[ORAL ARGUMENT NOT YET SCHEDULED]
No. 11-1102

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

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT WASHINGTON D.C.,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,

Intervenor.

ON PETITION FOR REVIEW OF A FINAL DECISION OF THE
FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE PETITIONER

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Certificate As To Parties, Rulings, And Related Cases

A. Parties.

1. Petitioner:

The petitioner is the United States Department of the Treasury, Bureau of the Public Debt Washington, D.C., one of the parties in the negotiability appeal below. The other party to the proceeding was the National Treasury Employees Union.

2. Respondent:

The respondent is the Federal Labor Relations Authority.

3. Amici and Intervenors: None below.

B. Ruling Under Review.

The ruling at issue on appeal is the Decision and Order on Negotiability Issues of the Federal Labor Relations Authority in *National Treasury Employees Union (Union) and United States Department of the Treasury Bureau of the Public Debt Washington, D.C. (Agency)*, 65 FLRA No. 109, Case No. 0-NG-3076, issued February 14, 2011.

C. Related Cases.

This case has not previously been before this Court. Counsel for the petitioner are unaware of any cases that may be considered related for purposes of this rule. However, *United States Department of Commerce, Patent and*

Trademark Office v. FLRA, No. 11-1019 (D.C. Cir.) (petitioner's opening brief filed June 29, 2011), which involves an arbitrator's award rather than a negotiability appeal (which is the case here), also presents the question whether the "excessive interference" test, rather than the FLRA's "abrogation" standard, should apply to determine whether a union proposal is an "appropriate arrangement" in response to the exercise of a management right. In an order dated June 6, 2011, this Court ordered that the instant case and No. 11-1019 be argued on the same day before the same panel.

/s/ *Howard S. Scher*
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Agency	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
Authority	Federal Labor Relations Authority
BOP	*Federal Bureau of Prisons Federal Transfer Center Oklahoma City, Oklahoma*, 58 FLRA 109 (2002)
BPD	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
EPA	*Environmental Protection Agency*, 65 FLRA 113 (2010)
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
NTEU	National Treasury Employees Union
ULP	Unfair labor practice
Union	National Treasury Employees Union

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Statement of Jurisdiction

The decision of the Federal Labor Relations Authority ("FLRA" or "Authority") was issued February 14, 2011. JA 192. The petitioner — the United States Department of the Treasury, Bureau of the Public Debt Washington, D.C.

("agency" or "BPD") — filed a petition for review on April 8, 2011 (JA 216), which was timely under 5 U.S.C. 7123(a).

Statement of the Issues

1. Whether the Authority erred in abandoning the "excessive interference" test in favor of the "abrogation" standard when reviewing the agency head's determination — pursuant to 5 U.S.C. 7114(c) — that certain terms in a proposed collective bargaining agreement are nonnegotiable.

2. Whether the proposals at issue are nonnegotiable because they excessively interfere with the exercise of the management rights at issue.

Statutory Background

The Federal Service Labor Management Relations Statute ("FSLMRS" or "labor statute"), Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq*., provides a general framework for regulating labor-management relations for the federal government. The statute grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices. See Sections 7114(a)(1), 7116. The Authority is responsible for implementing the FSLMRS through the exercise of broad adjudicatory, policy-making, and rulemaking powers. Sections 7104, 7105.

In pertinent part, the FSLMRS provides that the agency and labor organization "shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement." Section 7114(a)(4). The duty to negotiate in good faith includes, for example, the "obligation" to "meet at reasonable times" and "as frequently as may be necessary." Section 7114(b). Under the statute, it is an "unfair labor practice for an agency" to refuse to consult or negotiate in good faith with a labor organization as required by the FSLMRS. Section 7116(e)(5).

A federal agency has a general duty to bargain in good faith only "to the extent not inconsistent with any Federal law or any Government-wide rule or regulation * * *," 5 U.S.C. 7117(a)(1), and "agencies are specifically prohibited from negotiating on certain matters contained in the 'management rights' clause of 5 U.S.C. § 7106(a)," which includes the agency's budget, mission, work assignments, and internal security practices. *NRC v. FLRA,* 895 F.2d 152, 154 (4th Cir. 1990). See also *AFGE v. FLRA*, 778 F.2d 850, 853 (D.C. Cir. 1985). Notwithstanding the "management rights" provision, an agency is not precluded from negotiating over all matters that relate to management rights. An agency may elect to negotiate about "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" or "the technology, methods, and means of performing work." 5 U.S.C.

7106(b)(1). See *NTEU v. FLRA*, 453 F.3d 506, 508 (D.C. Cir. 2006) (describing these as "permissive subjects of bargaining"). And an agency is required to negotiate about "procedures which management officials will observe in exercising" management rights and "appropriate arrangements for employees adversely affected by the exercise of" management rights. 5 U.S.C. 7106(b)(2) & (3). See *U.S. Dep't of Interior Minerals Management Service, New Orleans, La. v. FLRA*, 969 F.2d 1158, 1160 (D.C. Cir. 1992); *Dep't of Navy v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992).

If, during the course of negotiations, the agency alleges that a union proposal does not fall within "the duty to bargain," the union has the right to seek expedited review by the Authority. 5 U.S.C. 7117(c). See also 5 U.S.C. 7105(a)(2)(E). After the union files its petition for review, the head of the agency must file a statement withdrawing the agency's allegation or setting forth reasons supporting the allegation. 5 U.S.C. 7117(c)(3)(A). The Authority then must "expedite proceedings * * * to the extent practicable" and issue "a written decision on the allegation and specific reasons therefor at the earliest practicable date." 5 U.S.C. 7117(c)(6).

Even after the agency and the union provisionally reach an agreement, issues of negotiability can still arise. *AFGE*, 778 F.2d at 853. The head of the

agency has 30 days from the date the agreement is signed to review the agreement, and he or she must approve the agreement if it is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation." 5 U.S.C. 7114(c)(2). "When the head of an agency disapproves an agreement[,] he is making essentially an assertion of nonnegotiability, which triggers the expedited review" just described. *AFGE*, 778 F.2d at 853. If the head of the agency does not approve or disapprove the agreement within the 30-day period, then the agreement takes effect. 5 U.S.C. 7114(c)(3).

Even if the parties, including the agency head, have agreed to, or in effect ratified, a provision — *i.e.*, "have allowed the agreement to take effect" without ever "hav[ing] * * * asserted nonnegotiability"— "either party [subsequently] may raise illegality of the provision as a defense to a charge that it has violated the terms of the agreement." *AFGE v. FLRA*, 778 F.2d at 853-854. Thus, "[i]f the defending party can show that the contract term in question is contrary to law — *i.e.*, was nonnegotiable — then the term is declared void and unenforceable." *Ibid*. (citing *National Federation of Federal Employees, Local 1332 and Department of the Army Headquarters, U.S. Army Materiel Development and Readiness Command*, 5 FLRA 599, 601 (1981)).

Statement of the Case: Facts and Proceedings Below

1. The agency and the National Treasury Employees Union ("NTEU" or "union") renegotiated a term collective bargaining agreement executed on April 7, 2010. See JA 7. The agreement was timely submitted for agency head review under 5 U.S.C. 7114(c), and the agency head found 62 provisions contrary to law, rule, or regulation. JA 7-9. In the absence of an agreement to sever the 62 provisions, the agency head disapproved the entire contract on May 7, 2010. See, *e.g.*, Agency Supplemental Submission dated June 04, 2010 (JA 85). Eventually, the union sought a ruling on negotiability with respect to five of the provisions disapproved by the agency head. See FLRA Op. at 1 n.2 (JA 192).[1]

The Authority addressed the five provisions, but only three of those provisions are now at issue — *i.e.*, Article 11 Section 4B, Article 18 Section 14B, and Article 22 Section 3B. FLRA Op. at 2-3, 11 (JA 193-194, 202).[2] Under the

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[1] The union originally sought review of 56 of the 62 disapproved provisions. The parties were able to resolve their dispute as to 50 provisions following informal and formal procedures before the FLRA, leaving six provisions for resolution. Then, the union withdrew a provision from its petition and agreed to renegotiate the language, leaving five provisions for resolution. See Agency Supplemental Submissions dated June 4, 9, 11, 16, & 18, 2010 (JA 85, 89, 97, 101, 105); Union Supplemental Submission dated June 10, 2010 (JA 93); Union Response to Agency Statement of Position at 5 (JA 14).

[2] The full text of the proposals appear in Addendum B to this brief. The proposals are also set out as excerpted in the Authority's opinion in Point B, *infra* at pp. 40-

first two provisions, the union proposed a performance-appraisal process to provide feedback to employees detailed or temporarily promoted to a position for fewer than 120 days. *Id*. at 3 (JA 194). Under that process, employees were to be given feedback on their performance at various periods during details or temporary promotions; were to receive performance expectations in writing — by email or hard copy — before being held responsible for those expectations; and could not be disciplined based on those expectations in the absence of written notice even if they had indisputably received oral notice from a supervisor. *Ibid*. Under the third provision, if an employee is suspected of abusing emergency annual leave, the agency is required to counsel the employee before imposing a leave restriction that would require the employee to provide evidence to justify subsequent uses of emergency annual leave; and if the employee were to continue to abuse emergency annual leave following counseling, the agency would be allowed to impose a leave restriction but only after counseling and after advising the employee in writing of the restriction. FLRA Op. at 11 (JA 202).

The agency argued that the first two proposals were nonnegotiable as "appropriate arrangements," first, because they are not "arrangements" designed to address the adverse effects of the exercise of a management right and, second,

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because they excessively interfere with management's rights to direct employees and assign work under Sections 7106(a)(2)(A) and (B). As to the second point, the proposals prevent the agency from "holding an employee accountable for performance expectations after the expectations have been communicated to the employee, but before they have been confirmed in writing" because they "bar * * * management['s] right to evaluate employees[,] a burden that outweighs the speculative benefits the provisions would provide to employees." FLRA Op. at 3 (JA 194) (internal quotation marks omitted). The agency argued that the leave abuse proposal is not an appropriate arrangement because, under settled Authority case law, a proposal that precludes management from issuing a leave-restriction letter regarding annual leave[3] until after counseling excessively interferes with management's right to discipline. *Id*. at 11-12 (JA 202-203).[4]

2. The Authority agreed that the three provisions affected management's right to direct employees, assign work, and discipline employees. See FLRA Op. at 4-5 (JA 195-196). The Authority then turned to the question whether each

[3] The parties' collective bargaining agreement provides that notices of sick leave restriction — as opposed to annual leave restriction — will not be considered disciplinary action. See FLRA Op. at 12 & n.10 (JA 203) (citing Article 23 Section 4C).

[4] The agency also argued that the provision is not a procedure within the meaning of Section 7106(b)(2). See FLRA Op. at 12 (JA 203).

proposal was nonetheless negotiable as an "appropriate arrangement" under 5 U.S.C. 7106(b)(3). Departing from long-standing precedent, the Authority announced that it was adopting a new standard for determining whether a proposal constitutes an "appropriate arrangement" once it is agreed upon at the bargaining table and submitted to an agency head for review. *Id*. at 5-10 (JA 196-201).

Under its old test, the Authority asked (1) "whether a proposal or provision is intended to be an arrangement for employees adversely affected by the exercise of a management right," and (2) if so, "whether the arrangement is appropriate or whether it is inappropriate because it 'excessively interferes' with management's rights." FLRA Op. at 5 (JA 196). The Authority declared in this case that, once a proposal is submitted for agency head review, the Authority "will no longer assess whether an arrangement is appropriate by applying an excessive interference standard" at the second step of its analysis. *Id*. at 5-6 (JA 196-197). Instead, the Authority "will assess whether the provision 'abrogates' — *i.e.*, waives — the management right(s) that the provision affects." *Id*. at 6 (JA 197). Notwithstanding this change, the Authority made clear that the "excessive interference standard will continue to apply in negotiability cases involving contract proposals to which parties have not yet agreed [at the bargaining table]." *Id*. at 6 n.4 (JA 197).

To justify the bifurcated standard of review, the Authority relied on the "plain wording" of the statute. FLRA Op. at 6 (JA 197). Specifically, the Authority contrasted the language of Section 7117(c)(1) (which relates to the statutory duty to bargain) with that of Section 7114(c)(2) (which relates to agency head review). Section 7117(c)(1) provides that a union's exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that the *duty to bargain* in good faith does not extend to any matter." 5 U.S.C. 7117(c)(1) (emphasis added). In contrast, the Authority explained, Section 7114(c)(2) "does not speak in terms of whether an agreed upon contract provision is within the duty to bargain." FLRA Op. at 6 (JA 197). Rather, it provides that, once an agency and a union representative have reached agreement, "[t]he head of the agency shall approve the agreement * * * if the agreement is *in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation*." 5 U.S.C. 7114(c)(2) (emphasis added).

The Authority found it "significant" that Congress did not state in Section 7114(c)(2) that an agency head may disapprove matters that are outside the duty to bargain. FLRA Op. at 6 (JA 197). "Put simply," the Authority explained, "Congress recognized that a matter may be outside the duty to bargain, but once agreed upon, may not be subject to agency-head disapproval unless it is contrary

to the Statute or any other law, rule, or regulation." *Ibid*.[5] As an example, the Authority cited Section 7106(b)(1) of the Statute.[6] That section permits, but does not require, an agency to negotiate about certain subjects. Once an agency elects to negotiate about those subjects, an agency head may not disapprove the resulting contract provisions as contrary to law merely because the agency did not have a duty to bargain about them in the first place. FLRA Op. at 6-7 (JA 197-198).

"In sum," the Authority explained, "although a particular proposal may be outside the duty to bargain because it is contrary to law, rule, or regulation, an agreed-upon contract provision is not contrary to law, rule, or regulation merely because, at the bargaining table, it was outside the duty to bargain." FLRA Op. at 7 (JA 198). Put another way, the FSLMRS permits an agency "to agree to a broader range of matters than those strictly within its duty to bargain." *Ibid*. (internal quotation omitted).

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[5] The majority also determined that the use of the term "shall" in the "plain wording" of Section 7114(c)(2) meant that an agency head has no discretion not to approve a contract provision unless that contract provision was contrary to "'[the Statute], or any other applicable law, rule or regulation.'" FLRA Op. at 6 (JA 197) (quoting Section 7114(c)(2)).

[6] This section provides that an agency and a union, "at the election of the agency," may negotiate "on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work." 5 U.S.C. 7106(b)(1).

Based on that observation, the Authority concluded that it was proper to apply two legal standards when determining whether a proposal constitutes an "appropriate arrangement" under Section 7106(b)(3): "excessive interference" when determining whether a proposal falls within the duty to bargain at the bargaining table and "abrogation" when determining whether the same proposal is in accordance with the law once it has been submitted to the agency head for review.[7] Thus, under the Authority's approach, a proposal at the bargaining table violates Section 7106(b)(3) and falls outside the duty to bargain if it "excessively interferes" with a management right. But that same proposal, once submitted to the agency head for review, must be considered consistent with Section 7106(b)(3) as long as it does not "abrogate" the management right in question.

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[7] The Authority cited its then-recent decision in *Environmental Protection Agency*, 65 FLRA 113 (2010) ("*EPA*"). See FLRA Op. at 7 (JA 198). In *EPA*, in determining whether an arbitrator's award enforces an appropriate arrangement under Section 7106(b)(3), the Authority rejected the "excessive interference" test in favor of the "abrogation" and, in doing so, resurrected the standard of review for arbitration awards that the Authority developed in 1990 in *Dep't of the Treasury, United States Customs Serv.*, 37 FLRA 309, and discarded in 2002 in *Federal Bureau of Prisons Federal Transfer Center Oklahoma City, Oklahoma*, 58 FLRA 109, 110 ("*BOP*"). See 65 FLRA at 116-118. See also *BOP*, 58 FLRA at 112-113 (Chairman Cabiniss, concurring) & 115 (Member Armendariz, concurring). The Authority held that it was proper to apply "abrogation" to its review of arbitral awards, even though it applies an "excessive interference" standard when determining whether a proposal qualifies as an appropriate arrangement within the duty to bargain. See *EPA*, 65 FLRA at 119.

The majority also noted that applying the "abrogation" standard in the context of agency head review would serve important policy interests. FLRA Op. at 8 (JA 199). Specifically, the majority emphasized that the abrogation standard promotes deference to the "bargaining parties' choices" by preventing agency heads from second-guessing those choices. *Id*. at 8-9 (JA 199-200). Moreover, the majority noted that deferring to the bargaining parties' choices was consistent with Section 7114(b)(2) of the Statute, which requires that agencies "be represented * * * at negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment." *Id*. at 9 (JA 200) (quoting 5 U.S.C. 7114(b)(2)). As the majority explained, this statutory provision "recognizes that agencies are required to provide bargaining representatives who adequately represent management's interests at the bargaining table *before* any agreement is reached." *Ibid*. "Thus, if a union proposal would impose burdens on an agency that the agency deems excessive, then those burdens should be assessed during negotiations" by the agency's bargaining representatives, not by the agency head "after the parties have reached agreement." *Ibid*.[8]

[8] Implicit in this conclusion is the Authority's view that there is a distinction between "proposals" and "provisions" — *i.e.*, that, once a document is signed by an agency representative at the bargaining table, it is no longer a proposal, but an agreed-to provision. See FLRA Op. at 7 (JA 198) ("although a particular *proposal* may be outside the duty to bargain because it is contrary to law, rule, or regulation,

For these reasons, the majority held that it "will find that a contractual provision is an 'appropriate' arrangement within the meaning of § 7106(b)(3) of the Statute — and that an agency head may not disapprove such an arrangement on § 7106 grounds — unless the arrangement abrogates, or waives, a management right." FLRA Op. at 10 (JA 201). Applying that test, the majority found that each of the three provisions were valid as appropriate arrangements under Section 7106(b)(3). Although the provisions did limit management's rights in some circumstances, they did not completely "preclude" management from exercising those rights. *Id*. at 10-11, 14 (JA 201-202, 205). Accordingly, the Authority ordered the Agency to rescind its disapproval of the provisions. *Id*. at 17 (JA 208).

Member Beck dissented. FLRA Op. at 18-22 (JA 209-213). He first criticized the majority for "jettison[ing] decades of precedent with respect to the standard by which we assess whether an agency head may, under § 7114(c)(2), reject a contract proposal that affects management's rights." *Id*. at 18 (JA 209). Since 1983, he explained, "the Authority has consistently applied the 'excessive interference' standard to management assertions that bargaining proposals are

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an agreed-upon contract *provision* is not contrary to law, rule, or regulation merely because, at the bargaining table, it was outside the duty to bargain") (emphasis added).

outside the duty to bargain because they impermissibly interfere with management's rights under § 7106(a)." *Ibid*. What is more, this standard "was applied whether the agency announced its position at the bargaining table or at the later stage of agency head review under § 7114(c)." *Id*. at 19 (JA 210).

Next, Member Beck made clear that the majority was effectively eliminating the process of agency head review. FLRA Op. at 19 (JA 210). Under the majority's approach, "once a proposal proceeds to agency head review, it will be binding on the agency even if it 'excessively interferes' with management's rights." (emphasis omitted). The head of the agency "will now be permitted to reject a proposal only if it nullifies completely — only if it eliminates entirely — one or more statutory management rights." *Ibid*. In Member Beck's view, this change will have significant consequences because his "research reveals *no case* in the past 20 years in which the Authority has found that a contract provision abrogates any management right; it just doesn't happen." *Ibid*. Thus, "as a practical matter, post-bargaining table agency review will no longer play any role in preserving the management prerogatives that Congress sought to protect through § 7106(a)." *Ibid*. That result, he concluded, "was flatly inconsistent with Congressional intent." *Ibid*.

Member Beck criticized the majority's interpretation of the Statute, calling it "so strained as to be untenable." FLRA Op. at 18 (JA 209). As he explained, the majority relied on a contrast between the language of Section 7117(c)(1) (which relates to the statutory duty to bargain) and that of Section 7114(c)(2) (which relates to agency head review). *Id*. at 19 (JA 210). For the majority, the crucial point was that Congress did not state in Section 7114(c)(2) that an agency head may disapprove matters that are outside the duty to bargain. To the majority, "this apparent omission indicates that an agency head is prohibited from rejecting a proposal merely because it is outside the duty to bargain." FLRA Op. at 20 (JA 211). Member Beck acknowledged that the majority's "observation about the statutory language is technically accurate" in the sense that "Congress did not expressly include 'outside the duty to bargain' as a reason for agency head rejection of a proposal." *Ibid*. But the legal conclusion that the majority drew from this observation was "wholly unjustified." *Ibid*. What the majority "missed is that two attributes — (1) being outside the duty to bargain and (2) being not in accordance with the Statute — are not mutually exclusive. *Ibid*. The reference to the latter in § 7114(c)(2) does not *preclude* the former; rather, it *includes* the former." *Ibid*. Member Beck further explained his view as follows:

> Simply put, when a proposal impermissibly interferes with a management right, it is prohibited by § 7106(a). And a proposal that is prohibited by § 7106(a) can properly be characterized as being *both* outside the duty to bargain and not "in accordance with the provisions of [the Statute]." Such a proposal is subject to agency head rejection under § 7114(c)(2). Rather than follow that axiomatic reading of the Statute, the Majority pursues a cramped reading that amounts to this: A proposal that violates § 7106(a) must nevertheless be treated by the agency head as being "in accordance with the provisions of [the Statute]."

FLRA Op. at 20-21 (JA 211-212).

Setting aside the majority's erroneous interpretation of the statute, Member Beck found that the majority's "new regime just does not survive the test of common sense." FLRA Op. at 21 (JA 212). "What sense is there," he asked, "in applying a different test for negotiability at the stage of agency head review than is applied at the bargaining table?" *Ibid*. The very purpose of agency head review under Section 7114(c) is "'to allow the head of an agency an extra 30 days to do that which his subordinates could have done earlier.'" *Ibid*. (quoting *AFGE v. FLRA*, 778 F.2d 850, 860 n.16 (D.C. Cir. 1985)).

Further, Member Beck explained, the majority's opinion produces absurd results. FLRA Op. at 21 (JA 212). Under its approach, "a proposal runs afoul of the Statute if it 'excessively interferes' with management rights when it is presented at the bargaining table; yet, when the same proposal reaches the agency

head, it is somehow transmuted so that it now runs afoul of the Statute only if it 'abrogates' management rights." *Ibid*. In Member Beck's view, the Statute simply did not possess such "alchemic properties." *Ibid*. "Nothing in the Statute's structure or purpose," he observed, "indicates that § 7106 means one thing at the bargaining table and something entirely different when agency head review takes place." *Ibid*. Rather, under Section 7106, a proposal that affects management rights "either is or is not a permissible limitation on those rights." *Ibid*. "Aside from its maladroit attempt to interpret § 7114(c)(2)," the majority had offered "no reason to apply a bifurcated standard of validity that is less rigorous at the stage of agency head review." *Ibid*.

Finally, Member Beck warned that the majority's approach would "impede normal labor relations" and "slow the bargaining process." FLRA Op. at 21 (JA 212). As he explained:

> Knowing that they may no longer review new contract provisions with an eye toward preserving their statutory management rights, agency heads are likely to delegate less authority to their labor relations officials in the field and reserve to themselves much more active and hands-on supervision of collective bargaining. My colleagues in the Majority are telling agency heads that the only meaningful review they now have is review that occurs before — not after — preliminary agreement is reached at the bargaining table. As a consequence, each proposal that might affect management rights will languish in limbo until it is transmitted to, and reviewed by, the agency head — an added step that is likely to increase substantially

> the time necessary to reach agreement on, or resolve disagreements about, specific proposals.

Id. at 21-22 (JA 212-213). That "state of affairs," Member Beck said, could not have been what Congress intended when it sought to promote "effective and efficient" federal labor relations and to "avoid unnecessary delays" in collective bargaining. *Id*. at 22 (JA 213) (internal quotation marks and citations omitted).

For these reasons, Member Beck would have applied the "excessive interference" test to the agency head's rejection of the three provisions at issue. And under that test, he would have agreed with the agency head that the three provisions were not appropriate arrangements. FLRA Op. at 22 (JA 213)

Introduction and Summary of Argument

1. The petition should be granted and the Authority's decision reversed. First, the Authority failed to give an adequate explanation for (1) establishing different standards of review for negotiability purposes between proposals at the bargaining table and proposals presented for agency head review and (2) rejecting "excessive interference" in favor of an "abrogation" test for the review of proposals disapproved by an agency head. Second, the three provisions at issue do not qualify as "appropriate arrangements" under the "excessive interference" test.

The "excessive interference" test derives from the textual analysis of Section 7106 by this Court in *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983), and adopted by the Authority in *Kansas Army National Guard*, 21 FLRA 24, 30-33 (1986). In contrast, the Authority's current rationale for the "abrogation" test does not depend on an analysis of Section 7106 but, rather the difference in language between Section 7117(c)(l) and Section 7114(c)(2) — a rationale that does not withstand scrutiny.

First, the plain language of Section 7106 does not suggest, even remotely, that "appropriate arrangements" have two different meanings, depending on whether the agency head or the agency head's representatives declare a proposal nonnegotiable. Second, neither do Sections 7117(c)(1) and 7114(c)(2) support the Authority's conclusion that an agency head should be treated differently — and of lesser authority — than the agency head's subordinate with respect to nonnegotiability determinations. Section 7117(c)(1) provides that an agency may declare a proposal nonnegotiable if it is alleged to be outside the duty to bargain while Section 7114(c)(2) authorizes the agency head to reject a provisionally agreed-to proposal if it is not in accordance with the federal law. But being outside the duty to bargain and being out of accord with federal law are coextensive — a proposal that impermissibly interferes with a management right

under 7106(a) is outside the duty to bargain. Accordingly, an agreement to such a proposal violates the labor statute, including section 7117(a)'s duty to bargain in general, and, as a violation of law, may be rejected as not in accordance with federal law.

In addition to the foregoing, the majority's interpretation inverts the roles of the agency head and the agency's representatives, giving the latter broader deference than the former. The majority did not adequately explain why this inversion of roles is what Congress contemplated when it established agency head review. Nor did the majority adequately explain why the inversion of roles furthers the collective bargaining ideals of the FSLMRS.

Furthermore, "abrogation" is demonstrably meaningless. In the years during which the Authority previously employed the "abrogation" standard (in the context of reviewing arbitral awards), no agency was ever able to meet it. Such a uniformly one-sided application effectively renders the test meaningless and removes all of its utility. Moreover, because the "abrogation" has never been met, the Authority's decision to employ that standard vis-a-vis agency head review reduces the agency head's authority to a nullity, which is clearly contrary to the vital role of the agency head in protecting management's interests.

Finally, the majority did not provide an adequate explanation for its distinction between proposals at the bargaining table and contract provisions, a holding that conflicts with an Authority regulation, 5 C.F.R. 2424.24. That regulation directs an agency in negotiability appeal matters to clearly state its position as to why a proposal *or* provision is not within the duty to bargain or contrary to law and does not distinguish between proposals and provisions. It also makes no distinction between an agency head or agency representatives with respect to the authority to declare proposals/provisions non-negotiable.

2. Under the "excessive interference" test, the Authority's decision cannot stand. The first two provisions set forth a performance-appraisal process for employees detailed or temporarily promoted to a position for fewer than 120 days, require feedback at various specified times during the details or temporary promotions, and require performance expectations to be communicated in writing before the employee may be held responsible for those expectations. These provisions excessively interfere with management's right to direct employees and assign work because they prevent the agency from holding an employee responsible for those expectations even if a supervisor has indisputably communicated the expectations to the employee orally.

The third provision deals with employee abuse of emergency annual leave and requires the agency to counsel the employee before undertaking any discipline. Authority precedent already establishes that a provision precluding management from issuing a leave-restriction letter as discipline until after counseling has taken place excessively interferes with management's right to discipline employees.

ARGUMENT

Standard of Review.

Under 5 U.S.C. 7123(c), courts "will * * * set aside an order of the Authority [if] it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *NTEU v. FLRA*, 452 F.3d 793, 796 (D.C. Cir. 2006) (quoting 5 U.S.C. 706(2)(A), which is the standard of review set forth in Section 7123(c); and citing *NTEU v. FLRA*, 414 F.3d 50, 57 (D.C. Cir. 2005)). See also *NTEU v. FLRA*, 399 F.3d 334, 337 (D.C. Cir. 2005) (quoting 5 U.S.C. 706(2)(A)). "The Authority is entitled to considerable deference when * * * applying the general provisions of the [FSLMRS] to the complexities of federal labor relations," and the court of appeals will defer to its interpretation of the Act if "reasonable and coherent." *Ibid*. (internal quotation marks omitted). See also *NTEU v. FLRA*, 414 F.3d at 57; *NAAE v. FLRA*, 473 F.3d 983, 986 (9th Cir. 2007).

Such deference, though, "'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *BATF v. FLRA*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)). Thus, reviewing courts are not to "rubber stamp" administrative decisions that are inconsistent with the statutory mandate or legislative intent. *FLRA v. Aberdeen Proving Ground*, 485 U.S. 409, 414 (1988); *BATF*, 464 U.S. at 97.

THE UNION PROPOSALS AT ISSUE ARE NONNEGOTIABLE BECAUSE THEY "EXCESSIVELY INTERFERE" WITH MANAGEMENT RIGHTS.

A.

There Is No Textual Basis For Replacing The "Excessive Interference" Test With The "Abrogation" Test.

1. The Authority held that the three union proposals at issue are negotiable as "appropriate arrangements" because they do not "abrogate" management rights. FLRA Op. at 4-11, 12-14 (JA 195-202, 203-205). The "abrogation" standard — re-minted only months before the decision in this case — replaced the "excessive interference" test the Authority had previously used in union challenges to agency

head determinations of nonnegotiability.[9] See *id*. at 5-10 (JA 196-201); and *id*. at 7 (JA 198) (citing *EPA*, 65 FLRA at 115 (Member Beck concurring)).[10] But the majority's only explanation for using the "abrogation" standard in reviewing agency head determinations of nonnegotiability is the difference in language between Section 7117(c)(l) (which relates to the statutory duty to bargain) and Section 7114(c)(2) (which relates to agency head review). See FLRA Op. at 6 (JA 197). Compare Section 7117(c)(1) (the exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that the duty to bargain in good faith does not extend to any matter") with Section 7114(c)(2) ("[t]he head of the agency shall approve * * * if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation"). Because Section 7117(c)(1) refers to declarations on nonnegotiability based on the claim that the proposed provision is "outside the duty to bargain" and Section 7114(c)(2) does not, the majority held that the agency head has less authority than the agency's representatives. FLRA Op. at 6 (JA 197).

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[9] As previously noted, the Authority still uses the "excessive interference" test in union challenges to declarations of nonnegotiability by the agency head's representatives. See FLRA Op. at 6 n.4 (JA 197).

[10] See also n.7, *supra*.

But the Authority provided no analysis of Section 7106, the only provision in the FSLMRS where the term "appropriate arrangements" appears. Rather, the Authority rejected "excessive interference" in favor of "abrogation" based on an interpretation of statutory provisions where the term "appropriate arrangements" does not appear and invoked seriously questionable policy to support its conclusion. Therefore, as explained below, the Authority's switch to the "abrogation" standard should be rejected.[11]

2. a. The "excessive interference" test derives from the textual analysis of Section 7106 by this Court in *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983). The Court recognized a statutory tension between management

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[11] The agency did not challenge the "abrogation" test before the Authority because the Authority had not yet resurrected that standard until the *EPA* decision (see n.7, *supra*) issued *after* all the briefing before the Authority was completed. See JA 113, 141, 168. The agency did not file a motion for reconsideration because it viewed such a motion as futile given the majority's definitive decision over a vigorous dissent that raised virtually all of the issues raised in this brief. In addition, in the *EPA* decision itself, the Authority indicated that it thought that "abrogation" should apply to agency head review as well as arbitral decisions. See *EPA*, 65 FLRA at 116 n.11 ("[O]ur analysis [in this arbitration case] calls into question whether abrogation also should be the standard applied in negotiability cases involving [agency head review]"). Thus, given the majority's firmly held stance on the "abrogation" issue, the failure to seek reconsideration should not block the instant challenge. Section 7123(c) does not bar an appeal where, as here, it would have been "patently futile" to urge the objection because of a recent Authority decision squarely addressing the contested issue. See, *e.g.*, *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004).

"rights" in Section 7106(a) and union bargaining rights over "appropriate arrangements" in Section 7106(b)(3), 702 F.2d at 1186-1188; that management exercises its rights "[s]ubject to" (Section 7106(a)) bargaining over "appropriate arrangements" (Section 7106(b)(3)) so that management does not exercise its 7106(a) rights "unfettered" (702 F.2d at 1188); but that, because "management rights" are "rights," "appropriate arrangements" cannot "impinge [on them] * * * *to an excessive degree*." *Ibid*. In other words, the Court understood the statute to contemplate a balancing to ensure that both management and union rights are given meaningful scope. "Abrogation," on the other hand, is a bright-line rule with no balancing: an "arrangement" is *not* "appropriate" only if management is completely prevented from exercising its rights; everything else is "appropriate" no matter how much interference with management rights exists. See *U.S. Department of Veterans Affairs Medical Center Kansas City, Missouri*, 65 FLRA 809, 814 (2011) ("The Authority has previously described an award that abrogates the exercise of a management right as an award that precludes an agency from exercising that right.") (internal quotation marks and citation omitted).

Subsequent to the decision in *AFGE, Local 2782*, the Authority adopted the "excessive interference" test in *Kansas Army National Guard*, 21 FLRA 24, 29-33 (1986). The Authority addressed the text of Section 7106 and the analysis of that

section by this Court in *AFGE, Local 2782*, and established several factors to balance in deciding whether a purported arrangement was "appropriate." See *id*. at 24-25, 30-31. See also, *e.g.*, *BOP*, 58 FLRA at 115 (Member Armendariz, concurring) ("The excessive interference standard allows an appropriate weighing of the relevant considerations in determining whether an award is deficient."). In general, the Authority's "excessive interference" test calls for a balancing of the benefits afforded employees under a particular proposal against the intrusion on the specific management's rights at issue, which is entirely faithful to the text of Section 7106 (and *AFGE, Local 2782*'s analysis).

b. In contrast, the Authority's rationale for the "abrogation" test does not depend on an analysis of Section 7106 but, rather, on the difference in language between Section 7117(c)(l) and Section 7114(c)(2). See FLRA Op. at 6 (JA 197). That rationale does not withstand scrutiny.

First, the term "appropriate arrangements" appears only once in the statute — in Section 7106(b)(3). It does not appear in Sections 7117(c)(1) and 7114(c)(2). And the plain language of Section 7106 does not suggest, even remotely, that the term "appropriate arrangements" has two different meanings, depending on whether the agency head or the agency representative makes the declaration of nonnegotiability. The very fact that Congress authorized

"appropriate arrangements" in a single statutory section indicates that Congress intended the term to have a uniform meaning. The Authority's reliance on Sections 7117(c)(1) and 7114(c)(2) is, therefore, entirely misplaced.[12]

Second, assuming arguendo that Sections 7117(c)(1) and 7114(c)(2) are somehow relevant to the meaning of "appropriate arrangements," see n.12, *supra*, the plain language of those provisions does not support the Authority's position regarding agency head authority. Neither provision suggests that an agency head has less authority than the agency head's subordinates with respect to nonnegotiability determinations regarding management's Section 7106(a) rights.[13]

In this connection, the Authority's argument that a proposal may be outside the duty to bargain and not be in violation of the statute does not withstand scrutiny. See FLRA Op. at 6-7 (JA 197-198). Being outside the duty to bargain and being out of accord with federal law are not mutually exclusive concepts. See also FLRA Op. at 20 (JA 211) (Member Beck, dissenting). Section 7117(c)(1)

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[12] The Authority's argument "that where Congress uses different terms in different parts of a statute [*i.e.*, Sections 7117(c)(1) and 7114(c)(2)], there is a presumption that Congress did not view the two terms as being identical," FLRA Op. at 6 (JA 197) (internal quotation marks and citation omitted), compounds its erroneous analysis. The latter two provisions apply to the duty to bargain. They have nothing to say about the term "appropriate arrangements" found *only* in Section 7106(b)(3).

[13] See also discussion of 5 C.F.R. 2424.24(a), *infra*, at pp. 39-40.

provides that an agency may declare a proposal nonnegotiable if it is alleged to be outside the duty to bargain while Section 7114(c)(2) expressly authorizes an agency head to reject an agreement reached at the bargaining table if not in accordance with federal law. As a matter of plain language, therefore, not being in accord with federal law (Section 7114(c)(2)) is *coextensive* with being outside the duty to bargain (Section 7117(c)(1)) — at least when it comes to bargaining over appropriate arrangements in response to the exercise of management's Section 7106(a) rights. Put another way, if a proposal impermissibly interferes with a management right, it is prohibited by Section 7106(a); and when a proposal is prohibited by Section 7106(a), it can only properly be characterized as being both outside the duty to bargain under Section 7117(c)(1) and not "in accordance with the provisions of" the FSLMRS under Section 7114(c)(2). Therefore, even the two provisions relied on by the Authority — when properly read — provide the agency head with the same scope of authority as the representative at the bargaining table. See also FLRA Op. at 20-21 (JA 211-212) (Member Beck, dissenting). Further, as correctly noted by Member Beck in dissent, the majority's analysis produces an absurd result: "[a] proposal that violates § 7106(a) must nevertheless be treated by the agency head as being 'in accordance with the provisions of [the Statute].'" *Id*. at 21 (JA 212).

The majority suggests that its decision is also compelled by the virtually identical language in Section 7114(c)(2) (proposals are negotiable if consistent with "with the [FSLMRS] * * * and any other applicable law, rule, or regulation") and Section 7122(a)(1) (arbitral decisions must not be "contrary to any law, rule, or regulation"). See FLRA Op. at 7-8 (JA 198-199). The majority's point, apparently, is that, if "abrogation" applies to its review of arbitral awards under Section 7122, then it must also apply to review of agency head declarations of nonnegotiability because of the identity of language in these two provisions. *Ibid*. See also n.11, *supra* (discussing *EPA*, 65 FLRA at 116 n.11).[14] We agree that the virtually identical language in the two provisions means that the same standard should be applied. But the standard should be "excessive interference," not "abrogation," because the former is compelled by the plain language of Section 7106(b)(3) (as this Court held in *AFGE, Local 2782 v. FLRA*, 702 F.2d at 1188). The fact that Sections 7114(c)(2) and 7122(a)(1) contain virtually identical language regarding whether proposals or provisions purporting to be "appropriate

[14] The Authority's application of the "abrogation" test to arbitral awards has been challenged by the agency in *United States Department of Commerce, Patent and Trademark Office v. FLRA*, No. 11-1019 (D.C. Cir.). The agency's opening brief in that case was filed June 29, 2011, and demonstrates why the "abrogation" standard in the review of arbitral awards is also invalid. That case and this one will be argued on the same date before the same panel.

arrangements" are lawful is irrelevant to the current inquiry because they say nothing about what constitutes an "arrangement" or when a purported "arrangement" is "appropriate."

c. The majority argues that there is, indeed, a textual difference between being outside the duty to bargain (on the one hand) and being out of accord with the federal law (on the other) and points to bargaining under 5 U.S.C. 7106(b)(1) — but not Section 7106(a) — to prove its point. See FLRA Op. at 6-7 (JA 197-198). In providing for collective bargaining for federal employees, the FSLMRS specifically and incontrovertibly excludes certain matters from bargaining under Section 7106(a). See pp. 3-4, *supra*. Section 7106(b)(1), however, permits bargaining "at the election of the agency" over certain subjects — the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. But such bargaining, though *outside* the agency's *duty* to bargain (because the agency can choose not to bargain over these subjects), is *not* contrary to the labor statute if the agency indeed chooses to bargain. *Ibid*. Thus, the 7106(b)(1) "carve out" stands as a clear exception to the prohibition on negotiation of management rights. As an exception, however, it provides no support for the Authority's point that the agency head's authority is narrower than

the agency's representatives with respect to the negotiability of Section 7106(a) subjects.

Further, provisions negotiated under Section 7106(b)(1) *are* in accordance with the labor statute because negotiation occurs entirely at the discretion of management. Accordingly, because agreements may be reached with respect to Section 7106(b)(1) proposals at the option of management, they "tell us nothing" about impermissible interference with Section 7106(a) subjects (*i.e.*, management rights). FLRA Op. at 20 n.2 (JA 211) (Member Beck, dissenting). Thus, given that Section 7106(b)(1) authorizes bargaining at the agency's option, the agency head may not declare proposals relating to Section 7106(b)(1) nonnegotiable on the ground that they are contrary to law. In contrast, union bargaining under Section 7106(b)(2) or (b)(3) is directed solely at Section 7106(a) subjects — whose substance the union may not bargain about. If a proposal vis-a-vis Section 7106(a) rights impermissibly interferes with management's right to exercise its authority under this provision, it is *not* "in accordance with the provisions of" the FSLMRS, and an agency is authorized to declare such proposals nonnegotiable. See *AFGE v. FLRA*, 778 F.2d at 863 (agency head may reject a contract term — even a settlement imposed by the Impasses Panel — if "it is violative of management prerogatives under the Act").

d. Critical to establishing two standards of review for negotiability and making way for the abrogation standard is the distinction the Authority apparently draws between a "provision of an agreement" and a "proposal."[15] In the majority's view, "proposals" are presented at the bargaining table; however, once the agency representative has executed an agreement, the proposals become "provisions." See FLRA Op. at 7 (JA 198) ("although a particular *proposal* may be outside the duty to bargain because it is contrary to law, rule, or regulation, an agreed-upon contract *provision* is not contrary to law, rule, or regulation merely because, at the bargaining table, it was outside the duty to bargain") (emphasis added). The Authority, however, does not cite any language in the labor statute for its distinction, and there is none.

The FSLMRS unambiguously states that what the parties execute — *i.e.*, an agreement — does not become a contract until 31 days (*i.e.*, one day longer than the agency head's 30-day review period) after the date of execution if not otherwise challenged by the agency. See 5 U.S.C. 7114(c)(2) & (3): "The head of the agency shall approve the agreement within 30 days from the date the agreement is executed," and "[i]f the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect

[15] See also discussion of 5 C.F.R. 2424.24, *infra*, at pp. 39-40.

and shall be binding on the agency and the exclusive representative * * *." Under the plain words of the labor statute, therefore, the document executed by agency representatives and the union pursuant to the Section 7117 duty to bargain *is a proposal* for the 30-day period following execution and does not become "agreed-upon" until the agency head approves it. And, even then, as previously discussed (see pp. 4-5, *supra*) "either party may [subsequently] raise illegality of the provision [*i.e.*, that it does not qualify as an "appropriate arrangement"] as a defense to a charge that it has violated the terms of the agreement." *AFGE v. FLRA*, 778 F.2d at 853-854.[16]

3. The "abrogation" test is inconsistent with the FSLMRS for another reason: *i.e.*, it is demonstrably meaningless. See *BOP*, 58 FLRA at 115 (Member Armendariz, concurring). In the years during which the Authority previously employed the "abrogation" standard (which was in the context of reviewing arbitral awards under Section 7122), no agency was ever able to meet it. *Ibid*. Member Beck in dissent in this case stated that "[his] research reveals *no case* in

[16] The fact that the FSLMRS uses the term "agreement" in Section 7114(c) lends further support to the argument that the Authority's distinction is without legal support. An "agreement" contains proposals to which the parties at the table have agreed, *i.e.*, "agreed-upon" provisions (FLRA Op. at 7; JA 198). Section 7114(c), however, indisputably authorizes an agency head to approve or disapprove the entire agreement. Therefore, Section 7114 plainly gives the agency head broader review authority than the Authority has held.

the past 20 years in which the Authority has found that a contract provision abrogates any management right; it just doesn't happen." FLRA Op. at 19 (JA 210). Former Member Armendariz, who originally made the point, stated that "[s]uch a uniformly one-sided application effectively renders the test meaningless and removes all of its utility." *BOP*, 58 FLRA at 115. See also FLRA Op. at 19 n.1 (JA 210) (Member Beck, dissenting). The majority, aware of this point, has not explained why a standard that cannot be met has any validity.

In addition, given the fact that the "abrogation" has never been met, the Authority's decision to employ that standard vis-a-vis agency head review reduces the agency head's authority to a nullity, which is clearly contrary to the vital role of the agency head in protecting management's interests. As this Court has recognized, agency head review "allow[s] the head of the agency an extra 30 days to do that which his subordinates could have done earlier." *AFGE v. FLRA*, 778 F.2d at 860 n.16. Therefore, it makes no sense to give agency representatives more authority than the agency head vis-a-vis protecting management's rights.

The majority defends the inversion of roles and nullification of agency head review authority as a deferral to the parties' "choices" at the bargaining table. FLRA Op. at 9-10 (JA 200-201). The majority notes that, under section 7114(c), the parties' choices at the bargaining table can have binding effects, such as when

an agency does not timely submit an agreement to agency head review or when the agency head does not timely disapprove an agreement or its provisions. *Id*. at 9 (JA 200). The Authority also concludes that deferring to the bargaining parties' choices "is consistent with the Statute's requirement [in Section 7114(b)(2)] that agencies 'be represented at * * * negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]'" *Ibid*.

The fact that proposals negotiated at the table take effect in the absence of timely submission to or timely disapproval by the agency head, see Section 7114, says nothing about the scope of the agency head's authority. Nothing in Section 7114 suggests that, because an agreement takes effect in the absence of agency head action, the agency head's authority is narrowed or limited when the agency head *does act in a timely fashion*. The time deadline is correctly understood not as a limitation on the scope of the agency head's authority but, rather, as a means to promote the efficiency of the collective bargaining process. And, because Section 7114(c) (which has no counterpart in private sector labor law) allows the agency head "an extra 30 days to do that which his subordinates could have done earlier," *AFGE v. FLRA*, 778 F.2d at 860 n.16, the obligation to send a representative to the bargaining table with authority to negotiate on behalf of the agency does not suggest, even remotely, that the agency head's authority to review what the

representative agrees to is somehow less than the representative's authority vis-a-vis Section 7106(a) rights.

The Authority's decision, moreover, does not further the collective bargaining ideals of the FSLMRS. Indeed, the contrary is true. See FLRA Op. at 21-22 (JA 212-213) (Member Beck, dissenting). The Authority's decision will force agency heads to become involved in bargaining *before* representatives sign on in order to ensure the protection of management rights. Although such early involvement might be seen as a remedy that would remove the need for the instant challenge, the fact is — as Member Beck stated in dissent (*ibid*.) — the agency head's early participation will likely impede collective bargaining by dramatically slowing it down. Agency heads will be forced to take a more active role in supervising collective bargaining within the multiple subordinate components of their agencies to preserve statutory management rights at the bargaining table, and thus, agency head review will be required before the agency's representatives agree to proposals. Ironically, as this Court has recognized, the very reason Congress allowed agency heads to review agreements after their execution was to avoid "impos[ing] a continuous burden on the head of the agency to review each and every proposal as it [arises] in the course of day-to-day bargaining." AFGE, 778 F.2d at 858. Thus, the Authority's ruling serves to "impose on agency heads

precisely the burden that Congress sought to avoid." FLRA Op. at 22 (JA 213) (Member Beck, dissenting). Because the 30-day review period in Section 7114(c)(2) will not have been triggered at this earlier point, the agency head can take as long as he or she thinks is necessary to ensure that every proposal is not "outside the duty to bargain." Then, after agency representatives sign, the agency head will have a second review bite of 30 days' duration to ensure that nothing has been overlooked that fits within the review authority described in the majority's decision. Such a process does not enhance "effective and efficient" federal labor relations, 5 U.S.C. 7101(b), or avoid "unnecessary delays" in collective bargaining, 5 U.S.C. 7114(b)(3).

4. Finally, the majority's holding also appears to conflict with an Authority regulation. 5 C.F.R. 2424.24(a) states that, the agency's "statement of position" in a negotiability appeal must "inform the Authority and the exclusive representative [*i.e.*, the union] why a *proposal or provision* is not within the duty to bargain or contrary to law, respectively." 5 C.F.R. 2424.24(a) (emphasis added). See Agency's Statement of Position at pp. ii-ix (JA 115-122) (using the Authority's prescribed form pursuant to 5 C.F.R. 2424.24 to state the agency's position on each proposal declared nonnegotiable). See also JA 169-175 (same for Agency Reply to Union Response to Agency Statement of Position). The regulation makes

no distinction between (a) proposals and provisions or (b) the agency head and the agency representatives with respect to declarations of nonnegotiability. See also 5 C.F.R. 2424.24(c) (directing the *agency* to set forth in its statement of position, *inter alia*, "its understanding of the proposal or provision, * * * any disagreement with the facts, arguments, or meaning of the proposal or provision set forth in the exclusive representative's [*i.e.*, union's] petition for review, and * * * all arguments and authorities in support of its position").

* * * * *

For these reasons, the Authority's use of the "abrogation" standard should be rejected.

B.

The Three Proposals At Issue Excessively Interfere With Management Rights.

Assuming the Court rejects the "abrogation" test, the proposals excessively interfere with management rights for the reasons which we now set forth.[17]

1. The three union proposals at issue, in pertinent part, state:

> Article 11 Section 4B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) days, the temporary supervisor shall discuss performance expectations with the

[17] See Addendum B for the full text of the proposals.

employee at the beginning of the detail. Normally, this will occur within five (5) workdays from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible for such performance expectations. When an employee on detail has performed under the performance expectations for at least ninety (90) days, but less than one hundred and twenty (120) days, an evaluation of the employee's performance while on such a detail shall be furnished in writing from the temporary supervisor of the detail to the employee's regular supervisor. When an employee on detail has performed under the performance expectation for less than ninety (90) days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. The employee's regular supervisor shall give appropriate consideration to such evaluations when evaluating the employee's overall performance.

Article 18 Section 14B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) calendar days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) work days from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible. If an employee is provided written expectations, a written evaluation is required when the employee has performed under the expectations for at least ninety (90) calendar days. The evaluation will be provided within thirty (30) calendar days of the end of the detail or temporary promotion.

When an employee on detail has performed under the performance expectations for less than ninety (90) calendar days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. This memorandum will be provided within thirty (30) calendar days of the end of the detail or

> temporary promotion. The employee's regular supervisor shall give appropriate consideration to such an evaluation when evaluating the employee's overall performance.
>
> Article 22 Section 3B. In those cases where [the Agency] has sound reason to believe that an employee is abusing "emergency" annual leave, the employee shall be counseled concerning such abuse. If such counseling is unsuccessful, and the employee continues to abuse "emergency" annual leave, [the Agency] may issue a written notice to the employee that all subsequent "emergency" annual leave absences must be supported by credible evidence justifying such absences.

See FLRA Op. at 2-3, 11 (JA 193-194, 202) (excerpting the proposals).

2. a. The first two provisions set forth a performance-appraisal process for employees detailed or temporarily promoted to a position for fewer than 120 days. They provide a feedback process for these employees at various periods of time during the details or temporary promotions; require performance expectations to be communicated in writing before the employee may be held responsible for those expectations; state that the written expectations may be submitted to an employee either by email or hard copy; and prevent the agency from holding an employee responsible for those expectations even if a supervisor has communicated the expectations to the employee orally. See FLRA Op. at 3 (JA 194).

These two provisions affect management's rights to direct employees and assign work under Sections 7106(a)(2)(A) and (B) because they prevent the

agency from "holding an employee accountable for performance expectations after the expectations have been communicated to the employee, but before they have been confirmed in writing." FLRA Op. at 3 (JA 194) (internal quotation marks omitted). And, they are not appropriate arrangements under Section 7106(b)(3) because they excessively interfere with those management rights: that is, the provisions "bar the exercise of * * * management['s] right to evaluate employees[,] a burden that outweighs the speculative benefits the provisions would provide to employees." *Ibid*. (internal quotation marks omitted).

The third provision proposes that, if the agency suspects an employee of abusing emergency annual leave, the agency is required to counsel the employee and if the abuse continues is required to advise the employee in writing that he or she must provide evidence to justify all subsequent uses of emergency annual leave, but counseling must precede the written notice. FLRA Op. at 11 (JA 202). Or, the agency can respond to a first offense with any form of discipline other than the issuance of a leave restriction notice. *Ibid*.[18] The Authority has already held that a provision that precludes management from issuing a leave-restriction letter until after counseling has taken place excessively interferes with management's right to discipline employees. See *National Federation of Federal Employees,*

[18] See n.3, *supra*.

Local 858 and U.S. Department of Agriculture Federal Crop Insurance Corporation Kansas City, Missouri, 42 FLRA 1169, 1171-1174 (1991). For that reason, the same result should obtain here.[19]

Conclusion

For the foregoing reasons brief, the petition for review should be granted and the Authority's decision reversed.

Respectfully submitted,

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[19] The discussion regarding the third provision demonstrates beyond doubt that the "excessive interference" test *does* make a difference as to whether union proposals qualify as "appropriate arrangements" under the labor statute. But for the "abrogation" standard, the Authority's prior decision under the "excessive interference" test would have been dispositive of the outcome here.

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(c) and D.C. Circuit Rule 32(a)(3)(B), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Time New Roman font, 14 point type. Based on a word count of my word processing system, Corel Wordperfect X4, this brief contains fewer than 14,000 words. It contains **10,287** words excluding exempt material.

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Certificate of Service

I hereby certify that on this **19th day of July, 2011**, I caused the foregoing Brief for the Petitioner to be filed by way of the ECF filing system. In addition, I caused eight (8) copies of the foregoing Brief for the Petitioner to be filed in hard copy with the Court. I also caused the Brief to be served on counsel for the Federal Labor Relations Authority and the Union by way of the Court's ECF notification system and by hard copy as follows:

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Addendum A:

Pertinent Provisions of 5 U.S.C. 7101 et seq.

5 U.S.C.

* * * *

§ 7106. Management rights

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

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

(2) in accordance with applicable laws —

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

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

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

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

(ii) any other appropriate source; and

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

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

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

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

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

* * * *

§ 7114. Representation rights and duties

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

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

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

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

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

(ii) the employee requests representation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * * *

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a) (1)Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective

bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

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

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

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

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

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

(c) (1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

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

(A) filing a petition with the Authority; and

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

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

(A) file with the Authority a statement--

(i) withdrawing the allegation; or

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

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

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

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

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

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

organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

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

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

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

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

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

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

* * * *

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

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

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

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

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

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

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

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

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

interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

ADDENDUM B:
Pertinent Provisions of the Collective Bargaining Agreement

Article 11, section 4b

SECTION 4 Performance Appraisals

A. Management has determined that an employee will not be held accountable for, or evaluated on, regularly assigned duties while on detail.

B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) workdays from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible for such performance expectations. When an employee on detail has performed under the performance expectations for at least ninety (90) days, but less than one hundred and twenty (120) days, an evaluation of the employee's performance while on such a detail shall be furnished in writing from the temporary supervisor of the detail to the employee's regular supervisor. When an employee on detail has performed under the performance expectation for less than ninety (90) days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. The employee's regular supervisor shall give appropriate consideration to such evaluations when evaluating the employee's overall performance.

C. An employee detailed or temporarily promoted for one hundred and twenty (120) days or longer shall receive written critical elements and performance standards as soon as possible but not later than thirty (30) days from the beginning of the detail or temporary promotion. An employee detailed or temporarily promoted for one hundred and twenty (120) days, or longer shall be evaluated in accordance with Article 18, Performance Appraisals.

D. When an employee is detailed outside the agency, Public Debt must make a reasonable effort to obtain appraisal information from the outside organization, which shall be considered in deriving the employee's next rating of record.

E. If an employee's performance while detailed or temporarily promoted will have an impact on the rating of record, the nature of the impact will be noted on the appraisal.

Article 18, section 14b

SECTION 14 Performance Appraisals While on Details

A. Public Debt has determined that employees will not be held accountable for, or evaluated on, regularly assigned duties while on detail.

B. When a detail or temporary promotion is expected to be less than one hundred and twenty (120) calendar days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) work days from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible. If an employee is provided written expectations, a written evaluation is required when the employee has performed under the expectations for at least ninety (90) calendar days. The evaluation will be provided within thirty (30) calendar days of the end of the detail or temporary promotion.

When an employee on detail has performed under the performance expectations for less than ninety (90) calendar days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. This memorandum will be provided within thirty (30) calendar days of the end of the detail or temporary promotion. The employee's regular supervisor shall give appropriate consideration to such an evaluation when evaluating the employee's overall performance.

C. An employee detailed or temporarily promoted for one hundred and twenty (120) calendar days or longer shall receive a performance plan as soon as possible but not later than thirty (30) calendar days from the beginning of the detail or temporary promotion. An employee detailed or temporarily promoted for one

hundred and twenty (120) calendar days or longer shall be evaluated when the annual performance rating is due or the detail or temporary promotion ends. If necessary, an evaluation must be completed within thirty (30) calendar days of the end of the assignment.

D. If an employee has been detailed outside of Public Debt, the supervisor must make a reasonable effort to obtain appraisal information which must be considered in deriving the employee's rating of record. If the employee has not worked at Public Debt for the minimum appraisal period but has worked outside of Public Debt on a detail, a reasonable effort must be made to secure a performance plan from the borrowing organization in order to construct a rating.

E. If an employee's performance while detailed or temporarily promoted will have an impact on his or her rating of record, the nature of the impact will be noted on the appraisal.

Article 22, section 3b

SECTION 3 Emergency Annual Leave

A. Requests for approval of emergency annual leave (that is, annual leave for absences which could not be anticipated in advance) must be made to the immediate supervisor or designee, as soon as possible on the first day of absence. These requests shall be made no later than two (2) hours after the employee's normal reporting time unless the difficulties encountered prevent compliance with the two (2) hour limit, in which case the employee will request approval as soon as possible. If emergency annual leave is requested by an employee and subsequently denied by Public Debt, an employee may be allowed a reasonable amount of annual leave or leave without pay, as appropriate, to report to work before such an employee is charged as absent without leave (AWOL), except for those employees subject to the restrictions in Section 3B.

B. In those cases where Public Debt has sound reason to believe that an employee is abusing "emergency" annual leave, the employee shall be counseled concerning such abuse. If such counseling is unsuccessful, and the employee continues to abuse "emergency" annual leave, Public Debt may issue a written notice to the employee that all subsequent "emergency" annual leave absences must be supported by credible evidence justifying such absences.