, Bureau of the Pub. Debt Wash., D.C. v. FLRA*, 670 F.3d 1315, 1319 (D.C. Cir. 2012); *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245–46 (D.C. Cir. 1993).

In this case, the Agency has raised five new arguments on appeal that were not included in its exceptions briefing before the Authority. (SA 683a-722a, 751a-811a). The arguments are: the Agency's "plain text" argument based on 5 U.S.C. §§ 104-105 (Br. 23-24); its "statutory context" arguments (Br. 26-29); its discussion of the constitutional-avoidance canon (Br. 31-34); its discussion of the federalism canon (Br. 34-36); its argument that the Authority's dues-withholding remedy was improper (Br. 38-39); and its contention that dual-status technicians are exempt from the Statute's coverage because they are "members of the uniformed services" (Br. 40-42.)

None of those arguments were included in the Agency's exceptions briefing before the Authority, although several were raised *sua sponte* by Chairman Kiko in her dissent. (PA 7a-9a.) They are thus waived, and this Court lacks jurisdiction to consider them. *See* 5 U.S.C. § 7123(c). Because the Agency's arguments on appeal bear little resemblance to the ones the Agency made in its exceptions briefing, they were not "fairly brought" before the Authority. *See NTEU 2014*, 754 F.3d at 1041. The Agency has not articulated any extraordinary circumstances that prevented it from property bringing those arguments to the Authority's attention. *See* 5 U.S.C. § 7123(c). Therefore, § 7123(c) bars this Court from reviewing those arguments. *EEOC*, 476 U.S. at 24.

A. The Agency has waived its "plain text" and "statutory context" arguments

This Court cannot hear the Agency's "plain text" and "statutory context" arguments under § 7123(c) because the arguments were not mentioned in the Agency's exceptions briefing. (SA 776a-786a.) While petitions for review often expand upon rationale brought before the Authority, entirely new rationales or arguments raised the first time on appeal cannot be considered. *U.S. Dep't of Def*, 982 F.2d at 580. Here,

the Agency has advanced entirely new rationales for why it is not subject to the Statute.

The Agency, in its exceptions filed before the Authority, argued as "Exception A" that it was exempt from the Statute's coverage and not subject to the Authority's jurisdiction. (SA 776a-786a.) But the reasons it presented in support were very different from those it now relies upon. The Agency cited Congress's military powers under the Constitution, the President's powers as Commander-in-Chief, and the Tenth Amendment. (*Id.*) It noted the Governor of Ohio's military powers under the Ohio Constitution, and urged that the Ohio National Guard was "an element of the organized militia of Ohio." (SA 777a.) Then, the Agency discussed the Adjutant General and his status as a state employee. (*Id.*)

Now, in its brief before this Court, the Agency presents a completely different rationale for why it is not subject to the Statute. It argues that it is not subject to the Authority's jurisdiction based on a "plain text" reading of the Statue. (Br. 23.) The Agency supports this argument with a "chain of definitions" from the Statute and 5 U.S.C. §§ 104-105. (*Id.*) The Agency claims that it is not "an agency" under

the Statute because it is not an "executive department[], government corporation[], or independent establishment[]" as defined in a different statute, 5 U.S.C. § 105. (Br. 24.)

This argument was not articulated by the Agency in its exceptions filed with the Authority. The Agency cited the definition of "executive agency" under § 7103, but did not include the "chain of definitions" it now relies upon, or any references to 5 U.S.C. §§ 104-105. (SA 777a-778a.) The Agency's exceptions before the Authority barely mentioned the Statute's text, and never discussed the definitions and other provisions upon which it now relies. (SA 776a-786a; Br. 15, 23-26.) This argument surfaces for the first time in the Agency's Opening Brief, and it is exactly the type of argument § 7123(c) bars from judicial review. *See Consol. Freightways v. Nat'l Labor Relations Bd.*, 669 F.2d 790, 793 (D.C. Cir. 1981).

The Agency also presents a "statutory context" argument in its Opening Brief that it never raised before the Authority. (Br. 26.) It expands on its "plain text" reading of 5 U.S.C. §§ 104-105, stating "[t]he exclusion of the state National Guards from the meaning of '[e]xecutive agency' is consistent with the overall statutory context with respect to

the relationship between the federal military and state national guard." (*Id.*) The Agency continues with a lengthy discussion of the federal government's power over state National Guards, citing several statutes and cases that it never cited to the Authority. (Br. 26-28.) It then mentions a "parallel federal agency," the MSPB, and precedent involving the MSPB, to allege that the Authority does not have jurisdiction over the Adjutant General. (Br. 28.)

This argument is new, except to extent that the Agency's argument relies on *Singleton*. (SA 776a-786a.) This new argument is also beyond the Court's jurisdiction as there are no traces of its reasoning in the Agency's exceptions filed with the Authority.

B. The Agency has waived its constitutional avoidance and federalism canon arguments

The Agency's next argument relies on the "constitutional-avoidance canon" and "federalism canon" to support is position that it cannot be subject to the Authority's jurisdiction. (Br. 30, 34.) These arguments are being raised for the first time before this Court and are thus waived. (PA 9a; SA 776a-777a.) While Chairman Kiko raised similar arguments in her dissent, this was not sufficient to preserve them for appeal under § 7123(c). *NAGE*, 363 F.3d at 479. If the Agency

wished to preserve these arguments for appeal, it had to raise them in its exceptions brief or, at a minimum, in a motion for reconsideration. *Id.* at 480. Section 7123(c) requires a *party* to present its own views to the Authority in order to preserve them for judicial review—it cannot rely on the dissenting Authority member. *Id.*

The Agency never presented the "constitutional-doubt canon" and "federalism canon" arguments to the Authority. (*Compare* Br. 18, 30-33, *with* PA 9a.) The analysis that the Agency presented in its exceptions brief would not in any way have put the Authority on notice of these arguments. (*Compare* SA 776a-777a *with* Br. 30-36.) As both of these arguments were only raised by the dissent and never by the Agency itself, they are waived and outside this Court's jurisdiction under § 7123(c).

C. The Agency failed to preserve its challenge to the Authority's order to reinstate canceled union dues allotments

The Agency's argument that the Authority cannot compel the Agency to reinstate dues allotments because it does not have SF 1187s for these employees was not preserved for appeal. (Br. 38-39.) The Agency's brief, for the first time, articulates a rationale for why such an

order violates federal law. (Br. 39.) The Agency failed to make this argument at all in either its exceptions brief filed with the Authority or its post-hearing brief filed with the ALJ. (SA 683a-722a, 751a-811a.) The Agency's exceptions brief simply asserted that the ALJ's findings were in error because the Authority did not have jurisdiction over the Agency and did not commit the charged ULPs; it did not raise any specific arguments against the remedies he recommended. (SA 801a.)

In addition, the Agency had notice that the General Counsel was seeking an order restoring lost dues allotments, but failed to raise any specific objection to this remedy before the ALJ. (*See* SA 863a (citing 5 C.F.R. § 2429.5, *U.S. Dep't of Justice Fed. Bureau of Prisons*, 68 FLRA 786, 787 (2015), U.S. Dep't of the Treasury, Internal Revenue Serv., 68 FLRA 329, 331 (2015)).) The Authority's regulations require the Agency to raise any arguments against proposed remedies in the proceedings before the ALJ. 5 C.F.R. § 2429.5 ("The Authority will not consider any . . . challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the" ALJ).

Thus, the Agency waived this argument even before it filed its exceptions with the Authority (which also failed to make this

argument). This Court is jurisdictionally-barred from considering the Agency's contentions regarding the supposed impropriety of the Authority's remedy. *See NTEU 2014*, 754 F.3d at 1040.

D. The Agency has forfeited the argument that dual-status technicians are "members of the uniformed services"

The Agency argues that dual-status technicians are not subject to the Statute because they are members of the uniformed services. (Br. 40-47.) In its post-hearing brief before the ALJ, the Agency made a cursory effort to raise this argument. (SA 712a.) But the Agency did not include the argument in its exceptions briefs to the Authority, and thus waived it. (SA 805a-809a.)

Whether the Agency omitted any support for this argument in its exceptions brief deliberately or by accident is of no consequence—it is forfeited either way. 5 C.F.R. § 2423.40(d) ("Any exception not *specifically argued* shall be deemed to have been waived.") (emphasis added). As with all of the Agency's new arguments to this Court, it has not even attempted to argue "extraordinary circumstances" excuse its failure to raise these arguments to the Authority. This Court thus lacks jurisdiction to consider the Agency's "uniformed services" argument. 5 U.S.C. § 7123(c).

II. It is settled law in this Circuit that technicians have collective bargaining rights protected by the Statue and that the Agency is subject to the Authority's jurisdiction

All federal courts, including this one, that have been asked to consider whether the Statute applies to technicians and state National Guard units have concluded it does. This Court settled the issue in *MANG*, when it found that the Statute "clearly" provides labor rights to dual-status technicians. *MANG*, 878 F.3d at 178.

A panel of this Court cannot overturn the decision of another panel of this Court—only the Court sitting *en banc* may do so. *Lanier*, 201 F.3d at 846 (holding that even if the Court was persuaded by the new argument, it remains bound by the circuits precedent and "only the court sitting en banc can overturn such a decision."); *Wright*, 939 F.3d at 700 ("Like most circuits, this circuit follows the rule that the holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court.").

This Court uses a three-factor test to distinguish matters essential to the Court's holding from *dicta*. *Id.* at 701-02. First, "[t]he decision of the issue must contribute to the judgment," second, "it must be clear that the court intended to rest the judgment (if necessary) on its

conclusion about the issue," and third, "it must be clear that the court considered the issue and consciously reached a conclusion about it." *Id.*

In *MANG*, the agency challenged the power of the FLRA to assert jurisdiction over it, citing many of the same cases the Agency now relies upon. *MANG*, 878 F.3d at 178-79 at 178-79 (citing, *inter alia*, *Fisher v. Peters*, 249 F.3d 433, 438 (6th Cir. 2001)). Specifically, the agency contended that the "technicians operate[] in a capacity that is 'irreducibly military in nature,'" thus precluding the FLRA from exercising jurisdiction. *Id.* at 178 (quoting *Fisher*, 249 F.3d at 439).

MANG rejected that challenge. *Id.* at 171, 174, 177-79. It held that technicians are "clearly" covered by the Statute, and the FLRA has jurisdiction over state National Guards and Adjutant Generals for the limited purpose of enforcing the Statute. *Id.* at 178. It stated that, "[u]nder the [Statute], the Guard . . . must engage in collective bargaining with a union representing Guard technicians[.]" *Id.* (quoting *N.J. Air Nat'l Guard v. FLRA*, 677 F.2d 276, 286 (3d Cir. 1982).) The Court cited *Lipscomb* approvingly for this same proposition. *Id.*

The *MANG* court's finding that the FLRA had jurisdiction over state National Guard units was essential to its decision. That is

because 1) the agency specifically challenged the FLRA's jurisdiction to remedy ULPs committed against technicians, and 2) if the FLRA lacked jurisdiction over the agency, the other issues in the case would have been irrelevant. The question of the Statute's coverage was an integral part of the case and controversy before the Court. *Wright*, 939 F.3d at 700; *see also MANG*, 878 F.3d at 171, 174, 177-79 (discussing the FLRA's jurisdiction over state National Guard units at length). *MANG* is thus binding precedent, and this panel cannot overturn it. *Wright*, 939 F.3d at 700-02; *Lanier*, 201 F.3d at 846.

III. Even if the Court had jurisdiction to consider the Agency's new arguments, and even if its decision in *MANG* did not control, these arguments should be denied on the merits

A. The Agency's plain text argument is meritless

Section 709(e) of the Technicians Act states that "[a] technician . . . is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(e). With this provision, "technicians, who had previously been employees of the states, were declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service." *N.J. Air Nat'l*

Guard, 677 F.2d at 279. This includes collective bargaining rights under the Statute. *Id*. at 284 ("Because, under section 709([e]) [of the Technicians Act], Guard technicians are now federal agency employees, they are within the scope of the [Statute]"); *see also MANG*, 878 F.3d at 174 (under the Technicians Act "dual-status technicians are afforded the benefits and rights generally provided for federal employees in the civil service, including rights under the [Statute]") (internal citations and formatting omitted).

Subsections 709(f) and (g) of the Technicians Act exempt technicians from specific provisions of Title 5 of the United States Code, but they do not exempt technicians from the Statute (which is part of Title 5). 32 U.S.C. §§ 709(f),(g). Further, at the time the Technicians Act was enacted in 1968, federal employees had collective bargaining rights under Executive Order 10988. *See* Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962) (granting "[e]mployees of the Federal Government. . . the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity" and providing consultation and bargaining rights to duly-recognized federal unions).

Thus, for many decades, it has been well-settled by the Authority and the federal courts that, in their civilian capacity, technicians enjoy the protection of the Statute. *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC) Caroline, P.R.*, 56 FLRA 174, 179 (2000), *aff'd sub nom.*, *Am. Fed'n Gov't Emps., Local 3936 v. FLRA*, 239 F.3d 66 (1st Cir. 2001); *Lipscomb*, 333 F.3d at 616 (collecting cases). The reasoning supporting this conclusion is straightforward:

> Federal employees of federal executive agencies, with the noted statutory exceptions, are entitled to exercise the rights provided in the [Statute]. The civilian technicians are non-excluded federal employees under the Act, and the [Adjutant General] employs those civilian technicians; as the federal employer of these federal employees, with full authority over such federal employees, the [Adjutant General] is—notwithstanding his dual capacity as a military officer of the State of Mississippi—an agency of the executive department of the federal government in the context of these proceedings, as are his organizational adjuncts in the exercise of that employer-related authority over federal employees.

Lipscomb, 333 F.3d at 620.

The Agency's argument to the contrary rests on a string of definitions from other parts of Title 5 and comparisons to other statutes. (Br. at 23-25.) These arguments miss the mark. Congress has spoken clearly in the Technicians Act and has expressly granted

technicians the rights and benefits enjoyed by federal civilian employees generally. That includes the collective bargaining rights that federal civilian employees enjoy by virtue of the Statute. *MANG*, 878 F.3d at 174; *Lipscomb*, 333 F.3d at 613 (technicians are "clearly federal employees by virtue of the" Technicians Act and, as such, "are included under the terms of the [Statute] as federal employees of an Executive agency."). As such, the employers of technicians—state National Guard units—"are federal executive agencies for the purpose of the [Statute], and consequently are subject to the jurisdiction of the FLRA." *Lipscomb*, 333 F.3d at 613.

Nor is the Agency's reliance on *Singleton* and similar cases sound. (Br. 28-29.) Following the Federal Circuit's decisions in those cases, Congress amended the Technicians Act to clarify that technicians in fact have MSPB appeal rights. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328 (2016); S. Rep. No. 114-255, at 139 (2016); H.R. Conf. Rep 114-840, at 1016-17 (2016)).

Further, to the extent that the Agency argues that Congress must call the state National Guards into federal service before technicians are subject to the Authority's jurisdiction, the Agency misunderstands

the distinct civilian and military roles technicians fill. To be sure, the Authority cannot exercise jurisdiction over the purely military aspects of technicians' employment. *See* 32 U.S.C. § 709(f); *Nat'l Fed'n of Fed. Emps., Loc. 1623 v. FLRA*, 852 F.2d 1349, 1352 (D.C. Cir. 1988) ("*NFFE*"). But the Authority in this case is not attempting to regulate any military aspect of technicians' employment, *see MANG*, 878 F.3d at 178-79, and thus these constitutional provisions are wholly inapplicable.

B. The Agency's statutory context argument is meritless

Technicians were widely unionized under the Executive Orders allowing for collective bargaining in the federal service that preceded the Statute. *See* H.R. Rep. No. 95-984, pt. 3, at 5 (1978) (noting that, by 1978, over 68,000 technicians had unionized under EO 11941). At the time Congress passed the Statute there were thirty-nine bargaining units at state National Guards. *Id.* Congress, in passing the Statute, made no effort to alter the meaning of "agency" in § 7103 to exclude state National Guard units—even as it specifically exempted several agencies from its coverage. *See* 5 U.S.C. § 7103(a)(3).

Section 7135(b) of the Statute states that "[p]olicies, regulations, and procedures established under and decisions issued under Executive Order[] 11491 . . . shall remain in full force and effect . . . unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter." *See* 5 U.S.C. § 7135(b). The Authority has specifically held Congress intended that the term "agency" have the same meaning under the Statute as it did under the Executive Orders, except where Congress made specific alterations. *Kennedy Ctr. for the Performing Arts*, 45 FLRA 835, 851 (1992). Congress made no alteration that would exempt a state National Guard in its capacity as an employer of technicians.

Legislation prohibiting collective bargaining amongst members of the military supports the view that technicians have collective bargaining rights. The language and legislative history of the statute barring military unions demonstrates that Congress recognized the special employment circumstances of technicians and sought to preserve their collective-bargaining rights. *See* H.R. Rep. No. 95-894(I), reprinted in 1978 U.S. Code Cong. & Admin. News 7575, 7580 ("the section [of the Senate bill] which required those [dual-status]

technicians who are members of a military labor organization to terminate their membership within 90 days of enactment w[as] omitted from the Committee bill."); H.R. Rep. No. 95-894 (II), reprinted in 1978 U.S. Code Cong. & Admin. News 7575, 7586. Indeed, the Agency acknowledges that the statute that "criminalizes union activities by a 'member of the armed forces' . . . does not include technicians." (Br. 46.)

Given this history, it is unsurprising that there are dozens of Authority decisions and court opinions confirming that technicians are covered by the Statute. The Agency's attempts to distinguish this case from previous ones based on arguments that it never raised before the Authority are unavailing.

First, the Agency has not addressed the rationale articulated by the Authority and several appellate courts that have noted 1) technicians are specifically defined as federal civilian employees by statute, 10 U.S.C. § 10216(a); 32 U.S.C. § 709(e); 2) state National Guards and Adjutant Generals control the day-to-day working conditions of these federal civilian employees, and 3) as a result, these entities, insofar as they employ federal civilian employees, are "Executive agencies" subject to the Statute. *See, e.g.*, *Lipscomb*, 333

F.3d at 613; *NFFE*, 852 F.2d at 1352 (holding that state National Guard units are subject to the Statute, except for specific matters reserved by the Technicians Act to the Adjutant General's control); *Am. Fed'n of Gov't Emps., Local 3486*, 5 FLRA 209, 211-14 (1981).

Second, the Agency's argument is totally reliant on cases that interpret different statutory provisions that have different wording than the Statute. (Br. 27-28.)

Third, the Authority and the courts have long understood that technicians must hold positions in their state National Guard and the U.S. military in order to hold their civilian position. *See*, *e.g.*, *NFFE*, 852 F.2d at 1351. But technicians' civilian and military duties are distinct and technicians do not (as the testimony during the ALJ hearing showed (PA 120a-122a, 183a-184a)) perform any of these duties at the same time. "Military status, in short, does not flatly deprive dual-status technicians of their statutory right 'to form, join, or assist any labor organization, freely and without fear of penalty or reprisal.'" *MANG*, 878 F.3d at 178-79 (formatting omitted) (quoting 5 U.S.C. § 7102).

The Authority's holding that technicians and the Agency are subject to the Statute is consistent with 40 years of precedent, the statutory text, and relevant legislative history. The Authority's interpretation is, at a bare minimum, reasonable and entitled to *Chevron* deference. *See City of Arlington, Tex.*, 569 U.S. at 293.

C. The Agency's "uniformed services" argument is meritless

The Agency's arguments that technicians are excluded from the Statute's coverage because they are "members of the uniformed services" under § 7103(a)(2)(B)(ii) is not supported by case law or the text and history of the relevant statutes. (Br. 40-46.) As discussed above, when Congress passed legislation prohibiting collective bargaining for members of the military it considered, and decided not to disturb, unionization of technicians. Further, the Agency's argument is based entirely on cases interpreting different statutes, and the Court has already rejected the notion that such cases control the interpretation of the Statute. *MANG*, 87 F.3d at 178-79.

The Agency's reliance on cases interpreting the windfall provisions of the Social Security Act is misplaced. (Br. 43-44.) The Agency cites to these cases as support that technicians' employment is

"irreducibly military" in character. (*Id.*) However, the fact that technicians must concurrently hold a position in the state National Guard where they work, as well as the U.S. military, does not mean that their technician employment is "irreducibly military." *Lipscomb*, 333 F.3d at 614. Indeed, the technician position is specifically designated as a federal civilian position by the Technicians Act. 10 U.S.C. § 10216(a); 32 U.S.C. § 709. Far from being "irreducibly military," the technicians' civilian duties are easily separable from their military responsibilities. *See MANG*, 878 F.3d at 178–79 (rejecting the argument that the Statute does not apply to technicians because their duties are "irreducibly military").

Indeed, this Court has already answered this question and found that technician roles are not wholly military in the context of Social Security law. "Rather, by its plain text, the uniformed-service exception [in the Social Security context] is cabined to payments that are based exclusively on employment in the capacity or role of a uniformed-services member." *Babcock v. Comm'r of Soc. Sec.*, 959 F.3d 210, 216 (6th Cir. 2020). All other circuits that have considered the issue, except the Eighth Circuit, agree. *See e.g. Martin v. Soc. Sec. Admin.*, 903 F.3d

1154 (11th Cir. 2018). Thus, precedent establishes that technicians are federal civilian employees who are only members of the uniformed services when they are serving in their reserve duties or called to active duty in the National Guard or U.S. military.

Next, the Agency argues that because this and other courts have found that technicians cannot bring claims under Title VII, technicians should also be excluded from the Statute's coverage. (Br. 44-46.) But this Court already rejected this argument in *MANG*. 878 F.3d at 178-79.

Thus, as with the the other arguments discussed above, the Agency has not presented any reason for this Court to break with its own precedent or the well-reasoned decisions of other courts.

D. The Authority can order restoration of the erroneously canceled dues allotments

The Agency has failed to demonstrate that it cannot legally comply with the remedies order by the Authority. While an agency cannot commence dues allotments without an employee's authorization, the Agency did not present any evidence that the employees in question failed to validly authorize dues deductions. (*See, e.g.*, PA 159a (union member testifying he submitted a completed SF 1187 in 2003); PA 205a

(same); *see also* 5 C.F.R. § 550.312 (general limitations on allotments).) Instead, the testimony indicated that the Agency failed to maintain copies of the technicians' completed SF 1187s and then proceeded to cancel several of those employees' due allotments on its own. (PA 275a-282a.)

Further, the relevant regulations are clear that only an employee may change or cancel indefinite allotments such as union dues deductions. 5 C.F.R. § 550.312(c). The Agency violated this provision when it unilaterally terminated technicians' dues allotments by signing SF 1188s on their behalf. (PA 325a.) That is, it was *the Agency's* actions that violated technicians' free speech rights under *Janus v. American Federation of State, County, and Municipal Employees*, 138 S. Ct. 2448 (2018). Moreover, any employees who do not wish to continue paying Union dues can simply submit an SF 1188 at any time after their allotments are restored. *See* 5 C.F.R. § 2429.19.

The Agency's argument about the "practicalities" of complying with the remedies ordered by the Authority (Br. 38-39) ignores the troubling message it would send if the Agency were not required to comply with the Authority's order. Specifically, this would mean that

an agency could fail to maintain proper personnel records that affect the Union's financial resources (PA 349a-350a), make a bad-faith attempt to "correct" the error without consulting with the Union (PA 33a, 207a), and then avoid any consequences for these actions by virtue of its own negligence in having lost the necessary dues authorization forms in the first place.

Finally, the Comptroller General has previously found that agencies can reimburse unions from appropriated funds for dues that an agency wrongfully failed to withhold from an employee's paycheck. *See, e.g.*, *Dep't of Labor*, 60 Comp. Gen. 93, B-199341, 1980 WL 14059 (1980). And the Agency can continue to process SF 1188s if technicians actually submit them. Thus, the Authority's remedy is not impractical or unlawful for the Agency to implement.

CONCLUSION

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

Respectfully submitted,

/s/ Noah Peters
NOAH PETERS
Solicitor
REBECCA J. OSBORNE
Deputy Solicitor
SARAH C. BLACKADAR
Attorney
FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW
Washington, DC 20424
(202) 218-7908

April 29, 2021

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 Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 8512 words excluding exempt material.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth 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. § 104

Independent establishment

For the purpose of this title, "independent establishment" means--

> **(1)** an establishment in the executive branch (other than the United States Postal Service or the Postal Regulatory Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and
>
> **(2)** the Government Accountability Office.

5 U.S.C. § 105

Executive agency

For the purpose of this title, "Executive agency" means an Executive department, a Government corporation, and an independent establishment.

5 U.S.C. § 7102

Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right--

> (1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7103(a)

Definitions; application

(a) For the purpose of this chapter--

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual--

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority;

but does not include--

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the International Communication Agency, the Agency for International Development, the Department of Agriculture, or the Department of Commerce; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Department of Veterans Affairs), the Library of Congress, the Government Publishing Office, and the Smithsonian Institution1 but does not include--

(A) the Government Accountability Office;

(B) the Federal Bureau of Investigation;

(C) the Central Intelligence Agency;

(D) the National Security Agency;

(E) the Tennessee Valley Authority;

(F) the Federal Labor Relations Authority;

(G) the Federal Service Impasses Panel; or

(H) the United States Secret Service and the United States Secret Service Uniformed Division.

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include--

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status,

political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint--

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning--

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(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;

(15) "professional employee" means--

(A) an employee engaged in the performance of work--

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);
(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which--

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit--

(i) on the basis of an election, or

(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

5 U.S.C. § 7123(c)

Judicial review; enforcement

(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 U.S.C. § 7135(b)

Continuation of existing laws, recognitions, agreements, and procedures

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter.

10 U.S.C. § 10216(a)

(a) In general.--(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who--

> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

(3) A military technician (dual status) who is employed under section 3101 of title 5 may perform the following additional duties to the extent that the performance of those duties does not interfere with the performance of the primary duties described in paragraph (1):

> (A) Supporting operations or missions assigned in whole or in part to the technician's unit.
>
> (B) Supporting operations or missions performed or to be performed by--
>
> > (i) a unit composed of elements from more than one component of the technician's armed force; or
> >
> > (ii) a joint forces unit that includes--
> >
> > > (I) one or more units of the technician's component; or
> > >
> > > (II) a member of the technician's component whose reserve component assignment is in a position in an element of the joint forces unit.
>
> (C) Instructing or training in the United States or the Commonwealth of Puerto Rico or possessions of the United States of--
>
> > (i) active-duty members of the armed forces;
> >
> > (ii) members of foreign military forces (under the same authorities and restrictions applicable to active-duty members providing such instruction or training);
> >
> > (iii) Department of Defense contractor personnel; or
> >
> > (iv) Department of Defense civilian employees.

32 U.S.C. § 709(e)

Technicians: employment, use, status

(e) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed in that position is required under subsection (b) to be a member of the National Guard.

32 U.S.C. § 709(f)

Technicians: employment, use, status

(f) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

(1) a person employed under subsection (a) who is a military technician (dual status) and otherwise subject to the requirements of subsection (b) who--

(A) is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned; and

(B) fails to meet the military security standards established by the Secretary concerned for a member of a reserve component under his jurisdiction may be separated from employment as a military technician (dual status) and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(2) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(3) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(4) a right of appeal which may exist with respect to paragraph (1), (2), or (3) shall not extend beyond the adjutant general of the jurisdiction concerned when the appeal concerns activity occurring while the member is in a military pay status, or concerns fitness for duty in the reserve components;

(5) with respect to an appeal concerning any activity not covered by paragraph (4), the provisions of sections 7511, 7512, and 7513 of title 5, and section 717 of the Civil Rights Act of 1991 (42 U.S.C. 2000e-16) shall apply; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and, unless the technician is serving under a temporary appointment, is serving in a trial or probationary period, or has voluntarily ceased to be a member of the National Guard when such membership is a condition of employment, such notification shall be given at least 30 days before the termination date of such employment.

32 U.S.C. § 709(g)

Technicians: employment, use, status

(g)(1) Except as provided in subsection (f), sections 2108, 3502, 7511, and 7512 of title 5 do not apply to a person employed under this section.

(2) In addition to the sections referred to in paragraph (1), section 6323(a)(1) of title 5 also does not apply to a person employed under this section who is performing active Guard and Reserve duty (as that term is defined in section 101(d)(6) of title 10).

5 C.F.R. § 550.312

General limitations.

(a) The allotter must specifically designate the allottee and the amount of the allotment.
(b) The total amount of allotments may not exceed the pay due the allotter for a particular period.

(c) The allotter must personally authorize a change or cancellation of an allotment.

(d) The agency has no liability in connection with any authorized allotment disbursed by the agency in accordance with the allotter's request.

(e) Any disputes regarding any authorized allotment are a matter between the allotter and the allottee.

(f) Notwithstanding the requirements in paragraphs (a) and (c) of this section, an agency may make an allotment for an employee's share of Federal Employees Health Benefits premiums under § 550.311(a)(7) and part 892 of this chapter without specific authorization from the employee, unless the employee specifically waives such allotment. Agency procedures for processing employee waivers must be consistent with procedures established by the Office of Personnel Management. (See part 892 of this chapter.)

5 C.F.R. § 2423.40(d)

Exceptions; oppositions and cross-exceptions; oppositions to cross-exceptions; waiver.

(d) Waiver. Any exception not specifically argued shall be deemed to have been waived.

5 C.F.R. § 2429.5

Matters not previously presented; official notice.

The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Regional Director, Hearing Officer, Administrative Law Judge, or arbitrator. The Authority may, however, take official notice of such matters as would be proper.

5 C.F.R. § 2429.19

Revocation of assignments.

Consistent with the exceptions in 5 U.S.C. 7115(b), after the expiration of the one-year period during which an assignment may not be revoked under 5 U.S.C. 7115(a), an employee may initiate the revocation of a previously authorized assignment at any time that the employee chooses. After the expiration of the one-year period of irrevocability under 5 U.S.C. 7115(a), upon receiving an employee's request to revoke a previously authorized dues assignment, an agency must process the revocation request as soon as administratively feasible.