ORAL ARGUMENT NOT YET SCHEDULED
No. 12-1234

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

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

ON PETITION FOR REVIEW OF A 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

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority" or "FLRA") were the National Treasury Employees Union ("NTEU" or "Union") and the United States Department of the Treasury, Internal Revenue Service ("IRS" or "Agency"). NTEU is the petitioner in this Court proceeding; the Authority is the respondent. There are no amici before this Court.

B. Ruling Under Review

The ruling under review in this case is *National Treasury Employees Union and United States Department of the Treasury, Internal Revenue Service*, Case No. 0-AR-4729, issued on March 30, 2012, reported at 66 FLRA (No. 109) 577.

C. Related Cases

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

/s/ Rosa M. Koppel
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DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES

GLOSSARY

APA	Administrative Procedure Act
Authority	Federal Labor Relations Authority
FLRA	Federal Labor Relations Authority
JA	Joint Appendix
NTEU	National Treasury Employees Union
PB	Petitioner's Brief
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
TAS	Taxpayer Advocate Service
ULP	Unfair labor practice
Union	National Treasury Employees Union

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STATEMENT OF JURISDICTION

A. Basis for the Authority's Jurisdiction

The decision under review in this case was issued by the Federal Labor Relations Authority ("Authority" or "FLRA") on March 30, 2012. The Authority's decision is published at 66 FLRA (No. 109) 577. A copy of the decision is included in the Joint Appendix ("JA") 9-15. 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]

B. Extent of the Court's Jurisdiction

Although the Court has jurisdiction over the petition for review, it lacks jurisdiction to consider one of the Union's arguments, which it raises for the first time before this Court.

1. The Court has jurisdiction over the petition for review, which challenges a final order involving an unfair labor practice.

On October 17, 2012, the Court ordered the parties to address in their briefs whether the Statute, at 5 U.S.C. § 7123(a), gives the Court jurisdiction over this petition for review.[2] In the Authority's view, the Court appears to have jurisdiction over this petition for review because: (a) the petition challenges a final order of the Authority; and (b) the Authority's order involves an unfair labor practice ("ULP").

a. The petition for review challenges a final order of the Authority.

As discussed in greater detail in the Statement of the Facts, the challenged order, in which the Authority reviewed exceptions to an arbitrator's award:

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

[2] The Court ordered further that this case be scheduled for oral argument on the same day and before the same panel as *National Treasury Employees Union v. FLRA*, No. 12-1199.

- Set aside the arbitrator's determination that the Agency committed a ULP;
- Left undisturbed the arbitrator's unchallenged determination that the Agency violated its collective- bargaining agreement;
- Denied the Union's exception to the arbitrator's denial of status-quo-ante relief; and
- Remanded the arbitrator's denial of the Union's request for attorney fees under the Back Pay Act, 5 U.S.C. § 5596.

JA 9-14. The Union's petition for review challenges the Authority's decision to set aside the arbitrator's finding that the Agency committed a ULP.

(i) Statutory authority for judicial review of the Authority's decision.

Judicial review of Authority decisions is provided for by § 7123(a) of the Statute, under which,

> [a]ny person aggrieved by any final order of the Authority . . . 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.[3]

5 U.S.C. § 7123(a).

[3] The Authority issued its decision on March 30, 2012, and the Union filed a timely petition for review on May 29, 2012.

(ii) Review of Authority decisions is conducted under the Administrative Procedure Act, which permits review of "the whole or part" of an Authority decision.

The petition for review concerns only a portion of the Authority's decision: the Authority's ruling that the Agency did not commit a ULP by leaving its work policies, practices, and procedures unchanged when the volume of requests for taxpayer advocate services increased over several years.

Review of a portion, rather than the entirety, of an Authority decision is permitted by the Statute's judicial review scheme. Under § 7123(c) of the Statute, the courts of appeals review Authority decisions "on the record in accordance with section 706 of this title." 5 U.S.C. § 7123(c). Section 706 - - part of the Administrative Procedure Act (APA) - - speaks to the review of agency "actions," 5 U.S.C. § 706(2), which are defined, in turn, as "the whole or *a part* of an agency rule, order . . . or the equivalent." 5 U.S.C. § 551(13) (emphasis added); *see also* 5 U.S.C. § 701(b)(2) (providing that the definition of "agency action" in 5 U.S.C. § 551 applies to the use of the term in 5 U.S.C. Chapter 7).

(iii) The Authority's decision that the Agency did not commit a ULP meets the APA test for finality.

The Authority's decision that the Agency did not commit a ULP is final under the Supreme Court's test in *Bennett v. Spear*, 520 U.S. 154 (1997) ("*Bennett*"). In *Bennett*, the Supreme Court explained,

As a general matter, two conditions must be satisfied for agency

> action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined" or from which "legal consequences will flow[.]"

Id. at 177-178 (citations omitted); *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) (reciting two-part *Bennett* analysis).

With respect to the first condition, the Authority's holding that the Agency had not committed a ULP was not "tentative, open to further consideration, or conditional on future agency action." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007).

Likewise, this holding determined the parties' rights and obligations. The Authority determined that the Agency did nothing to trigger statutory obligations to give the Union notice and an opportunity to bargain. In so holding, the Authority's decision had a "direct and immediate effect on the day-to-day business of the parties challenging the action[.]" *John Doe, Inc. v. DEA*, 484 F.3d 561, 566 (D.C. Cir. 2007) (internal quotations and citations omitted).

(iv) Pragmatic considerations support treating as final the Authority's holding that the Agency did not commit a ULP.

The *Bennett* factors are "interpreted pragmatically to assure that courts neither improperly intrude into the agency's decisionmaking process nor squander judicial resources through piecemeal review." *Union Pacific R.R. Co. v. Surface*

Transp. Bd., 358 F.3d 31, 34 (D.C. Cir. 2004) (internal quotations and citations omitted). In the interest of pragmatism, courts will treat an agency action as final even if it is not "the last administrative [action] contemplated by the statutory scheme . . . [so long as] the agency has imposed an obligation, denied a right, or fixed some legal relationship [.]" *Role Models America, Inc. v. White*, 317 F.3d 327, 331 (D.C. Cir. 2003) (internal quotations and citations omitted, first change in original). Here, the Authority's holding that the Agency did not commit a ULP both determined rights and fixed legal relationships, and so pragmatic considerations support treating this portion of the Authority's decision as final.

(v) The pending attorney fee issue does not render the Authority's holding non-final.

The only matter that the Authority did not decide with finality was the Union's entitlement to attorney fees under the Back Pay Act. JA 14. Instead, the Authority remanded that issue to the arbitrator. *Id*. That the Union's entitlement to attorney fees may be subject to further adjudication does not affect the finality of the Authority's holding that the Agency did not commit a ULP. *See White v. N.H. Dep't of Emp't Sec.*, 455 U.S. 445, 452-53 n. 14 (1982) ("*White*") ("[T]he collateral character of the fee issue *establishes* that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable.'") (emphasis added and citation omitted)). The *White* Court's reasoning has been found to apply to attorney fee requests brought under numerous statutes, including

the Back Pay Act. *See Schultz v. Crowley*, 802 F.2d 498, 502 n.1, 504-05 (D.C. Cir. 1986). Resolution of the attorney fee issue will not "alter," "moot," or "revise" the Authority's holding on the ULP issue and, thus, will not render that holding non-final. *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 199-200 (1988).

b. The Authority's decision involves a ULP.

Under § 7123(a)(1) of the Statute, Authority decisions on exceptions to arbitrators' awards generally are not subject to judicial review. *Ass'n of Civilian Technicians, N.Y.S. Council v. FLRA*, 507 F.3d 697, 698-99 (D.C. Cir. 2007). An exception to this general bar to judicial review occurs when the Authority's decision "involves [a ULP] under section [7116][4] of this title." This Court has found that an Authority decision "involves" a ULP when "a statutory [ULP is] either an explicit ground for, or necessarily implicated by, the Authority's decision." *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 68- 69 (D.C. Cir. 1987). Here, the test is met because the Authority explicitly set aside the arbitrator's finding that the Agency committed a ULP. JA 12.

[4] Although the text of the Statute refers to §7118, that reference has generally been recognized as an inadvertent miscitation. *Am. Fed'n of Gov't Emps. Local 2510 v. FLRA*, 453 F.3d 500, 502 n. * (D.C. Cir. 2006). Section 7116 of the Statute is the correct reference. *Id.*

2. The Court lacks jurisdiction under 5 U.S.C. § 7123(c) to consider an argument that the Union did not make before the Authority.

On exceptions, the Union asked the Authority to establish a new "bright line rule" under which significantly increased workloads at an agency would automatically trigger the agency's obligations under the Statute to give the union notice and an opportunity to bargain regardless of whether or not the agency "precipitated" the increase or otherwise had any control over it. JA 12, 121. But, the Union, in its petition for review, asks the Court to order the Authority to establish a different rule, one that appears not to be a bright-line rule. Under this new rule, significantly increased workloads would trigger the statutory notice and bargaining obligations if the agency has "substantial control" over factors affecting workload, regardless of whether or not it chooses to exercise that control. Petitioner's Brief (PB) 10, 17-18.

Absent extraordinary circumstances, the Court is without jurisdiction to entertain this request. Section 7123(c) of the Statute precludes judicial consideration of arguments or theories that a party raises for the first time in court. 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 should 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. 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 Union does not demonstrate any extraordinary circumstances that would excuse its failure to raise before the Authority, either in the proceedings that took place or as part of a request for reconsideration, its argument in favor of a "substantial control" test in lieu of the previously proposed "bright-line rule." Thus, the Union is barred from making that argument before this Court.

STATEMENT OF THE ISSUE

Did the Authority reasonably hold that the Agency did not violate the Statute when factors beyond the Agency's control caused its workload to increase and the Agency continued its existing policies, practices, and procedures without giving the Union notice and an opportunity to bargain?

STATEMENT OF THE CASE

This case arises out of exceptions to an arbitrator's award that the Agency filed under § 7122 of the Statute. During fiscal years 2006 through 2009, following a decline in workload, the Agency experienced an increase in the number of requests for taxpayer advocacy services. The Union filed a national grievance contending that the Agency violated both the Statute and the collective-bargaining agreement by allowing the workload of its case advocates to increase without giving the Union notice and an opportunity to bargain over the impact and implementation of the increased volume of service requests. The arbitrator determined that the Agency committed a ULP and violated the agreement even though, at the same time, she found that the Agency did not initiate a change in any policy, practice, or procedure that affected conditions of employment. As relevant here, the Authority set aside the arbitrator's determination that the Agency committed a ULP. The Union now seeks review of this decision.

STATEMENT OF THE FACTS

A. Background

In 2000, Congress created a Taxpayer Advocate Service (TAS) within the Agency to act as an advocate for taxpayers. JA 160, 166. Taxpayers obtain advocacy services by submitting requests to TAS. The Agency has no control over

the number of requests received and may not ignore a request or hold it in abeyance. JA 162, 193.

Over the years, daily, weekly, monthly, and quarterly fluctuations in caseloads have been typical. JA 196. Caseloads reached their lowest volume in fiscal year 2004. JA 166, 197-198. Caseloads rose between FY 2006 and FY 2009. JA 198. Although the Union eventually filed the grievance giving rise to this litigation, it never demanded bargaining over the rising caseloads. JA 203.

B. The Union's Grievance

On June 25, 2008, the Union filed a national grievance alleging that the Agency had "measurably increased the caseloads of Case Advocates within [TAS] without giving notice to [the Union] and providing an opportunity to bargain" and thereby violated the Statute and the parties' collective-bargaining agreement. JA 160-161. In response to the grievance, the Agency claimed that the Union failed to identify any action by the Agency that triggered the statutory notice and bargaining obligations. *Id*. The grievance was unresolved and the parties proceeded to arbitration. JA 158, 161.

C. The Arbitrator's Award

Arbitrator Jeanne M. Vonhof framed the following issue:

Did the Agency violate Article 47 of the parties' National Agreement[5]

[5] The arbitrator's determination that the Agency violated Article 47 of the agreement, JA 203, 205, is not before this Court because the Agency did not file an

> and 5 U.S.C. § 7116(a)(1) and (5) [*i.e.*, committed a ULP] by increasing the workload assigned to TAS Case Advocates by more than a *de minimis* amount, without providing notice to, or bargaining with[,] the Union?

JA 158. The arbitrator found that "[u]nilateral changes in working conditions *made by* [the Agency] without giving the [U]nion notice and an opportunity to bargain over the changes may trigger a finding that the [Agency] has engaged in a [ULP]." JA 190-191 (emphasis added). She recognized that the Agency's statutory notice and bargaining obligations are triggered only by "actions the Agency has taken." JA 191.

As to whether the Agency took any actions to make a change in the TAS Case Advocates' conditions of employment, the arbitrator made these factual findings:

1. The Agency "cannot control how many taxpayers use [the services of Case Advocates] and cannot choose to ignore taxpayers' inquiries and concerns." JA 193;
2. Some fluctuation in caseloads is to be expected and, in fact, "daily, weekly, monthly and quarterly fluctuations in caseloads are typical and have been tolerated by the Union." JA 196;

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exception to that determination with the Authority. Therefore, this brief will not discuss the arbitrator's contractual determination further.

3. Average caseload reached its lowest point in FY 2004; and then increased each year between FY 2006 and FY 2009. JA 197-198;
4. The Agency "has control over other factors [other than the number of incoming cases] that affect workload, including the way that cases are processed, the deadlines by which individual actions must be taken; the number of staff available to perform the work and other factors." JA 193, 196-197;
5. The Agency did not change the way cases are processed. Employees were "still being held to normal standards of timeliness" and "being asked to meet similar standards for processing each case that they were asked to meet for years." JA 201, 202;
6. The Agency did not make permanent changes to the existing deadlines. JA 200;
7. The number of staff available to perform the work remained "virtually the same." JA 197; and
8. The Union "never filed a demand to bargain" over the impact of the growing workload and "used a broad range of time in which to compare the case inventory levels" making it "difficult if not impossible to determine exactly to what point in time the Agency must return" to correct the ULP that the arbitrator found. JA 203.

Despite finding that the Agency made no changes in its policies, practices, or procedures, the arbitrator concluded that the Agency violated § 7116(a)(1) and (5) of the Statute by unilaterally changing employees' conditions of employment without fulfilling its notice and bargaining obligations. JA 203. To redress what she found to be a ULP, the arbitrator directed the Agency to bargain with the Union over the impact and implementation of the changes to the policies and practices that she found the Agency had *not* made. *Id*. The arbitrator also directed the Agency to post a notice stating that the Agency had committed a ULP and had been ordered by the arbitrator to bargain and make the employees whole for certain monetary losses resulting from the ULP. JA 203-204. She denied the Union's request for a status-quo-ante remedy concerning the Case Advocates' workloads and also denied the Union's request for attorney fees under the Back Pay Act. JA 203-205.

Both parties filed exceptions to the award and oppositions to one another's exceptions. JA 16, 32, 54, and 92. The Agency excepted to the arbitrator's determination that the Agency had committed a ULP. JA 65-83. It contended that the arbitrator's factual findings demonstrated that the Agency had not initiated any change in policy or practice and, thus her finding that the Agency had committed a ULP was inconsistent with Authority precedent. JA 66-75.

The Union opposed the Agency's exception, contending that the arbitrator correctly held that the Agency committed a ULP when it did not provide the Union notice and an opportunity to bargain. JA 104-122. The Union argued that, to the extent that Authority precedent "requires . . . show[ing] that an agency has taken affirmative acts to change a 'policy or practice' that resulted in changes in conditions of employment, that standard . . . ought to be changed to include the type of factual circumstances" in this case. JA 106. The specific change that the Union asked the Authority to make was to establish the following "bright line rule,"

> [W]henever an act or actions, be they precipitated by the agency or some other entity, (for example[,] where more and more taxpayers face economic hardship and request the assistance of TAS), causes a more than *de minimis* change in bargaining unit employees' conditions of employment, the obligation to bargain attaches.

JA 121.

In neither its own exceptions, JA 16-31, nor its opposition to the Agency's exceptions, JA 92-129, did the Union except to any of the arbitrator's factual findings regarding what specific actions the Agency took, or did not take, in response to the growing increase in workload.

D. The Authority's Decision

In its review of the Agency's exception to the arbitrator's legal conclusion that the Agency violated the Statute, the Authority set out and applied the

appropriate standards of review. That is, the Authority explained that it would assess the arbitrator's factual findings under a deferential standard and her legal conclusions under a de novo review standard pursuant to which the Authority would determine whether the arbitrator's conclusions were consistent with the applicable standard of law. JA 11.

Relying on an unbroken line of Authority precedent starting in 1980, the Authority explained that in order to find that an agency violated § 7116(a)(1) and (5) by failing to provide a union with notice and an opportunity to bargain over changes to conditions of employment, there must be "a threshold determination that the agency made a change in a policy, practice, or procedure" affecting conditions of employment. JA 11-12. In addition, the change must be "unilateral." *Id*. Further, the Authority explained that an increase in workload not attributable to any changes in the agency's policies, practices, or procedures does not trigger the Statute's notice and bargaining obligations. *Id*.

Next, the Authority deferred to the arbitrator's findings of fact, including that: (1) the Agency divided a growing pool of cases among virtually the same number of Case Advocates "without making other reasonable adjustments"; (2) the Agency made no permanent changes in case processing deadlines or adjustments in the application of job performance criteria; and (3) the Agency did not "sufficiently mitigate[]" the effects of the substantial caseload increase." JA 12

(citations omitted). On these factual findings, the Authority held that the Agency made no unilateral changes to any policies, practices, or procedures and thus did not violate § 7116. *Id*. Observing that the Union had not explained how an agency could make a unilateral change in violation of § 7116 when it had not made *any* change, the Authority rejected the Union's request to establish a new "bright line rule" under which significantly increased workloads automatically trigger the Statute's notice and bargaining obligations regardless of whether or not the agency "precipitated" the change. *Id*. The Authority set aside the arbitrator's legal conclusion that the agency violated § 7116(a)(1) and (5). *Id*. The Union now appeals that decision.

STANDARD OF REVIEW

The Court's review over this matter is "narrow." *Am. Fed'n of Gov't Emps., 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).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing [a ULP] determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp.* v. *FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992). So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal.

SUMMARY OF ARGUMENT

An agency violates its statutory notice and bargaining obligations when it makes a unilateral change to a policy, practice, or procedure affecting conditions of employment without providing notice to the union and an opportunity to bargain. Under an unbroken line of Authority precedent, beginning in 1980, these obligations are triggered only when the agency takes a unilateral action.

The Authority based its decision on this line of precedent. In so doing, it properly deferred to the arbitrator's findings of fact, conducted a de novo review of

the arbitrator's legal conclusions, and gave a rational explanation for its decision to set aside the arbitrator's conclusion that the Agency committed a ULP.

The Union asks this Court to ignore Authority precedent and, instead, find that the Agency committed a ULP by *not* taking any actions. It asks this Court to impose on the Authority a new "substantial control" rule for determining when an agency's statutory notice and bargaining obligations are triggered. But, the Court is barred from considering this proposed rule under 5 U.S.C. § 7123(c) because the Union never proposed it when the parties were before the Authority. Nor did it seek reconsideration to ask the Authority to adopt the rule.

Even if the Court could consider adopting the "substantial control" rule, there are good reasons why it should reject that rule. Under the rule, any increase in the agency's workload that has more than a *de minimis* effect on conditions of employment triggers the agency's notice and bargaining obligations if the agency has "substantial control" over factors affecting employees' conditions of employment. This is regardless of whether the agency took action to change those factors.

To begin with, the Union points to no support in the Statute or in case law for such a rule. Also, the rule would require the Agency to guess when a gradually increasing (as well as a fluctuating) workload reaches a point at which notice to the union is required in order to avoid committing a ULP, a burden that even the

arbitrator found "difficult if not impossible" to meet. JA 203. Instead of imposing this unworkable rule on the Authority, the Court should give deference to the Authority's supported and rationally explained decision.

ARGUMENT

THE AUTHORITY REASONABLY HELD THAT THE AGENCY DID NOT VIOLATE THE STATUTE WHEN FACTORS BEYOND THE AGENCY'S CONTROL CAUSED ITS WORKLOAD TO INCREASE AND THE AGENCY CONTINUED ITS EXISTING POLICIES, PRACTICES, AND PROCEDURES WITHOUT GIVING THE UNION NOTICE AND AN OPPORTUNITY TO BARGAIN.

A. The Authority Reasonably Determined that the Agency did not Make any Change in Conditions of Employment Requiring Notice and Bargaining Under the Statute.

1. Governing legal principles.

The Statute gives most federal employees the right to organize and bargain collectively, and requires agencies to negotiate with the recognized bargaining representative of their employees regarding "conditions of employment." *See* 5 U.S.C. §§ 7102, 7103(a)(2) and (12). "Conditions of employment" are defined, in part, as "personnel policies, practices, and matters … affecting working conditions." 5 U.S.C. § 7103(a)(14). Further, although the agency does not have the duty to bargain over its "management rights" as defined in 5 U.S.C. § 7106(a) - - such as determining its organization, number of employees, the assignment of work, and personnel by which agency operations shall be conducted - - the agency is required to negotiate about the "impact and implementation" of its exercise of

those rights. *See* 5 U.S.C. § 7106(b)(2), (3); *see also Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 50 (D.C. Cir. 1992) ("*Marine Corps*"). When an agency refuses to negotiate over the impact and implementation of proposed changes to personnel policies and practices that affect working conditions, the agency may have committed a ULP. 5 U.S.C. § 7116(a)(5).

In this case, the Union alleges that the Agency has made a unilateral change to conditions of employment that has a greater than *de minimis* impact, and has not given the union notice and an opportunity to bargain over the change. With exceptions not relevant here, an agency commits a ULP whenever it implements such a change without fulfilling its statutory notice and bargaining obligations. *Marine Corps*, 962 F.2d at 62; *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 446 F.3d 162, 167 (D.C. Cir. 2006) (Agency committed a ULP when it changed its firearms training policy without first providing the union notice and an opportunity to bargain because the change had greater than a *de minimis* effect on working conditions).

2. The Authority's decision was based on its long-standing interpretation of the Statute under which an agency does not commit a ULP until it makes a unilateral change to a policy, practice, or procedure without fulfilling its notice and bargaining obligations.

What was *not* at issue before the Authority were any of the Arbitrator's findings of fact. Neither the Agency nor the Union excepted to, and the Authority

left undisturbed, those findings, including that the Agency: (1) cannot control the volume of cases that TAS receives; and (2) did not change factors over which it has control including the way cases are processed, the "normal standards of timeliness," case processing deadlines, or the number of staff available to work on the cases. JA 193, 196-197, 200-202. It is plain that rather than ignoring these facts, as the Union contends (PB 14-18), the Authority incorporated them into its legal analysis. JA 12.

The only question before the Court is whether this *particular* change (or changes, depending on whether the gradual increase in workload should be viewed as one change or some number of multiple changes) in conditions of employment triggers the Agency's notice and bargaining obligations under § 7116 of the Statute. Under long-standing Authority precedent as applied to these facts, the answer, plainly, is "no."

As the Authority explained, to find that an agency violated the notice and bargaining obligations under § 7116 (a)(1) and (5), there must be a "threshold determination that the agency made a change in a policy, practice, or procedure affecting unit employees' conditions of employment." JA 11. When, as here, the agency experiences a workload increase that is not attributable to any change it made to its policies, practices, or procedures affecting working conditions, the increase does not trigger the Agency's notice and bargaining obligations. *Id*.

Applying these legal standards to the arbitrator's factual findings, the Authority held that the Agency did not violate the Statute because it did not make a unilateral change to conditions of employment. JA 12.

The Authority's reasoned explanation of its holding is buttressed by a long and unbroken line of Authority precedent. *See, e.g.*, *U.S. Dep't of Labor, OSHA, Region 1, Bos., Mass.*, 58 FLRA 213, 215 (2002) ("In order to determine whether the [agency] violated the Statute, there must be a threshold finding that the [agency] changed the employee's conditions of employment."); *U.S. Immigration & Naturalization Serv., N.Y.C., N.Y.*, 52 FLRA 582, 585-6 (1996) (For there to be a violation of the notice and bargaining obligation, the agency's *action* must constitute a change in conditions of employment); *U.S. Immigration & Naturalization Serv., Houston Dist., Houston, Tex.*, 50 FLRA 140, 143 (1995) (same); *Internal Revenue Serv., Wash., D.C.*, 4 FLRA 488, 497 (1980) (Authority order adopting Administrative Law Judge's legal conclusion that the Statute's notice and bargaining requirements are triggered when an agency "change[s] personnel policies, practices, or working conditions").

In a case similar to this one, the Authority held that an increase in admissions of acute psychiatric patients to an agency's medical unit did not, by itself, trigger the agency's notice and bargaining obligations when the agency made no change in its admissions policies, practices, or standards. *U.S. Dep't of*

Veterans Affairs, Med. Ctr., Sheridan, Wyo., 59 FLRA 93 (2003). That the increase in admissions of these types of patients immediately followed the agency's marketing of the medical unit's ability to accept them did not alter the Authority's holding that the agency did not violate the Statute by failing to provide the union with notice and an opportunity to bargain over the increased admissions. A similar holding was appropriate in this case in which there was no finding that the Agency did anything at all to stimulate the increase in workload.

Nonetheless, the Union avers that the Authority's decision is not reasoned because, according to the Union: (1) the Agency changed a practice, and thereby committed a ULP under the standards applied by the Authority; (2) in the alternative, the Authority's standards are too narrow because *any* change in conditions of employment that has a greater than *de minimis* impact on conditions of employment should trigger the Statute's notice and bargaining obligations; and (3) the Authority's decision relieved the Agency of its duty to bargain (PB 18-23). The Union is incorrect on all grounds.

The Union does not identify just what practice, policy, or procedure it believes the Agency changed. Instead, it claims that the Agency "*changed* a practice" by "*continuing* to hold Case Advocates to the same performance standards," PB 10 (emphasis added), and was "an actor in creating a different and difficult work environment for employees" by "holding employees to the *same*

standards" while allowing workload to increase. PB 19 (emphasis added). In essence, the Union's explanation is that the Agency changed a practice by *not* changing a practice.

In its alternative argument, the Union misstates the Agency's obligations under the Statute by asserting that "[i]t is [a ULP] for an agency to fail to notify the union of a change in the conditions of employment." PB 13. *See also* PB 20 ("The fundamental question presented by this case is whether TAS Case Advocates experienced a change in 'conditions of employment,' which triggered the Agency's obligations to provide notice of the change and to bargain with the Union."). Under that interpretation of the Statute, an agency would commit a ULP whenever it fails to give the union advance notice of an act of Congress, a natural disaster, or any other event that the agency cannot predict or control and that causes working conditions to change. The Union points to no Authority precedent, including the cases the Union cites (PB 13), supporting that interpretation. Further, the interpretation contradicts the "substantial control" rule that the Union now asks the Court to establish.

Finally, the Union's argument that the Authority's decision relieves the Agency of its duty to bargain over changes to conditions of employment (PB 21-22) confuses an agency's notice and bargaining obligations before making a change to conditions of employment with its obligation to negotiate over union-

initiated proposals that are within the duty to bargain. The Union, citing this Court's opinion in *Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983), argues that the Authority's decision permits the Agency to "blithely ignore[]" its bargaining obligations under the Statute. PB 21. The Authority's decision does not relieve the Agency of its duty to bargain over union-initiated proposals that are within the duty to bargain. The Union did not initiate any such proposals.

3. The Authority's rejection of the Union's proposed "bright line rule" was reasonable.

In its exceptions, the Union asked the Authority to establish a "bright line rule" that "whenever an act or actions, be they precipitated by the agency or *some other entity*, . . . causes a more than *de minimis* change in bargaining unit employees' conditions of employment" the agency's obligations to give the union notice and an opportunity to bargain are triggered. JA 121 (emphasis added). The Authority rejected this request, finding that the "bright line rule" would be inconsistent with longstanding Authority precedent holding that agencies violate their § 7116(a)(5) notice and bargaining obligations only when, as relevant here, they make "unilateral changes" to conditions of employment. JA 12.

That the Authority has consistently required a threshold of a unilateral change in policy, practice, or procedure since 1980 is a perfectly valid consideration for not eliminating that requirement now. "[U]psetting the stability and predictability of the law is not something that should be taken lightly." *Santos*

v. United States, 461 F.3d 886, 894 (7th Cir. 2006); *see also United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) ("Overturning a long-standing precedent is never to be done lightly, and particularly not in the area of statutory construction, where Congress is free to change interpretation of its legislation.").

This is no less true for administrative agencies like the Authority. *See City of Lawrence, Mass. v. CAB*, 343 F.2d 583, 589 (1st Cir. 1965) (Aldrich, C.J., dissenting) ("The principles that an administrative agency must have standards, must not depart from them in an individual case, and should not make a general change lightly . . . seem to me as important as the basic proposition that its findings and reasoning must be set forth sufficiently to permit intelligent review.").

For these reasons, the Authority acted reasonably in declining the Union's invitation to jettison more than 30 years of Authority precedent. In addition, common sense supports the Authority's decision in light of the Union's failure to explain how an agency could be said to make a unilateral change when it has not made *any* change. JA 12.

B. The Court, Assuming, Arguendo, that it has Jurisdiction to Consider Imposing the Union's Newly Proposed "Substantial Control" Rule, Should Reject it.

As the Authority has established, at 8-9, *supra*, the Court lacks jurisdiction to consider the Union's newly-raised argument that the Authority should be made to apply a "substantial control" rule for analyzing when an agency's statutory

notice and bargaining obligations are triggered. PB 10, 17-18. Assuming, arguendo, that the Court has jurisdiction to hear this argument, the Court should reject it.

The newly proposed "substantial control" rule suffers from the same infirmities as the previously proposed "bright line rule." Additionally, it would require an agency to guess when the impact of a gradually increasing workload with fluctuations reaches a point at which notice to the union is required in order to avoid committing a ULP. As even the arbitrator concluded when she denied status-quo-ante relief, under these circumstances, it would be "difficult if not impossible" to determine exactly when the Agency, in allowing existing policies and practices to continue, and without a bargaining request from the Union, may have crossed the line between compliance and noncompliance with of its statutory obligations. JA 203.

Yet, the Union asks that the "substantial control" rule be adopted because the Authority's threshold requirement of unilateral action would encourage an agency "to do nothing (as here) to address employees' ever-worsening working conditions." PB 22. But the case that the Union chiefly relies upon, *Library of Congress*, *supra*, illustrates that a union may submit proposals intended to address the impact of changed working conditions. Here, the Union did not do this.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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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 6,331 words excluding exempt material.

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Certificate of Service

I hereby certify that on this 31st day of December, 2012, I caused an original of the foregoing Brief for Respondent 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. Following this, eight (8) hard copies of the brief will be filed with the Court and hard copies will be delivered to:

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Relevant Statutes

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5 U.S.C. § 551. Definitions

For the purpose of this subchapter—

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(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . . .

5 U.S.C. § 701. Application; definitions

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(b) For the purpose of this chapter—

*****

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, "agency" means—
(1)an Executive agency;
(2)the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
(3)the Library of Congress;
(4)the Government Printing Office;
(5)the government of the District of Columbia;
(6)the Architect of the Capitol, including employees of the United States Senate Restaurants; and
(7)the United States Botanic Garden.
(b)
(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
(A)is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
(i)an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
(ii)reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and
(B)for all purposes, is deemed to have performed service for the agency during that period, except that—
(i)annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and
(ii)annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be

included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(2)

(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

(B) Such interest—

(i)shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii)shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii)shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.

(5) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, "unfair labor practice" means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

5 U.S.C. § 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.

5 U.S.C. § 7105. Powers and duties of the Authority
(a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

* * * * *

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

* * * * *

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

§ 7106. Management rights

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

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

(2) in accordance with applicable laws—

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

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

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

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

(ii) any other appropriate source; and

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

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

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

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

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

5 U.S.C. § 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.

(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).

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.