No. 07-1450

In the Supreme Court of the United States

ASSOCIATION OF CIVILIAN TECHNICIANS, NEW YORK STATE COUNCIL, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, pursuant to 5 U.S.C. 7123(a)(1), the court of appeals lacked subject-matter jurisdiction to review the Federal Labor Relations Authority order on exceptions to an arbitrator's award where the arbitrator neither considered nor ruled on an unfair labor practice claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 507 F.3d 697. The opinion of the Federal Labor Relations Authority (Pet. App. 36a-45a) is reported at 60 F.L.R.A. 890.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2007. A petition for rehearing was denied on January 18, 2008 (Pet. App. 85a). The petition for a writ of certiorari was filed on April 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, § 701, 92 Stat. 1191, 5 U.S.C. 7101 *et seq.*, governs labor relations between federal agencies and their employees. The CSRA established the Federal Labor Relations Authority (FLRA), a three-member bipartisan body within the Executive Branch, and gave it a role analogous to that which the National Labor Relations Board plays in the private sector. 5 U.S.C. 7104; *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983) (*BATF*). The FLRA provides leadership and guidance regarding collective bargaining in the federal sector, including the adjudication of unfair labor practice complaints, negotiability disputes, bargaining unit issues, representational election matters and, as particularly relevant here, exceptions to arbitrators' awards. 5 U.S.C. 7105(a)(1) and (2); see *BATF*, 464 U.S. at 92-93.

Under the CSRA, "where an issue can be raised either as a grievance * * * or as an unfair labor practice complaint, the complainant must elect one or the other procedure." *United States Marshals Serv.* v. *FLRA*, 708 F.2d 1417, 1419 (9th Cir. 1983) (*Marshals Serv.*). Specifically, the CSRA's choice-of-forum provision directs:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair

> labor practice under this section, but not under both procedures.

5 U.S.C. 7116(d).

This case arose from petitioner's election to invoke the CSRA's grievance procedures pursuant to Section 7121 and its subsequent filing of exceptions to the arbitrator's award pursuant to Section 7122. Under Section 7122(a), the FLRA may find an arbitrator's award deficient either "(1) because it is contrary to law, rule, or regulation; or (2) on other grounds similar to those applied by Federal courts in private sector labor-management relations." 5 U.S.C. 7122(a).

Although the CSRA provides generally for judicial review of FLRA final orders, orders reviewing arbitrator awards under Section 7122 are expressly precluded from judicial review "unless the order involves an unfair labor practice under section 7118 [of the CSRA]."[1] 5 U.S.C. 7123(a)(1). That limitation on judicial review promotes "[e]xpeditious enforcement of arbitration awards," which encourages arbitration and protects "the integrity of the bargaining and contract process itself." *Marshals Serv.*, 708 F.2d at 1420 (discussing the "congressional encouragement to arbitrate" reflected in the CSRA); see *Overseas Educ. Ass'n* v. *FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987) (the "circumscribed judicial review of such cases * * * is firmly grounded in the strong Congressional policy favoring arbitration of labor disputes

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[1] Although the text of the CSRA refers to Section 7118, courts have recognized that reference to be a citation error. Section 7116 of the CSRA is the correct reference. *AFGE Local 2510* v. *FLRA*, 453 F.3d 500, 502 note (D.C. Cir. 2006); *AFGE Local 1923* v. *FLRA*, 675 F.2d 612, 613 n.2 (4th Cir. 1982).

and accordingly granting arbitration results substantial finality").

2. Petitioner is a labor union that represents bargaining units of National Guard technicians employed by the New York Army and Air National Guard (Guard).[2] Pet. App. 3a. In June 2003, in accordance with an amendment to the New York State Clean Indoor Air Act requiring that every employer in the state provide smoke-free work areas, the New York Division of Military and Naval Affairs (Agency) issued a new policy prohibiting smoking in all Guard facilities. *Id.* at 58a-60a. In response, petitioner filed a grievance over the Agency's unilateral implementation of the revised smoking policy. When the parties were unable to resolve the grievance, they submitted the dispute to arbitration pursuant to their collective bargaining agreement. *Id.* at 64a.

Addressing a threshold matter, the arbitrator first noted that the parties were unable to stipulate as to which issues were properly before the arbitrator. Petitioner had alleged in its prehearing brief that the Agency's conduct constituted not only a contractual violation, but also a statutory unfair labor practice. After reviewing the parties' proposed statements of issues, the arbitrator concluded that "[a]t the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement." Pet. App. 78a. The arbitrator therefore framed the issue as follows: "Did the Agency violate the Collective Bargaining Agreement when it issued a new smok-

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[2] "[T]he employment status of National Guard technicians is a hybrid, both of federal and state, and of civilian and military strains." *Illinois Nat'l Guard* v. *FLRA*, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

ing policy * * * ? If so, what should the remedy be?" *Id.* at 48a.

On the merits, the arbitrator denied the grievance. Pet. App. 83a. She found that the Agency had not violated the collective bargaining agreement by issuing the new smoking policy. According to the arbitrator, by limiting negotiations to matters "within the purview" of the Agency, the collective bargaining agreement "limits the [p]arties' latitude to negotiate employee-smoking rules." *Id.* at 82a-83a. Specifically, she ruled that, because the smoking ban was a state statutory requirement, the matter of indoor smoking had been removed from the purview of the Agency. The arbitrator concluded that the collective bargaining agreement therefore permitted the Agency to refuse to bargain over the policy. *Ibid.*

3. Pursuant to Section 7122 of the CSRA, petitioner filed exceptions to the arbitrator's award with the FLRA. Before the FLRA, petitioner first contended that the arbitrator had improperly failed to address whether the Agency's conduct constituted an unfair labor practice. Citing well-established principles of arbitration practice, the FLRA held that, in the absence of agreement over which issues were before the arbitrator, the arbitrator has the authority and discretion to frame the issues. Pet. App. 40a-42a (citing, *e.g.*, *AFGE Local 1367*, 60 F.L.R.A. 187, 190 (2004)). The arbitrator's exercise of discretion to limit the question presented to the contractual issue therefore was not reversible error. *Ibid.*

Petitioner also argued that the arbitrator's award was contrary to law because federal law, rather than state law, controls the technicians' working conditions. Pet. App. 42a. The FLRA held that the arbitrator's de-

termination was based on her interpretation of the parties' collective bargaining agreement, specifically her finding that the collective bargaining agreement had limited the parties' bargaining obligation. Because the arbitrator was enforcing lawful, agreed-upon limits on the parties' obligation to bargain, the FLRA concluded that the award was not contrary to law. *Id.* at 42a-44a.

Petitioner filed a motion for reconsideration, which the FLRA denied. Pet. App. 24a-35a.

4. Petitioner filed a petition for review of the FLRA's order in the court of appeals. Pet. App. 1a. The court of appeals dismissed the action for lack of subject-matter jurisdiction pursuant to 5 U.S.C. 7123(a)(1) because the FLRA's order did not involve an unfair labor practice. Pet. App. 9a. In so holding, the court of appeals explained that the FLRA's deference to the arbitrator's framing of the issue presented was grounded in rules of arbitration procedure, which resulted in the unfair labor practice claim's exclusion from review in this case. That "secondary effect" on the unfair labor practice claim, the court explained, did not sufficiently implicate an unfair labor practice to invoke the court's jurisdiction. *Id.* at 4a-5a.

The court of appeals explained that its own well-established precedent compelled that conclusion. It noted that judicial review of FLRA arbitration decisions is available only where the "'substance of the unfair labor practice' is 'discussed in some way in, or [is] some part of, the [FLRA]'s order.'" Pet. App. 6a (quoting *AFGE Local 2510* v. *FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006)). Applying that standard, the court of appeals determined that the FLRA "did not engage in any substantive discussion of [petitioner]'s unfair labor practice claim in its order." *Id.* at 8a. It further explained that,

under its case law, "the [FLRA]'s order itself must have some 'bearing upon the law of unfair labor practices' in order to qualify as an order that 'involve[s] an unfair labor practice.'" *Id.* at 9a (quoting *AFGE Local 2510*, 453 F.3d at 505). The court of appeals concluded that the FLRA's order in this case, which upheld the arbitrator's exercise of discretion to frame the issues in the absence of the parties' agreement, neither discussed nor affected the substantive law governing unfair labor practices. *Id.* at 9a. It therefore dismissed the petition for review for lack of subject-matter jurisdiction.[3]

ARGUMENT

Petitioner renews its claim (Pet. 5-6) that the court of appeals had subject-matter jurisdiction over its petition for review. The court of appeals correctly rejected that argument, and its decision does not conflict with its own precedent or that of any other court. Accordingly, this Court's review is not warranted.

1. Petitioner primarily contends (Pet. 5-6) that the decision of the court of appeals conflicts with the Ninth Circuit's decision in *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (1983), and with the court of appeals' own decisions in *Overseas Education Ass'n* v. *FLRA*, 824 F.2d 61 (D.C. Cir. 1987) (*OEA*), and *United States Department of the Interior* v. *FLRA*, 26 F.3d 179, 183-184 (D.C. Cir. 1994) (*DOI*) . That contention is without merit. As an initial matter, even if the court of appeals' decision did conflict with another opinion of that court, review would be unwarranted because any intra-circuit conflict should be resolved by the D.C. Circuit,

[3] Judge Tatel dissented and would have held that the FLRA's order involved an unfair labor practice. Pet. App. 9a-10a.

not by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, the court of appeals' decision is consistent with its own precedent and that of other circuits. In *Marshals Service*, the Ninth Circuit held that, under 5 U.S.C. 7123, "where arbitration has been elected and the [FLRA] reviews exceptions to an award, we have no jurisdiction to review the [FLRA's] determination unless an unfair labor practice is either an explicit or a necessary ground for the final order issued by the [FLRA]." 708 F.2d at 1420. The D.C. Circuit expressly adopted that standard in *OEA*, making clear that "[t]he fact that the underlying conduct *could be* characterized as a statutory unfair labor practice will not suffice." 824 F.2d at 67. Rather, for an FLRA arbitration decision to be subject to judicial review, "a statutory unfair labor practice must be either an explicit ground for, or be necessarily implicated by, the [FLRA]'s decision." *Id.* at 67-68 (citing *Marshals Serv.*, 708 F.2d at 1420).

The D.C. Circuit later clarified that judicial review of an FLRA arbitration decision is available only if the FLRA order itself discusses the substance of the unfair labor practice. *AFGE Local 2510* v. *FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006). The court explained that this limitation follows from the text of 5 U.S.C. 7123(a)(1), under which the court of appeals' jurisdiction turns on whether "the [FLRA's] order involves an unfair labor practice." *Id.* at 504. An FLRA order that neither discusses nor has necessary implications for the law of unfair labor practices cannot naturally be said to "involve an unfair labor practice." *Ibid.*; see *id.* at 504-505; Pet. App. 7a. For essentially the same reasons, such an order does not implicate the purpose of the unfair labor practice exception in Section 7123(a)(1)—*i.e.*, to assure

uniformity in the case law concerning unfair labor practices. *AFGE Local 2510*, 453 F.3d at 505. Where "there is no risk the [FLRA] will leave the path of the law of unfair labor practices and yet escape the review that would bring it back to the straight and narrow, * * * neither is there any reason for the Congress to have departed from its established policy 'favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality.'" *Ibid.* (quoting *OEA*, 824 F.2d at 63); see *DOI*, 26 F.3d at 183-184; Pet. App. 6a-8a.

The court of appeals applied its established standard in the instant case. Consistent with the *Marshals Service* standard adopted in *OEA* and its progeny, the court of appeals asked whether the FLRA's order "engage[d] in any substantive discussion of [petitioner]'s unfair labor practice claim." Pet. App. 8a. It determined that the order did not contain such a discussion because the FLRA merely "found that the arbitrator was justified in concluding that the substance of the unfair labor practice claim was not part of the dispute." *Ibid.* The court further inquired whether the FLRA's order affected the substantive law regarding unfair labor practices, and similarly concluded that, under its precedent, "[a] passing reference to an unfair labor practice or a mere effect on the reviewability of an unfair labor practice claim is not enough." *Id.* at 9a. Contrary to petitioner's contention, the court of appeals' decision represents a straightforward application of the *Marshals Service* standard as adopted by the D.C. Circuit.[4]

[4] There is no merit to petitioner's contention (Pet. 5) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *DOI*. In that case, as here, the parties submitted a grievance to arbitration, but were unable to agree on a statement of the issue. The arbitrator fram-

2. In any event, this Court's review of the court of appeals' jurisdictional determination would not benefit petitioner because the FLRA properly deferred to the arbitrator's statement of the issue presented. It is well-established that, where parties to an arbitration do not stipulate to the issues to be arbitrated, the moving party's mere contention that an issue has been properly raised is insufficient to place the issue before the arbitrator. Rather, in the absence of an agreement between the parties, the arbitrator has broad discretion to make that determination. See, *e.g.*, *AFGE Local 1367*, 60 F.L.R.A. 187, 190 (2004) (where parties to arbitration do not stipulate to the issues presented, arbitrator may frame the issues); *Sport Air Traffic Controllers Org.*, 55 F.L.R.A. 771, 774 (1999) (*Sport ATC*) (although union contended before the arbitrator that agency conduct was an unfair labor practice, in absence of stipulation, arbi-

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ed the issue as one involving the proper interpretation of the parties' collective bargaining agreement, and the FLRA reviewed the arbitrator's order so framed. The court of appeals held that it lacked jurisdiction under the *OEA* standard because the FLRA's order did not involve an unfair labor practice. 26 F.3d at 183. The court of appeals did state that "[i]f the aggrieved party chose to go the grievance procedure route, but characterized its claim as a statutory unfair labor practice, judicial review certainly would be available." *Ibid.* But the court's focus was on *how the issue was actually framed by the arbitrator* (and thus how the issue was presented to the FLRA), not on how the aggrieved party wanted the issue to be framed. *Id.* at 183-184 ("There also is nothing material in either the arbitrator's decision or the FLRA's order to support DOI's contention that this case involves an unfair labor practice. The arbitrator's decision clearly frames the issue as one arising solely under the parties' collective bargaining agreements."). Nowhere did the court indicate, as petitioner suggests, that the aggrieved party's statement of the issue controls the unfair labor practice analysis. Rather, its approach was consistent with *OEA*, *Marshals Service*, and the court of appeals' approach in the instant case.

trator found that only a contractual claim was at issue); see also *AFGE Local 916*, 50 F.L.R.A. 244, 247 (1995) (in absence of a stipulation, arbitrator may adopt one party's formulation of the issue rather than the other's). Where an arbitrator exercises discretion to frame the issue presented, the FLRA and reviewing courts grant substantial deference to the arbitrator's formulation of the issue. *Sport ATC*, 55 F.L.R.A. at 744; *Air Force Space Div.*, 24 F.L.R.A. 516, 518 (1986); *Madison Hotel* v. *Hotel & Rest. Employees, Local 25*, 144 F.3d 855, 857 (D.C. Cir. 1998); *Pack Concrete, Inc.* v. *Cunningham*, 866 F.2d 283, 285 (9th Cir. 1989); *Mobil Oil Corp.* v. *Indep. Oil Workers Union*, 679 F.2d 299, 302 (3d Cir. 1982).

As the court of appeals recognized, the FLRA correctly applied those well-established principles in the instant case. After reviewing the parties' arguments, the arbitrator found that "[a]t the heart of this case is a dispute over the interpretation and application of the language of the Parties' Collective Bargaining Agreement," and she formulated the issue presented accordingly. Pet. App. 78a. Deferring to the arbitrator's statement of the issue, the FLRA properly held that petitioner had failed to establish that the arbitrator had exceeded her authority by limiting the proceeding to the contractual issue. *Id.* at 42a-44a; see *AFGE Local 1367*, 60 F.L.R.A. at 190.

Petitioner suggests (Pet. 6-7) that, under the FLRA's decision, an employer-agency may thwart a union's pursuit of an unfair labor practice claim through arbitration simply by refusing to consent to presentation of the unfair labor practice to the arbitrator. That suggestion is misplaced. A party's refusal to consent to an issue does not automatically eliminate that issue from

consideration. Rather, as discussed above, if the parties do not agree on the issues presented, the arbitrator must decide how the issues are most appropriately framed. Moreover, petitioner's contrary rule would allow a party to benefit from judicial review in every Section 7121 arbitration by characterizing any breach-of-agreement claim as an unfair labor practice claim. Such an outcome would frustrate Congress's intent to encourage the arbitration of disputes and the finality of arbitral judgments. See *Marshals Serv.*, 708 F.2d at 1420 ("Expeditious enforcement of arbitration awards based on the contract promotes the force and meaning of the contractual process and encourages resort to negotiated grievance procedures. Review of exceptions to the arbitration award by the [FLRA] itself, without judicial review unless an unfair labor practice is necessarily implicated, is the explicit congressional design.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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