ORAL ARGUMENT SCHEDULED FOR FEBRUARY 11, 2005

No. 04-1157

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

_____

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

_____

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

_____

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

DAVID M. SHEWCHUK
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7999

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 11, 2005
CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the National Treasury Employees Union (NTEU) and the United States Department of the Treasury, Customs Service, Washington, D.C. (Customs). NTEU is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *National Treasury Employees Union and United States Department of the Treasury, Customs Service, Washington, D.C.*, Case No. 0-NG-2615, decision issued on March 12, 2004, reported at 59 F.L.R.A. (No. 135) 749.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

ADDENDUM

Page

TABLE OF AUTHORITIES

CASES

Page

TABLE OF AUTHORITIES
(Continued)

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Page

TABLE OF AUTHORITIES
(Continued)

FEDERAL STATUTES

Page

*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

AFGE Local 32	*Am. Fed'n of Gov't Employees, Local 32*, 14 F.L.R.A. 6 (1984)
agency	United States Customs Service
Authority	Federal Labor Relations Authority
Customs	United States Customs Service
FEMTC	*Fed. Employees Metal Trades Council*, 41 F.L.R.A. 107 (1991)
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
KANG	*Nat'l Ass'n of Gov't Employees, Local R14-87*, 21 F.L.R.A. 24 (1986)
NAGE	National Association of Government Employees
NFFE Local 2050	*Nat'l Fed'n Fed. Employees, Local 2050*, 36 F.L.R.A. 618 (1990)
NTEU	National Treasury Employees Union
Pet. Br.	Petitioner's brief
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
union	National Treasury Employees Union

ORAL ARGUMENT SCHEDULED FOR FEBRUARY 11, 2005

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

No. 04-1157

NATIONAL TREASURY EMPLOYEES UNION,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on March 12, 2004. The Authority's decision is published at 59 F.L.R.A. (No. 135) 749 (Joint Appendix (JA) 6-15)). The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute,

5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether the Authority correctly held that the union's proposal, which would have required the agency to completely alter its policies and practices regarding securing and storing employee firearms, was outside the agency's duty to bargain because it interfered with the agency's management right to determine its internal security practices under § 7106(a)(1) of the Statute, and constituted neither a procedure under § 7106(b)(2) of the Statute nor an appropriate arrangement under § 7106(b)(3).

STATEMENT OF THE CASE

This case arises as a negotiability proceeding brought under § 7117 of the Statute. On December 28, 2000, the United States Department of the Treasury, United States Customs Service[2] ("Customs" or "agency") issued a memorandum entitled "Implementation of Treasury Firearms Safety and Security Policy." JA 7, 37. The National Treasury Employees Union ("NTEU," or "union") sought to

[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

[2] The Customs Service has since been transferred from the Department of the Treasury to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. § 203(1) ("Homeland Security Act of 2002," Pub. L. 107-296; 6 U.S.C. § 101, *et. seq.*). As the Authority noted, "there is no evidence in the record that this change has affected the continued processing of the case." JA 6 n.2.

bargain over the implementation of Customs' memorandum, and introduced a proposal that would have required Customs to change its policies and practices to permit overnight storage of firearms in all Customs offices. JA 7. Customs refused to bargain over the proposal.

Pursuant to § 7105(a)(2)(E) of the Statute, the union appealed the matter to the Authority. The Authority (Member Pope, dissenting in part) held that the union's proposal was non-negotiable because it interfered with Customs' exercise of its management right to determine internal security practices. Furthermore, the Authority held that the proposal was neither a procedure under § 7106(b)(2) of the Statute nor an appropriate arrangement under § 7106(b)(3). The union now seeks review of the Authority's decision in this Court.

STATEMENT OF THE FACTS

A. Background

NTEU represents Customs Service employees who, as a condition of their employment as law enforcement officers, are required to carry firearms. JA 23. The roughly 8,000 firearm-carrying Customs employees work in more than 300 facilities nationwide. JA 8. These facilities

> differ in the level of staffing and [a]gency control. [Customs] points out that many of the facilities are not secure enough to protect firearms stored there during off-duty hours because they are not staffed during those hours. . . . [Customs] asserts that even when it has control of a facility, the facility may not have sufficient physical security to provide adequate and safe storage of firearms.

Id. Customs employees "have been carrying firearms as part of their duties for many years," JA 6, and Customs has promulgated a number of internal security practices relating to the use and storage of these firearms.

As early as 1986, a "Firearms Policy" was in effect, placing responsibility for "the safe storage, operation, general care and maintenance of the firearm" with the individual officer. JA 61. Ten years later, in 1996, Customs issued a "Firearms and Use of Force Handbook." The Handbook did "not provide for storage of firearms at the work site," JA 7, but instead reemphasized the individual employee's responsibility for securing his firearm: "Employees are expected to exercise good judgment in providing adequate security to all Service-issued and Service-authorized, personally-owned firearms." JA 7, quoting JA 36.

In 2000, Customs issued two firearms-related policies. The first, dated March 3, 2000, permitted Customs agents, at the agents' election, to carry their firearms 24 hours a day. JA 7, JA 41. Prior to permitting 24-hour carry, employees could either store their firearms overnight "in [Customs] locations where appropriate security is available," JA 8, or "go directly home from work" in order to secure their firearms at home. JA 17. Twenty-four hour carry was authorized, in part, to decrease the burden on employees; rather than travel directly from work to home (or home to work), employees participating in 24-hour carry were granted greater freedom of movement, subject to certain restraints (e.g., no

alcohol consumption). The agency reminded its employees of the significant responsibilities that accompany 24-hour carry:

> This authority presents a tremendous responsibility and has potential for significant liabilities to the individual officer, as well as the Customs Service. Any officer who elects to carry a service-issued firearm off-duty must realize that his or her behavior must be significantly modified while armed.

JA 7, quoting JA 41.

On December 28, 2000, Customs issued another policy, "Implementation of Treasury Firearms Safety and Security Policy." JA 37. The policy again emphasized personal responsibility for agency-issued and agency-authorized firearms:

> All [employees] authorized to carry firearms in the performance of their official duties are personally responsible for the security of all firearms to prevent unauthorized use, unintentional discharge, and theft.

JA 38-39. Specifically,

> When not under the employee's immediate control, one of the following methods of securing the firearm must be used:
>
> Firearm storage in a government office:
> a. Place in a lock box or other secure and locked container such as a safe, file cabinet, or desk.
> …
>
> Firearm storage in a residence:
> a. Install a safety lock device;
> ….

JA 39. Together, the December 28, 2000, memorandum and other policies constitute Customs' internal security practices with respect to the use and storage of agency-issued and agency-authorized firearms. Their effect is to allow a limited number of employees to store their firearms overnight at secure worksites -- approximately ten of Customs' more than 300 worksites. JA 6, citing JA 23 and JA 48. However, "in the great majority of locations, employees carry their firearm between work and home and either store it at home under secure conditions with an agency provided safety lock or carry it under [the] 24-hour carry policy." *Id*.

B. The Union's Proposal

In response to Customs' December 28, 2000, memorandum, the union introduced a proposal challenging Customs' policies. The proposal would have required Customs to take a number of steps to permit on-site, overnight, firearm storage:

> Customs will ensure that either a lockbox or other secure and locked container such as a safe, file cabinet, or desk is available at all government offices where armed employees work or are assigned. Routine overnight storage of a firearm in a government office is permitted.

JA 6. When Customs declared the proposal non-negotiable, the union filed a petition for review with the Authority.

C. The Authority's Decision

The Authority held that the proposal interferes with Customs' right to determine its "internal security practices" under § 7106(a)(1) of the Statute, and also held that the proposal does not constitute a "procedure" or an "appropriate arrangement" under § 7106(b)(2) & (3), respectively. Consistent with the parties' understanding, the Authority interpreted the union's proposal as requiring the agency to "permit the overnight storage of [a]gency-authorized firearms in a . . . secure storage container at all [Customs] offices where armed employees work or are assigned." JA 9.

Regarding the proposal's infringement on Customs' management right to determine its internal security practices, the Authority explained that "the right to determine internal security practices . . . includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks," JA 10, "includ[ing] the level of security necessary to protect" those assets and functions. *Id.* The Authority further explained: "Where the agency shows a link, or reasonable connection, between its objective of securing or safeguarding its personnel, property, or operations and the policy or practice designed to implement the objective, a proposal that 'conflicts with' the policy or practice affects

management's right under § 7106(a)(1)," and consequently is non-negotiable. JA 10, citing *Nat'l Treas. Employees Union*, 55 F.L.R.A. 1174, 1186 (1999).

The Authority held that Customs had established such a link in this case. The Authority noted in this connection Customs' claims that agency facilities did not all have the same level of staffing and agency control, and that Customs was unable to assure adequate security for firearms that might be stored at those facilities during off-duty hours. Furthermore, the Authority found that Customs had addressed these concerns by determining as a matter of policy and practice that it would "not allow[] storage [of firearms] during off-duty periods at those facilities which lack adequate security," JA 10, and that it would require "employees who are trained and qualified to carry firearms maintain possession and access to their firearms when off-duty." JA 11. In the Authority's view, the agency's firearms policies and practices reflected the agency's determination of how to "reduc[e] the risk of [firearm] theft and further[] its asserted internal security practice determinations." JA 10. Finding that "[t]he [a]gency policies and practices at issue in this case relate to the protection of [a]gency personnel, property and operations from the risks presented by firearm theft and misuse," *id.*, the Authority held that Customs had established a link between its storage policies and its internal security concerns. *Id*.

Having found a link between the agency's policy and its internal security concerns, the Authority next determined that the union's proposal would interfere with the agency's right to determine its internal security practices. Specifically, the Authority determined that the union's proposal "would require [Customs] to establish a level of security at [all] facilities comparable to the security provided at facilities where storage during off-duty hours is currently allowed." *Id.* Because the proposal would require the agency to adopt different measures and controls than those the agency had determined were necessary to achieve its security objectives, an aspect of management's right, the Authority held that the proposal "affects management's right to determine its internal security practices under § 7106(a)(1)." *Id.*

The Authority also held that the proposal did not constitute a procedure under § 7106(b)(2). "Proposals that require the adoption of security measures to ensure a specific level of security do not constitute negotiable procedures under § 7106(b)(2) of the Statute." JA 11. Because the union's proposal would require Customs to ensure a specific level of security – the level sufficient to permit safe overnight firearm storage – at its facilities, the Authority held "the disputed proposal in this case does not constitute a procedure . . . ." *Id.*

Finally, the Authority held that the proposal did not constitute an appropriate arrangement under § 7106(b)(3). As an initial matter, the Authority held that the

proposal constituted an arrangement. *Id.* The Authority noted in this regard that the proposal would "mitigat[e] the adverse effects . . . from the agency's action of making employees responsible for the security of their authorized firearms during off-duty hours." JA 11. However, the Authority continued, the arrangement represented by the proposal would not be *appropriate* under the test of *National Association of Government Employees, Local R14-87*, 21 F.L.R.A. 24 (1986) (*KANG*).

Under *KANG*, an arrangement is appropriate only if it does not "excessively interfere[] with the relevant management rights." JA 11, citing *KANG* at 31-33. In this case, the Authority determined that the union's proposal, requiring secure overnight firearm storage at every single Customs installation, regardless of the unique problems presented by a given installation, would excessively interfere with the agency's right to determine its internal security practices. The Authority stated:

> [W]e note that of the approximately 300 facilities used by the [a]gency in the accomplishment of its mission, the [u]nion identified approximately 10 facilities where the [a]gency has determined that adequate security permits the off-duty storage of firearms. Because this proposal would mandate that the [a]gency undertake actions to provide such security even at locations that are not under its control, we find this proposal excessively interferes with the exercise of the [a]gency's management rights.

JA 11. The Authority further explained that although "the risk of harm to employees and their families from firearms properly stored and secured at home is

not taken lightly, the Authority . . . does not have the ability to second-guess the merits of an agency's determinations about what its internal security practices should be." JA 12.

Accordingly, the Authority held that because "the [u]nion's proposal imposes a burden upon the [a]gency's exercise of its management right to determine its internal security practices that outweighs the benefits provided to some unit employees," *id.*, the proposal is not an appropriate arrangement under *KANG*.[3]

STANDARD OF REVIEW

Authority decisions are reviewed "in accordance with the Administrative Procedure Act," and may be set aside only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress v. FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). As such, "the Authority

[3] Because the proposal is not an appropriate arrangement based on its excessive interference with Custom's internal security rights, there was "no need [for the Authority] to address the [a]gency's argument regarding the interference the proposal places upon its right to assign work." JA 12.

is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms*, 464 U.S. at 97.

With regard to a negotiability decision, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Assoc. v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *Nat'l Treasury Employees Union v. FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

The Authority correctly held that the union's proposal, which would have negated the Customs Service's internal security practice determinations concerning the safe and secure off-duty storage of agency-authorized firearms, was not within the agency's duty to bargain under the Statute. The proposal impermissibly interferes with Customs' exercise of its management right to determine its internal security practices. As the record demonstrates, Customs has implemented a number of internal security policies and practices regarding firearms security and storage. Under these policies and practices, employees are permitted to store their firearms at the worksite while off-duty only where Customs has determined that proper security safeguards are in place. However, the vast majority of the approximately 300 facilities where Customs employees are assigned do not have

such safeguards. Consequently, Customs has determined that its firearms security objectives are best achieved by requiring employees assigned to those facilities to secure their weapons themselves while off-duty, either by carrying them directly home from work or under a 24-hour carry policy. The union's proposal, which would require Customs to permit off-duty storage of firearms at all facilities used by Customs, including those ill-equipped and unsuitable for the off-duty storage of firearms, would negate these internal security practice determinations, and thus would impermissibly interfere with Customs' management rights under § 7106(a) of the Statute.

In addition, the Authority properly determined that the union's proposal is not a negotiable procedure under § 7106(b)(2). As case law makes clear, and the union concedes, proposals that interfere with an agency's exercise of its right to determine internal security practices are not negotiable as procedures.

Finally, the Authority was correct in holding that the proposal does not constitute an appropriate arrangement under § 7106(b)(3). Although the proposal's language would operate as an "arrangement" for employees adversely affected by Customs' exercise of its management rights, the proposal would entirely negate Customs' internal security practice determinations concerning firearms storage and safety at the approximately 300 facilities where armed Customs employees are assigned. Because the proposal's burden on Customs' need to ensure the safe and

secure off-duty storage of firearms outweighs any benefit that the proposal would produce for some Customs employees, the Authority properly applied the *KANG* balancing test and determined that union's proposal "excessively interfered" with Customs' management rights. As a result, the proposal is not an appropriate arrangement under *KANG*. Therefore, given the proposal's conflict with Customs' right to determine its internal security practices under § 7106(a), as well as the proposal's failure to qualify as either a negotiable procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3), the Authority properly concluded that the proposal was not within Customs' duty to bargain under the Statute.

ARGUMENT

THE AUTHORITY CORRECTLY HELD THAT THE UNION'S PROPOSAL, WHICH WOULD HAVE REQUIRED THE AGENCY TO COMPLETELY ALTER ITS POLICIES AND PRACTICES REGARDING SECURING AND STORING AUTHORIZED EMPLOYEE FIREARMS, WAS OUTSIDE THE AGENCY'S DUTY TO BARGAIN BECAUSE IT INTERFERED WITH THE AGENCY'S MANAGEMENT RIGHT TO DETERMINE ITS INTERNAL SECURITY PRACTICES UNDER § 7106(a)(1) OF THE STATUTE, AND CONSTITUED NEITHER A PROCEDURE UNDER § 7106(b)(2) OF THE STATUTE NOR AN APPROPRIATE ARRANGEMENT UNDER § 7106(b)(3).

A. The Authority Correctly Held that the Union's Proposal Interfered with the Agency's Right to Determine Its Internal Security Practices Under § 7106(a)(1) of the Statute.

Under § 7106(a)(1) of the Statute, agencies have the exclusive right to "determine the[ir] . . . internal security practices[.]" The Authority and this Court

have interpreted § 7106(a)(1) to render non-negotiable proposals that would directly interfere with an agency's right to determine its internal security practices. *Amer. Fed'n of Gov't Employees and Air Force Logistics Command*, 2 F.L.R.A. 603 (1980), *aff'd sub nom*. *Dep't of Defense v. FLRA*, 659 F.2d 1140 (D.C.Cir. 1981); *accord Dep't of the Army, U.S. Army Aberdeen Proving Ground Installation Support Activity v. FLRA*, 890 F.2d 467, 469 (D.C. Cir. 1989) ("Subject to [§ 7106(b)(2) and § 7106(b)(3)] . . . management retains full, nonnegotiable control over an agency's internal security practices . . . .").[4]

1. The Authority properly determined that Customs' firearms policies and practices are "internal security practices," and correctly identified those practices.

The Authority properly determined that Customs' firearm storage and security policies are "internal security practices" for the purposes of § 7106(a)(1). It is uncontested that "[w]here the agency shows a link, or reasonable connection, between its objective of securing or safeguarding its personnel, property, or operations and the policy or practice designed to implement that objective," the policy or practice will be considered an "internal security practice" under § 7106(a)(1). JA 10, citing *NTEU*, 55 F.L.R.A. 1174, 1186 (1999). It is also uncontested by the union in its brief that, as the Authority reasonably determined,

[4] As indicated, language that would be non-negotiable as a proposal under § 7106(a)(1) may nonetheless be a valid § 7106(b)(2) procedure or an appropriate § 7106(b)(3) arrangement. *Amer. Fed'n of Gov't Employees, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1186-87 (D.C. Cir. 1983).

Customs' policies and practices concerning limited on-site overnight storage of employee firearms, and the need for employees to take personal responsibility for the safeguarding of their firearms while off-duty, have a link to the agency's plan to "secure or safeguard its personnel, property, or operations[.]" *Id*. The Authority's conclusion on this point, that these agency policies and practices are "internal security practices" for purposes of §7106(a)(1) of the Statute, follows directly.

Although not directly contesting the linkage between Customs' firearms security policies and practices and its internal security concerns, the union contends that the Authority "incorrectly defined" those practices. Petitioner's Brief (Pet. Br.) 14. Specifically, the union claims that Customs' *only* internal security practice regarding firearm storage and safety is that "weapons must be stored in secure locations." Pet. Br. 15. The union's contentions should be rejected.

As a threshold matter, the union's objections concerning correctly defining the internal security practices relevant to this case are not within this Court's jurisdiction to consider pursuant to §7123(c) of the Statute, because they were not urged in the administrative proceeding before the Authority.[5] However, even if the

[5] Section 7123(c) provides that "no objection that has not been urged before the Authority . . . shall be considered by the court . . . ." That the dissenting opinion raised the issue does not excuse the union's failure to do so. *Nat'l Ass'n. of Gov't*

Court were to consider the union's contentions on this point, it should reject them because they lack merit.

In this regard, contrary to the union's contentions, and as discussed above at pp. 4-6, the record reflects that Customs made a number of internal security practice determinations linked to the agency's objective of assuring the safe storage and use of agency-issued and agency-authorized firearms. For example, the record reflects that Customs has implemented practices that permit overnight onsite firearm storage where proper safeguards are in place. JA 6, 55-56. However, the record also reflects that at worksites where those safeguards are not present, the agency has determined that overnight onsite storage will not be permitted. JA 23, 24, 27. In addition, it is clear from the record that the agency has determined, "as part of its internal security determinations," JA 12, that at worksites that do not present a safe and secure environment for off-duty storage of firearms (or when employees elect 24-hour carry or home storage), that "firearms used by [a]gency employees in the performance of their duties need to be secured by the employees trained and authorized to possess them when they are off-duty." JA 12, 24. In such circumstances, the record substantiates that the agency has

---

Employees, Local R5-136 v. FLRA, 363 F.3d 468, 479-80 (D.C. Cir. 2004). Although the union discusses a variety of matters in its reply (JA 45-57) to the agency's statement of position, the union does not raise any issue as to the specific identity of internal security practices involved in the case. Furthermore, the union did not file any motion for reconsideration with the Authority on this point to preserve the issue for judicial review.

determined that employees should be responsible for the safekeeping of firearms at their residences with a Customs-provided safety lock. JA 6, 39.

The fundamental flaw in the union's challenge to the Authority's interpretation of Customs' internal security practice determinations is one of logic. In this regard, the fact that the agency permits overnight storage at work locations it deems secure does not "prove," as the union asserts (Pet. Br. 15), that the agency has not also made different internal security practice determinations to deal with overnight storage issues where work locations are not secure. The agency's various determinations are consistent because they address different circumstances. Put differently, even if it were true that the union's proposal does not conflict with the internal security practice as characterized by the union, "that weapons must be stored in secure locations" (Pet. Br. 15), the union's proposal might well conflict with other compatible agency internal security practice determinations, such as the requirement that employees secure their own firearms while off-duty when on-site storage is not secure.

In sum on this point, the Authority's decision reflects a comprehensive and supportable understanding on the part of the Authority that Customs' internal security practices are reflected in a number of documents, and been have adapted over time to meet the agency's needs and the needs of its employees. Conversely, it should be clear that the union's attack on the Authority's definition of the

internal security practices here involved is based on an oversimplification of Customs' internal security practices. The fact that the union's proposal might not conflict with a hypothetical internal security practice determination cherry-picked by the union does not demonstrate that the contested proposal comports with other internal security practice determinations that the record reflects are part of Customs' plan to secure and safeguard its personnel, physical property, and operations.

2. The Authority correctly determined that the union's proposal would directly interfere with Customs' right to determine its internal security practices.

As explained above, a proposal that conflicts with an agency's plan, i.e., its policies and practices, to secure or safeguard its personnel, physical property, or operations improperly interferes with management's right to determine its internal security practices. In this case, as the Authority correctly determined, the union's proposal that the agency be required to permit the overnight storage of agency-issued or agency-authorized firearms at all agency worksites where armed employees work or are assigned, regardless of how secure those worksites are, would give rise to such an interference.

As determined by the Authority based on the case's record, Customs' plan for securing and safeguarding its personnel, physical property, and operations includes the internal security practice of not permitting the storage of firearms

during off-duty periods at agency facilities that lack adequate security. In addition, Customs has determined that firearms used by employees assigned to such facilities need to be secured by the employees when they are off-duty and that this should be done by requiring the employees to maintain possession and access to those firearms.

The union's proposal clearly conflicts with these internal security practice determinations. The proposal would displace the agency's determination to prohibit off-duty storage of firearms at facilities lacking adequate security, and would require the agency to alter its existing security measures and controls at those facilities to provide sufficient security. Furthermore, the proposal would negate the agency's plan to reduce the risk of firearm theft and related concerns at facilities lacking adequate security by requiring employees to secure their firearms themselves while off-duty, substituting instead the requirement that the agency assume the responsibility for providing such secure storage. "Because the proposal would impose . . . internal security practice[s] on the Agency, it directly interferes with the Agency's right to determine its internal security practices under section 7106(a)(1) of the Statute." *Nat'l Fed'n of Fed. Employees, Local 2050*, 36 F.L.R.A. 618, 652 (1990) (*NFFE Local 2050*). Accordingly, because the Authority's determinations are consistent with the Statute, Authority case law, and the case's record, they should be affirmed.

The union's argument, Pet. Br. 16-20, that the Authority "acted arbitrarily and capriciously in departing" from its precedent is based on Authority decisions that have either been superseded or are inapposite. The case on which the union places primary reliance, *American Federation of Government Employees, Local 32*, 14 F.L.R.A. 6 (1984) (*AFGE Local 32*), *enforced on other grounds sub nom. FLRA v. Office of Personnel Management*, 778 F.2d 844 (D.C. Cir. 1985), was explicitly overruled by the Authority in 1990. *NFFE Local 2050*, 36 F.L.R.A. at 631. In *AFGE Local 32*, the Authority had held negotiable a union proposal that would have required OPM to provide "adequate security" to all employees. Revisiting *AFGE Local 32* in *NFFE Local 2050*, the Authority explained:

> For the following reasons, we conclude that [*AFGE Local 32*] and *Haskell Indian Junior College* must be overruled. Proposals that establish a substantive criterion that would restrict management's discretion in the exercise of a management right directly interfere with that right. . . . [*AFGE Local* 32] and *Haskell Indian Junior College* concerned the adequacy of and the necessity for the measures which an agency would take to provide security for its employees. The terms "adequacy" and "necessity" prescribe substantive criteria governing management's decision as to the security measures it will adopt.

NFFE Local 2050 at 631-32. The union's second case on this point, *American Federation of Government Employees, Local 1759*, 29 F.L.R.A. 261 (1987), also preceded *NFFE Local 2050*, in which the Authority explained its revised approach.

The only other case the union offers to show that the Authority did not follow its own precedent is completely inapposite. *Federal Employees Metal*

Trades Council, 41 F.L.R.A. 107 (1991) (*FEMTC*) concerned a union proposal that would have required the Navy to place storage containers for motorcycle safety equipment at the base's main gates. *Id*. at 111. No security practices were even remotely implicated by the union's proposal and the Authority rejected, without discussion, the Navy's claims to the contrary. *Id*. In the instant case, security practices are the entire point of the union's proposal. For these reasons, the union's claim that the Authority's decision is inconsistent with its own precedent should be rejected.

In sum on this point, the Authority reasonably and correctly identified and analyzed the agency internal security practice matters pertinent to this case, as well as the nature of the conflict between the union's bargaining proposal and management's right to determine agency internal security practices. The union's assertions to the contrary lack merit and should be rejected.

B. The Authority Correctly Held that the Union's Proposal is not a § 7106(b)(2) Procedure.

In light of the foregoing analysis, the Authority correctly held that the union's proposal is not a negotiable procedure. Section 7106(b)(2) of the Statute provides –

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

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

5 U.S.C. § 7106(b)(2). However, as the union properly concedes, "proposals that directly interfere with a management right under . . . § 7106(a) do not constitute negotiable procedures." Pet. Br. 21. *See, e.g., Nat'l Fed'n of Fed. Employees, Local 1482*, 44 F.L.R.A. 637, 648 (1992); *see also Dep't of Defense v. FLRA*, 659 F.2d 1140, 1151-52 (D.C.Cir. 1981), *cert. denied sub nom*. 455 U.S. 945 (1982). Because the union's proposal would require Customs "to adopt measures that are sufficient to ensure the security of . . . firearms stored at its facilities during non-work hours, the disputed proposal in this case" interferes with management rights and "does not constitute a procedure within the meaning of §7106(b)(2) of the Statute." JA 11.

C. The Authority Correctly Held that the Union's Proposal is not an Appropriate § 7106(b)(3) Arrangement.

The Authority also correctly held that the union's proposal is not an appropriate arrangement under § 7106(b)(3). Section 7106(b)(3) provides for the negotiation of "appropriate arrangements for employees adversely affected by the exercise" of a management right under §7106 of the Statute. If the Authority determines that a proposal constitutes an "arrangement," as the Authority did in this case, JA 11, the Authority then must determine whether the proposal is "appropriate," or whether the proposal is non-negotiable because it "excessively

interferes" with the agency's exercise of its management right. *KANG* at 31-33; *Am. Fed'n of Gov't Employees, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983). Regarding the determination of whether an arrangement "excessively interferes" with management rights, "this will be accomplished, as suggested by the D.C. Circuit, by weighing the competing practical needs of employees and managers." *KANG* at 31-32.

1. Because the proposal would excessively interfere with Customs' right to determine its internal security practices, the Authority was correct in determining that it is not an appropriate arrangement under *KANG*.

As indicated previously, pp. 9-10, *supra*, the Authority determined that the union's proposal constituted an "arrangement" under § 7106(b)(3) of the Statute. The Authority's further determination, that as an arrangement the proposal was nevertheless non-negotiable because it "excessively interfered" with Customs' right to determine its internal security practices, should be upheld because it represents a reasonable and correct application of the Statute, and the *KANG* factors, to the facts of this case.

The union's proposal would entirely preempt Customs' determinations as to how to secure and safeguard its personnel, property, and operations at facilities deemed unsuitable for the overnight storage of firearms. As the Authority found, in those locations, "the proposal would completely negate the [a]gency's

determination that its internal security is best served by having employees retain possession of their firearms while off-duty" rather than permitting the storage of firearms at facilities "ill-equipped and unsuitable for the off-duty storage of firearms." JA 12. As further found by the Authority based on the record, the number of facilities used by the agency that lack adequate security for off-duty storage of firearms numbers almost 300, and includes facilities that are not under the agency's control. JA 11.

Not only does the union's proposal completely preclude Customs from making certain internal security determinations concerning firearms safety, but the extent of the proposal's benefit to those employees who would be affected is not established in the record. Thus, although the proposal would benefit "some" employees by "mitigating the adverse effects" of Customs' determination that certain employees should secure their authorized firearms during off-duty hours, JA 12, the record does not include any demonstration of the number of employees affected, or the extent of the adverse effects that the proposal would alleviate.

Accordingly, because the proposal would entirely negate Customs' internal security practice determinations concerning firearms storage and safety, and given the union's failure in the record to establish the extent of the benefits, the Authority reasonably concluded that the "burden upon [Customs'] exercise of its management right to determine its internal security practices . . . outweighs the

benefits provided to some unit employees." JA 12. Consequently, as the Authority decided, the union's proposal is outside Customs' duty to bargain because it excessively interferes with Customs' right to determine its internal security practices.

2. The union's arguments are without merit.

a. The union's claims that the Authority's determination should be overturned are without merit. As an initial matter, the union concedes that "if, as the Authority believed, the Union's proposal completely precluded" management's internal security determinations, then the union's proposal would interfere excessively with Customs' management rights, and not be negotiable as an appropriate arrangement. Pet. Br. 25-26. As demonstrated above, pp. 24-26, and as discussed by the Authority at length in its decision, JA 11-12, the union's proposal does just that. Accordingly, because the Authority's comprehensive analysis of the internal security practice determinations implicated by the union's proposal is supportable and correct, and because the union's constricted view of this matter is inaccurate, the union's criticism of the Authority's appropriate arrangements analysis should be rejected, and the Authority's conclusion on this subject upheld.

b. In addition, the union's criticism of the Authority's assessment of the proposal's benefit to employees, Pet. Br. 26-27, is unfounded. The union asserts in

this connection that the Authority ignored the record when it found that "the extent of [the proposal's] benefit [to employees] has not been established[.]" JA 12. The union supports its assertion with a list of five types of benefits that assertedly would flow to employees as a consequence of the proposal.

This union challenge to the Authority's appropriate arrangement analysis misconstrues the Authority's decision. The Authority fully considered, as part of the pleadings before it, the list of benefits claimed by the union. *See* JA 53-54. When the Authority found that the "extent" of the alleged benefits had not been established in the record, the Authority was referring to the record's failure to demonstrate the nature and degree of the proposal's effect on conditions of employment. The listing provided by the union did not include that information.

In contrast, the agency's pleadings to the Authority directly address the extent of the proposal's impact on Customs' operations. *See*, *e.g.*, JA 23 ("The union's proposal would require the agency to allow overnight storage in all [300 of] these facilities when a great many of them are not secure enough . . . to provide secure overnight storage[.]"); JA 24 ("[I]f adopted, [the proposal] would prevent the agency from acting at all with regard to determining this aspect of its internal security practices," and "[t]he union's proposal would allow employees to transfer that responsibility to the agency . . . and, thereby, increases the chances that employees and property may be placed in jeopardy.").

Accordingly, because the Authority properly considered and applied the record before it, the Authority's determination that the proposal's preemption of Customs' internal security practice determinations outweighs the uncertain employee benefits flowing from the proposal should be upheld.

c. The union errs further when it claims (Pet. Br. 28-29) that the Authority should be faulted for not including in its analysis a discussion of each of the *KANG* factors. Contrary to the union's criticism, nothing in *KANG* requires the Authority to include in every appropriate arrangements analysis a discussion of every *KANG* factor. Indeed, in its *KANG* decision, the Authority specifically indicated that the primary analysis under *KANG* would "weigh[] the competing practical needs of employees and managers." *KANG*, 21 FLRA at 31-32. Because the Authority will consider under *KANG* "such factors" as those listed there and cited by the union, the list in *KANG* are examples, but are neither a necessary nor a complete list. *See, e.g.*, *Nat'l Treas. Employees Union*, 59 F.L.R.A. 978, 2004 WL 1170012, **6-7 (2004) and *Nat'l Treas. Employees Union*, 55 F.L.R.A. 1174, 1175 (1999) (both cases applying *KANG* and weighing "competing practical needs" without using five factors found in *KANG* at 32). By accurately analyzing the proposal's effect – negating Customs' internal security practice determinations concerning firearms safety and storage in this case – and weighing it against a variety of uncertain employee benefits, the Authority did all that is required by the Statute and its case

law. Consequently, the union's claim that the Authority departed from the analytical scheme set forth in *KANG* should be rejected, and the Authority's appropriate arrangements analysis should be upheld.

d. Finally, the union's claim (Pet. Br. 29-31) that the Authority's decision in this case is inconsistent with precedent is flawed. Each of the decisions cited by the union reflects the Authority's analysis and weighing of the competing practical needs of employees and managers in the factual circumstances unique to each case. The decisions demonstrate that the Authority resolves appropriate arrangement claims in favor of finding proposals negotiable as well as by finding them outside the duty to bargain. However, none of the decisions cited by the union demonstrates that the Authority in the decision under review in this proceeding departed as a matter of legal principle from the requirements of the precedent established in the Authority's *KANG* decision.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

David M. Smith
Solicitor

William R. Tobey
Deputy Solicitor

David M. Shewchuk
Attorney
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7999

November 2004

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

NATIONAL TREASURY EMPLOYEES UNION,	)	
Petitioner	)	
	)	
v.	)	**No. 04-1157**
	)	
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority, have been served this day, by mail, upon the following:

Gregory O=Duden, General Counsel
Larry J. Adkins, Deputy General Counsel
Caryl L. Casden, Assistant Counsel
National Treasury Employees Union
1750 H Street, NW
Washington, D.C. 20006

Tracy Arcaro
Paralegal Specialist

November 29, 2004

TABLE OF CONTENTS

Page

' 7105. Powers and duties of the Authority

* * * * * * *

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

* * * * * * *

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

* * * * * * *

§ 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 forappointments 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) filing a petition with the Authority; and

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

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

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

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

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

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

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

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

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

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

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

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

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

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

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

' 7123. Judicial review; enforcement

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

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

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

* * * * * * *

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

evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting side 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.

* * * * * * *