ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 20, 2011
No. 10-1304

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

UNITED STATES DEPARTMENT OF THE NAVY,
NAVAL UNDERSEA WARFARE CENTER DIVISION
NEWPORT, RHODE ISLAND,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties to this petition for review are the petitioner, United States Department of the Navy, Naval Undersea Warfare Center Division Newport, Rhode Island, and the respondent, the Federal Labor Relations Authority. Two local unions participated in proceedings before the arbitrator but have not intervened before this Court. Those local unions are the Federal Union of Scientists and Engineers RI-144 ("FUSE") and the National Association of Government Employees RI-134 ("NAGE"). There are no amici before this Court.

B. Ruling Under Review

The ruling under review is *United States Department of the Navy, Naval Undersea Warfare Center Division Newport, Rhode Island (Agency) and National Association of Government Employees, Local RI-134, Federal Union of Scientists and Engineers, Local RI-144 (Unions)*, Case No. 0-AR-4405, issued on July 29, 2010, reported at 64 F.L.R.A. (No. 199) 1136.

C. Related Cases

Respondent is not aware of any related cases.

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GLOSSARY

Authority	Federal Labor Relations Authority
FLRA	Federal Labor Relations Authority
FUSE	Federal Union of Scientists and Engineers RI-144
NAGE	National Association of Government Employees RI-134
Navy	United States Department of the Navy, Naval Undersea Warfare Center Division Newport, Rhode Island
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
ULP	Unfair labor practice

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STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on July 29, 2010. The Authority's decision is published at 64 F.L.R.A. (No. 199) 1136. A copy of the decision is included in the Joint Appendix ("JA") at 131-139. The Authority exercised

jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1] As explained below, this Court lacks jurisdiction to review the Authority's decision pursuant to § 7123(a)(1) of the Statute because it was on exceptions to an arbitrator's award that did not involve an unfair labor practice ("ULP") under § 7116 of the Statute. As also explained below, this Court lacks jurisdiction, pursuant to § 7123(c) of the Statute, to consider the agency's new argument that the Authority is bound by a factual finding in separate arbitration awards that were not part of the record before it in this case.

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction under § 7123(a)(1) of the Statute to review the Authority's decision on exceptions to an arbitrator's award when neither the award nor decision involves a ULP.

2. Whether the Court lacks jurisdiction under § 7123(c) of the Statute to consider the agency's new argument, made for the first time before this Court, that the Authority is bound by a factual finding in a different arbitrator's awards that the agency's water supply was potable.

3. Assuming, *arguendo*, that the Court has jurisdiction to consider the agency's petition for review, whether the arbitral award, as sustained by the

[1] Pertinent statutory provisions, regulations, and rules are set forth as an Addendum to this brief.

Authority, is contrary to the Anti-Deficiency Act, 31 U.S.C. § 1341, or the Purpose Statute, 31 U.S.C. § 1301, even though the arbitrator did not find that the agency's water supply was potable.

STATEMENT OF THE CASE

Petitioner, the United States Department of the Navy, Naval Undersea Warfare Center Division, Newport, Rhode Island ("Navy"), seeks review of a decision of the Authority upholding an arbitration award pursuant to § 7122 of the Statute. The grievances before the arbitrator alleged only that the Navy violated a collective bargaining agreement. They did not also allege that the Navy committed a ULP. In his decision, the arbitrator found that the Navy had established a long-standing past practice of providing bottled water to bargaining unit employees, and that the practice was grounded in, and thereby modified, a collective bargaining agreement. He found that the Navy's subsequent unilateral discontinuation of this past practice violated the agreement. In so finding, the arbitrator made no mention of a ULP because none was alleged. In fact, the arbitrator made it clear that all he needed to do was interpret the agreement. Thus, his award did not involve a ULP. Accordingly, the Authority's decision reviewing the Navy's exceptions to the award could not possibly have involved a ULP for purposes of § 7123(a)(1).

STATEMENT OF THE FACTS

Background

Employees of the Navy facilities involved in the grievances are represented by two unions - the National Association of Government Employees, Local RI-134 (NAGE), and the Federal Union of Scientists and Engineers, Local RI-144 (FUSE). NAGE has a collective bargaining agreement with the Navy. JA 39. Article 25, Section 6 of the NAGE agreement provides that the Navy "will make every reasonable effort to maintain . . . high quality drinking and wash water facilities . . . affecting employee's health, welfare, and morale, in accordance with Department of the Navy standards and applicable regulations." JA 63. Although FUSE does not have a collective bargaining agreement with the Navy, the parties have a grievance procedure agreement. JA 106.

In approximately the mid-1990s, the Environmental Protection Agency published a list of water fountains that were manufactured with lead-containing components. JA 84 (Stipulation of Fact 1).[2] Some of the listed lead-containing water fountains were present in various Navy buildings. *Id*. (Stipulation of Fact 2). The Navy used appropriated funds to purchase and provide bottled water to those buildings where the lead-containing water fountains were present. *Id.* (Stipulation

[2] The parties submitted a set of joint stipulated facts to the arbitrator in lieu of participating in a hearing. JA 27, 84-86. The arbitrator accepted the stipulations. JA 29.

of Fact 3); 90. Over time, the Navy also began to provide bottled water to some buildings that did not have lead-contaminated fountains, and it also began to replace lead-contaminated fountains with lead-free fountains. JA 84, 85 (Stipulations of Fact 4 and 6).

After July of 2006, the Navy tested fountains for lead and determined that water from the fountains was safe for drinking. Based on this determination, the Navy unilaterally discontinued its practice of providing bottled water. JA 33, 85 (Stipulation of Fact 8). After the Navy stopped providing bottled water, it posted signs at certain sinks or water fountains indicating that the water "should be flushed for 1 minute at the start of the day or following a period of questionable use to reduce the lead level below 15 ppb [parts per billion]." JA 85-86 (Stipulation of Fact 14). NAGE and FUSE did not agree to the discontinuation of the provision of bottled water and contended that the water from the fountains remained unsafe. JA 33.

On December 22 and 29, 2006, FUSE and NAGE, respectively, filed grievances contending that the Navy removed the bottled water without first negotiating with the unions. JA 94 and 96. When the grievances were not resolved, they were submitted to arbitration. JA 27. The unions argued before the arbitrator that the Navy's actions violated the Navy's obligation, set out in Article

25, Section 6 of the NAGE agreement, to provide high quality drinking water to the workforce. JA 28.

The Arbitrator's Award

As relevant here[3], the arbitrator found that the Navy's practice of providing bottled water was grounded in Article 25, Section 6 of the NAGE agreement, and that, by expanding the practice to buildings with lead-free drinking fountains, the parties effected "a modification to the actual written contract." JA 33. The arbitrator also found that the Navy was required to bargain before changing this established past practice. JA 33-34. He rejected the Navy's contention that continuing to provide the bottled water would be contrary to the Anti-Deficiency Act, 31 U.S.C. § 1341, and the Purpose Statute, 31 U.S.C. § 1301(a), finding that he should not "look[] outside of the collective bargaining agreement between the parties." JA 35.

The arbitrator noted that whether or not the water from the drinking fountains actually was potable (despite the Navy's determination that it was) remained in dispute, and he chose not to resolve that dispute. JA 33, 35. Instead,

[3] The Navy excepted to the arbitrator's finding that the unions filed their grievances on time, and the FLRA denied the exception. JA 133-135. The question of whether the grievances were timely filed is not before this Court.

the arbitrator found it to be an issue for the parties to negotiate, and that "what is within the domain of this [a]rbitrator is to interpret the contract." JA 35.[4]

The Authority's Decision

The Authority affirmed the arbitrator's award, holding that the availability of potable water is a condition of employment. JA 137. The Authority found that such conditions of employment may be established either by contract or past practice of the parties. *Id*. The Authority agreed with the arbitrator, and noted that the parties did not dispute, that the Navy's provision of bottled water for many years was an established past practice. JA 135. The Authority found that the Navy could not change this condition of employment without fulfilling its bargaining obligations unless it was precluded from doing so by statute or

---

[4] The grievances before this arbitrator concerned the unilateral discontinuation of the past practice of providing bottled water to bargaining unit employees. The Navy also discusses, and requests judicial notice of, different arbitration proceedings before a different arbitrator that addressed different grievances - the contamination of and test results for the fountain water. Petitioner's Brief (PB) at 8, 33. In these separate proceedings, the arbitrator found that the unions did not offer expert testimony to rebut the Navy's expert testimony that the Navy's drinking water supply was potable. As the Navy acknowledges, the arbitrator's awards, issued on October 24 and 27, 2008, were not part of the record before the Authority. PB at 9 n. 4. Nonetheless, the Navy requests that the Court take judicial notice of these awards under Rule 201(b) of the Federal Rules of Evidence. PB at 9 n. 4, 38-39. As explained in our brief, *infra, in Part II*, the Court should deny this request pursuant to § 7123(c) of the Statute because it is nothing more than an attempt by the Navy to present to the Court for the first time information that it could have, but neglected to, present to the Authority in a motion for reconsideration.

regulation. *Id*. Not having before it any factual finding by the arbitrator that the Navy's water supply was potable, the Authority concluded that neither the Anti-Deficiency Act nor the Purpose Statute nor any Comptroller General decision concerning the use of appropriations for bottled water prohibits such negotiations. JA 136.

Earlier Proceedings in this Court

After the Navy filed its petition for review, the Authority filed a motion to dismiss the petition for lack of jurisdiction under § 7123(a)(1) of the Statute. On March 18, 2011, this Court issued an order referring the jurisdictional question to the merits panel and ordering the parties to "address in their briefs the issues presented in the motion to dismiss." This brief complies with that order.

STANDARD OF REVIEW

The standard of review of Authority decisions presupposes that the Authority's decision is properly before this Court. Here, as explained *infra*, because the Authority's decision is on exceptions to an arbitrator's award and it does not involve a ULP, judicial review is foreclosed. *See* 5 U.S.C. § 7123(a)(1); *AFGE, Local 2510 v. FLRA*, 453 F.3d 500, 503-05 (D.C. Cir. 2006) ("*AFGE, Local 2510*"); *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987) ("*OEA*").

Assuming that the Authority's decision is somehow properly before this Court, the Court lacks jurisdiction to consider an argument that the Navy raises for the first time in its petitioner's brief. The Navy's new argument is that the Authority's decision is contrary to the Anti-Deficiency Act and the Purpose Statute because in arbitration awards subsequent to that which the Authority reviewed in this case, there was a finding that the Navy's water supply was potable. Because the Navy did not first present this argument, or those other arbitration awards, to the Authority in a motion for reconsideration pursuant to the Authority's regulations at 5 C.F.R. §2429.17, this Court should not entertain the argument. *See* 5 U.S.C. § 7123(c); *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (a Court of Appeals is without jurisdiction to consider issues not raised before the Authority if the failure to do so is not excused by extraordinary circumstances); *AFSCME Capital Area Council 26 v. FLRA*, 395 F.3d 443, 451-52 (D.C. Cir. 2005) ("*AFSCME*").

Further, the Court's review, assuming it has jurisdiction over this matter, is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one

that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845. As the Supreme Court has stated, 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." *NFFE, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

This case involves the Authority's interpretation of its own organic Statute as it relates to other federal laws, specifically, the Anti-Deficiency Act and the Purpose Statute. When the Authority interprets other statutes, although it is not entitled to deference, *Dep't of the Navy, Military Sealift Command*, 836 F.2d 1409, 1410 (3rd Cir. 1988), the Authority's interpretation should be followed to the extent the reasoning is "sound." *Ass'n of Civilian Technicians, Tex. Lone Star Chapter v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (*quoting Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)) ("*ACT, Tex.*").

Here, the Authority's determination that the Navy's provision of bottled water to bargaining unit employees was a condition of employment established by past practice is owed deference as the Authority's interpretation of its organic Statute. And, the Authority's interpretation of the Anti-Deficiency Act and the

Purpose Statute as not precluding the Navy's obligation to negotiate over its change to the condition of employment was "sound." *ACT, Tex.*, 250 F.3d at 782. Thus, assuming that this Court has jurisdiction over this appeal, the Navy's petition for review should be denied because the Authority's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

SUMMARY OF ARGUMENT

Judicial review is foreclosed in this case. The Authority decision that the Navy asks this Court to review is on exceptions to an arbitrator's award and does not involve a ULP. Thus, under the plain language of § 7123(a)(1) of the Statute, as consistently interpreted by this Court, the Navy's petition for review must be dismissed. The Navy's attempt to evade this insurmountable bar to judicial review by arguing that the unions could have claimed a ULP is unavailing. This Court has rejected such attempts in previous decisions, and also should reject this attempt.

In addition, under § 7123(c) of the Statute, this Court is without jurisdiction to consider the Navy's new argument that the Authority, based on a factual finding in two arbitration awards that were not before it, should have found that the Navy's water supply was potable. Finding that, the Navy contends, the Authority then should have found that the arbitral award before it was contrary to the Anti-Deficiency Act and the Purpose Statute. However, in making this argument, the Navy is asking this Court to, in effect, rewrite this arbitral award by adding to it the

factual finding from the subsequent two awards. Then, the Navy is asking this Court, based on such a reconstructed arbitral award, to find that the award, and the Authority's affirmance thereof, are contrary to federal fiscal law. This Court should deny the Navy's request that the Court assume the roles of the arbitrator and the Authority.

Finally, even assuming, *arguendo*, that this Court has jurisdiction to review the Authority's decision, the Court should uphold the decision as reasonable and not contrary to law. The Navy's argument to the contrary is based on the potability finding in the two arbitration awards that were not part of the record before the Authority. The record that was before the Authority contains no potability determination and, hence, no basis for concluding that the arbitrator's order that the Navy must bargain over a change to its past practice of providing bottled water is contrary to the Anti-Deficiency Act or the Purpose Statute. And, should this Court, somehow, find that the Authority's decision is flawed because it did not take into consideration the two arbitration awards that were not before it, the Court should remand the case to the Authority.

Therefore, the petition for review should be dismissed for lack of jurisdiction. Alternatively, the petition for review should be denied on the merits.

ARGUMENT

I. THE COURT LACKS JURISDICTION TO REVIEW THE AUTHORITY'S DECISION ON EXCEPTIONS TO AN ARBITRATION AWARD.

It is axiomatic that federal court jurisdiction is conferred by Congress and that Congress may limit or foreclose review as it sees fit. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940); *Wydra v. Law Enforcement Assistance Admin.*, 722 F.2d 834, 836 (D.C. Cir. 1983). With respect to the Statute, examination of its language and legislative history reveals "unusually clear congressional intent generally to foreclose review" of virtually all Authority decisions in arbitration cases pursuant to section 7123(a). *Griffith v. FLRA*, 842 F.2d 487,490 (D.C. Cir. 1988) ("*Griffith*"). Because the instant petition for review involves just such an Authority decision, it must be dismissed as an attempt to evade the specific strictures Congress placed on judicial review of Authority arbitration decisions.

A. The Statute's Language and Legislative History Make it Clear That Congress Intended to Bar Judicial Review of Authority Decisions on Exceptions to Arbitrator's Awards in Virtually All Cases

The Statute's language embodies the strict limits Congress set on judicial review of Authority decisions concerning arbitrators' awards. Section 7123(a) of the Statute specifically precludes judicial review of certain Authority decisions and orders. This section states, in relevant part:

> 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 [7116][5] of this title, . . .
>
> . . . .
>
> 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 . . . .

5 U.S.C. § 7123(a). Thus, the plain language of 5 U.S.C. § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the jurisdiction of the courts of appeals to review an FLRA arbitration decision to those instances that "involve[] an unfair labor practice" under the Statute. *OEA*, 824 F.2d at 63. This broad jurisdictional bar to the review the Navy seeks here has been recognized by all of the courts of appeals, including this one, that have considered the issue.[6]

The legislative history of § 7123(a) underscores the tight restrictions Congress placed on review of Authority decisions issued under § 7122, involving

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[5] Although the text of the Statute refers to § 7118, that reference has generally been recognized as an inadvertent miscitation. *AFGE, Local 2510*, 453 F.3d at 502 note. Section 7116 of the Statute is the correct reference. *Id.*

[6] *See Begay v. Dep't of the Interior*, 145 F.3d 1313, 1315-16 (Fed. Cir. 1998); *NTEU v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *U.S. Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Philadelphia Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992); *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 27 (2d Cir. 1986); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417 (9th Cir. 1983); *AFGE, Local 1923 v. FLRA*, 675 F.2d 612, 613 (4th Cir. 1982).

an award by an arbitrator. "The rationale for circumscribed judicial review of such cases is not hard to divine." *OEA*, 824 F.2d at 63. Congress strongly favored arbitrating labor disputes, and sought to create a scheme characterized by finality, speed, and economy. To this end, the conferees discussed judicial review in the following terms:

> [T]here will be *no judicial review* of the Authority's action on those *arbitrators['] awards in grievance cases which are appealable to the Authority*. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined *it would be inappropriate for there to be subsequent review by the court of appeals in such matters*.

H.R. Rep. No. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (*Legis. Hist.*) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any* . . . *authority* or administrative body" other than the FLRA. *Id.* at 826 (emphasis added).

Accordingly, the language and legislative history of the Statute establish conclusively that Congress intended to restrict review of arbitration awards exclusively to the Authority, and intended that there be "no judicial review of the

Authority's action on . . . arbitrators[']' awards." *Legis. Hist.* at 821. Because, as discussed below, the Authority's decision on review of the arbitrator's award in this case indisputably does not involve a ULP[7], no review of that decision is available in a court of appeals. The petition for review must therefore be dismissed.

B. The Authority's Decision Does Not "Involve an Unfair Labor Practice" Within the Meaning of § 7123(a)(1) of the Statute

The Statute limits this Court's review to orders of the Authority which involve ULPs in order to balance a "strong Congressional policy favoring arbitration of labor disputes," *OEA*, 824 F.2d at 63, with a Congressional intent for "uniformity in the case law concerning [ULPs]." *AFGE, Local 2510*, 453 F.3d at 505. The Statute contains a "two-track system for resolving labor disputes." *OAE*, 824 F.2d at 62. A party aggrieved by a ULP may go down either track, but not both. 5 U.S.C. § 7116(d).

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[7] This Court has recognized several other exceptions to the general bar to judicial review of Authority decisions reviewing arbitrator's awards. However, the Navy does not claim that any of them apply here. In addition to the express exception in § 7123(a)(1), concerning Authority decisions involving a ULP, this Court has indicated that an exception to the jurisdictional bar may be present where the Authority exceeds its delegated powers and acts contrary to a clear statutory mandate, *AFGE, Local 2986 v. FLRA*, 130 F.3d 450, 451(D.C. Cir. 1997) (citing *Leedom* v. *Kyne*, 358 U.S. 184 (1958)); where the Authority exceeds its jurisdiction by finding grievable the application of a law that was not issued for the purpose of affecting working conditions, *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 689 (D.C. Cir. 1994); and where the Authority's proceedings clearly violate a party's constitutional rights. *Cf. Griffith*, 842 F.2d at 495.

Under the first track, a party complaining of a ULP may file a charge with the Authority's General Counsel, who will investigate and issue a complaint if warranted. *OEA*, 824 F.2d at 62; 5 U.S.C. § 7118(a). The matter is then adjudicated by the Authority, and the Authority's decision is subject to judicial review. *Id*; §§ 7118, 7123.

Under the second track, a party may file a grievance in accordance with its collective bargaining agreement that alleges a ULP, a violation of the agreement, or both. As here, either party may seek binding arbitration if the grievance cannot be resolved. 5 U.S.C. § 7121(b)(1)(C)(iii). Limited review of an arbitral award may be sought before the Authority, but judicial review of the Authority's order is unavailable "unless the order involves an unfair labor practice under section 711[6]" of the Statute. The second track is for those who "prefer[ ] to benefit from the relatively expeditious and (presumably) final result that arbitration promises." *OEA*, 824 F.2d at 66.

Orders of the Authority "involve" a ULP only when a ULP, *i.e.*, a violation of § 7116 of the Statute, is an explicit ground for, or is necessarily implicated by, the Authority's decision. *OEA*, 824 F.2d at 67-68. To be reviewable in this Court, "the substance of the [ULP] must at least be discussed in some way in, or be some part of, the Authority's order." *AFGE, Local 2510*, 453 F.3d at 505 (internal quotations omitted). Without even that level of involvement, "there is no risk that

the Authority will leave the path of the law of [ULPs] and yet escape the review that would bring it back to the straight and narrow." *Id*. And where there is no such risk, there is no reason for Congress to have departed from its established policy of granting arbitration results "substantial finality". *Id*.

Neither the arbitrator's award nor the Authority's decision references § 7116 of the Statute or discusses a statutory ULP in any manner. To begin with, the arbitrator did not find that the grievances before him alleged that the Navy committed a statutory ULP; instead, he found that they alleged that the Navy violated a collective bargaining agreement. JA 28. The arbitrator found that the Navy's practice of providing bottled water was grounded in Article 25, Section 6 of the NAGE collective bargaining agreement, and that it evolved as a past practice that modified the written agreement. JA 33-34. Additionally, the arbitrator found that any unilateral change to this past practice was improper, and that any proposed changes were subject to bargaining. JA 34. In so finding, the arbitrator made clear his view that all he needed to do was interpret the agreement, and that "factors(s) . . . not within the essence of the Collective Bargaining Agreement" were "not properly to be considered . . . ." JA 35.[8] Plainly, the award did not involve a ULP.

[8] The Navy, in its exceptions, acknowledged that the arbitrator's decision relied "exclusively" on language in the NAGE collective bargaining agreement. JA 9, 115. The exceptions, like the award and the Authority's decision, contain no discussion, and indeed make no mention, of ULPs.

Nor did the Authority's decision, which did nothing more than address exceptions to the award, involve a ULP.

C. The Navy's Arguments That This Court Has Jurisdiction Over its Appeal Lack Merit

The Navy argues that the Authority's decision "necessarily implicates" a ULP because the basis of the arbitrator's award and the Authority's decision was that the Navy violated its duty to bargain over a change to a condition of employment when it unilaterally ended access to bottled water. PB 18-19. Therefore, the Navy contends, the arbitrator "implicitly ruled" that the Navy committed a ULP, and the Authority affirmed the implicit ruling. PB 19. Stated otherwise, the Navy claims that its violation of its duty to bargain was "identical" to a ULP under § 7116(a)(5) of the Statute. PB 20.

It is true that changing a condition of employment without giving the union notice and an opportunity to bargain over the decision to do so is a ULP in violation of §§7116(a)(1) and (5) of the Statute. *U.S. Dep't of Labor, Wash., D.C., et al*., 38 FLRA 899, 910 (1990) ("*DOL II*"); *U.S. Dep't of Labor, Wash., D.C., et al*., 37 FLRA 25, 36 (1990) ("*DOL I*"). However, neither before the arbitrator nor the Authority did the unions allege that the Agency's conduct constituted a ULP. It is well settled that "[t]he fact that the underlying conduct *could be* characterized as a statutory unfair labor practice will not suffice" to confer jurisdiction in the courts of appeals. *OEA*, 824 F.2d at 67 (emphasis in original).

Underlying conduct that could have been characterized as a ULP, but, as here, was litigated solely as a contractual violation, cannot be the basis for the availability of judicial review of Authority arbitration decisions. *Id.* at 67-68. To hold otherwise would "drastically limit[ ] the finality which Congress intended to attach to arbitral awards." *Id*. at 66. Moreover, in this case, it would, in effect, permit the Navy to undo the aggrieved unions' decision to pursue their disputes along the grievance track as strictly a contract violation, and opt for the "relatively expeditious and (presumably) final result that arbitration promised." *Id*. *See also AFGE, AFL-CIO, Local 916 v. FLRA*, 951 F.2d 276, 279 (10th Cir. 1991) (a party "cannot be permitted at this late stage to transform [a] grievance claim into a statutory claim.")

The Navy, citing *OEA*, notes correctly that an express determination of a ULP charge is not required in order for an Authority decision to "involve" a ULP. PB 22-23.[9] However, this case is readily distinguishable from *OEA*. In *OEA*, this Court held that an Authority decision involved a ULP. There, the Authority had set aside an arbitrator's award, finding that the subject grievance was precluded from arbitration under § 7116(d) of the Statute because the grievance raised the same

[9] The Navy offers no support for its suggestion that the absence of the term "unfair labor practice" in the Authority's decision reflects an attempt to "avoid the judicial review otherwise allowed by Section 7123(a)(1)." PB 22. Instead, as explained *supra*, the award simply did not involve a ULP, and so neither did the Authority's decision reviewing the award.

issue as had previously been raised as a ULP. *See OEA*, 824 F.2d at 70-71. Although the Court rejected the Authority's argument that for jurisdiction to attach, the Authority's decision must address "the merits" of a ULP allegation, the Court nonetheless required more than a passing reference to a ULP. *Id.* at 71. Thus, in finding jurisdiction in *OEA*, the Court stressed that the Authority was required to make a detailed assessment of the previously filed ULP charge and compare the substance and legal theory of the charge to that raised at arbitration. *Id*. In sharp contrast, here the Authority did not assess the substance of any ULP claim. Consequently, the Authority did not even make a "passing reference" to a ULP claim.

In addition, the Navy attempts to dismiss as inapposite several decisions in which this Court found that an Authority decision did not involve a ULP. PB 24-26. In *Ass'n of Civilian Technicians, New York State Council v. FLRA*, 507 F.3d 697 (D.C. Cir. 2007), a majority of a panel of this Court held that the Authority's decision did not involve a ULP but, instead, affirmed an award that failed to address a ULP claim before the arbitrator. Here, too, the Authority's decision did not address a ULP claim; because the unions alleged no ULP claim for either the arbitrator or Authority to address. *See OEA*, 824 F.2d at 67 ("a statutory [ULP] is an unvarying requirement" for a case to "involve[ ]" a statutory ULP).

In *Dep't of the Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994) ("*Dep't of Interior*"), the arbitrator's decision, like the one in this case, was limited to the resolution of a grievance arising under a collective bargaining agreement. There, as here, the Authority found no basis to overturn the arbitrator's construction of the agreement. There, as here, the grievants did not present a statutory duty to bargain issue. And, in *Dep't of Interior*, this Court found that no ULP was involved even though the unions' post-hearing brief, the arbitrator's award, and the Authority's decision made passing references to an "unfair labor practice." *Dep't of Interior*, 26 F.3d at 183-84. The Court characterized the agency's assertion to the contrary as "fanciful." *Id*. Likewise, this Court, in *AFGE, Local 2510*, *supra*, held that mere passing references to a ULP will not suffice to make an otherwise unreviewable Authority decision reviewable. Of course, in this case, there is no record of even passing references to ULPs.

Based on the foregoing, this Court plainly lacks jurisdiction under § 7123(a)(1) of the Statute to review the Authority's decision.

II. THE COURT LACKS JURISDICTION TO CONSIDER THE NAVY'S NEW ARGUMENT THAT THE AUTHORITY IS BOUND BY A FACTUAL FINDING MADE IN ARBITRATION AWARDS THAT WERE NOT PART OF THE RECORD BEFORE THE AUTHORITY.

The Navy asks this Court to consider two awards in arbitration proceedings involving the Navy, NAGE and FUSE which concerned grievances different from

those involved in this case and decided by a different arbitrator. Those awards, which were issued after the arbitrator's award at issue here but before the Authority's decision reviewing that award, are not part of the record in this case.[10] In those awards, the arbitrator made a finding that the unions failed to establish that the Navy's water supply was not potable.

The Navy would like this Court to, in effect, rewrite the award that the Authority upheld here. To accomplish this, the Navy asks this Court to set aside the arbitrator's determination not to make a finding on whether the Navy water supply was potable. Then, the Navy asks this Court to replace that determination with the finding of a different arbitrator that the unions failed to establish that the Navy water supply is not potable. Next, the Navy asks the Court, based on such a reconstructed arbitrator's award, to find that the award, and the Authority's affirmance thereof, are contrary to the Anti-Deficiency Act and the Purpose Statute. *See* PB 33. In other words, the Navy is asking this Court to assume the roles of the arbitrator and the Authority, a request this Court should flatly reject.

What the Navy could have done, instead, but failed to do, was to bring these subsequent awards to the Authority's attention in a motion for reconsideration. It cannot raise the issue of the relevance of these awards for the very first time before this Court.

[10] The Navy has attached the awards to its brief as an addendum.

Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in review proceedings, but that were not presented to the Authority. As this Court has stated, the Court's jurisdiction to review the Authority's decisions does not extend to an "objection that has not been urged before the Authority." *AFSCME*, 395 F.2d at 451-52, *citing* 5 U.S.C. § 7123(c)[11] and *EEOC v. FLRA*, 476 U.S. 19, 23 (1986). In the absence of extraordinary circumstances, Section 7123(c) precludes this Court from considering an objection if the petitioner has not raised the objection before the Authority in a request for reconsideration. *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004); *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993).

Under the Authority's regulations, after a final decision of the Authority, a party to the proceeding who can establish "extraordinary circumstances" may move for reconsideration of the decision. *See* 5 C.F.R. § 2429.17. The Authority has found that extraordinary circumstances exist in a limited number of situations including, among others, "evidence, information or issues critical to the decision had not been presented to the Authority." *Air Force, 375th Combat Support Group, Scott AFB, IL*, 50 FLRA 84, 86 (1995) ("*Scott AFB*"). As explained below, the

[11] Section 7123(c) provides: "[n]o 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."

Navy could have moved for reconsideration so that the Authority could consider the significance, if any, of the two arbitration awards to the Authority's decision, but did not.

The chronology of relevant events is as follows: On August 10, 2006, FUSE filed a grievance entitled "Water Quality and Testing". JA 96; PB, Addendum. On August 24 or 27, 2006, NAGE did the same. JA 94; PB Addendum. In December of 2006, FUSE and NAGE filed grievances regarding the loss of access to bottled water. JA 94-97. When these December 2006 grievances were not resolved, they were submitted to arbitration before Jerome H. Wolfson. JA 27. The grievances were consolidated and entitled "Removal of Bottled Water and Access to Quality Water." JA 26. Arbitrator Wolfson issued his award on June 19, 2008. JA 37. The Navy filed exceptions to Arbitrator Wolfson's award with the Authority on July 23, 2008. JA 4-21. On October 24 and 27, 2008, Arbitrator Laurie G. Cain issued awards in the "Water Quality and Testing" grievances filed, respectively, by FUSE and NAGE. PB Addendum. On July 29, 2010, the Authority issued its decision denying the Navy's exceptions to Arbitrator Wolfson's award. JA 131-139. Under 5 C.F.R. § 2429.17 of the Authority's regulations, the Navy had ten days after service of this decision to move for reconsideration.[12]

[12] The Navy could also have filed a supplemental submission under 5 C.F.R. § 2429.26, entitled "Other documents." Under § 2429.26, the Authority may, in its discretion, grant a party leave to file "other documents" as deemed appropriate.

Well before July 29, 2010, the Navy should have known, and does not assert to the contrary, of the existence of Arbitrator Cain's awards. Thus, the Navy had the opportunity, under 5 C.F.R. § 2429.17, to move for reconsideration of the Authority's decision in order to present the Cain awards, along with any evidence in the record before Arbitrator Cain, as information "critical to the decision." *See Scott AFB*, 50 FLRA at 86. Then, the Authority could have decided whether the awards contained critical information warranting a remand to Arbitrator Wolfson. Because the Navy could have, but failed to, raise this matter before the Authority, § 7123(c) of the Statute precludes it from doing so before this Court.

Nor should this Court grant the Navy's request, PB 9 n.4, 39, to take judicial notice of the extra-record Cain awards pursuant to Rule 201(b) of the Federal Rules of Evidence. Rule 201(b) provides that a judicially noticed fact must be one "not subject to reasonable dispute" in that it is either "generally known within the territorial jurisdiction" of the Court or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Courts "have tended to apply Rule 201(b) stringently. " *See Lussier*

See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Corr. Ctr., Chi., Ill.., 63 FLRA 423, 423 n. 1 (2009) (parties may be granted leave to address the applicability of court decisions that issued while the parties' dispute was pending before the Authority); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex*., 58 FLRA 77, 79 (2002) (it is the parties' responsibility to advise the Authority of relevant developments that occur after the submission of their filings that may have an effect in a pending case).

v. Runyon, 50 F.3d 1103, 1114 (1st Cir. 1995) (citations omitted). The Navy has not even attempted to show that either fork of the standard in Rule 201(b) applies to the Cain awards' finding that the unions failed to demonstrate that the Navy water supply was not potable. Further, the decisions of this Court that the Navy cites in support of its Rule 201(b) argument, PB 39, have nothing to do with Rule 201(b) or judicial notice of adjudicative facts. In any event, even if this Court opts to take judicial notice of the existence of the Cain awards, for the reasons discussed *supra*, the Court should give no weight to any facts therein.

III. ASSUMING, ARGUENDO, THAT THE COURT HAS JURISDICTION OVER THIS MATTER, THE AUTHORITY'S DECISION IS NOT CONTRARY TO THE ANTI-DEFICIENCY ACT OR THE PURPOSE STATUTE.

As discussed *infra*, this Court lacks jurisdiction under § 7123(a)(1) of the Statute to review the Authority's decision on exceptions to an arbitration award because it does not involve a ULP. Assuming *arguendo*, though, that this Court has jurisdiction, it should uphold the Authority's decision as reasonable and not contrary to law.

As the decision explains, beginning in the mid-1990s, when it was discovered that various Navy buildings had lead-contaminated water fountains, the Navy purchased and provided bottled water for bargaining unit employees working in those buildings. JA 132. The Navy used appropriated funds to purchase the

bottled water. JA 84, 90.[13] In December of 2006, after the Navy determined that its drinking fountains were safe, it unilaterally ended its practice of providing bottled water. *Id*. As the Authority noted, the Navy did not dispute that its provision of bottled for many years was an established past practice and, thus a condition of employment.[14] JA 135. Citing its decisions in *DOL I*, 37 FLRA at 36, and *DOL II*, 38 FLRA at 910, the Authority held that the Navy was obligated to bargain over the discontinuation of the past practice unless it was precluded from doing do by statute or regulation. *Id*. The Authority considered, but rejected, the Navy's argument that, because of its pronouncement that its water supply was potable, bargaining over the discontinuation of its past practice was precluded by the Anti-Deficiency Act, the Purpose Statute, and Comptroller General decisions on bottled water purchases. JA 136.

The Navy suggests that because the Authority "did not dispute that the water was tested and found to be safe", it erred in concluding that neither the fiscal laws nor the Comptroller General decisions prohibited the Navy from exercising through negotiation its discretion to determine whether there was sufficient evidence of the necessity to purchase bottled water. PB 33. But, a finding that the

[13] Presumably, before the Navy ended its practice of providing bottled water, it regarded the practice as authorized by fiscal laws. Apparently, its view changed when it determined in 2006 that its fountain water was potable.

[14] The Statute defines "conditions of employment" as "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. § 7103(a)(14).

Navy determined that its water supply was potable is very different from a finding that the Navy's water supply actually was potable when the Navy made its determination. The arbitrator made the former finding, but chose not to make the latter finding. JA 33, 35.[15] The Navy, recognizing that the Authority did not have in the record before it a finding that the water supply was potable, now asks this Court to graft such a finding from the Cain arbitration awards onto the arbitration award that the Authority reviewed. As discussed in Part II, *supra*, this Court should not honor such an extraordinary request.

Instead, if the Court is to determine the reasonableness of the Authority's decision, it must do so based on the record that was before the Authority, not on the record that the Navy now wishes was before the Authority. The Authority's reasonable, and undisputed, determination that the Navy's provision of bottled water is a condition of employment is entitled to deference. And, in light of the absence of a finding in the record that the Navy's water supply was potable, the Authority's determination that the fiscal laws do not excuse the Navy from its bargaining obligation is sound. Accordingly, the Court should uphold the Authority's decision.

Finally, should this Court, somehow, find that the Authority's decision is flawed because it did not take into consideration the Cain awards that were not

[15] In its exceptions, the Navy did not except to the arbitrator's decision not to make a potability finding. JA 4-24.

before it, the Court should remand the case to the Authority. As the Navy acknowledges, a court of appeals should remand a case to an agency for a decision of a matter that a statute places primarily in an agency's hands. PB 36 (citations omitted). The relevant statute here, § 7122 of the Statute, places in the Authority's hands the review of exceptions to arbitral awards. Nonetheless, the Navy argues that remand would be unnecessary because it would convert judicial review "into a ping pong game." PB 35-36. Such a concern is especially unwarranted here where the Authority had no opportunity to consider the Cain awards because the Navy failed to bring them to the Authority's attention. This Court should not enable the Navy in its blatant attempt to evade the statutory prohibitions in § 7123(c) and have this Court decide matters that the Navy could have brought to the Authority's attention in accordance with Authority procedures.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction and the Navy's new argument concerning the Cain awards should be rejected as barred by § 7123(c) of the Statute. Alternatively, the petition for review should be dismissed on the merits. Or, alternatively, the Court should remand the case to the Authority so that it may take into consideration the arbitral awards that were not before it.

Respectfully submitted,

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June 1, 2011

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 7,461 words excluding exempt material.

/s/ Rosa M.Koppel
Rosa M. Koppel
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Certificate of Service

I hereby certify that on this 1st day of June, 2011, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Agency by way of the Court's ECF notification system and by hand delivery of hard copies to:

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Relevant Statutes, Regulations, and Rules

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§ 7103. Definitions; application

(a) For the purpose of this chapter—

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

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

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

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

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter.

*****

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person

involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

§ 7121. 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.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this

section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

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

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

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

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

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

§ 7123. Judicial review; enforcement

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

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

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

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

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

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

whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

31 U.S.C. § 1301

(a) Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

31 U.S.C. § 1341

(a)
(1) An officer or employee of the United States Government or of the District of Columbia government may not—
(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation;
(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;
(C) make or authorize an expenditure or obligation of funds required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985; or
(D) involve either government in a contract or obligation for the payment of money required to be sequestered under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.
(2) This subsection does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government.
(b) An article to be used by an executive department in the District of Columbia that could be bought out of an appropriation made to a regular contingent fund of the department may not be bought out of another amount available for obligation.

5 C.F.R. § 2429.17

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

5 C.F.R. § 2429.26

(a) The Authority or the General Counsel, or their designated representatives, as appropriate, may in their discretion grant leave to file other documents as they deem appropriate.

(b) A copy of such other documents shall be served on the other parties.

Rule 201, Federal Rules of Evidence

(a) Scope of rule.

This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary.

A court may take judicial notice, whether requested or not.

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.