ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED
No. 22-1017

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

INDEPENDENT UNION OF PENSION EMPLOYEES FOR DEMOCRACY AND JUSTICE,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

ON PETITION FOR REVIEW OF DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing before the Federal Labor Relations Authority ("Authority" or "FLRA") were the Independent Union of Pension Employees for Democracy and Justice ("Union") and the Pension Benefit Guaranty Corporation ("PBGC" or the "Agency"). The Union filed the Petition for Review in this Court proceeding against the Authority. The National Treasury Employees Union ("NTEU") has appeared as *amicus curie* for the Union. Thus, the Union is the petitioner, NTEU is *amicus curie* for the petitioner, and the Authority is the respondent in this Court proceeding.

B. Rulings Under Review

The Union seeks review of two Authority decisions: *Independent Union of Pension Employees for Democracy & Justice* ("*IUPEDJ I*"), 72 FLRA 281 (2021) (Chairman DuBester dissenting in part; Member Abbott dissenting in part) and *Independent Union of Pension Employees for Democracy & Justice*, 72 FLRA 571 (2021) (Chairman DuBester concurring) (denying reconsideration of *IUPEDJ I*).

C. Related Cases

This case was not previously before this Court or any other court, nor is the Authority aware of any related cases pending before this Court or any other court.

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

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GLOSSARY

Arbitrator	Charles Feigenbaum
Authority	The Federal Labor Relations Authority
Br.	Petitioner's opening brief
IUPEDJ I	*Independent Union of Pension Employees for Democracy & Justice*, 72 FLRA 281 (2021)
IUPEDJ II	*Independent Union of Pension Employees for Democracy & Justice*, 72 FLRA 571 (2021)
FLRA	The Federal Labor Relations Authority
JA	Joint Appendix
NTEU	National Treasury Employees Union
NTEU Br.	NTEU Amicus for Petitioner Brief
PBGC	The Pension Benefit Guaranty Corporation
Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Petitioner, the Independent Union of Pension Employees for Democracy and Justice

STATEMENT REGARDING JURISDICTION

This Court lacks appellate jurisdiction over the Petition for Review because the Union failed to exhaust its administrative remedies. Passed as part of the Civil Service Reform Act ("CSRA"), the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101–7135 (2018) (the "Statute") "requires a party to exhaust administrative remedies before obtaining judicial relief for an actual or threatened injury." *Fraternal Ord. of Police v. Gates*, 562 F. Supp. 2d 7, 12 (D.D.C. 2008) (citing 5 U.S.C. § 7123(a)); *see also Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 966 (D.C. Cir. 1990).

Here, the Independent Union of Pension Employees for Democracy and Justice (the "Union") seeks to have this Court review the decisions of the Federal Labor Relations Authority ("FLRA" or the "Authority") in *Independent Union of Pension Employees for Democracy & Justice* ("*IUPEDJ I*"), 72 FLRA 281 (Chairman DuBester dissenting in part; Member Abbott dissenting in part), *reconsideration denied*, 72 FLRA 571 (2021) ("*IUPEDJ II*") (Chairman DuBester concurring). In those decisions, the Authority granted in part, and denied in part, the Union's

exceptions to an arbitration decision. The arbitrator's decision was based on two grounds, and the arbitrator did not make clear whether they were independent of one another. (JA036-37.) In *IUPEDJ I* and *IUPEDJ II*, the Authority upheld one ground, rejected the other, and said nothing about what relief the arbitrator might ultimately order.

Section 7121(a)(1) of the Statute provides that collective bargaining agreement ("CBA") "procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a). The governing CBA here states that "[a]ny dispute over the application of the arbitrator's award shall be returned to the arbitrator for resolution." (JA055.) But despite the CBA's clear language, the Union failed to return to the arbitrator to seek relief or clarification after the Authority partially invalidated his award. Thus, the Union's Petition for Review must be dismissed for failure to exhaust administrative remedies.

STATEMENT OF THE ISSUES PRESENTED

1. May this Court review the Authority's ruling that partially invalidated an arbitration award without making clear what relief the arbitrator might ultimately order, where the governing CBA provides

that "[a]ny dispute over the application of the arbitrator's award shall be returned to the arbitrator for resolution"?

2. Did the Authority act arbitrarily, capriciously, or contrary to law when it found that a CBA provision mandating that "at least 9%" of the Pension Benefit Guaranty Corporation's (the "Agency" or "PBGC") awards budget go towards funding Special Achievement Awards ("Special Awards") violated management's right under 5 U.S.C. § 7106(a)(1) "to determine . . . the budget . . . of the agency"?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This Petition for Review challenges *IUPEDJ I* and *IUPEDJ II*, two Authority decisions that granted in part and denied in part exceptions to an arbitrator's award. (JA519-524, JA550.) The dispute stemmed from the Union's grievance challenging PBGC's cancellation of the Special Awards program described in Article 3, Section 2 of the parties' CBA. (JA197-203.) PBGC claimed that it could unilaterally terminate "any permissive or illegal" provisions of the CBA. (JA194.)

And, it contended, the Special Awards program was a permissive provision. (JA194.)

The parties proceeded to arbitration. The arbitrator framed the issue as: "Did the Agency violate the CBA and Statute when it canceled Article 3, Section 2, of the Agreement? If so, what shall be the remedy?" (JA022.) The arbitrator held that PBGC could not unilaterally terminate any lawful section of the CBA while it was being renegotiated, because the Union had properly invoked the CBA's continuance provision. (JA025-027.)

But the arbitrator held that PBGC could terminate the Special Awards program because Article 3, Section 2 of the CBA violated PBGC's management rights in two ways. *First*, Article 3, Section 2(D) violated management's right to determine the agency's budget under 5 U.S.C. § 7106(a)(1) by requiring that at least 9% of PBGC's awards budget be given to the Special Awards program. (JA031-JA034.) *Second*, Article 3, Section 2(A) violated the Agency's management right "to determine the criteria for awarding employees" because it provided that a Joint Awards Committee (the "Committee") would issue the Special Awards, and thus removed the discretion of Agency

management to distribute them. (JA034-036.) The arbitrator did not specify whether the two grounds were independent reasons for denying the Union's grievance. (JA036-037.)

The Union filed exceptions with the Authority. (JA001-211). The Authority granted the Union's exception as to the arbitrator's ruling that the powers of the Committee to issue awards (Article 3, Section 2(A)) violated PBGC's management rights. *IUPEDJ I*, 72 FLRA at 282-83. The Authority set aside the arbitrator's ruling on this point because he had not identified a management right that Article 3, Section 2(A) violated. *Id*. at 282. At the same time, the Authority denied the Union's exception to that portion of the arbitrator's ruling that held that Article 3, Section 2(D) violated PBGC's management right to determine its budget. *Id*. at 283-84.

Both the Union and PBGC filed motions for reconsideration of *IUPEDJ I*. (JA525-538.) PBGC contended that the management rights to assign work and direct employees supported the arbitrator's ruling that Article 3, Section 2(A) was unlawful. (JA529-532.) The Union contended that the Authority's decision in *IUPEDJ I* "is erroneous in that it fails to address the [Union's] exception concerning the

repudiation of the agreement and [unfair labor practice, or "ULP"] and fails to order or dictate a remedy." (JA536.)[1] The Union urged that "[t]his absence of an appropriate remedial order constitutes error sufficient to justify reconsideration." (JA536.)

The Authority denied PBGC's motion for reconsideration. *IUPEDJ II*, 72 FLRA at 572-73. It found that PBGC had never raised with the arbitrator or Authority its arguments that the Special Awards program fell under the management rights to "assign work" and "direct employees." *Id.* at 572. The Authority thus found that PBGC forfeited those arguments. *Id.* The Authority further found that even if PBGC had made these arguments, they would have been unavailing because "setting incentives for superior performance . . . does not fall within the management rights to assign work and direct employees." *Id.* at 573 (citing *Nat'l Treasury Emps. Union v. FLRA*, 793 F.2d 371, 375 (D.C. Cir. 1986)).

The Authority dismissed the Union's motion for reconsideration because it had been filed electronically, and the Authority's regulations

[1] The text of the Union's motion in the Joint Appendix appears to have been garbled; the Union's motion is reprinted without the formatting errors as Exhibit 4 to the Authority's Motion to Dismiss in this matter.

"permit the filing of motions only through commercial mail, first-class mail, certified mail, or facsimile." *Id.* at 573 n.8. Nor had the Union corrected the improper filing even after being notified via an Order to Show Cause. (*Id.*)

The Union filed this Petition for Review of *IUPEDJ I* and *IUPEDJ II*. The National Treasury Employees Union ("NTEU"), a nonparty, has submitted an Amicus for Petitioner Brief supporting the Union.

STATEMENT OF THE FACTS

The Union represents employees of the PBGC. *Indep. Union of Pension Emps. for Democracy & Just. v. FLRA*, 961 F.3d 490, 492–93 (D.C. Cir. 2020). The Union and PBGC are bound by a 2011 CBA. *Id.* at 495-97; *see also* JA025-027.

Section 7121(a)(1) of the Statute provides that CBA "procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a). In accordance with this provision, the CBA states that it contains "the

exclusive procedure available to employees, the Union, and the Employer for resolving grievances." (JA091.)

If PBGC and the Union cannot resolve their grievance using informal means such as alternative dispute resolution, they may proceed to binding arbitration. (JA094-095.) Article 2 of the CBA sets forth arbitration procedures. It states: "where a violation of this Agreement is sustained, the arbitrator will fashion relief to achieve what the Agency action would have been but for the violation." (JA 055.) The arbitrator's power in this regard is broad: "The arbitrator may order any relief that is just and proper, consistent with this Agreement, and permissible under law." (JA055.) Further, the CBA provides, in a subsection titled "Disputes Over Application of Arbitration Award" that "[a]ny dispute over the application of the arbitrator's award *shall be returned* to the arbitrator for resolution." (JA055 (emphasis added).)

Article 3, Section 2 of the CBA created a Special Awards program. (JA022-023, JA025.) The Special Awards are "intended to provide monetary recognition to eligible individual employees or teams of employees for one time (1), non-recurring exceptional achievements or a

Special Performance Act that advances the [PBGC]'s mission, goals, or objectives." (JA059.) Special Awards are open only to bargaining-unit employees represented by the Union. (JA058.) Any PBGC employee or supervisor may nominate a bargaining-unit employee for a Special Award; a bargaining-unit employee may self-nominate, but the self-nomination must be endorsed by another PBGC employee.

The CBA permits the Committee to decide which bargaining-unit employees receive Special Awards. (JA058.) The Committee consists of eight members: four appointed by PBGC and four appointed by the Union. (JA059.) If the Committee cannot agree on whether an individual should receive an award, the matter may be sent to a Review Board composed of one PBGC representative, one Union representative, and a third member chosen by the other two. (JA060-061.) In addition, if the Committee's decision is not unanimous, an employee may ask the Review Board to reconsider the Committee's decision not to grant an Award. (JA060.)

The CBA further provides that:

> Special Achievement Awards will be distributed quarterly. The monies allocated for bargaining[-]unit Special Achievement Awards will be at least 9% of all monies

allocated for all awards, excluding amounts allocated to Committee.

(*Id.*)

In 2015, the Union gave notice of its intent to renegotiate the 2011 CBA. (JA026-027.) While negotiations were ongoing, PBGC told the Union that it was cancelling the Special Awards program. PBGC claimed that it could unilaterally terminate "any permissive or illegal" provisions of the CBA. (JA023, JA025.) And, it contended, the Special Awards program was a permissive provision. (JA025-026.) PBGC further contended Article 3, Section 2 of the CBA, which mandated that 9% of PBGC's awards budget go to Special Awards program, violated PBGC's management right to determine its budget under 5 U.S.C. § 7106(a)(1). (JA195.)

The Union grieved PBGC's termination of the Special Awards program. *IUPEDJ I*, 72 FLRA at 281. In support, it asserted that the CBA (including provisions related to the Special Awards program) remained binding even after the Union sought to renegotiate it.

The parties proceeded to arbitration. The arbitrator framed the issue as: "Did the Agency violate the CBA and Statute when it canceled Article 3, Section 2, of the Agreement? If so, what shall be the remedy?"

(JA022.) In his decision, the arbitrator held that PBGC could not unilaterally terminate any lawful section of the CBA while it was being renegotiated, because the Union had properly invoked the CBA's continuance provision. (JA025-027.) The CBA's continuance provision said, "[i]n the event that the Parties elect to renegotiate the Agreement, the current terms of the Agreement will remain in effect until superseded by a new Agreement." (JA191.)

But the arbitrator held that PBGC could terminate the Special Awards program because Article 3, Section 2 of the CBA violated PBGC's management rights in two ways: 1) by violating management's right to determine its budget, and 2) by granting the Committee the right to distribute Special Awards. (JA036.)

The arbitrator first found that Article 3, Section 2(D) violated management's right to determine the agency's budget under 5 U.S.C. § 7106(a)(1) because it required that at least 9% of PBGC's awards budget be allocated to the Special Awards. (JA031-034.) In so holding, the arbitrator relied on *National Association of Government Employees Local R1 144, Federal Union of Scientists & Engineers* ("*Naval Underwater*"), 38 FLRA 456 (1990), which involved the negotiability of

several union proposals. The arbitrator found two in particular to be relevant:

> Proposal 7 - Proper and equitable performance ratings and resulting payments and awards will be granted to covered employees. *If management decides to give awards within any given grouping, then the budget allocations in that grouping will be 1.5% of base aggregate payroll.* Responsibility for ensuring that the 1.5% limit is not exceeded and the 1.5% is set aside in a fund to be distributed as awards to employees is delegated to the Activity Head Designees. . . .
>
> Proposal 10 - The money in each Activity Head Designee[']s fund shall be split into two pools[,] one for GS-12 and below and another for GS-13 and above. *The funds in each pool shall be obtained from % of payroll for the respective grouping.* Awards for GS-12 and below shall be only from their pool and likewise for GS-13 and above.

(JA031 (citing *Naval Underwater*, 38 FLRA at 475-76 (emphases added)).)

In *Naval Underwater*, the Authority ruled that the italicized sentences were non-negotiable. 38 FLRA at 475-76. The Authority read the provisions as requiring 1.5% of base aggregate payroll be allocated to awards, rejecting the union's argument that "under the proposal the [a]gency is free to refrain from giving any awards and, thereby, avoid the funding requirements of the proposals." *Id*. at 479.

But the Authority's concern went further. It found that "[e]ven assuming that the proposals would legitimately leave the [a]gency with a means of avoiding the requirement that 1.5 percent of base aggregate payroll be allocated in budgets for 'Activity Head Designee groupings' . . . the question of whether the funding requirement violates the [a]gency's right to determine its budget would still exist." (*Id.*) The Authority found this to be the case because "a proposal that prescribes the amount to be allocated in an agency's budget for a particular program or operation violates management's right to determine its budget." (*Id.*) And the Authority found "that the second and third sentences of Proposal 7 and the second sentence of Proposal 10, all of which integrally relate to the 1.5 percent funding requirement, directly interfere with the Agency's right to determine its budget." (*Id.* at 480.)

The arbitrator found that *Naval Underwater*'s analysis showed that Article 3, Section 2 of the CBA violated PBGC's right to manage the budget. As he explained,

> Article 3, [Section 2(D)], suffers from the same defect as the non-negotiable sentences in *Naval Underwater Systems Center*. Those sentences "prescribe[d] an amount to be allocated in the [a]gency's budget for a particular program or operation." In the case before me, Article 3, [Section 2(D)], "prescribes [a percentage] to be allocated in the Agency's

> budget for a particular program or operation." Here, the "particular program or operation" is Special Achievement Awards for bargaining[-]unit employees.

(JA032.)

The arbitrator then distinguished a case cited by the Union, *Nat'l Ass'n of Gov't Emps. Loc. R14-52* ("*Red River Army Depot I*"), 41 FLRA 1057 (1991), which involved a proposal that the amount budgeted by the agency for a gainsharing program be divided evenly between management and employees. In *Red River Army Depot I*, the Authority found that the proposal did not "prescribe[] the programs and operations to be included in the agency's budget or . . . the amount to be allocated for them." (JA032 (quoting *Red River Army Depot I*, 41 FLRA at 1066-67).) Instead, the Authority found that "the proposal is limited to a matter that occurs within the context of, and reflects, a budget that already has been formulated." *Red River Army Depot I*, 41 FLRA at 1067. Assessing the significance of *Red River Army Depot I*, the arbitrator found,

> Special Achievement Awards and gainsharing are not similar programs except in the broad sense that they are both incentive programs. Otherwise, they are two different

> animals. What may be negotiated for one does not necessarily mean it can be negotiated for the other.

(JA033.)

Nor, in the arbitrator's view, was Article 3, Section 2 similar to the "pool" proposal in *Naval Underwater*; that is, the first and third sentences of Proposal 10:

> The money in each Activity Head Designee[']s fund shall be split into two pools[,] one for GS-12 and below and another for GS-13 and above. . . . Awards for GS-12 and below shall be only from their pool and likewise for GS-13 and above.

(JA033 (quoting *Naval Underwater*, 38 FLRA at 476).) The arbitrator reasoned the creation of those pools did not control the agency's budget, but "merely outline a procedure for the Agency to follow in implementing its decision concerning the amount of funds budgeted for performance awards." (*Id.*)

The arbitrator found that this case was different because under Article 3, Section 2, at least 9% of the total amount management budgeted for awards "must go to Special Achievement Awards for bargaining[-]unit members." (JA034.) The arbitrator found that Section 2 "does not change the total amount that management has budgeted for awards, but it affects how much PBGC can allocate" for

"non-bargaining[-]unit employees, and also for other awards, essentially performance awards." (*Id.*)

Along with finding that Section 2(D) violated management's right to determine its budget, the arbitrator found that Article 3, Section 2(A) violated the Agency's management right "to determine the criteria for awarding employees" because it provided that the Committee—not Agency management—had the authority to issue the awards. (JA034-036.)

The arbitrator concluded his decision by reiterating that "Article 3, [Section] 2, violates PBGC's management rights on two statutory counts." (JA036.) But he did not specify whether the two grounds were independent reasons for denying the Union's grievance. (*Id.*)

The Union filed exceptions to the arbitrator's ruling with the Authority. The Authority first denied a Union exception that the arbitrator had been biased because the Union had not raised that issue with the arbitrator, as required by the Authority's regulations. *IUPEDJ I*, 72 FLRA at 282.

The Authority then granted the Union's exception as to the arbitrator's ruling that the powers of the Committee in Article 3,

Section 2(A) violated PBGC's management rights. *Id*. at 282-83. The Authority faulted the arbitrator for not identifying a management right that Article 3, Section 2(A) violated. It also held that "there is no management right to 'determine the criteria for performance awards' in the Statute." *Id*. at 282.

Finally, the Authority denied the Union's challenge to the arbitrator's ruling that Article 3, Section 2(D) violated PBGC's management right to determine its budget under 5 U.S.C. § 7106(a)(1). *Id*. at 283-84. The Authority noted that Article 3, Section 2(D) was similar to proposals the Authority had found to be non-negotiable in *International Federation of Professional & Technical Engineers, Local No. 1* ("*Norfolk*"), 38 FLRA 1589, 1595 (1991) and *Naval Underwater*. *IUPEDJ I*, 72 FLRA at 283.

The Authority observed that "[i]n *Norfolk*, the relevant proposal established a formula that set a maximum funding allowance for performance awards at 1.5% of base payroll." *Id.* (citing *Norfolk*, 38 FLRA at 1595). The *Norfolk* proposal further "establishe[d] a specific budgetary restriction on the funding levels for performance awards and . . . that limitation directly affect[ed] the amount of money the [a]gency

may include in its budget for that purpose." *Id.* (alterations in original) (quoting *Norfolk*, 38 FLRA at 1595). Thus, it was nonnegotiable because it "directly interfere[d] with the Agency's right to determine its budget under § 7106(a)(1) of the Statute." *Id.* (alterations in original) (quoting *Norfolk*, 38 FLRA at 1595).

Similarly, the Authority found that *Naval Underwater* "considered a proposal requiring that whenever the agency allocated awards funding to a particular group of employees, the awards budget for that group would be 1.5% of base payroll." *IUPEDJ I*, 72 FLRA at 283 (citing *Naval Underwater*, 38 FLRA at 475-76). In *Naval Underwater*, the Authority held that "even if the agency could potentially avoid the 1.5% requirement by electing not to fund any performance awards for a particular group, the proposal 'prescribe[d] an amount to be allocated in the [a]gency's budget for a particular program or operation' and, therefore, affected management's right to determine the budget." *IUPEDJ I*, 72 FLRA at 283 (alterations in original) (quoting *Naval Underwater*, 38 FLRA at 478-80)).

The Authority found that although Article 3, Section 2(D) "does not set a specific amount for" the Special Awards, "it operates in the

same manner as the proposals in *Norfolk* and *Naval Underwater* by limiting how the Agency can allocate funds—specifically, by preventing it from allocating to special-achievement awards less than '9% of all monies allocated for all awards.'" *Id.* (quoting JA059).

The Authority rejected the Union's argument "that the Agency could avoid the special-achievement-awards funding requirement by electing not to fund any awards." *Id.* It observed that "in *Naval Underwater*, the Authority rejected a similar argument stating that even if the agency could avoid the requirement, 'the question of whether the funding requirement violates the [a]gency's right to determine its budget would still exist.'" *Id.* (quoting *Naval Underwater*, 38 FLRA at 479.)

Both the Union and PBGC filed motions for reconsideration of *IUPEDJ I*. PBGC claimed that it had preserved its arguments that the way Special Awards were distributed violated specific management rights. (JA528-529.) It also contended that when the arbitrator ruled that Section 2(A) violated management rights, he was essentially ruling that Section 2(A) violated the management rights to assign work and direct employees. (JA529-532.)

For its part, the Union contended that *IUPEDJ I* "is erroneous in that it fails to address the [Union's] exception concerning the repudiation of the agreement and [ULP] and fails to order or dictate a remedy." (JA536.) The Union asked the Authority to "fashion a remedy" for PBGC's unilateral termination of the Special Awards program. (*Id.*) And it urged that "[t]his absence of an appropriate remedial order constitutes error sufficient to justify reconsideration." (*Id.*)

In *IUPEDJ II*, the Authority denied PBGC's motion for reconsideration. 72 FLRA at 572-73. The Authority reiterated that "[a]mong the nineteen explicit management rights in § 7106, no 'right to determine the criteria for awarding employees' exists." *Id.* at 572. It found that arbitrator's reliance on that "nonexistent right[]" could not support his ruling that the Committee's power violated PBGC's management rights. *Id.* The Authority also determined that PBGC had never raised its arguments about the management rights to "assign work" and "direct employees," and had thus forfeited them. *Id.* Even if PBGC had made those arguments, the Authority noted, the arguments would have been insufficient. *Id.* at 573.

The Authority dismissed the Union's motion for reconsideration because it had been filed electronically, and the Authority's regulations "permit the filing of motions only through commercial mail, first-class mail, certified mail, or facsimile." *Id*. at 573 n.8. The Authority noted that the Union had not corrected the improper filing even after it was notified via an Order to Show Cause. *Id*.

The Union then filed this Petition for Review.

SUMMARY OF ARGUMENT

This Court should dismiss the Petition for Review because it lacks jurisdiction over it. Even if the Court had jurisdiction over the Petition, denial of it is appropriate because the Authority's decision is neither arbitrary nor capricious.

With the Statute, as with all of the CSRA, "Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector, including the authorization of collective bargaining." *Steadman*, 918 F.2d at 967. "Under the CSRA, the negotiated grievance procedure prescribed in a collective bargaining agreement is generally the exclusive path to redress for a federal employee with a grievance." *Johnson v. Peterson*, 996 F.2d 397, 398

(D.C. Cir. 1993) (citing 5 U.S.C. § 7121(a)). Thus, petitioners are "obliged to pursue their available remedies under the CSRA," including through CBA procedures, before bringing suit. *Steadman*, 918 F.2d at 966; *Johnson*, 996 F.2d at 398; 5 U.S.C. § 7121(a)).

In this case, the Union's Petition for Review should be dismissed because it has not exhausted its remedies through its CBA grievance procedure. That is because the arbitrator's award and Authority's decision leaves open a question that can be resolved only by the arbitrator.

The arbitrator gave two reasons why PBGC could lawfully terminate the Section 2 Special Awards program. *First*, he found that Section 2(A)—related to the structure of the Special Awards program—violated an unspecified management right. *Second*, he found that Section 2(D)—which required the Agency to spend 9% of its awards budget on the Special Awards program—violated the management right to determine its own budget.

Although the Authority upheld the second finding, it set aside the first. *IUPEDJ I*, 72 FLRA at 282-83. The arbitrator's award, however, was unclear as to whether the two findings were independent of one

another and whether he might have awarded remedies for PBGC's cancellation of the Special Awards absent his first finding. (JA036-037.) To answer that question, the Union was required, under the CBA and Statute, to return to the arbitrator to clarify the scope of his award and decide what remedy (if any) was appropriate.

If the Union had sought such clarification, the arbitrator may have found that Article 3, Section 2 remained binding, so long as the budgetary provision of Section 2(D) was effectively redlined from it. He could further have awarded appropriate remedies for PBGC's refusal to comply with the remaining portions of Article 3, Section 2. As the Union never sought further proceedings, however, the arbitrator had no chance to clarify his award after the Authority's partial invalidation of it.

The Union failed to return to the arbitrator even though it informed the Authority of the arbitrator's failure to fashion such a remedy. (See JA536 (asking the Authority to "fashion a remedy" for PBGC's unilateral termination of the Special Awards program in the wake of its partial invalidation of the arbitrator's award).) The Union provides no reason why it did not return to the arbitrator to allow him

to "fashion a remedy" or clarify his award—as was its right and obligation under Article 2, Section 10 of the CBA. (JA055.) Thus, the Union failed to exhaust its administrative remedies.

If the Court finds that it has jurisdiction over the Petition for Review, it should still deny the Petition because the Authority correctly held that Article 3, Section 2(D) violates PBGC's management right to determine its budget under § 7106(a)(1) of the Statute.

The Statute sets forth certain nonnegotiable management rights over which agencies retain exclusive authority. *See* 5 U.S.C. § 7106. As relevant here, the Statute specifies that "nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . budget." *Id.* § 7106(a)(1). To establish that a proposal affects management's right to determine its budget, an agency must either show that the proposal: "(1) prescribes the particular programs to be included in the budget or the amount to be allocated in the budget for those programs; or (2) entails an increase in costs that is significant and unavoidable and is not offset by compensating benefits." *Norfolk*, 38 FLRA at 1593.

Here, the Authority applied the first budget test. *See IUPEDJ I*, 72 FLRA at 283. The Authority reasonably concluded Section 2(D) of the CBA "affects management's right to determine its budget" by "limiting how the agency can allocate funds." *Id.* at 283-84. By requiring that the Special Awards for bargaining-unit employees be "at least 9% of all monies allocated for all awards" (JA059), Article 3, Section 2(D) fixes a budget floor for the Special Awards and a ceiling for all other awards. Every time PBGC wishes to increase its budget for other awards, it must also increase the budget amount for the Special Awards to stay above the required 9% threshold. In doing so, Article 3, Section 2(D) prescribes the amounts that PBGC must allocate to its awards budget, violating PBGC's management right to determine its budget.

As Article 3, Section 2(D) forces PBGC to fund the Special Awards for at a specific minimum percentage of PBGC's overall awards budget, it also interferes with the Agency's discretion to determine the size of its budget. PBGC's management right to determine its budget under § 7106(a)(1) of the Statute includes its right to determine "*the amounts required to fund [its programs and operations]*." *Nat'l Ass'n of Gov't*

Emps. Loc. R14-52 ("*Red River Army Depot II*"), 48 FLRA 1198, 1206 (1993) (emphasis added).

Under *Red River Army Depot II*, Article 3, Section 2(D) would "not be inconsistent with the first part of the budget test" if it required PBGC to pay a specified amount every time the Committee determined that an employee had earned an Award. *Cf. id.* This is because it would not require an agency to "place a specified amount in its budget." *See id.* at 1207-08.

But Section 2(D) does much more than this—it requires the Agency to place a specified amount "*for the purpose of funding*" Special Awards within its overall awards program budget. *Id.* at 1208 (emphasis added). It thus "directly prescribes the substantive composition of the estimates and plans that constitute the budget process." *Id.* That is because "[p]roposals requiring a 'budget allocation' of a specified amount to fund performance awards, *even if expressed solely in percentage terms*, directly interfere with management's right to determine its budget under section § 7106(a)(1) of the Statute." *Norfolk*, 38 FLRA at 1594 (emphasis added).

Applying *Norfolk*, the Authority agreed with the arbitrator that Article 3, Section 2(D) "prescribes [a percentage] to be allocated in the Agency's budget for a particular program or operation." (JA032.) By specifying that the budget for Special Awards will be set as a specific minimum percentage of the entire performance awards budget, Article 3, Section 2(D) impacts the "agency's plan for allocating funds among its operations." *Red River Army Depot II*, 48 FLRA at 1206.

NTEU argues that a funding proposal that governs only "the relative proportion" of the total budget does not interfere with the Agency's management right to determine its budget under the two-part test. (NTEU Br. 7-8 (citing *Am. Fed'n of Gov't Emps.* ("*AFGE*"), 31 FLRA 921, 931 (1988).) But *AFGE* is readily distinguishable, because, unlike the proposals/provisions in *Norfolk*, *Naval Underwater* and this case, the proposal in *AFGE* did not set any specific percentage floor or ceiling on the agency's awards budget.

The Authority's decisions were neither arbitrary nor capricious. Denial of the Petition for Review would therefore be appropriate even if this Court had jurisdiction over the case.

STANDARD OF REVIEW

Before the Court considers the merits of the Union's arguments, it "must determine whether [it] has subject matter jurisdiction." *Broad. Bd. of Governors Off. of Cuba Broad. v. FLRA*, 752 F.3d 453, 465 (D.C. Cir. 2014). The Union bears the burden of establishing jurisdiction. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992). Congress confers federal court jurisdiction and may limit or foreclose judicial review as it sees fit. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 404 (1940) ("Such jurisdiction as [a court] has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review.").

Under the Statute, petitioners are "obliged to pursue their available remedies under the CSRA," including through CBA procedures, before bringing suit. *Steadman*, 918 F.2d at 966; *Johnson*, 996 F.2d at 398; 5 U.S.C. § 7121(a)). Otherwise, the courts would be "improperly interjected . . . at a premature stage into the CSRA's carefully developed system of administrative review." *Steadman*, 918 F.2d at 966. A petitioner's failure to exhaust its remedies deprives this

Court of jurisdiction over a case. *Fraternal Ord. of Police*, 562 F. Supp. 2d at 12 (citing 5 U.S.C. § 7123(a)).

If a petitioner can establish jurisdiction, the Court "reviews the Authority's interpretation of the [Statute] under the two-step framework announced in [*Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984)]" because "Congress has clearly delegated to the Authority the responsibility in the first instance to construe the [Statute]." *Nat'l Treasury Emps. Union v. FLRA* ("*NTEU 2014*"), 754 F.3d 1031, 1041 (D.C. Cir. 2014) (alteration in original) (quotation omitted). Under *Chevron* step one, the Court considers "whether Congress has spoken directly to the precise question at issue." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 96 (D.C. Cir. 2005). If a law is silent or ambiguous, this Court moves to step two. *NTEU 2014*, 754 F.3d at 1042.

At *Chevron* step two, "'the question for the [C]ourt is whether the agency's interpretation is based on a permissible construction of the statute in light of its language, structure, and purpose.'" *Id.* (quoting *Am. Fed'n Govt' Emps. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)). The Court "need not conclude that the Authority's interpretation of the

Statute is 'the only one it permissibly could have adopted,'" *id.* (quoting *Chevron*, 467 U.S. at 843 n.11), or "'even the interpretation deemed most reasonable'" by the Court, *id.* (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). On the contrary, the Court will "defer to an agency's interpretation of a statute so long as it is reasonable." *Id.* (citations omitted).

Chevron step two analysis "overlaps with" the APA's arbitrary and capricious standard. *Shays*, 414 F.3d at 96 (quotation omitted). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the [Authority] failed to consider relevant factors or made a clear error in judgment[.]" *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

Thus, Courts uphold Authority decisions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *NTEU 2014*, 754 F.3d at 1041 (quoting *Am. Fed'n of Gov't Emps., Loc. 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); see also 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The scope of such review is narrow. *See, e.g., Am.*

Fed'n of Gov't Emps., Loc. 2303 v. FLRA, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

ARGUMENT

I. The Court Lacks Jurisdiction to Consider the Petition for Review Because It Failed to Exhaust Its Administrative Remedies

The Union's Petition for Review should be dismissed for lack of jurisdiction because the Union has not exhausted its administrative remedies.

The doctrine of administrative exhaustion provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006). Thus, "as a general rule . . . courts should not 'topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*.'" *Id.* (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). It is not enough that the Union "may conclude—correctly or incorrectly—that exhaustion is not efficient in that party's particular case." *Woodford*,

548 U.S. at 89. Exhaustion requirements, by their very nature, "are designed to deal with parties who do not want to exhaust." *Id.*

The Statute is no exception to this rule. Passed as part of the Civil Service Reform Act ("CSRA"), the Statute "requires a party to exhaust administrative remedies before obtaining judicial relief for an actual or threatened injury." *Fraternal Ord. of Police*, 562 F. Supp. 2d at 12 (citing 5 U.S.C. § 7123(a)); *see also Steadman*, 918 F.2d at 966. With the Statute, as with all of the CSRA, "Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector, including the authorization of collective bargaining." *Steadman*, 918 F.2d at 967."Under the CSRA, the negotiated grievance procedure prescribed in a collective bargaining agreement is generally the exclusive path to redress for a federal employee with a grievance." *Johnson*, 996 F.2d at 398 (citing 5 U.S.C. § 7121(a)). Thus, petitioners are "obliged to pursue their available remedies under the CSRA," including through CBA procedures before bringing suit. *Steadman*, 918 F.2d at 966; *Johnson*, 996 F.2d at 398; *Carter v. Carson*, 241 F. Supp. 3d 191, 197–99 (D.D.C. 2017), *aff'd*, 715 F. App'x 16 (D.C. Cir. 2018); *Fernandez v. Chertoff*, 471 F.3d 45, 52–53

(2d Cir. 2006); *Koch v. Walter*, 934 F. Supp. 2d 261, 268–69 (D.D.C. 2013); 5 U.S.C. § 7121(a)).

Section 7121(a)(1) of the Statute provides that CBA procedures "shall be the exclusive administrative procedures for resolving grievances which fall within [their] coverage." The CBA in this case, which sets forth the governing arbitration procedures, is clear: "Any dispute over the application of the arbitrator's award *shall be returned to the arbitrator* for resolution." (JA055 (emphasis added).)

The Authority's decision granted in part, and denied in part, the Union's exceptions to an arbitration ruling, and set aside, in part, the arbitrator's award. *IUPEDJ I*, 72 FLRA at 282-83. The arbitrator's decision was unclear whether the two grounds he cited for denying the Union's grievance were independent of one another. (JA036-037.) Thus, under the Statute and CBA, the Union was required, after the Authority's ruling, to return to the arbitrator to clarify the scope of his award and decide what remedy (if any) was appropriate. (*See* JA536 (asking the Authority to "fashion a remedy" for PBGC's unilateral termination of the Special Awards program in the wake of its partial invalidation of the arbitrator's award).) That is, the Union had to seek

clarification from the arbitrator before it could seek review from this Court.

If the Union had sought such clarification, the arbitrator may well have found that Article 3, Section 2 remained binding, so long as the budgetary provision of Section 2(D) was redlined from it. He could further have awarded appropriate remedies for PBGC's refusal to comply with the remaining portions of Article 3, Section 2. As the Union never sought further proceedings, however, the arbitrator had no chance to clarify his award after the Authority's partial invalidation of it. Thus, the Union failed to exhaust its administrative remedies.

The Union's failure to exhaust contrasts with PBGC's actions. PBGC sought reconsideration of the Authority's decision to partially invalidate the arbitrator's award. (*See* JA525-533.) It presumably did so because it expected that the arbitrator, in subsequent proceedings, could have found that PBGC committed a ULP by repudiating Section 2(A), which the Authority found to be lawful. That is because the CBA requires that "[a]ny dispute over the application of the arbitrator's award *shall be returned to the arbitrator* for resolution." (JA055.)

Again, the Union knew, or should have known, that it needed to exhaust its claims before the arbitrator.

The Union's failure to pursue further arbitration is even more puzzling given that its Motion for Reconsideration before the Authority faulted "the arbitral award's failure to remedy the ULP," and demanded that the Authority "fashion a remedy" for PBGC's unilateral termination of the Special Awards program. (JA535-536.) In that motion, the Union urged that "[*IUPEDJ I*] *d[id] not address the* [Union]'s arguments concerning the ULP, the Agency's repudiation of Article 3, *and the arbitral award's failure to remedy the ULP*." (JA535 (emphasis added).) The Union "request[ed] that the Authority address the argument or clarify whether the decision to set aside the award with respect to Article 3, Section 2(A) [wa]s intended to encompass and/or validate the [Union]'s ULP/repudiation exception." (*Id.*) In the Union's view, far from settling the issue, *IUPEDJ I* "fail[ed] to acknowledge the ULP or fashion a remedy." (JA536.) "It is important to carve out the exception concerning the ULP/repudiation of the agreement and seek reconsideration," the Union urged back then, "because the decision to deny the remaining exceptions *does not clarify*

whether the ULP/repudiation exception is inclusive." (*Id*. (emphasis added).)

But the Union failed to properly serve this motion, and never responded to the Authority's show-cause order. *IUPEDJ II*¸ 72 FLRA at 572 n.8. Thus, the Authority dismissed the Union's motion for reconsideration. *Id*. And the Union never returned to the arbitrator so that he could clarify his award or enter a remedial order—again, despite the CBA's requirement that the parties present disputes over awards to the arbitrator. (JA055.)

Instead, the Union brought the matter to this Court. Attempting to stave off dismissal, it now takes the *precise opposite* position that it took in its motion for reconsideration before the Authority. Now, the Union claims that *IUPEDJ I* "clarified that the arbitrator would not need to fashion a remedy." (Br. 11). And the Union urges that *IUPEDJ I* held that "no remedy would be required even if the Agency's additional reasons violated the Statute or its repudiation of a viable portion of the CBA constituted a ULP." (*Id.*) Thus, the Union's current position is that there is no "dispute concerning the applicability of the award after" *IUPEDJ I*, and thus *IUPEDJ II* "was a final order within the meaning

of the Statute." (*Id*. at 6-7). In sum, the Union's new position is the exact opposite of the position it took before the Authority.

The Union was right the first time. *IUPEDJ I* did not state "that the arbitrator would not need to fashion a remedy" for PBGC's alleged violation of Article 3, Section 2(A) of the CBA. (Br. 11.) Nor did the Authority hold that "no remedy would be required even if the Agency's additional reasons violated the Statute or its repudiation of a viable portion of the CBA constituted a ULP," as the Union now claims. (*Id*.) Instead, the Authority was completely silent on whether the arbitrator could properly award a remedy for violating Article 3, Section 2(A), given the Authority's holding that the arbitrator's management rights analysis about that provision was erroneous.

The Union points to footnote 43 of *IUPEDJ I* as the basis for its new position. (Br. 10-11.) But that footnote said nothing about what the arbitrator could or could not do given *IUPEDJ I*'s partial invalidation of his ruling. *IUPEDJ I*, 72 FLRA at 284 n.43. Instead, it merely held that the arbitrator did not exceed his authority by his *previous decision* not to award a remedy. *Id*. Specifically, the Authority stated, "While we set aside the arbitrator's conclusion regarding Section 2(A), we find

the award directly responsive to the issue that the arbitrator framed. Accordingly, we deny this exception." *Id.* *Nothing* in that statement precluded the arbitrator from awarding the Union relief given the Authority's decision to set aside his award in part. Nor did that statement mean, as the Union now implausibly claims, that "no remedy would be required even if the Agency's additional reasons violated the Statute or its repudiation of a viable portion of the CBA constituted a ULP." (Br. 11.)

The Union's failure to return to the arbitrator to allow him to "fashion a remedy" or clarify his award—as was its right and obligation under Article 2, Section 10 of the CBA (JA055), amounts to a failure to exhaust administrative remedies that deprives this Court of jurisdiction. Dismissal is therefore appropriate.

II. The Petition for Review Fails on Its Merits Because the Authority Did Not Arbitrarily or Capriciously Decide that Article 3, Section 2(D) of the CBA, in Directly Specifying a Minimum Funding Percentage for Special Awards, Violated Management's Right to Determine its Budget.

If the Court finds that it has jurisdiction over the Petition for Review, it should still deny the Petition because the Authority decision that Article 3, Section 2(D) violates PBGC's management right to

determine its budget under § 7106(a)(1) of the Statute was not arbitrary or capricious.

The Authority's decisions are entitled to *Chevron* deference. As to *Chevron* step one, although Congress broadly defined management rights under § 7106, key aspects of those rights are undefined and Congress did not dictate how the Statute would apply in cases such as this. As to *Chevron* step two, the Authority's interpretation and application of the Statute was reasonable.

The Statute sets forth certain nonnegotiable management rights over which agencies retain exclusive authority. *See* 5 U.S.C. § 7106. The Statute specifies that "nothing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . budget" of the agency. *Id.* § 7106(a)(1). The Statute does not define "budget." The Authority thus uses a dictionary definition for the term: "a statement of the financial position of a body for a definite period of time based on detailed estimates of planned or expected expenditures during the period and proposals for financing them." *Am. Fed'n of Gov't Emps., AFL-CIO*, 2 FLRA 603, 608 (1980). Thus, "an agency's authority to determine its budget extends to the determination of the programs

and operations that will be included in the estimate of proposed expenditures *and the determination of the amounts required to fund them*." *Red River Army Depot II*, 48 FLRA at 1202.

To establish that a proposal affects management's right to determine its budget, the Authority requires agencies to show either that the proposal: "(1) prescribes the particular programs to be included in the budget or the amount to be allocated in the budget for those programs; or (2) entails an increase in costs that is significant and unavoidable and is not offset by compensating benefits." *Norfolk*, 38 FLRA at 1593.

In this case, the Authority reasonably applied the first budget test when assessing whether Section 2 affected PBGC's ability to determine its budget. *See IUPEDJ I*, 72 FLRA at 283. The first budget test "encompasses the specific process that is dedicated to formulating . . . (1) the budget estimate for an agency . . . (2) estimates for funding the operations and programs of an agency . . . and (3) an agency's plan for allocating funds among its operations and programs." *Red River Army Depot II*, 48 FLRA at 1206. Using the first budget test, the Authority's conclusion that Section 2(D) of the CBA "affects management's right to

determine its budget" by "limiting how the agency can allocate funds" was not arbitrary or capricious. *IUPEDJ I*, 72 FLRA at 283-84.

A. Section 2(D) Limits How the Agency Can Allocate Its Funds Within Its Performance Awards Budget.

By setting a floor of 9% for Special Awards, Section 2(D) impermissibly limits how the Agency determines its overall performance awards budget. It fixes a budget floor for the Special Awards and a ceiling for all other awards, including those for non-bargaining-unit employees. Thus, the provision affects PBGC's "plan for allocating funds among its operations and programs"—in other words, Section 2(D) affects PBGC's budget. *See Red River Army Depot II*, 48 FLRA at 1206.

The Authority's conclusion in this regard follows its own precedent in *Norfolk* and *Naval Underwater*, which it cited in support. *IUPEDJ I*, 72 FLRA at 283 (citing *Norfolk*, 38 FLRA 1589; *Naval Underwater*, 38 FLRA 456). *Norfolk*, for example, involved a provision that set a "maximum funding allowance for performance awards at 1.5% of base payroll." *Norfolk*, 38 FLRA at 1595. The Authority applied the first budget test and found the proposal directly interfered with management's right to determine the budget. *Id.* The Authority

reasoned that "[p]roposals requiring a 'budget allocation' of a specific amount to fund performance awards, even if expressed solely in percentage terms, directly interfere with management's rights to determine its budget under section 7106(a)(1) of the Statute." *Id.* at 1594.

Similarly, in *Naval Underwater*, the Authority had "considered a proposal requiring that whenever the agency allocated awards funding to a particular group of employees, the awards budget for that group would be 1.5% of base payroll." *Naval Underwater*, 38 FLRA at 475-76. The Authority found this proposal non-negotiable under the first budget test. *See id.* at 477-80. It held that by specifying a pool of funds defined in terms of a percentage of base aggregate payroll, the proposal prescribed an amount to be allocated in the agency's budget overall, violating its management rights. *Id.*

The Authority's conclusion that Article 3, Section 2(D) imposes similar budget restrictions as the proposals in *Norfolk* and *Naval Underwater* was not arbitrary or capricious. *IUPEDJ I*, 72 FLRA at 283. By requiring that the Special Awards for bargaining-unit employees be "at least 9% of all monies allocated for all awards,"

(JA059), Article 3, Section 2(D) fixes a budget floor for the Special Awards and a ceiling for all other awards. The provision thus "pertains to what the budget itself can include" by impermissibly limiting how PBGC may allocate funds within its performance award budget. *IUPEDJ I*, 38 FLRA at 1596.

Moreover, Article 3, Section 2(D) affects the Agency's "plan for allocating funds among its operations and programs" by fixing a specific percentage floor for Special Awards as a proportion of the entire performance awards budget. *See Red River Army Depot II*, 48 FLRA at 1202. Every time PBGC wishes to increase its budget for other awards, it must also increase the budget amount for the Special Awards to stay above the required 9% threshold. In so doing, Article 3, Section 2(D) prescribes the amounts that PBGC must allocate to its awards budget, violating PBGC's management right to determine its budget.

In its amicus brief, the NTEU labels *Norfolk* and *Naval Underwater* "inapposite" because "the proposals in *Norfolk* and *Naval Underwater* tied performance-award funding to a specified percentage of base aggregate payroll—a baseline over which the agency had *no* discretion or control." (NTEU Br. 4-5.)

To be sure, the Authority in *Norfolk* and *Naval Underwater* was not concerned with the agencies' control over base aggregate payroll—the source of the performance-award funding. Rather, the Authority in *Norfolk* found that limiting performance award funding to 1.5% of aggregate base payroll *itself* "prescribe[d] a 'ceiling,' which the Agency is prevented from exceeding." *Norfolk*, 38 FLRA at 1595. Although the proposals did "not prescribe a specific amount or a specific program to be included in the [a]gency's budget," the proposals still "pertain[ed] to what the budget itself can include." *Id.* at 1595-96. "By imposing a ceiling on what the Agency's budget can contain in the way of funds for incentive awards," the Authority explained, "Proposal 1 *goes directly to the budget per se*." *Id.* at 1596 (emphasis added); *see Fort Stewart Schs. v. FLRA*, 495 U.S. 657, 658 (1990).

Here too, Article 3, Section 2(D) goes directly to the budget *per se*. By requiring "at least 9% of all monies allocated for all awards" be allocated for Special Awards (JA059), the proposal prescribes a specific percentage floor that PBGC must maintain in funding the Special Awards program. *Cf. Norfolk*, 38 FLRA at 1595.

Similarly, by setting a floor on the funding of the Special Awards program, the provision also fixes a ceiling for all other awards, including those for non-bargaining-unit employees. (*See* JA057-64.) Indeed, the arbitrator relied on just this reasoning in finding Article 3, Section 2(D) violates PBGC's management rights. (JA034.) The 9% floor for Special Awards for bargaining-unit employees "affects how much PBGC can allocate (budget) for Special Achievement Awards *for non-bargaining[-]unit employees*, and also for other awards." (JA034 (emphasis added).) Thus, just like the provisions in *Norfolk* and *Naval Underwater*, Article 3, Section 2(D) imposes a budget ceiling for all non-Special Awards program awards and thus goes directly to the budget *per se*.

Therefore, this is not a provision "that would result in expenditures by an agency and, consequently, have a [general] impact on the budget process" or one that "simply ha[s] cost ramifications." *Naval Underwater*, 38 FLRA at 478. This CBA provision "limit[s] how [PBGC] can allocate funds" by specifically preventing PBGC from allocating less than 9% of its performance awards budget to Special

Awards. *IUPEDJ I*, 72 FLRA at 283. Thus, the provision violates PBGC's management right to determine its budget.

B. Section 2(D) Directly Ties Bargaining-Unit Special Awards to the Agency's Budget.

The Authority's conclusion that Section 2(D) violated management's right to determine its budget was similarly not arbitrary and capricious. As Article 3, Section 2(D) forces PBGC to allocate a specific minimum percentage of PBGC's overall awards budget to the Special Awards program, it also interferes with PBGC's discretion to determine the size of its budget. PBGC's management right to determine its budget under § 7106(a)(1) of the Statute includes its right to determine "*the amounts required to fund [its programs and operations]*." *Red River Army Depot II*, 48 FLRA at 1206 (emphasis added).

Red River Army Depot II, the principal case cited by NTEU (NTEU Br. 6-7), held that under the first part of the budget test, "a proposal that directly prescribes the . . . amounts that will be specified in an agency's plan to fund its programs and operations . . . interferes with the agency's right to determine its budget." *Red River Army Depot II*, 48 FLRA at 1208. The Authority explained:

> [A] proposal requiring that an agency pay a specified amount toward health benefits premiums for bargaining[-]unit employees would not be inconsistent with the first part of the budget test. ***However, a proposal requiring that the agency place a specified amount in its budget for the purpose of funding health benefits premiums for bargaining[-]unit employees would.***

Id. (emphasis added).

Applying that logic here, Article 3, Section 2(D) would "not be inconsistent with the first part of the budget test" if it required PBGC to pay a specified amount every time the Committee determined that an employee had earned an Award. *Cf. id.* Such a term would be a proposal "that could result in a cost to an agency" but does not require an agency to "place a specified amount in its budget." *See id.* at 1207-08.

But Section 2(D) does much more than this—it requires the Agency to place a specified amount "*for the purpose of funding*" Special Awards within its overall awards program budget. *Red River Army Depot II*, 48 FLRA at 1208 (emphasis added). Article 3, Section 2(D) "directly prescribes the substantive composition of the estimates and plans that constitute the budget process." *Id.* at 1208.

Recall too, "[p]roposals requiring a 'budget allocation' of a specified amount to fund performance awards, *even if expressed solely in percentage terms*, directly interfere with management's right to determine its budget under section § 7106(a)(1) of the Statute." *Norfolk*, 38 FLRA at 1594 (emphasis added). Applying *Norfolk* and *Naval Underwater*, the Authority agreed with the arbitrator that Article 3, Section 2(D) prevents the agency from "allocating to special-achievement awards less than 9% of all monies allocated for all awards." *IUPEDJ I*, 72 FLRA at 283 (quotation omitted); *see* JA032 (Article 3, Section 2(D) "prescribes [a percentage] to be allocated in the Agency's budget for a particular program or operation."). By specifying that the budget for Special Awards will be set as a specific minimum percentage of the entire performance awards budget, Article 3, Section 2(D) impacts the "agency's plan for allocating funds among its operations." *Red River Army Depot II*, 48 FLRA at 1206.

NTEU argues that a funding proposal that governs only "the relative proportion" of the total budget does not interfere with the Agency's management right to determine its budget under the two-part test and cites AFGE for that proposition. (NTEU Br. 7-8 (citing *AFGE*,

31 FLRA at 931).) But *AFGE* is readily distinguishable, because, unlike the proposals/provisions in *Norfolk*, *Naval Underwater* and this case, the proposal in *AFGE* did not set any specific percentage floor or ceiling on the agency's awards budget. Instead, *AFGE* considered a proposal that required the amount of money allocated by the agency for employee performance awards to "not be less than the highest percentage allocated to any other pool." *AFGE*, 31 FLRA at 926. Thus, AFGE's flexible requirement did not prescribe "an amount of funds to be included in the [a]gency's budget." *Id.* at 931. Instead, the proposal was "concerned only with the relative proportion of the total resources which the agency decided to devote to performance awards." *Id.* at 931.

By contrast, Section 2(D) is not "concerned only with the relative proportion," because the mandatory floor forces PBGC to allocate even more funds to the total awards budget that would otherwise have been unnecessary. *AFGE*, 31 FLRA at 926. Given the 9% floor on funding the Special Awards in Article 3, Section 2(D), if PBGC wants to increase spending on other awards, it must fund its overall performance awards budget at a higher level than initially estimated due to the restriction that at least 9% of those funds go to the Special Awards program. This

is because the floor is measured as a minimum percentage rather than a particular dollar amount or a flexible benchmark.

So, for example, if PBGC wished to increase funding for a separate performance awards program by $100,000, it would need to increase its total performance awards budget by at least $109,000 to account for the 9% floor. In other words, the 9% floor unlawfully impacts how much money PBGC needs to allocate to the total performance awards budget to provide for any other specific awards programs that PBGC desires to fund.

Article 3, Section 2(D) therefore interferes with PBGC's right to decide "the amounts required to fund [its programs and operations]." *Red River Army Depot II*, 48 FLRA at 1206. Since Article 3, Section 2(D) sets a strict floor at a fixed percentage, it interferes with PBGC's discretion to determine the size of its performance awards budget. As a result, Article 3, Section 2(D) goes directly to PBGC's budget *per se* and violates PBGC's management right to determine its budget under § 7106(a)(1) of the Statute.

The Authority had clear precedent in *Norfolk* and *Naval Underwater* dealing with proposals that set specific percentage floors

for specific awards budgets. Article 3, Section 2(D), in setting a specific percentage floor for the Special Awards budget, affected PBGC's discretion to fund other awards and to set its overall performance awards budget. (JA031-034.) Given the obvious similarity of Article 3, Section 2(D) to the proposals considered in *Norfolk* and *Naval Underwater*, the Authority adequately explained why Article 3, Section 2(D) impermissibly interfered with management's right to determine the agency's budget under 5 U.S.C. § 7106(a)(1). *IUPEDJ I*, 72 FLRA at 283–84. Its conclusions were thus not arbitrary and capricious and the Petition for Review should be denied on its merits.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court dismiss the Petition for Review for lack of jurisdiction or deny it on its merits.

Respectfully submitted,

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 9,743 words excluding exempt material.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Deputy Solicitor
Federal Labor Relations Authority

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of September, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Deputy Solicitor
Federal Labor Relations Authority

ADDENDUM

Relevant Statutes

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STATUTES

5 U.S.C. § 7106. Management rights

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

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

(2) in accordance with applicable laws--

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

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

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

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

(ii) any other appropriate source; and

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

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

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

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

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

5 U.S.C. § 7121(a). Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

5 U.S.C. § 7123 (a), (c). Judicial review; enforcement

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

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

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

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

* * * * *

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

review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

* * * * *