ORAL ARGUMENT NOT YET SCHEDULED

No. 04-1433

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

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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 Homeland Security, Customs and Border Protection, 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 Homeland Security, Customs and Border Protection, Washington, D.C.*, Case No. 0-NG-2627, decision issued on November 8, 2004, reported at 60 F.L.R.A. (No. 77) 367.

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).

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

GLOSSARY

AFGE	*Am. Fed'n of Gov't Employees, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983)
AFGE 2782	*AFGE, Local 2782*, 7 F.L.R.A. 91 (1981)
agency	Department of Homeland Security, Customs and Border Protection
Authority	Federal Labor Relations Authority
Customs	Department of Homeland Security, Customs and Border Protection
FAA	Federal Aviation Administration
FLRA	Federal Labor Relations Authority
Handbook	1996 "U.S. Customs Service Firearms and Use of Force Handbook"
JA	Joint Appendix
KANG	*Nat'l Ass'n of Gov't Employees, Local R14-87*, 21 F.L.R.A. 24 (1986)
NTEU	National Treasury Employees Union
NTEU	*Nat'l Treasury Employees Union v. FLRA*, 404 F.3d 454 (2005)
Pet. Br.	Petitioner's brief
RSOP	Response to Agency's Statement of Position
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
union	National Treasury Employees Union

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on November 8, 2004. The Authority's decision is published at 60 F.L.R.A. (No. 77) 367 (Joint Appendix (JA) 7-66)). The Authority exercised jurisdiction over the case in accordance with § 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 ISSUE

Whether the Authority reasonably and correctly held that two union proposals, which would have nullified certain safety-oriented restrictions on employee carriage of firearms off duty and superseded the agency's ability to determine the priority of certain internal investigations, were not appropriate arrangements under § 7106(b)(3) of the Statute, and thus were not within the agency's duty to bargain.

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," revising the agency's Firearms and Use of Force

[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 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 7 n.1.

Handbook. JA 8, 10. The National Treasury Employees Union ("NTEU," or "union") sought to bargain over the implementation of these changes, and introduced proposals. Customs refused to bargain over a number of these proposals and, pursuant to §7105(a)(2)(E) of the Statute, the union appealed to the Authority.

The Authority (Chairman Cabaniss dissenting in part, Member Pope concurring in part and dissenting in part) held that several of the union's proposals were negotiable and required Customs to bargain over those proposals.[3] JA 49-50. However, with respect to several other proposals, the union's petition for review was denied.[4] The Authority held that this second group of proposals was non-negotiable because they interfered with Customs' right to determine its internal security practices. The Authority further held that the offending proposals were neither procedures under § 7106(b)(2) of the Statute nor appropriate arrangements under § 7106(b)(3).

The union now seeks review of the Authority's decision, arguing that Proposals 11 and 14(f) are, in fact, appropriate arrangements.[5]

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[3] The Authority held that Proposals 14(a)-(d) and the second sentence of 14(f) were negotiable.

[4] The Authority held that Proposals 10(a), 11, the first sentence of 14(f), and 14(g) and (h) were non-negotiable.

[5] Based upon the union's statement of issues and argument, the union does not challenge the Authority's ruling regarding the other proposals found non-negotiable by the Authority (Proposal 10(a), 14(g) or 14(h)). Moreover,

STATEMENT OF THE FACTS

A. Background

NTEU represents Customs Service employees who, as a condition of their employment, are required to carry firearms. JA 8. "These employees have been carrying firearms as part of their duties for many years," and the Treasury Department and the Customs Service have issued a number of regulations "regarding firearms use and storage." *Id*. These regulations, designed to protect a number of agency interests, constitute Customs' internal security practices. *See, e.g.*, JA 8-10.

Two regulations are particularly relevant to the instant case. The first, dated March 3, 2000, permits Customs agents, at their election, to carry their firearms 24 hours a day. JA 9, 207. Prior to permitting 24-hour carry, most employees were "required to travel directly between home and work while carrying their authorized firearm." [6] JA 10. Twenty-four hour carry was authorized, in part, to decrease the burden on employees; rather than travel

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the union does not argue that Proposal 11 and the first sentence of 14(f) are substantively negotiable or proper procedures, only that the two are appropriate arrangements. Petitioner's Brief (Pet. Br.) 2, 10, 17-27.

[6] As the Authority noted, "in a limited number of locations, [Customs] permits employees to store authorized firearms at the work site during non-duty work hours[.]" JA 8. In all other locations, however, employees must transport their weapons to and from work every day, either directly to and from work or with the option of making stops en route under the restrictions of the agency's 24-hour carry policy.

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., firearms may not be left "in a vehicle or in a hotel room," no alcohol consumption, weapon must remain concealed when officer is not in uniform). The agency emphasized to its employees 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 9, quoting JA 207. In order to be eligible for 24-hour carry, "officers must have completed firearms training and been issued the appropriate credentials," and "must sign the '24-Hour Carry of a Firearm Certificate,'" agreeing to the terms of the 24-hour carry policy. JA 208. Although participating in 24-hour carry does not commit an officer to being armed at all times, it does allow officers to be armed, if they wish, while engaging in everyday activities outside of work. *Id*.

The second relevant regulation is found in the 1996 "U.S. Customs Service Firearms and Use of Force Handbook." Customs agents must maintain current "credentials" in order to carry a firearm. In the Handbook,

Customs establishes the conditions under which an employee may lose his or her credentials:

> Examples of actions which would warrant the denial, suspension, or recision of credentials are: failure to qualify … , evidence of substance abuse, evidence of the commission of a felony, evidence of an emotional or psychological disorder, evidence of inappropriate violent behavior, evidence of the misuse of a firearm, and/or evidence of serious breaches of integrity or security.

JA 258. When an employee's credentials are suspended, Customs conducts an internal investigation to determine whether the credentials should be reinstated or permanently revoked. If an employee wishes to challenge Customs' decision to deny or suspend his credentials while the investigation is conducted, he may "invoke the parties' grievance and arbitration procedures." JA 30, citing JA 189; s*ee also* JA 143-160.

B. The Union's Proposals

The union requested to negotiate over a number of proposals concerning the agency's firearms policies and procedures. Customs declined to negotiate over several of these proposals, including the two proposals relevant to this case.

The first proposal, Proposal 11, sought to afford Customs' firearm-carrying agents greater freedom of movement, similar to that granted by the

24-hour carry policy, but without having to qualify for, or even agree to the terms of, that policy.

> Proposal 11
> Those officers who carry their weapons to and from their residences will be permitted to make reasonable diversions and stops between their residence and work. These diversions and stops will be defined as those that any ordinary citizen would make before and after work.

JA 22.

The second proposal, Proposal 14, overhauled the processes and procedures that would be used when Customs is forced to temporarily remove an agent's firearm credentials. Specifically, the first sentence of Proposal 14(f) provided:

> Proposal 14(f) (first sentence)
> In the event that Customs takes an officer's firearm pending an internal investigation, it will conduct an expeditious investigation on a priority basis.

JA 29.

When Customs declared these and several other proposals non-negotiable (*see* n. 3, n. 4, *supra*), the union filed a petition for review with the Authority.

C. The Authority's Decision

The Authority held that Proposal 11 and the first sentence of Proposal 14(f) were non-negotiable, as they affected Customs' right to determine its

internal security practices under § 7106(a) of the Statute, and also held that the proposals did not constitute "procedures" or "appropriate arrangements" under § 7106(b)(2) or (3), respectively.

1. Proposal 11

The Authority construed Proposal 11 as "permit[ing] certain employees [those not covered by the 24-hour carry policy] who carry their authorized firearms between their residences and their work locations to make reasonable diversions and stops, as that term is defined in the proposal," i.e., "stops . . . that any ordinary citizen would make before and after work." JA 22. Noting record evidence that "all employees are required to receive the training necessary" to participate in 24-hour carry, the Authority determined that Proposal 11 would apply only to "employees who either fail mandatory training or refuse to sign the necessary certificate." JA 25.

In rulings that are not contested in this proceeding, the Authority determined that Proposal 11 was not moot, that the proposal affected the agency's right to determine its internal security practices under § 7106(a)(1) of the Statute, and that the proposal did not constitute a procedure under § 7106(b)(2). JA 25-27.

Reaching the issue on which the union focuses its petition for review in this case, the Authority addressed whether Proposal 11 was an appropriate arrangement under § 7106(b)(3) of the Statute, and held that it was not. In considering whether a proposal is an appropriate arrangement, the Authority "use[s] the *KANG* analysis," set forth in *National Association of Government Employees, Local R14-87*, 21 F.L.R.A. 24 (1986) (*KANG*). JA 27.

> Under that test, the Authority initially determines whether a proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right … [i]f a proposal is an arrangement, the Authority then determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights.

JA 19 (citations omitted).

Holding that Proposal 11 was an "arrangement," the Authority determined nevertheless that the proposal was not "appropriate" because it "excessively interfered" with the agency's right to determine its internal security practices. JA 27-28. As the Authority explained,

> Proposal 11 would require [Customs] to permit employees who cannot or do not accept the conditions required for 24-hour carry authority, to make stops between their work site and their residence, while in possession of their authorized firearm. This minimal benefit is more than outweighed by [Customs'] interest in protecting the public from the danger posed by employees carrying firearms, especially if those employees are not operating under the restrictions concerning conduct provided for in the 24-hour carry policy.

JA 27-28.

Accordingly, holding that Proposal 11 excessively interfered with Customs' right to determine its internal security practices, the Authority concluded that the proposal was not within Customs' duty to bargain under the Statute. JA 28.

2. Proposal 14(f) (first sentence)[7]

Proposal 14(f) concerns the process under which Customs would investigate and discipline agents whose ability to carry firearms was suspended or revoked. The proposal requires Customs to "conduct an expeditious investigation on a priority basis" when an employee's firearm is removed pending an internal investigation. JA 29. Thus, the Authority held, the proposal "would require the Agency to give priority to certain investigations," and would "require[] the Agency to conduct its investigations in a certain order." JA 40.

As it had with Proposal 11, the Authority made various rulings not challenged in this proceeding. Specifically, the Authority held that Proposal 14(f) affected the agency's right to determine its internal security practices under § 7106(a)(1) of the Statute, and that the proposal did not constitute a procedure under § 7106(b)(2). JA 39-40.

[7] Hereinafter, simply "Proposal 14(f)."

Addressing the "appropriate arrangements" issue that the union raises in this case, the Authority held that Proposal 14(f) qualified as an "arrangement" because "it aids employees who are adversely affected by the Agency's act of denying or suspending firearm carriage authority[.]" JA 40.

However, as with Proposal 11, the Authority held that, under *KANG*, the proposal was not an "appropriate" arrangement. *Id.* In this connection, the Authority balanced the benefit to employees (the potential for a quicker return to firearm credentialing) against the burden to Customs, and found the arrangement excessively burdensome.

> [T]his language would require the [a]gency to conduct an investigation related to firearm carriage authority at the expense of all other pending investigations, no matter the importance of other investigations to the [a]gency's internal security. The proposal therefore negates the [a]gency's internal security determination as to which investigations are the most important and in what order of priority those investigations should be conducted. . . . [W]e find this intrusion upon the [a]gency's right to decide which investigative work is most important to the accomplishment of the [a]gency's operations outweighs the benefits.

JA 41. Because "the burden this … proposal would impose upon the [a]gency is not outweighed by the benefit it would provide," under *KANG*, the Authority held that the Proposal 14(f) was not an appropriate § 7106(b)(3) arrangement. JA 41.

The union now appeals the Authority's decision and order regarding Proposals 11 and 14(f) to this Court.

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 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 (citation omitted).

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. Ass'n 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). Finally, courts "afford considerable deference to the FLRA's balancing of management and employee interests under its 'excessive interference' test." *Dep't of Treasury, Office of the Chief Counsel, Internal Revenue Serv. v. FLRA*, 960 F.2d 1068, 1074 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

The Authority reasonably held that the union's two proposals were not appropriate arrangements under § 7106(b)(3) of the Statute, and thus were not within the agency's duty to bargain. Specifically, both Proposal 11, which would have nullified certain safety-oriented restrictions on employee carriage of firearms off duty, and Proposal 14(f), which superseded the agency's ability to determine the priority of certain internal investigations, created burdens on Customs that outweighed the benefits the proposals would have offered employees. As a result, under the *KANG* analysis, the Authority correctly determined that the proposals excessively interfered with Customs' management right to determine its internal security practices.

As an initial matter, the Authority correctly applied the *KANG* analysis in evaluating the union's proposals. *KANG* requires the Authority

to weigh a proposal's burden on management rights against its benefit to employees in order to determine whether the proposal's interference with management rights is "excessive." This analysis is unmodified by this Court's recent *NTEU* decision which, contrary to the union's arguments, does not place new limitations on the Authority's ability to consider facts or issues raised by the case but not fully set forth in the record. The union is also mistaken in claiming that the Authority has abandoned the *KANG* balancing process in favor of its prior "direct interference" test. In this case, the Authority clearly balanced the proposals' burdens and benefits, which is not required by the "direct interference" test but is an integral part of *KANG*.

Regarding Proposal 11, the Authority reasonably and correctly held that Customs' interest in public safety outweighed the proposal's benefit to employees of increasing the convenience of home to work commutes. Proposal 11 would have permitted Customs' armed employees to interrupt their home to work commutes for such purposes as visiting friends or working out at the gym, but would have prohibited Customs from requiring those employees to observe a variety of safety-oriented restrictions that Customs had established to mitigate the risk inherent in the carriage of firearms in such situations. Applying *KANG*, the Authority properly recognized that Customs' right to determine its internal security practices

encompasses an interest in protecting the public, that the carriage of firearms by employees not operating under the safety-oriented restrictions Customs had established posed special risks, and that the kinds of home to work stops and diversions that the union indicated the proposal would permit represented only a minimal benefit to employees. Consequently, the Authority's application of the *KANG* balancing test, finding that the proposal's burden on Customs' exercise of its management rights consistent with its public safety interests outweighed the proposal's convenience-oriented benefits, was also reasonable and correct, and should be upheld.

Similarly, the Authority reasonably and correctly held that Proposal 14(f)'s burden on Customs' management right to make internal security practice determinations relating to which internal investigations were most critical to the agency's operations outweighed the proposal's benefit to employees – faster investigations for employees who had lost the right to carry firearms. These employees would have lost their authority to carry firearms on grounds ranging from, for example, commission of a felony or drug abuse to, for example, a medical condition. As the Authority reasonably interpreted the proposal, Customs would be required to place even routine firearms carriage investigations ahead of even an extremely important non-firearms carriage investigation. Applying the *KANG*

balancing test, the Authority reasonably and correctly found that the proposal's burden on Customs' exercise of its management rights to prioritize all internal investigations outweighed the limited benefit of faster investigations that would accrue to employees whose firearm-carriage authority was restored.

ARGUMENT

THE AUTHORITY REASONABLY AND CORRECTLY HELD THAT TWO UNION PROPOSALS, WHICH WOULD HAVE NULLIFIED CERTAIN SAFETY-ORIENTED RESTRICTIONS ON EMPLOYEE CARRIAGE OF FIREARMS OFF DUTY AND SUPERSEDED THE AGENCY'S ABILITY TO DETERMINE THE PRIORITY OF CERTAIN INTERNAL INVESTIGATIONS, WERE NOT APPROPRIATE ARRANGEMENTS UNDER § 7106(b)(3) OF THE STATUTE, AND THUS WERE NOT WITHIN THE AGENCY'S DUTY TO BARGAIN.

A. The Analytical Framework Provided by *KANG*.

The instant case focuses on the Authority's appropriate arrangement determinations regarding Proposals 11 and 14(f). Because those determinations are the result of the Authority's application of its *KANG* precedent to this case, a brief discussion of the analytical framework provided by *KANG* is warranted.

In *KANG*, the Authority addressed the analysis that it would apply to determine whether a proposal that affected a § 7106 management right

would nevertheless be within an agency's duty to bargain as an "appropriate arrangement" under § 7106(b)(3). As the Authority explained in *KANG*, the touchstone of this analysis is whether a disputed proposal "excessively interferes" with management rights. "This will be accomplished, as suggested by the D.C. Circuit [in *American Federation of Government Employees, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983) (*AFGE*)] by weighing the competing practical needs of employees and managers." *KANG* at 31-32.

In its brief, the union makes two arguments regarding the *KANG* analysis. First, the union claims that this Court's decision in *National Treasury Employees Union v. FLRA*, 404 F.3d 454 (D.C. Cir. 2005) (*NTEU*) modifies the *KANG* analysis. Second, the union asserts that the Authority has abandoned the *KANG* analysis in favor of the "direct interference test" that was applied before this Court's decision in *AFGE*. Both arguments are incorrect.

With respect to its argument that *NTEU* modifies the *KANG* analysis, the union appears to argue that this Court's recent decision in *NTEU* stands for the proposition that "in making findings regarding how the agency exercises [its right to determine internal security practices], the Authority must rely only on evidence in the record before it." Pet. Br. 21. Not only

does the union misread the Court's decision, but the Authority's decision in this case is entirely consistent with *NTEU*.[8]

As an initial matter, *NTEU* did not hold that the Authority "must rely only on evidence in the record before it" when performing a *KANG* analysis. *NTEU* does not limit, or even discuss, the Authority's ability to raise issues *sua sponte* or to take notice of publicly-available facts not in the record. *NTEU* and other cases merely establish that the record must support administrative agencies' decisions, but the union cites nothing in its pleadings to the Authority or to this Court for the proposition that the Authority must turn a blind eye to issues or facts raised by the case but not fully discussed by the parties.

In any event, the Authority's decision in the instant case is entirely consistent with *NTEU*. The Authority considered the evidence in the record, which enabled it to accurately determine the scope of the proposals' benefits and the extent of their burdens, conducted the *KANG* balancing in a

[8] The union's argument on this point is barred by § 7123(c). Objections not urged in the administrative proceeding before the Authority are not within the Court's jurisdiction to consider. The union has not sought reconsideration from the Authority in light of *NTEU*, and its failure to do so is not justified by extraordinary circumstances under § 7123(c). *See Dep't of Housing and Urban Dev., Wash., D.C. v. FLRA*, 964 F.2d 1, 4 n.2 (D.C. Cir. 1992) (intervening judicial decisions do not constitute extraordinary circumstances under § 7123(c)); s*ee also Dep't of the Treasury v. FLRA*, 707 F.2d 574, 581 n.25 (D.C. Cir. 1983) (citing *Szewczuga v. NLRB*, 686 F.2d 962, 971-72 (D.C. Cir. 1982)).

reasonable manner, and used the results of that balancing to determine that the proposals were not appropriate arrangements.

Regarding the union's second claim, at several points in its brief, Pet. Br. 19, 27, the union erroneously asserts that the Authority has "stealthily applied the long-discredited 'direct interference' test." Prior to the adoption of the excessive interference test in *KANG*, the Authority held that a proposal that directly interfered with the exercise of a management right under § 7106(a) of the Statute "cannot be deemed an appropriate arrangement . . . within the meaning of [§] 7106(b)(3)." *AFGE, Local 2782*, 7 F.L.R.A. 91, 93 (1981) (*AFGE* 2782). In *AFGE 2782*, the Authority's analysis stopped at the determination that the proposal directly interfered with the affected management right. No consideration was given at all to the benefits the proposal might provide for employees adversely affected by the exercise of a management right. On remand from the D.C. Circuit's *AFGE* decision, the Authority rejected the direct interference test as it had previously been applied in evaluating proposals under § 7106(b)(3), and adopted the "excessive interference" test. *KANG*, 21 F.L.R.A. at 30-33. Under the excessive interference test, and unlike the direct interference test, the Authority weighs the competing practical needs of employees and managers. *Id.* at 31-32. This balancing of interests is precisely what the

Authority has done in the instant case. Although the union may disagree with the results of that balancing, it cannot be said that the Authority has reverted to its direct interference test and given no consideration to employee interests.

B. The Authority's Determination That Proposal 11 Is Not Within Customs' Duty To Bargain Is Consistent With Authority Precedent And Supported By The Record.

The Authority's determination that Proposal 11, modifying Customs' firearm carriage policies, is not an appropriate arrangement should be upheld because it is based on the reasonable and supportable view that the agency's public safety interest, related to firearms carriage, outweighs employees' interest in increasing the convenience of home to work commutes. Each aspect of the Authority's rationale underlying its conclusion is consistent with Authority precedent and supported by the case's record.

As pertinent here, the Authority's non-negotiability determination rests on three bases. First, consistent with its precedent, the Authority recognized that Customs, as part of its right to determine its internal security practices, has an interest in safeguarding the public. Second, consistent with the record, the Authority reasonably determined that the carriage of firearms by employees not operating under the restrictions of Customs' 24-hour carry policy posed special risks. Third, again consistent with the record, the

Authority reasonably determined that the proposal's benefit to a narrow group of employees, permitting them to make the kinds of diversions and stops "that any ordinary citizen would make" during home to work commutes, was "minimal." These three aspects of the Authority's decision will be discussed below.

1. The Authority correctly recognized that Customs, as part of its right to determine its internal security practices, has an interest in safeguarding the public.

Consistent with the analytical framework established by *KANG*, the Authority correctly identified protecting the public as a cognizable interest of Customs. This determination is fully consistent with Authority case law construing the right of agency management to determine internal security practices under § 7106(a) of the Statute, and should be upheld.

In this connection, it is well-settled that an agency's right to determine its internal security practices encompasses an interest in public safety. For example, in *Prof'l Airway Sys. Specialists MEBA/NMU*, 53 F.L.R.A. 1246, 1254-57 (1998), the union offered a proposal modifying the Federal Aviation Administration's policy that certain employees, once given a "last-chance" rehabilitation for alcohol abuse, must abstain from alcohol for the rest of their careers with the FAA. The Authority held that the union's proposal affected management's right to "determine the internal security

measures necessary to protect its personnel and the safety of the flying public." 53 F.L.R.A. at 1254. *See also Am. Fed'n of State, County and Mun. Employees, Locals 2910 and 2477*, 49 F.L.R.A. 834, 841-43 (1994) (union proposal that employees be required to wear identification badges only in some areas held inappropriate arrangement due to burden on the agency's right to set internal security practices for protection of the public).

Just as in the cases discussed above, where agency internal security practice determinations had clear implications for public safety, so too in this case was it reasonable for the Authority to recognize a public safety significance to Customs' determination concerning how employees should behave when armed and off duty. Accordingly, the Authority's conclusion in this regard should be upheld.

The union's claim, essentially that the Authority should not rely on its established construction of this management right in resolving the case because Customs did not explicitly raise its interest in safeguarding public safety, provides no basis upon which to overturn the Authority's decision. As an initial matter, the union's claim is not properly before the Court under § 7123(c) of the Statute. As discussed, *supra*, n. 8, under § 7123(c), objections not urged in the administrative proceeding before the Authority are not within the Court's jurisdiction to consider. The union did not request

reconsideration by the Authority on this point, and there is no indication that its failure to do so should be excused because of extraordinary circumstances.

Moreover, even if the union's argument were properly before the Court, it should be rejected because it lacks merit. First, it is undisputed that Customs relied on its right to determine internal security practices when it argued that Proposal 11 was nonnegotiable. JA 23, citing JA 111-12. As discussed above, the Authority has recognized that an interest in safeguarding the public is implicit in that right.

Moreover, "it is well settled that the Authority may raise *sua sponte* such questions as it finds relevant and necessary in any case before it." *United States Dep't of Justice*, 52 F.L.R.A. 1093, 1098 (1997); *see also Headquarters, Nat'l Aeronautics and Space Admin., Wash., D.C.*, 50 F.L.R.A. 601, 623 n.18 (1995) (noting that "the Authority has previously addressed, *sua sponte*, matters that were not [raised] by the parties"). This Court has consistently supported the Authority's right to raise and dispose of issues on its own initiative. *See, e.g., Nat'l Ass'n of Gov't Employees, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004); *Patent Office Prof'l Ass'n v. FLRA*, 26 F.3d 1148, 1155 (D.C. Cir. 1994).

Accordingly, the Authority correctly recognized that Customs had an interest, for purposes of applying the *KANG* balancing test in this case, in safeguarding the public. That determination should be upheld.

2. Consistent with the record, the Authority reasonably determined that the carriage of firearms by employees not operating under the restrictions of Customs' 24-hour carry policy posed special risks.

The Authority also made the reasonable and supportable determination that special risks were posed by the off duty carriage of firearms by employees not subject to the restrictions of Customs' 24-hour carry policy. It is undeniable that "[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions." *Florida v. J.L.*, 529 U.S. 266, 272 (2000). Indeed, as the record in this case reflects, Customs has already recognized this type of risk, and sought to mitigate it in certain circumstances. Specifically, as discussed *supra*, at p. 5, Customs' memorandum publishing its 24-hour carry policy includes the cautionary note that carrying a firearm while off duty "presents a tremendous responsibility and has potential for significant liabilities[.]" JA 207. The restrictions imposed on employees who agree to the 24-hour carry policy are reasonably understood as objective evidence of Customs' public safety concerns over the carriage of firearms by employees who are off-duty.

Against this factual background, it was logical for the Authority to conclude that off-duty employees enjoying the freedom of movement of employees subject to the 24-hour carry policy, but unrestrained by the policy's safety-oriented restrictions, would present a special risk. Consequently, because this Authority determination is supported by the record, it should be upheld.

The union's contentions regarding the Authority's findings on this point should be rejected for a variety of reasons. In this connection, the union makes two related claims (Pet. Br. 23-24). First, the union argues that employees not subject to the 24-hour carry policy do not pose any greater danger to the public than do employees who accept the restrictions of that policy, because both groups have the same training and certifications. Second, the union asserts that officers not covered by the 24-hour carry policy are subject to home to work firearms restrictions "that are *identical* in all material respects" to 24-hour carry policy restrictions. Pet. Br. 24 (emphasis in original).

As an initial matter, as discussed *supra* at p. 18 n. 8, these union contentions were not urged in proceedings before the Authority, and accordingly under § 7123(c) are not within the Court's jurisdiction to consider.

Furthermore, the union's contentions lack merit. As to its claim that employees not covered by the 24-hour carry policy pose no greater danger than employees that comply with the policy, under the union's proposal, a new group of employees – those previously required to travel directly to and from work because they could not comply with, or would not agree to, the 24-hour carry policy – would be permitted to possess firearms in public spaces while making diversions and stops on the way to and from work. By the terms of the proposal, these additional employees are either demonstrably less qualified to carry firearms in public (if they have failed the training for 24-hour carry) or have refused to accept the responsibilities of the 24-hour carry policy (by not signing the necessary certificate).

Being covered by the 24-hour carry policy is not a meaningless formality; the policy is designed to make firearm-carrying employees, and the public around them, safer. As the record clearly reflects, the numerous restrictions set forth as part of the 24-hour carry policy are safety-oriented. For example, under the policy, an employee must complete firearms training, keep his weapon concealed when not in uniform, refrain from consuming alcohol, and not leave the weapon unattended and unsecured (as in a vehicle or a hotel room). JA 207-08. The end result of the union's proposal is a predictable increase in the public's exposure to the inherent

danger of firearms as a result of the actions of employees who are either less qualified to carry them, or who have declined to be bound by Customs' safety-oriented restrictions on their behavior while armed and off duty.

Additionally, the union's assertion that employees not subject to the 24-hour carry policy must observe home to work restrictions that are essentially "identical" to the restrictions imposed by the policy is also unfounded. As indicated previously, this objection was not raised before the Authority, and thus is not properly before the Court. 5 U.S.C. § 7123(c).[9]

Furthermore, the claim is belied by the record. In this regard, there are a variety of differences between the restrictions in the 24-hour carry policy and the regulations cited by the union. On the one hand, under the 24-hour carry policy, (1) employees may carry only service-issued weapons with which they have successfully qualified, (2) the weapon must remain in the officer's control at all times, and (3) may only be used for self-defense or in assistance of another law enforcement officer. Furthermore, the officer (4) must have completed firearms training, (5) been issued appropriate

[9] The fact that the regulations relied upon by the union (Pet. Br. 24) are in the record is unavailing. As this Court has held, a party may not simply reference "statutes or regulations;" instead, it must "direct the Authority … with as much specificity as possible" to the exact provisions supporting the party's argument. *Nat'l Fed'n of Fed. Employees v. FLRA*, 681 F.2d 886, 891 (D.C. Cir. 1982). The union did not do this in proceedings before the Authority.

credentials, (6) and must keep those credentials with him at all times when armed. Finally, the firearm-carrying officer, (7) when not in uniform, must keep his weapon concealed, (8) may not consume alcohol, (9) may not leave his firearm unattended and unsecured ("for example, in a vehicle or in a hotel room"), (10) may not leave his firearm in the possession of another person and (11) must sign the 24-hour carry certificate. JA 207-08.

In contrast, the regulations cited by the union, and claimed to be "identical in all material respects," only prohibit alcohol consumption and permit employees to leave their firearms only in secure vehicle trunks. Pet. Br. 24-25, citing JA 127-130. In all other respects, Customs' regulations cited by the union do not reflect the 24-hour carry policy's requirements.

Moreover, were these differences as meaningless as the union suggests, it is difficult to understand why the union has pursued its proposal with such vigor in negotiations, before the Authority, and now before this Court. In sum on this point, should the Court reach the merits of these union claims, it should reject them.

3. Consistent with the record, the Authority reasonably determined that the proposal's benefit to employees, permitting them to make the kinds of diversions and stops "that any ordinary citizen would make" during home to work commutes, was "minimal."

The Authority's determination that the proposal would produce only "minimal" benefits for employees was also reasonable and has ample record support. First of all, the emphasis in the proposal's own wording on the "ordinary" character of the proposal's benefits, i.e., "diversions and stops . . . any ordinary citizen would make," suggests that the proposal's benefits are more akin to routine commuting conveniences than the potentially life and death issues that the agency's interest in proper firearms carriage and security implicate.

The record confirms the mundane character of the benefits that the proposal's wording suggests. As the union explained, JA 185, the proposal's anticipated benefits would encompass such commonplace matters as shopping on the way to and from work, working out at the gym, visiting friends, and picking up children. In a case where the relevant frame of reference for balancing purposes is calibrated by the interest in safeguarding the public from the dangers inherent in the carriage of firearms, there is nothing unreasonable about characterizing the proposal's commuting

convenience benefits to employees as "minimal." Accordingly, this aspect of the Authority's decision also merits affirmance.

In sum regarding Proposal 11, an examination of the Authority's decision and the record confirms that the manner in which the Authority decided the case is completely consistent with its *KANG* precedent. Further, the record supports the Authority's decision. Conversely, the union's challenges to this aspect of the Authority's decision are either not properly before the Court, or lack merit, and therefore should be rejected.

C. The Authority's Determination That Proposal 14(f) Is Not Within Customs' Duty To Bargain Properly Applies The Authority's *KANG* Analysis And Is Supported By The Record.

As pertinent here, the Authority properly determined that Proposal 14(f), concerning Customs' investigative priorities, was not within the agency's duty to bargain because it did not constitute an appropriate arrangement under § 7106(b)(3) of the Statute. The Authority's assessment of the proposal's benefit to employees is uncontested. In this connection, the Authority held that the proposal would diminish the adverse financial impact on employees who lose or are denied the authority to carry firearms, by requiring Customs "to conduct a priority investigation into whether the action was appropriate." JA 40.

The Authority's assessment of the proposal's impact on the agency's interests was also reasonable, correct, and supported by the record. Two points are relevant in this regard. First, the Authority reasonably construed the proposal's meaning. Second, applying the balancing test established in *KANG*, the Authority reasonably concluded that the proposal's burden on the agency outweighed the benefits that the proposal would provide to employees, and that the proposal therefore was not an appropriate arrangement. These matters are discussed below.

1. The Authority reasonably construed the meaning of Proposal 14(f).

As the Authority reasonably construed the proposal, it would completely override Customs' determinations concerning which investigative work was most critical to the agency's operations. The proposal "would require the Agency to give investigations [covered by the proposal] greater priority than any other investigations it conducts . . . no matter how much more time-critical or important those other investigations might be" and "no matter the importance of other investigations to the Agency's internal security." JA 41.

The Authority's construction of Proposal 14(f)'s absolute, overriding character is supported by the record. First, the meaning ascribed to the proposal by the Authority is consistent with the proposal's wording. The

proposal requires that covered investigations be both "expeditious" and undertaken on a "priority" basis. This emphasis in the proposal on an investigation's speed and overriding importance provides a reasonable basis for construing the proposal as requiring the agency to give such investigations "greater priority than any other investigations it conducts[.]" JA 41.

In addition, the Authority's construction of the proposal is supported by the union's description of the proposal in its Response to Agency's Statement of Position (RSOP) in the proceeding below. In its RSOP, the union explained:

> Given the importance to an officer of having the authority to carry a firearm, NTEU has proposed that investigations related to this issue be given priority in relation to other [a]gency investigations.

JA 194. There is no qualifying or tempering language in the union's description of the proposal; nothing suggests that even an extremely important non-firearms carriage investigation could be placed ahead of a routine firearms carriage investigation. This Court has previously indicated the importance of considering a proposal's effect, above and beyond its plain language. *Am. Fed'n of Gov't Employees v. FLRA*, 110 F.3d 810, 815 (D.C. Cir. 1997). The foreseeable effect of this proposal would be to force Customs to conduct firearms-carriage investigations, not only quickly, but

before other investigations, regardless of their relative importance to the agency and its mission.

The union's criticism, Pet. Br. 26, that the Authority's construction of the proposal is an "erroneous finding" is without merit. As discussed above, the Authority's understanding of the proposal is wholly supported by both the proposal's wording and the union's description. Furthermore, to the extent that the union is faulting the Authority for failing to include specific record citations in its discussion of the proposal's meaning (*see* Pet. Br. 26), no such requirement exists. The union cites no authority for the counterintuitive proposition that an administrative agency's factual finding, supported by ample record evidence and the contesting party's own admission, is erroneous unless accompanied by specific record citations.

To the extent that the union claims that the Authority's interpretation of the proposal is actually incorrect, as opposed to simply unfounded, the union was obligated to raise its claim before the Authority before bringing it to this Court. 5 U.S.C. § 7123(c); *see also Dep't of Health and Human Serv., Soc. Sec. Admin., Kansas City, Mo. Dist.*, 39 F.L.R.A. 22, 24-25 (1991) (granting reconsideration and modifying decision where underlying decision had been based on non-fact). However, it is clear that the Authority's understanding of the union's proposal – requiring firearm

carriage investigations to come before all other investigations, regardless of relative importance or other considerations – is grounded in the plain language of the proposal and the union's pleadings to the Authority.[10]

2. Applying the balancing test established in *KANG*, the Authority reasonably concluded that Proposal 14(f)'s burden on the agency outweighed the benefits that the proposal would provide to employees, and that the proposal therefore was not an appropriate arrangement.

The Authority's conclusion that the burdens Proposal 14(f) imposed on the agency outweighed its benefits to employees was reasonable. The proposal's burden on Customs is severe and prescriptive. As the Authority found, "[t]he proposal … negates the [a]gency's internal security determination as to which investigations are the most important and in what order of priority those investigations should be conducted." JA 41. Thus, the proposal completely eliminates Customs' ability to prioritize any non-firearms carriage investigations, both as to pending and all future matters.

In contrast, the proposal's benefits for employees may reasonably be viewed as less weighty. First, as the Authority observed, not all investigated employees would benefit from the union's proposals; the benefit would be limited to those for whom the initial suspension is ultimately reversed. JA

[10] Moreover, the union did not claim before the Authority, and does not claim before this Court, that the proposal has a contrary meaning.

40. Moreover, because the proposal only requires faster investigations, benefits to employees whose privileges *were* reinstated would be limited to the enhanced value of a quicker reinstatement. For these reasons, and considering the deference owed the Authority in such matters, the Authority's determination that the proposal's burdens on the agency outweighed its benefits to employees should be upheld as a reasonable application of the *KANG* balancing test to the facts of this case.

The union's contention, Pet. Br. 27, that the Authority "failed to make 'findings based on the record before it'" when it identified Proposal 14(f)'s burden on the agency is unfounded. As discussed above, the absolute, preclusive nature of the proposal's burden on Customs' practical ability to conduct investigations critical to its operations is evident from the proposal's language and the union's description of the proposal's meaning. Thus, the record provides ample support for the Authority's conclusions. Accordingly, the union's claim should be rejected.

In conclusion, with regard to Proposal 14(f), a review of the Authority's decision, the language of the proposal, and the union's own pleadings supports the Authority's interpretation of the proposal's meaning. Furthermore, the Authority properly conducted the balancing test required by *KANG*, and reasonably determined that the proposal's benefit to

employees would be outweighed by its heavy burden upon Customs. Finally, the union's challenges to this aspect of the Authority's decision are either not properly before the Court, or lack merit, and therefore should be rejected.

CONCLUSION

The petition for review should be denied.

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May 2005

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

NATIONAL TREASURY EMPLOYEES UNION,	)	
Petitioner	)	
	)	
v.	)	**No. 04-1433**
	)	
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:

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May 25, 2005