ORAL ARGUMENT NOT YET SCHEDULED
No. 12-1463

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

BROADCASTING BOARD OF GOVERNORS,
OFFICE OF CUBA BROADCASTING,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1812,
Intervenor.

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

FINAL BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority" or "FLRA") were the Broadcasting Board of Governors, Office of Cuba Broadcasting ("OCB" or "Agency") and the American Federation of Government Employees, Local 1812 ("AFGE" or "Union"). OCB is the petitioner in this Court proceeding, the Authority is the respondent, and AFGE is the intervenor. There are no amici before this Court.

B. Ruling Under Review

The ruling under review in this case is *Broadcasting Board of Governors, Office of Cuba Broadcasting and American Federation of Government Employees, Local 1812*, Case No. 0-AR-4800, issued on September 25, 2012, reported at 66 FLRA (No. 182) 1012.

C. Related Cases

This case has not previously been before this Court or any other court. However, on January 3, 2013, the FLRA filed a motion to dismiss this case for lack of jurisdiction under 5 U.S.C. § 7123(a). The Court referred the question of the Court's jurisdiction to the merits panel and directed the parties to address that issue in their briefs. See Order dated June 18, 2013. Counsel for the FLRA is

unaware of any cases pending before this Court that are related to this case within the meaning of Circuit Rule 28(a) (1) (C).

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Attorney for the Respondent

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GLOSSARY

AFGE	American Federation of Government Employees, Local 1812
Agency	Broadcasting Board of Governors, Office of Cuba Broadcasting
Authority	Federal Labor Relations Authority
CBA	Collective Bargaining Agreement
FLRA	Federal Labor Relations Authority
FSLMRS	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
I&I bargaining	Impact and implementation bargaining
JA	Joint Appendix
OCB	Broadcasting Board of Governors, Office of Cuba Broadcasting
OPM	Office of Personnel Management
PB	Petitioner's Brief
RIF	Reduction in Force
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
ULP	Unfair labor practice
Union	American Federation of Government Employees, Local 1812

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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 September 25, 2012. The

Authority's decision is published at 66 FLRA (No. 182) 1012. A copy of the decision is included in the Joint Appendix ("JA") 494. 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 under § 7123(a)(1) of the Statute.

STATEMENT OF THE ISSUE

Does the Court have jurisdiction under 5 U.S.C. § 7123(a) to review the Authority's decision on exceptions to an arbitration award when the decision does not involve or necessarily implicate an unfair labor practice or implicate sovereign immunity?

STATEMENT OF THE CASE

Petitioner, the Broadcasting Board of Governors, Office of Cuba Broadcasting ("Agency"), seeks review of a decision of the Authority pursuant to § 7122 of the Statute. In its decision, the Authority dismissed, in part, and denied, in part, the Agency's exceptions to an arbitration award. One exception that the Authority denied was to the arbitrator's finding that the Agency violated contractual provisions obligating it to bargain over the impact and implementation ("I&I") of reductions-in-force ("RIFs") when it refused to engage in I&I

[1] Pertinent statutory provisions and regulations are set forth in the Statutory and Regulatory Addendum to this brief.

bargaining with the American Federation of Government Employees, Local 1812 ("Union") over a RIF. Having denied that exception, the Authority found it unnecessary to also address the Agency's exception to the arbitrator's separate and independent finding that the Agency's refusal to bargain was an unfair labor practice ("ULP") in violation of the Statute, and that the "covered by" defense was not available to the Agency.

The Authority's decision also denied the Agency's exceptions to the arbitrator's findings that the Agency violated contractual provisions governing RIFs and failed to prove that the RIF was bona fide.

STATEMENT OF THE FACTS

A. Factual Background and the Arbitrator's Award

The Agency is a component of the Broadcasting Board of Governors. JA 494 (66 FLRA at 1012). Congress reduced the Agency's 2010 fiscal year budget by $4.2 million. *Id*. Although the Agency reduced its operating costs, it ultimately determined that a RIF was necessary. *Id*. The Agency informed the Union of the impending RIF but told the Union that it would not engage in I&I bargaining over the RIF because, in the Agency's view, the parties' collective bargaining agreement ("CBA") did not require that. JA 494 (66 FLRA at 1012).

The Union filed an institutional grievance alleging that the Agency violated the CBA and committed a ULP. The grievance was unresolved, and the parties

proceeded to arbitration. JA 494 (66 FLRA at 1012). In the arbitration, the parties were unable to stipulate the issues. As a result, the arbitrator framed the issues as follows: (1) "[i]s the grievance arbitrable as a whole and/or only in part?" [2]; (2)"[d]id the agency violate the [Statute] and/or the [CBA], including past practice, in the matter of the . . . RIF . . . .?" ; and (3) "[w]hat shall be the remedy?" JA 47-48 (Award at 3-4); JA 494 (66 FLRA at 1012).

The arbitrator found that the Agency violated a duty under Article 3 and Article 30, Section 2 of the CBA[3] of I&I bargaining over RIFs. JA 105 (Award at 61). She found that the parties' bargaining history demonstrated their intent to engage in I&I bargaining over RIFs and noted that the Union had rejected the Agency's attempts over the years to modify Articles 3 and 30. JA 104-108 (Award at 60-64).

The arbitrator rejected the Agency's assertion that language in Article 3 and Article 30, Section 2 foreclosed I&I bargaining over the RIF. JA 105 (Award at 61). She disagreed with the Agency that Article 3 excused it from its bargaining obligation because it applies to personnel policies and procedures that are not negotiable. *Id*. Instead, she found that because Article 30 concerns negotiated

[2] The arbitrator concluded that the grievance was arbitrable, and the Agency did not challenge that conclusion. JA 100-102 (Award at 56-58); JA 494 (66 FLRA at 1012 n.2).

[3] Article 3 and portions of Article 30 of the CBA appear in the appendix to the Authority's Decision. JA 503-505 (66 FLRA at 1021-23).

procedures that cover RIFs, it followed that the parties believed other such procedures *would* be negotiable. *Id*. The arbitrator also found that Article 3 expressly requires the Agency to provide the Union notice and "reasonable opportunity to request negotiations with the Agency on matters relating to the impact of the changes on the bargaining unit." *Id*.

As for the ULP allegation, the arbitrator rejected the Agency's assertion that it did not violate the Statute when it refused to engage in I&I bargaining because the matters over which the Union sought to negotiate were already "covered by" the CBA. JA 108 (Award at 64). Instead, the arbitrator found that the CBA could not cover all possible appropriate arrangements the parties could negotiate, and that they had negotiated five prior I&I agreements for other RIFs notwithstanding the existing CBA provisions. *Id*. Further, the arbitrator found that the Agency violated a continuing past practice of engaging in I&I bargaining over RIFs whenever the Union requested it. JA 111-112 (Award at 67-68). The arbitrator also found that the Agency failed to prove that the RIF was bona fide, that is, necessitated by either a shortage of funds or lack of work. JA 113-122 (Award at 69-78).

Then, the arbitrator found that the Agency violated RIF provisions in Article 30 in addition to Section 2. As relevant here, the arbitrator found that the Agency violated Section 4(e), which she construed as giving excepted-service employees

affected by a RIF priority consideration for vacant positions, including competitive-service positions. JA 123, 124-125 (Award at 79, 80-81).

The arbitrator ordered the Agency to rescind the RIF, reinstate all affected employees to their previous positions, and give them back pay. JA 138 (Award at 94). She retained jurisdiction to consider any petition for attorney fees that the Union might submit. *Id*.

B. The Authority's Decision

Pursuant to § 7122 of the Statute, the Agency filed exceptions to the award with the Authority. JA 494 (66 FLRA at 1012). In its exceptions, the Agency claimed that the arbitrator's interpretation of the CBA as requiring I&I bargaining over RIFs conflicted with the "covered-by" doctrine. JA 495-496 (66 FLRA at 1013-14). In addition, the Agency contended that the award was contrary to 5 C.F.R. § 351.705(b)(6)[4] because the arbitrator construed Article 30, Section 4(e) of the CBA as requiring the Agency to give excepted-service employees affected by a RIF priority consideration for vacant competitive-service positions. JA 496 (66 FLRA at 1014). Also, the Agency contended that the arbitrator exceeded her authority by allowing individual employees to obtain relief as part of an

[4] OPM regulations, at 5 C.F.R. § 351.705(a), give agencies discretion to permit employees affected by a RIF to "displace" certain other employees. Section 351.705(b)(6) states that agency provisions adopted pursuant to § 351.705(a) "[m]ay not provide for the assignment of an employee in an excepted position to a position in the competitive service." 5 C.F.R. § 351.705(b)(6) (2013).

institutional grievance. JA 496 (66 FLRA at 1014). Further, the Agency argued that the award failed to draw its essence from the CBA. JA 497 (66 FLRA at 1015).

The Authority dismissed some of the Agency's exceptions as barred by the Authority's regulations. As relevant here, the Authority dismissed the Agency's exception that the arbitrator exceeded her authority when, for an institutional grievance, she granted relief to individual employees. The Authority held that the exception was barred because the Agency failed to raise that objection during arbitration. JA 498 (66 FLRA at 1016).[5]

The Authority denied the Agency's remaining exceptions, including that the award was contrary to 5 C.F.R. § 351.705(b)(6) and that it failed to draw its essence from the CBA. JA 499-501 (66 FLRA at 1017-19). As to the latter exception, the Authority, citing 5 U.S.C. § 7122(a)(2), explained that it applies "the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector." JA at 500 (66 FLRA at 1018). Applying that standard, the Authority held that the Agency failed to demonstrate that the arbitrator's interpretation of Article 3 and Article 30, Section 2 as providing for

[5] In its Statement of Issues, filed on December 17, 2012, the Agency stated as one of its issues: "2. Whether the union could challenge a reduction-in-force itself and seek relief for individual employees." It appears that the Agency has since abandoned that issue.

I&I bargaining over RIFs was "irrational, unfounded, implausible, or evidenced a manifest disregard of the" CBA. JA 501 (66 FLRA at 1019). Further, the Authority denied the Agency's exceptions to the arbitrator's findings that the Agency breached other RIF provisions in Article 30. *Id*.

Although the Authority acknowledged the Agency's "covered-by" defense to the allegation that it committed a ULP by violating the Statute, it did not address the defense's substance at all. Instead, the Authority explained that addressing the "covered by" defense would be "unnecessary" because "[t]he [a]rbitrator's contractual interpretation . . . of the parties' agreement serves as a separate and independent basis for the award, and the Agency has not established that this basis is deficient." JA 501 (66 FLRA at 1019 n.5).

STANDARD OF REVIEW

The standard of review of Authority decisions presupposes that the Authority's decision is properly before this Court. 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*").

Even assuming that the Authority's decision is properly before the Court, the standard of review that would apply 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. *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. 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." *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

SUMMARY OF ARGUMENT

Judicial review of the Authority's decision, which reviewed exceptions to an arbitrator's award, is foreclosed. Under 5 U.S.C. § 7123(a)(1), Congress specifically precluded judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricted the jurisdiction of the courts of appeals to review such decisions to instances that "involve[] an unfair labor practice." As this Court has held, an Authority decision on exceptions to an arbitrator's award

does not "involve" a ULP when it does not address the substance of a ULP in any way. In order for an Authority decision to "involve" a ULP, a statutory ULP must be either an explicit ground for, or necessarily implicated by, the decision.

The Agency concedes that a ULP is not an explicit ground for the Authority's decision, which expressly declines to address the ULP allegation that was before the arbitrator. It argues, though, that the decision necessarily implicates a ULP. That is incorrect. Applying the deferential standard of review in the Statute, the Authority denied the Agency's exceptions to the arbitrator's interpretation of the CBA as obligating the Agency to engage in I&I bargaining over RIFs, finding that the interpretation drew its essence from the CBA. Having done that, the Authority concluded that it was unnecessary to also address whether the Agency committed a ULP by violating a statutory duty of I&I bargaining. The Authority reached this conclusion based on its longstanding "separate and independent grounds" doctrine, under which the Authority need not address an exception where, as here, its resolution would not affect the overall disposition of the case. Once the Authority denied exceptions to the award's findings of a contractual duty of I&I bargaining over RIFs, it was unnecessary for it to then consider whether there was also a statutory duty. The overall disposition of the case would be the same no matter how the ULP issue was resolved - - that there was a duty of I&I bargaining over RIFs.

This Court should reject the Agency's assertion that the Authority's decision should be remanded or reversed because it does not address the Agency's "covered by" defense to the ULP allegation. To begin with, the argument is barred from judicial review by § 7123(c) of the Statute because the Agency did not raise it in a motion for reconsideration before the Authority. Further, the argument lacks merit because it is based on the flawed premise that if there is no statutory duty to bargain, then there is no contractual duty to bargain either.

Even though the Authority's decision plainly does not "involve" a ULP, the Agency argues that, nonetheless, it is properly before the Court as" implicating sovereign immunity" because the award is contrary to OPM regulations prohibiting an excepted-service employee affected by a RIF from displacing a competitive-service employee. But the CBA, as interpreted by the arbitrator, does not require any such displacements.

Thus, the Court lacks jurisdiction to review the Authority's decision.

ARGUMENT

THE COURT LACKS JURISDICTION UNDER 5 U.S.C. § 7123(a) TO REVIEW THE AUTHORITY'S DECISION ON EXCEPTIONS TO AN ARBITRATION AWARD WHEN THE DECISION DOES NOT INVOLVE OR NECESSARILY IMPLICATE AN UNFAIR LABOR PRACTICE OR IMPLICATE SOVEREIGN IMMUNITY

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). An examination of the Statute's 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 Agency's 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 decisions that review exceptions to arbitration awards.

A. The Statute's Language and Legislative History Make it Clear That Congress Intended to Bar Judicial Review of Authority Decisions on Exceptions to Arbitrators' 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][6] 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 § 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 Authority 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 Agency seeks here has been recognized by all of the courts of appeals, including this one, that have considered the issue.[7]

The legislative history of § 7123(a) underscores the tight restrictions Congress placed on review of Authority decisions issued under § 7122 involving an award by an arbitrator. "The rationale for circumscribed judicial review of such

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[6] 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.*

[7] *See Ass'n of Civilian Technicians, NYS Council v. FLRA*, 507 F.3d 697, 698-99 (D.C. Cir. 2007) ("*ACT*"); *AFGE, Local 2510*, *supra*; *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, Mo. Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Phila. Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992); *Griffith*, *supra*; *OEA*, *supra*; *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 27 (2nd 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).

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 Authority. *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[']s awards." *Legis. Hist.* at 821. As discussed

below, the Authority's decision plainly does not involve a ULP. Nor does it implicate sovereign immunity. Therefore the Agency's petition for review must be dismissed under § 7123(a) of the Statute for lack of jurisdiction.

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

1. The decision neither involves nor necessarily implicates an unfair labor practice.

This Court has considered the circumstances in which it can be said that an Authority decision "involves [a ULP]" for purposes of § 7123(a)(1). *See ACT,* 507 F.3d at 699-700; *AFGE, Local 2510,* 453 F.3d at 503-04; *OEA*, 824 F.2d at 63-66. Where a statutory ULP has not "actually been considered or addressed by the Authority," the requirement of § 7123(a)(1) is not met and the Court lacks jurisdiction. *OEA*, 824 F.2d at 67. In order for an Authority decision to "involve" a ULP, that is, to be judicially reviewable, "a statutory [ULP] must be either an explicit ground for, or necessarily implicated by, the Authority's decision." *Id*. at 68-69. That is, to be judicially reviewable, the Authority's decision must discuss, in some way, the *substance* of a ULP allegation. *AFGE, Local 2510,* 453 F.3d at 505 (finding no jurisdiction because the Authority's order "did not engage at all with the substance of the [ULP]"). Further, in determining whether judicial review is available, a court will consider whether review would serve to insure uniformity in case law concerning ULPs. *Id.* In order to qualify as an order that "involves [a

ULP],” the Authority’s decision “*itself* must have some ‘bearing upon the law of [ULPs].’” *ACT*, 507 F.3d at 700 (quoting *AFGE, Local 2510*, 453 F.3d at 505) (emphasis added). A “passing reference to a [ULP] or a mere effect on the reviewability of a [ULP] claim is not enough.” *Id*.

It is plain here that the Authority did not address or consider the ULP allegation when it denied the Agency’s exceptions to the arbitrator’s findings that the Agency had a duty of I&I bargaining over the RIF. Nor did the Authority address the Agency’s “covered by” defense to the ULP charge. Under the “covered by” doctrine, “[i]f a collective bargaining agreement ‘covers' a particular subject, then the parties to that agreement ‘are absolved of any further duty to bargain about that matter during the term of the agreement.’ ” *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91, 94–95 (D.C. Cir. 2011) (quoting *Dep't of the Navy, Marine Corps Logistics Base, Albany, Ga. v. FLRA*, 962 F.2d 48, 53 (D.C. Cir.1992)) (“*Federal Bureau of Prisons*”). The doctrine serves as a defense to an agency’s alleged unlawful refusal to bargain under the *Statute*. *NTEU v. FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Here, the Authority based its determination on the duty to bargain entirely on the separate and independent ground of the arbitrator’s interpretation of the

CBA, specifically, Article 3 and Article 30, Section 2, as imposing a *contractual* duty of I&I bargaining over RIFs. JA 500-501 (66 FLRA at 1018-19).[8]

The Authority, as it was required to do, applied a deferential standard of review to the arbitrator's interpretation of the CBA. *See* 5 U.S.C. § 7122(a)(2); *United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960) ("*United Steel*") (It is the arbitrator's construction of a CBA that the parties bargain for). This Court has recognized that the Authority's role in reviewing an arbitrator's interpretation of a CBA is "limited to that of 'federal courts in private sector labor-management relations.'" *U.S. Dep't of the Treasury, U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 687 (D.C. Cir. 1994) (citing 5 U.S C. § 7122(a)(2)).

In this role, the Authority must uphold the arbitrator's contractual interpretation if it "draws its essence" from the parties' agreement. *Id*. (citing *United Steel*, 363 U.S. at 597). That standard is met if the arbitrator "premise[d] his award on his construction of the contract." *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441 (D.C. Cir. 2009) (citing *United*

[8] For this reason, this case is readily distinguishable from *U.S. Department of the Navy v. FLRA*, 665 F.3d 1339 (D.C. Cir. 2012), in which this Court held that an Authority decision on exceptions to an arbitrator's award "necessarily implicated" a ULP because, among other reasons, the Authority "did not identify any provision of the [CBA] as creating a duty to bargain." *Id*. at 1345. The Court's other reasons, equally inapplicable here, were that the Authority's decision relied upon statutory ULP case law and that one of the unions who had brought a grievance had no CBA with the agency. *Id*. at 1346.

Steel, 363 U.S. at 597). *See also Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (as long as an arbitrator is even arguably construing the CBA, that a court is convinced the arbitrator committed serious error does not suffice to find the award deficient).

Applying this standard, the Authority found that the arbitrator's interpretation of the CBA as requiring I&I bargaining over RIFs drew its essence from the CBA. Having denied the Agency's essence exceptions to the arbitrator's findings of a *contractual* duty of I&I bargaining, the Authority found, under its "separate and independent grounds" doctrine, that it was unnecessary to also review the Agency's "covered by" exception to the arbitrator's finding that the Agency committed a ULP by violating a *statutory* duty to bargain. JA 501 (66 FLRA at 1019, n. 5).

The Authority developed its "separate and independent grounds" doctrine more than 20 years ago, (*see U.S. Dep't of the Treasury, IRS, Indianapolis District*, 36 FLRA 227, 231 (1990)), and has applied the doctrine consistently. The doctrine is based on the Authority's common-sense view that an exception need not be addressed when, as here, "the resolution of the exception will not affect the overall disposition of the case." *U.S. Dep't of Labor, Wash., D.C.*, 55 FLRA 1019, 1023 (1999) ("*DOL*"). Under the doctrine, when an arbitrator bases an award on two or more separate and independent grounds, the Authority will not find an award

deficient when the party challenging the award fails to establish that *all* of those grounds are deficient. *See, e.g., U.S. Dep't of the Air Force, Kirtland AFB, Air Force Materiel Command, Albuquerque, N.M.*, 62 FLRA 121, 123 (2007); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.,* 56 FLRA 292, 299 (2000); *Office and Prof'l Emps. Int'l Union, Local 268*, 54 FLRA 1154, 1158-59 (1998). The Authority, having found that the Agency failed to establish that the contractual basis for the award was deficient, did not also need to address whether the separate and independent statutory basis was deficient. The overall disposition of the case would be the same no matter how the ULP issue was resolved - - that there was a duty of I&I bargaining over the RIF.

2. The Court should reject the Agency's argument that the Authority erred in declining to address the Agency's "covered by" defense.

a. Section 7123(c) bars the Agency from making this argument before the Court.

The Agency urges the Court to either remand the Authority's decision or reverse it outright because the Authority did not address the Agency's "covered by" defense. Petitioner's Brief ("PB") at 14-15; 19-22. The Agency asserts that a ULP was "necessarily implicated" in, even though not an explicit ground for, the Authority's decision because of the Agency's "covered by" defense (PB at 40), and that "the scope and meaning of the CBA is an integral part of the 'covered by' analysis, not independent of it." PB at 14. The Agency could have, but did not,

make this argument before the Authority in a request for reconsideration.[9] Therefore, the Court may not consider it.

Absent extraordinary circumstances, the Court is precluded from considering an objection if the petitioner did not raise it with 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, 245-46 (D.C. Cir. 1993). The Court's "jurisdiction to review the Authority's decisions does not extend to an 'objection that has not been urged before the Authority.'" *Am. Fed'n of State, Cnty. & Mun. Emps. Capital Area Council 26 v. FLRA*, 395 F.3d 443, 451-52 (D.C. Cir. 2005) (citations omitted). In promulgating § 7123(c), Congress intended that the Authority be the first to analyze issues arising under the Statute, "thereby bringing its expertise to bear on the resolution of those issues." *EEOC v. FLRA*, 476 U.S. 19, 23 (1986). Section 7123(c) requires that a party "present its own views to the Authority in order to preserve a claim for judicial review." *U.S.*

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[9] Under 5 C.F.R. § 2429.17, after the Authority has issued a final decision or order, a party –

> who can establish . . . 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. . . . .

5 C.F.R. § 2429.17 (2013).

Dep't of the Treasury, Bureau of Public Debt v. FLRA, 670 F.3d 1315, 1319 (D.C. Cir. 2012). Even when all the party claims to be doing is adding "a somewhat different twist" on an argument it had made before the Authority, this Court has held that the new twist would not properly be before it. *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987).

The Agency does not demonstrate any extraordinary circumstances that would excuse its failure to raise before the Authority in a request for reconsideration its argument, raised for the first time in its opposition to the Authority's motion to dismiss, that the Authority erred in not reaching the ULP issue. Therefore, § 7123(c) precludes this Court from considering this argument.

b. The argument lacks merit

Even if the Court finds that it has jurisdiction to address the Agency's new argument, it should reject the argument as baseless. The Agency has no viable explanation for its assertion that the Authority erred when it treated the contractual and ULP bases for the award as separate and independent of one another. Indeed, that is how the Agency treated these bases in its exceptions, contending that the arbitrator's rejection of the "covered by" defense was contrary to the *Statute* (JA 165-168 (Agency's Exceptions at 19-22)) *and* that her finding of a contractual duty to bargain failed to draw its essence from the *contract*. JA 177-178 (Agency's Exceptions at 31-32). In so doing, the Agency recognized that there are two

authorities for the creation of bargaining duties, the duty to bargain under the Statute and a duty to bargain established by contract. *See*, *e.g.*, *U.S. Dep't of the Treasury IRS Wage and Inv. Div.*, 66 FLRA 235, 240-41 (2011) (agency's statutory arguments provided no basis for finding that arbitrator's conclusion regarding contractual violation was deficient). The Authority, having denied the Agency's exceptions to the arbitrator's finding that there was a *contractual* duty of I&I bargaining over RIFs, did not then need to address exceptions to the arbitrator's finding that there also was a *statutory* duty. Resolution of the ULP allegation would not have affected "the overall disposition of the case." *DOL*, 55 FLRA at 1023.

Yet, the Agency contends that the ULP and contractual bases for the award are "integrally related" because "if the statutory 'covered by' defense applies, the agency has no duty to bargain – period – whether under the statute *or* a collective bargaining agreement." PB at 20 (citation omitted) (emphasis in original). Similarly, the Agency contends that a contractual duty to bargain is not independent of a statutory duty to bargain. PB at 42. These contentions are premised on a fundamental misunderstanding of collective bargaining under the Statute. This erroneous premise is that parties may not enter into, and arbitrators may not enforce, agreements to bargain anything that is not absolutely required by the Statute.

3. The Court should reject the Agency's argument that application of the "covered by" defense requires reversal of the Authority's decision

As established above, once the Authority denied exceptions to the arbitrator's findings of a contractual duty of I&I bargaining over the RIFs, it had no need to address the Agency's "covered by" defense to the charge that the Agency violated a statutory duty to bargain. Nonetheless, the Agency asks this Court to apply the "covered by" defense for the Authority and reverse the Authority's decision. PB at 23-36. The Agency, proposing its own interpretation of the CBA in place of the arbitrator's interpretation for which it had bargained (*see United Steel*, 363 U.S. at 599), asserts the following: (1) the "comprehensiveness" of Article 30 of the CBA demonstrates that the "covered by" defense applies (PB at 23-27); (2) Article 30 does not contain a "reopener" clause imposing a duty of I&I bargaining over RIFs (PB at 27-30); and (3) the arbitrator erred in relying on parol evidence rather than exclusively on the "plain, unambiguous language of" the CBA (PB at 30-36). The Court should reject each of these assertions as either lacking in merit or as not properly before it.

a. The CBA's purported "comprehensiveness," by itself, does not make the "covered by" defense applicable.

The Agency, interpreting the CBA on its own, concludes that the "comprehensiveness" of Article 30, by itself, demonstrates that the CBA leaves no room for any I&I bargaining over RIFs and, hence, that the "covered by" doctrine

applies. PB at 24-25. The Agency seeks support for its conclusion from this Court's decision in *Federal Bureau of Prisons*, *supra*. But, unlike the arbitrator whose award was at issue in that case, the arbitrator here interpreted the CBA as containing a provision for further I&I bargaining, and the Authority found this interpretation to draw its essence from the CBA. Therefore, *Federal Bureau of Prisons* does not support the Agency's argument that the "covered by" defense should also apply here.

b. The Court should not grant the Agency's request for de novo review of the arbitrator's interpretation of the CBA as providing for I&I bargaining over RIFs.

The Agency asks the Court to adopt its interpretation of the CBA and set aside the arbitrator's interpretation (which the Agency inaccurately refers to as an interpretation that "the Authority deduced . . . ." PB at 28) of Articles 3 and 30 as requiring I&I bargaining over RIFs. PB 27-30. The Agency argues that, unlike other CBA provisions, Article 3 and Article 30, Section 2 do not constitute a "reopener" clause, that is, a clause that "specifies the conditions under which a party may seek to renegotiate a term 'covered by' the agreement." *NTEU v. FLRA*, 399 F.3d at 341. Yet, whether Article 3 and Article 30, Section 2 could properly be characterized as comprising a "reopener" clause is not an issue that should be before this Court. In effect, the Agency asks the Court to reverse the Authority for respecting the statutory limits of its role in reviewing exceptions to an arbitrator's

contractual interpretations rather than adopting interpretations more to the Agency's liking, such as those outlined in the Agency's brief. PB at 27-29. Court precedent requires that this request be denied.

c. The Court should not grant the Agency's request for de novo review of the arbitrator's reliance upon parol evidence.

The Agency asks the Court to reverse the Authority's decision, claiming that the arbitrator should have relied strictly on the "plain, unambiguous language" of the CBA instead of allowing in parol evidence such as testimony on past practices and bargaining history. PB at 30-31. Again, the Agency is asking the Court to do what it may not do - - overrule the arbitrator's interpretation of the CBA and replace it with an interpretation that the Agency prefers.

This Court's decision in *American Federation of Government Employees, Local 2924 v. FLRA*, 470 F.3d 375 (D.C. Cir. 2006) ("*AFGE, Local 2924*"), which the Agency claims stands for the proposition that "[n]either the Arbitrator nor Authority may conjure[] up an ambiguity in unambiguous language" via parole evidence, PB at 30-31 (citation omitted), is unavailing. In *AFGE, Local 2924*, the Authority, reversing an administrative law judge, dismissed a ULP complaint based on its *own* interpretation of the CBA as ambiguous**.** The Authority did so in accordance with its long-standing approach to the resolution of ULP cases turning on the meaning of CBA provisions, under which the Authority must ascertain the provisions' meaning. *See, e.g.*, *U.S. Dep't of Justice, FBP*, 59 FLRA 515, 519

(2001); *U.S. Dep't of Justice, INS*, 52 FLRA 256, 261 (1996); *IRS, Wash., D.C.*, 47 FLRA 1091, 1111 (1993) ("*IRS*"). In the ULP context, the Authority "will determine whether the judge's interpretation is supported by the record and by the standards and principles of interpreting [CBAs] applied by arbitrators and the Federal courts." *IRS*, 47 FLRA at 1111. *See also HHS v. FLRA*, 976 F.2d 229, 234 n.4 (4th Cir. 1992) ("[W]e cannot see how the FLRA's jurisdiction [to construe a CBA in order to decide a ULP case] can be denied."). In *AFGE Local* 2924, the Court vacated and remanded the Authority's decision, finding it inappropriate for the *Authority* to resort to parol evidence when interpreting CBA provisions. 470 F.3d at 383-84. But when, as here, the Authority is reviewing exceptions to an arbitration award, the Authority's review of the arbitrator's CBA interpretation is under the deferential standard required by the Statute; the Authority's role in this context is not to interpret the CBA anew.

Further, the Agency did not except to the arbitrator's decision to look beyond the language of the CBA and consider parol evidence even though the Agency did except to the arbitrator's interpretation of the parol evidence that she did consider. JA 168-169 (Agency Exceptions at 22-23). Thus, the Agency is barred by § 7123(c) of the Statute from raising with the Court its objection to the arbitrator having looked beyond the purportedly "plain, unambiguous language" of the CBA. PB at 30. The Agency also is barred from raising its objection to the

Authority's denial of its exceptions to the arbitrator's finding of a continuing past practice of I&I bargaining over RIFs. In this regard, the Agency argues that the Authority erred in finding that the Agency had not asserted a nonfact exception. PB at 33-35. The Agency contends that it had made a nonfact exception but did not label it as such. *Id*. at 34-35.[10] The Agency could have, but chose not to, seek the Authority's reconsideration of this aspect of its decision. Under these circumstances, § 7123(c) of the Statute precludes the Court from reviewing it.

4. If the Authority should address the "covered by" defense, then the case should be remanded so that it may do so.

If the Court finds that the Authority should address the Agency's "covered by" defense, then the case should be remanded to the Authority. When an agency "has not spoken" on a matter that a statute places "primarily in an agency's hands," the "ordinary rule" is to remand to give the agency "the opportunity to address the matter in the first instance in light of its own expertise." *Negusie v. Holder*, 555 U.S. 511, 517 (2009), quoting *INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002). The Authority "has not spoken" on the Agency's "covered by"

[10] The Authority's regulations governing review of arbitration awards require that parties identify the grounds for their exceptions with specificity, and lists as one possible ground "based on a nonfact." 5 C.F.R. § 2425.6(b). Indeed, the Agency did label several of its exceptions as "nonfact" exceptions, but its exception to the arbitrator's finding of a continuing past practice was not one of them. See JA 502 (66 FLRA at 1020).

defense, and the Statute places in the Authority's hands the question of whether a ULP has been committed.

C. The Authority's Decision Does Not Implicate Sovereign Immunity

Even though, as demonstrated above, the Authority's decision does not involve or necessarily implicate a ULP, the Agency argues that, nonetheless, the decision is properly before this Court because it "implicates sovereign immunity." PB at 42, citing *U.S. Dep't of the Air Force v. FLRA*, 680 F.3d 826, 830 (D.C. Cir. 2012). What the Agency appears to mean by "implicates sovereign immunity" is that the award "potentially requires the [Agency] to violate government-wide regulations, 5 C.F.R. § 351.705(b)(6)." *Id*.

The Agency claims that the arbitrator's interpretation of Article 30, Section 4(e) of the CBA, under which the Agency is required to give excepted-service employees affected by a RIF priority consideration for vacant competitive-service positions, is contrary to 5 C.F.R. § 351.705(b)(6). PB at 37-39; 42-43. That is incorrect.

OPM regulations, at 5 C.F.R. § 351.705(a), permit agencies to adopt at their discretion certain RIF procedures when competing employees are in a position to "displace" other employees. Section 351.705(b)(6) prohibits *displacements* that "provide for the assignment of an employee in an excepted position to a position in the competitive service." *See also MSPB v. FLRA*, 913 F.2d 976, 978, 979 (D.C.

Cir. 1990) (section 351.705 pertains to displacement of employees by RIFed employees with "bump and retreat" privileges).

Article 30, Section 4(e) of the CBA, as interpreted by the arbitrator, does not require any displacements. Instead, it requires only that the Agency give employees impacted by a RIF priority consideration for vacant positions. JA 124_ (Award at 80). For this reason, as the Authority found, ((JA 499) (66 FLRA at 1017)), and contrary to what the Agency contends here, the arbitrator 's award would not require the Agency to violate a Government-wide regulation.

CONCLUSION

The Agency's petition for review should be dismissed because the Court lacks jurisdiction to review the Authority's decision.

Respectfully submitted,

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November 8, 2013

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 6,930 words excluding exempt material.

/s/ Rosa M. Koppel
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Certificate of Service

I hereby certify that on this 8th day of November, 2013, I caused an original of the foregoing Final Brief for Respondent to be filed by way of the ECF filing system. I also caused the Final Brief to be served on counsel for the Agency by way of the Court's ECF notification system. I further certify that I will cause eight (8) paper copies of the brief to be filed with this Court within two (2) business days. Hard copies also will be delivered to:

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Statutory and Regulatory Addendum

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5 U.S.C. § 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;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

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

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

5 U.S.C. § 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.

(a) 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).

5 U.S.C. § 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.

5 C.F.R. § 351.701. Assignment involving displacement

(a) *General.* When a group I or II competitive service employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent, or higher, is released from a competitive level, an agency shall offer assignment, rather than furlough or separate, in accordance with paragraphs (b), (c), and (d) of this section to another competitive position which requires no reduction, or the lease possible reduction, in representative rate. The employee must be qualified for the offered position. The offered position shall be in the same competitive area, last at least 3 months, and have the same type of work schedule (e.g., full-time, parttime, intermittent, or seasonal) as the position from which the employee is released. Upon accepting an offer of assignment, or displacing another employee under this part, an employee retains the same status and tenure in the new position. The promotion potential of the offered position is not a consideration in determining an employee's right of assignment.

(b) *Lower subgroup—bumping.* A released employee shall be assigned in accordance with paragraph (a) of this section and bump to a position that:
(1) Is held by another employee in a lower tenure group or in a lower subgroup within the same tenure group; and
(2) Is no more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released.

(c) *Same subgroup-retreating.* A released employee shall be assigned in accordance with paragraphs (a) and (d) of this section and retreat to a position

that:
(1) Is held by another employee with lower retention standing in the same tenure group and subgroup; and
(2) Is not more than three grades (or appropriate grade intervals or equivalent) below the position from which the employee was released, except that for a preference eligible employee with a compensable service-connected disability of 30 percent or more the limit is five grades (or appropriate grade intervals or equivalent). (The agency uses the grade progression of only the released employee's position of record to determine the applicable grades (or appropriate grade intervals or equivalent) of the employee's retreat right. The agency does not consider the grade progression of the position to which the employee has a retreat right.); and
(3) Is the same position, or an essentially identical position, formerly held by the released employee on a permanent basis as a competing employee in a Federal agency (*i.e.*, when held by the released employee in an executive, legislative, or judicial branch agency, the position would have been placed in tenure groups I, II, or III, or equivalent). In determining whether a position is essentially identical, the determination is based on the competitive level criteria found in § 351.403, but not necessarily in regard to the respective grade, classification series, type of work schedule, or type of service, of the two positions.

(d) *Limitation.* An employee with a current annual performance rating of record of minimally successful (Level 2) or equivalent may be assigned under paragraph (c) of this section only to a position held by another employee with a current annual performance rating of record no higher than minimally successful (Level 2) or equivalent.

(e) *Pay rates.* (1) The determination of equivalent grade intervals shall be based on a comparison of representative rates.
(2) Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific reduction-in-force notices, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.
(f)(1) In determining applicable grades (or grade intervals) under §§ 351.701(b)(2) and 351.701(c)(2), the agency uses the grade progression of the released employee's position of record to determine the grade (or interval) limits of the employee's assignment rights.
(2) For positions covered by the General Schedule, the agency must determine

whether a one-grade, two-grade, or mixed grade interval progression is applicable to the position of the released employee.
(3) For positions not covered by the General Schedule, the agency must determine the normal line of progression for each occupational series and grade level to determine the grade (or interval) limits of the released employee's assignment rights. If the agency determines that there is no normal line of progression for an occupational series and grade level, the agency provides the released employee with assignment rights to positions within three actual grades lower on a one-grade basis. The normal line of progression may include positions in different pay systems.
(4) For positions where no grade structure exists, the agency determines a line of progression for each occupation and pay rate, and provides assignment rights to positions within three grades (or intervals) lower on that basis.
(5) If the released employee holds a position that is less than three grades above the lowest grade in the applicable classification system (e.g., the employee holds a GS–2 position), the agency provides the released employee with assignment rights up to three actual grades lower on a one-grade basis in other pay systems.

(g) If a competitive area includes more than one local commuting area, the agency determines assignment rights under this part on the basis of the representative rates for one local commuting area within the competitive area (*i.e.*, the same local commuting area used to establish competitive levels under § 351.403(c)(4), (5), and (6)).

(h) If a competitive area includes positions under one or more pay bands, a released employee shall be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or one pay band lower, as determined by the agency, than the pay band from which released. A preference eligible with a service-connected disability of 30 percent or more must be assigned in accordance with paragraphs (a) through (d) of this section to a position in an equivalent pay band or up to two pay bands lower, as determined by the agency, than the pay band from which released.

(i) If a competitive area includes positions under one or more pay bands, and other positions not covered by a pay band (e.g., GS and/or FWS positions), the agency provides assignment rights under this part by:
(1) Determining the representative rate of positions not covered by a pay band, consistent with § 351.203;
(2) Determining the representative rate of each pay band, or competitive level within the pay band(s), consistent with § 351.203;

(3) As determined by the agency, providing assignment rights under paragraph (b) of this section (bumping), or paragraphs (c) and (d) of this section (retreating), consistent with the grade intervals covered in paragraphs (b)(2) and (c)(2) of this section, and the pay band intervals in paragraph (h) of this section.

5 C.F.R. § 351.705. Administrative assignment

(a) An agency may, at its discretion, adopt provisions which:
(1) Permit a competing employee to displace an employee with lower retention standing in the same subgroup consistent with § 351.701 when the agency cannot make an equally reasonable assignment by displacing an employee in a lower subgroup;
(2) Permit an employee in subgroup III-AD to displace an employee in subgroup III-A or III-B, or permit an employee in subgroup III-A to displace an employee is subgroup III-B consistent with § 351.701; or
(3) Provide competing employees in the excepted service with assignment rights to other positions under the same appointing authority on the same basis as assignment rights provided to competitive service employees under § 351.701 and in paragraphs (a) (1) and (2) of this section.
(b) Provisions adopted by an agency under paragraph (a) of this section:
(1) Shall be consistent with this part;
(2) Shall be uniformly and consistently applied in any one reduction in force;
(3) May not provide for the assignment of an other-than-full-time employee to a full-time position;
(4) May not provide for the assignment of a full-time employee to an other-than-full-time position;
(5) May not provide for the assignment of an employee in a competitive service position to a position in the excepted service; and
(6) May not provide for the assignment of an employee in an excepted position to a position in the competitive service.

5 C.F.R. § 2425.6. Grounds for review; potential dismissal or denial for failure to raise or support grounds

(a) The Authority will review an arbitrator's award to which an exception has been filed to determine whether 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.
(**b)** If a party argues that an award is deficient on private-sector grounds under paragraph (a)(2) of this section, then the excepting party must explain how, under standards set forth in the decisional law of the Authority or Federal courts:
(1) The arbitrator:
(i) Exceeded his or her authority; or
(ii) Was biased; or
(iii) Denied the excepting party a fair hearing; or
(2) The award:
(i) Fails to draw its essence from the parties' collective bargaining agreement; or
(ii) Is based on a nonfact; or
(iii) Is incomplete, ambiguous, or contradictory as to make implementation of the award impossible; or
(iv) Is contrary to public policy; or
(v) Is deficient on the basis of a private-sector ground not listed in paragraphs (b)(1)(i) through (b)(2)(iv) of this section.
(c) If a party argues that the award is deficient on a private-sector ground raised under paragraph (b)(2)(v) of this section, the party must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.
(d) The Authority does not have jurisdiction over an award relating to:
(1) An action based on unacceptable performance covered under 5 U.S.C. 4303 ;
(2) A removal, suspension for more than fourteen (14) days, reduction in grade, reduction in pay, or furlough of thirty (30) days or less covered under 5 U.S.C. 7512; or
(3) Matters similar to those covered under 5 U.S.C. 4303 and 5 U.S.C. 7512 which arise under other personnel systems.
(e) An exception may be subject to dismissal or denial if:
(1) The excepting party fails to raise and support a ground as required in paragraphs (a) through (c) of this section, or otherwise fails to demonstrate a legally recognized basis for setting aside the award; or
(2) The exception concerns an award described in paragraph (d) of this section.

5 C.F.R. § 2429.17. Reconsideration

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.