ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED
No. 22-1220

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

FEDERAL EDUCATION ASSOCIATION-STATESIDE REGION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

A. Parties

Appearing below before the Federal Labor Relations Authority (the "Authority" or "FLRA") were the Federal Education Association-Stateside Region (the "Union") and the U.S. Department of Defense, Domestic Dependents Elementary and Secondary Schools. In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. Rulings Under Review

The Union seeks review of two Authority decisions *U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools ("DOD I"),* 72 FLRA 601 (2021) (then-Chairman DuBester concurring) and *U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools*, 73 FLRA 149 (2022) (denying reconsideration of *DOD I*) (then-Chairman DuBester concurring).

C. Related Cases

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

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

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GLOSSARY

Agency	U.S. Department of Defense, Domestic Dependents Elementary and Secondary Schools
Arbitrator	Neal Orkin
Authority	The Federal Labor Relations Authority
Br.	Petitioner's opening brief
DOD I	*U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools*, 72 FLRA 601 (2021) (then-Chairman DuBester concurring)
DOD II	*U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools*, 73 FLRA 149 (2022) (then-Chairman DuBester concurring)
FLRA	The Federal Labor Relations Authority
FSIP	The Federal Service Impasses Panel
JA	Joint Appendix
Panel	The Federal Service Impasses Panel
Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair labor practice
Union	Petitioner, Federal Education Association-Stateside Region

STATEMENT REGARDING JURISDICTION

This Court lacks appellate jurisdiction over the Petition for Review filed by the Federal Education Association Stateside (affiliated with the National Education Association) (the "Union").

The Union seeks review of the decisions of the Federal Labor Relations Authority ("FLRA" or "Authority") in *United States Department of Defense, Domestic Dependent Elementary and Second Schools and Federal Education Association Stateside Region*, 0-AR-5590, 72 FLRA 601 (2021) ("*DOD I*"), *motion for recons. denied,* 73 FLRA 149 (2022) ("*DOD II*"). In those cases, the Authority set aside an arbitration award on the ground that the Arbitrator did not have the power to determine whether the Federal Service Impasses Panel (the "Panel" or "FSIP") properly exercised jurisdiction over a dispute. All other findings and conclusions in *DOD I* and *DOD II* flow from that core issue.

Under § 7123 of the Federal Service Labor-Management Relations Statute ("Statute"), 5 U.S.C. § 7101-7135 (2018), federal courts lack subject-matter jurisdiction to review Authority decisions regarding arbitration awards unless the Authority's order "involves an unfair

labor practice." 5 U.S.C. § 7123(a)(1). To "involve" an unfair labor practice, the Authority's decision must "include some sort of substantive evaluation of a statutory unfair labor practice." *Ass'n of Civilian Technicians, N.Y. State Council v. FLRA* ("*ACT*"), 507 F.3d 697, 699 (D.C. Cir. 2007) (internal quotation marks omitted). "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 700.

The Authority's decisions in this case do not involve a "substantive evaluation of a statutory unfair labor practice." The decisions instead relate to the central question of whether an arbitrator has the power to directly review Panel decisions—a power that neither this Court[1] nor the Authority[2] has. Indeed, the arbitrator's underlying award hinges not on whether one of the parties engaged in an unfair labor practice,

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[1] *See Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 14 (D.C. Cir. 2020); *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP*, 437 F.3d 1256, 1258 (D.C. Cir. 2006); *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985); *Council of Prison Locs. v. Brewer*, 735 F.2d 1497, 1499 (D.C. Cir. 1984).

[2] *See* 5 U.S.C. § 7105; *see also Nat'l Treasury Emps. Union*, 71 FLRA 962, 962 (2020); *State of N.Y., Div. of Mil. & Naval Affs.*, 2 FLRA 185, 188 (1979).

but rather whether the Panel properly exercised jurisdiction over a dispute about a collective bargaining agreement.

As the Authority's decisions in *DOD I* and *DOD II* concern the power of an arbitrator to directly review a Panel decision, the decisions do not further "Congress's other stated interest of ensuring 'a single, uniform body of case law concerning unfair labor practices.'" *ACT*, 507 F.3d at 699 (quoting *Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006)). The Petition for Review should therefore be dismissed for lack of jurisdiction under § 7123(a)(1).

STATEMENT OF THE ISSUES PRESENTED

1. Does this Court have the jurisdiction to review Authority decisions setting aside an arbitration award on the ground that it violated 5 U.S.C. § 7119 because it directly reviewed a Panel decision?

2. Did the Authority act arbitrarily and capriciously when it determined that the Union directly challenged a Panel decision by repeatedly claiming the Panel "lacked jurisdiction" over the matter it had decided or "exceeded its authority"?

3. Did the Authority act arbitrarily and capriciously when it determined that an arbitration award violated 5 U.S.C. § 7119 because

the arbitrator determined that the Panel "should not have issued a decision ordering the parties" to accept a collective bargaining term based on his belief that the Panel did not have jurisdiction over that dispute?

4. Did the Authority act arbitrarily and capriciously when it determined that agency-head review properly occurred 30 days after a Panel decision resolved all remaining bargaining issues in the case?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

A. Relevant statutory background

When it passed the Statute, "Congress established a distinct regulatory framework for collective bargaining between federal agencies and their employees." *Nat'l Air Traffic Controllers Ass'n v. FSIP*, 606 F.3d 780, 783 (D.C. Cir. 2010). The Statute "grants federal agency employees the right to organize, provides for collective bargaining, and defines various unfair labor practices." *Id.*; *see also* 5 U.S.C. §§ 7114(a)(1), 7116. It also imposes a duty on "unions and federal

agencies [to] negotiate in good faith over certain matters." *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump ("AFGE v. Trump")*, 929 F.3d 748, 752 (D.C. Cir. 2019) (citations omitted). "The FLRA is primarily responsible for administering the [S]tatute." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP ("NATCA 2006")*, 437 F.3d 1256, 1257 (D.C. Cir. 2006).

The Panel is "an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives." 5 U.S.C. § 7119(c)(1). It "serves as a forum 'of last resort in the speedy resolution of disputes' between a federal agency and the exclusive representatives of its employees 'after negotiations have failed.'" *NATCA 2006*, 437 F.3d at 1257-58 (quoting *Council of Prison Locs. v. Brewer ("Brewer")*, 735 F.2d 1497, 1501 (D.C. Cir. 1984)). Congress created the Panel to resolve impasses without the need for strikes, which are prohibited in federal-sector employment. *See* 124 Cong. Rec. H. 9698 (daily ed. Sept. 13, 1978) (discussing the Statute's effect on 5 U.S.C. § 7311 and 18 U.S.C. § 1918, which bar federal worker strikes).

Either a federal employer or a union may request the Panel's assistance to resolve a negotiation impasse. 5 U.S.C. § 7119(b). Pursuant to the Statute, the Panel must "promptly investigate any impasse presented to it," *Id.* § 7119(c)(5)(A), and then "either (1) [d]ecline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction" or "(2) [a]ssert jurisdiction," 5 C.F.R. § 2471.6(a). If the Panel asserts jurisdiction, then it may "take whatever action is necessary and not inconsistent with [the Statute] to resolve the impasse. . . ." *Am. Fed'n. of Gov't Emps. v. FLRA*, 691 F.2d 565, 569 n.26 (D.C. Cir. 1982) (citing 5 U.S.C. § 7119(c)(5)(B)(iii)); *see also* 5 C.F.R. § 2471.6(a)(2)(ii).

"Panel impasse-resolving action often takes the form of ordering the parties to adopt particular contract provisions. The FLRA and the courts consider such Panel-imposed terms to be part of the collective bargaining agreement." *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA* ("*AFGE 1985*"), 778 F.2d 850, 863 (D.C. Cir. 1985). As such, they are subject to review by the head of the agency affected. *See* 5 U.S.C. § 7114 ("An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.");

AFGE 1985, 778 F.2d at 857 ("This court and the Authority have interpreted the term 'agreement' as used in the head of the agency provision, to include all terms—whether achieved by negotiation or imposed by the Impasses Panel.").

Neither this Court nor the Authority have the power to directly review a Panel decision. *See* 5 U.S.C. § 7105 (list of powers of the Authority does not include the power to review Panel decisions); *id.* § 7119(c)(5)(C) (actions of the Panel are "final and binding"); *AFGE 1985*, 778 F.2d at 854; *U.S. Army Corps of Eng'rs Kan. City Dist. Kan. City, Mo.*, 16 FLRA 456, 458–59 (1984) ("a party to a proceeding before the FSIP may not appeal directly to the Authority" (citing *State of N.Y., Div. of Mil. & Naval Affs. ("State of N.Y.")*, 2 FLRA 185 (1979)). Instead, Panel decisions may be indirectly attacked through the Statute's detailed remedial scheme by which parties may file or be the subject of ULP proceedings, appeal those findings to the FLRA, and then to this Court. *See also Nat'l Treasury Emps. Union v. FLRA,* 712 F.2d 669, 671 n.5 (D.C. Cir. 1983) ("The Panel's decision is reviewable, first before the Authority, then in court, in an unfair labor practice

proceeding."); *see also Brewer*, 735 F.2d at 1500-501 (same); 5 U.S.C. §§ 7105, 7118, 7121, 7123(a).

"The Statute establishes essentially a two-track system for resolving" allegations of a ULP. *Overseas Educ. Ass'n v. FLRA,* 824 F.2d 61, 62 (D.C. Cir. 1987). First, either party may file a ULP charge. 5 U.S.C. § 7118(a)(1). Second, either party may submit a grievance to an arbitrator under provisions set forth in an existing CBA. *Id.* § 7122(a). The choice of which track to pursue belongs to the complaining party. Under 5 U.S.C. § 7116(d), "[a]n aggrieved party may elect either track—the statutory complaint procedure or binding arbitration—but not both." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1344 (D.C. Cir. 2012).

Although Panel orders are not directly reviewable by the Authority, the Statute provides a particular avenue for an indirect challenge. Either party's noncompliance with a Panel decision constitutes an ULP. 5 U.S.C. § 7116(a)(6), (b)(6) (making "fail[ure] or refus[al] to cooperate in impasse procedures and impasse decisions" by agency or union alike an ULP); *e.g., Am. Fed'n of Gov't Emps.*, 16 FLRA 318, 318–19 (1984) (holding that a union committed an ULP when it

refused to sign the parties' pre-negotiation agreement incorporating a Panel decision); *Interpretation & Guidance*, 15 FLRA 564, 567–68 (1984) (explaining that an agency head's erroneous rejection of a Panel decision as contrary to any applicable law, rule, or regulation under 5 U.S.C. § 7114(c) is an ULP). A party charged with such an ULP may challenge the validity of the Panel decision as a defense against the ULP. *See Brewer*, 735 F.2d at 1500-01; *State of N.Y.*, 2 FLRA at 188.

Challenging the circumstances surrounding a Panel decision as distinguished from challenging the validity of the Panel decision itself - may be accomplished in a number of ways. For example, a party also could contend that the other party had committed a ULP by bargaining to impasse over permissive subjects. *Am. Fed'n of Gov't Emps., Loc. 3937 ("AFGE, Loc. 3937")*, 64 FLRA 17, 21 (2009) ("It is well established that insisting to impasse on a permissive subject of bargaining violates the Statute."). A party could also be found to have committed a ULP by refusing to bargain in good faith over matters left unresolved by a Panel decision. *Dep't of HHS, Health Care Fin. Admin.*, 39 FLRA 120, 131 (1991) (unilateral implementation of a policy while matter was before the Panel was a ULP).

But although a party may bring a variety of ULP claims arising from that party's conduct both before and after a Panel decision, and remedies for those ULPs could nullify a portion of the Panel's decision, the party *cannot* directly attack the Panel decision itself. ULP claims that are based in whole or in part on a challenge to a Panel decision constitute such forbidden direct attacks.

B. Procedural History

The dispute arose after the Union and the U.S. Department of Defense, Domestic Dependents Elementary and Secondary Schools (the "Agency") submitted to the Panel for resolution, articles of a successor Master Labor Agreement ("MLA") that the parties had been unable to resolve. *DOD I,* 72 FLRA 601.

With the Panel's assistance, the parties voluntarily resolved most of the disputed articles, including Article 18, Section 1(a), which concerned the number of hours in the workday. *Id.*

Ten issues remained unresolved, including Article 18, Section 3(f), relating to compensation for school days rescheduled due to weather. *Id.* The Union argued to the Panel that it lacked jurisdiction over Article 18, Section 3(f) because the subject matter of that section was

covered by Article 11. *Id.* On December 14, 2018, the Panel issued an order resolving all ten issues, including Article 18, Section 3(f). *Id.* at 602. In that order, the Panel determined that no conflict existed between Article 11 and Article 18, because Section 3(f) of Article 18 establishes a "190-day work year" and Article 11 was meant to address compensation beyond the 190-day work year requirement. *Id.*

As the Panel decision resolved all remaining issues in the case, the Agency forwarded the MLA to the Director of Defense Civilian Personnel Advisory Service ("DCPAS" or the "Agency Head") for review. *Id.* at 602.

The Union filed two grievances alleging that the Agency unlawfully: (1) submitted the MLA to the agency-head for review (JA 120-121) and (2) repudiated the parties' ground rules and former MLA (JA 133-134). In its second grievance, the Union disputed the Panel's jurisdiction over Article 18, Section 3(f). (JA 133-134.)

The parties proceeded to arbitration. On January 2, 2020, the Arbitrator issued his award. The Arbitrator found in relevant part, "the Panel "should not have issued a decision ordering the parties to accept the Agency's proposed version of Article 18, Section 3(f)." *DOD I,* 72

FLRA at 602. The Arbitrator therefore set aside the Panel decision and found that the issues the Panel decision had resolved were reopened. *Id.* Based on his invalidation of the Panel decision, the Arbitrator found that there were now unresolved bargaining issues involving Article 18, Section 3(f), Article 18 was reopened, and the Union could consequently withdraw from Article 18, Section 1(a). *Id.* Based on his determination that the Panel lacked jurisdiction over Article 18, Section 3(f), and his related finding that bargaining over Article 18 was unresolved, the Arbitrator concluded that the Agency should not have submitted an unsigned agreement – including the Panel-imposed provisions of Article 18 – for agency-head review. On February 3, 2020, the Agency filed exceptions with the Authority, contending the Arbitrator's award was contrary to law. (JA 27-57.)

On December 20, 2021, the Authority issued *DOD I*. 72 FLRA at 601. In that Decision, the Authority set aside the Arbitrator's award on three grounds. First, the Authority found that the award was contrary to § 7119 because the Union's ULP grievances constituted a direct attack on the FSIP decision. *Id.* at 603. Second, the Authority determined the award was contrary to § 7114 because the Arbitrator

erroneously concluded there were unresolved provisions remaining in the MLA after the FSIP decision. *Id.* at 604. Third, the Authority found that the Arbitrator erred in finding that the MLA was not properly executed since "the successor MLA was executed when the Panel issued its order." *Id.* at 605. On December 27, 2021, the Union filed a motion for reconsideration of *DOD I*. (JA 372-80.)

On August 16, 2022, the Authority denied the Union's motion for reconsideration in *DOD II,* finding that the Union's arguments failed to establish extraordinary circumstances warranting reconsideration. 73 FLRA 149. Addressing the Union's specific objections, the Authority found that there had been no change in law regarding the statutory scheme for reviewing FSIP decisions and that FSIP decisions are not subject to direct review. *Id.* at 150-51. The Authority reiterated that the Union's grievances constituted an impermissible direct attack on the FSIP decision. *Id.* at 150-52. In rendering those determinations, the Authority found that its Decision did not "limit the methods by which a union can challenge matters pertaining to an order by the Panel." *Id.* at 152 n.32 (note by then-Member Grundmann). Finally, the Authority rejected as both untimely, and failing to demonstrate that it had erred,

the Union's arguments that there were unresolved MLA terms when FSIP issued its decision. *Id.* at 151-52.

Thereafter, the Union filed this Petition for Review of the Authority's decisions in *DOD I* and *DOD II*.

STATEMENT OF THE FACTS

A. Background

The Agency provides elementary and secondary education to children of military employees. (JA 173-174.) The Union represents certain Agency professional employees. (JA 174.)

In 2010, the Agency and the Union began negotiating a successor MLA. *DOD I*, 72 FLRA at 601. The Agency and the Union implemented ground rules stating, in relevant part, that "[o]nce agreement is reached on all proposals/provisions of the [successor MLA], and it is signed, the agreement will be formally executed (signed and dated) and submitted for agency[-]head review." (JA 131.)

In 2015, the Agency and the Union reached a new ground-rules agreement through a Memorandum of Understanding that added, "Except by mutual agreement, all agreed upon [a]rticles . . . remain agreed and not subject to further modification" but "[p]arties reserve

the right to modify their proposals concerning any [a]rticle . . . to which the parties have not yet reached agreement." 72 FLRA at 601. The Agency and Union then continued to negotiate the successor MLA.

B. FSIP Decision

In 2018, after being unable to come to an agreement on various MLA provisions, the Agency notified FSIP that the parties were at impasse on those issues. (JA 173.) FSIP agreed and on October 23 and October 25, 2018, the Agency and Union had an informal conference with a FSIP Member. (JA 173.) During that conference, the parties resolved nearly 30 of the outstanding issues, including issues related to Article 18, Section 1(a), which concerned working hours. (JA 173.) However, at the conclusion of the informal conference, there were 10 articles over which the Agency and the Union had not reached an agreement, including Article 18, Section 3(f). (JA 173.) The FSIP Member directed the parties to file written submissions on the remaining issues by November 9, 2018. (JA 173.)

In its submission, the Agency proposed language for Article 18, Section 3(f), which concerned working days and school closings. (JA 176.) The Union opposed that proposal and argued that FSIP did not

have jurisdiction over it because a different article (Article 11, Section 5(b)) already addressed (or "covered" that issue) and the two articles conflicted with one another. (JA 176-77.) The Union did not, however, offer a counter proposal to the Agency's proposed language for Article 18, Section 3(f). (JA 176.)

On December 14, 2018, the Panel issued a decision on the Union and Agency's remaining disputes. (JA 173-97.) In relevant part, FSIP determined that it did have jurisdiction over Article 18, Section 3(f). The Panel determined that no conflict existed between Article 11 and Article 18, because Section 3(f) of Article 18 establishes a "190-day work year" and Article 11 was meant to address compensation beyond the 190-day work year requirement. (JA 178.) FSIP then ordered the parties to adopt the Agency's proposal regarding Article 18, Section 3(f). (JA 179.)

Pursuant to the FSIP decision, on January 11, 2019, DCPAS signed a memorandum approving the agreement as directed by FSIP. (JA 198.) The Union refused to sign the agreement claiming, in spite of the FSIP decision to the contrary, that there were still unresolved

articles in the MLA. (JA 122.) On January 23, 2019, the Union sent an email to the Agency stating:

> [t]he remaining roadblock to executing a term bargaining agreement concerns FSIP's adoption of the Agency's proposed Article 18.3.f. As you are aware, it is [the Union's] position that FSIP lacked jurisdiction over the Agency's proposal . . . [the Union] asks that the agency seriously consider withdrawing its proposed Article 18.3.f altogether.

(JA 122.)

C. Grievances

On February 9, 2019, the Union filed a grievance asserting "the Agency's decision to submit an unexecuted draft of the parties' successor MLA to DCPAS is in violation of the parties' ground rules and law and constitutes bad faith bargaining and an ULP under § 7116(a) of the Statute." (JA 120-21.)

On February 11, 2019, the Agency sent the Union an email stating that the effective date of the successor MLA was January 11, 2019, the date the Agency Head approved the agreement. (JA 137.) On February 13, 2019, the Union responded that it considered the Agency's email to be:

> an express repudiation of the parties' Master Labor Agreement. The agreed upon requirement for the parties to execute a final agreement is a statutory right. Until such

> time a new agreement is executed and becomes effective, under the duration clause of the MLA and the parties' ground rules, the terms of the 2005 MLA remain in effect.

(JA 136.)

On February 21, 2019, the Union filed a separate grievance alleging that "the Agency's repudiation of the terms of the parties' Master Labor Agreement and the Agency's notification that it will be implementing the terms of an unexecuted successor Master Labor Agreement" was an ULP under § 7116(a) of the Statute. (JA 133-34.) It also disputed the Panel's jurisdiction over Article 18, Section 3(f), explaining, "[The Union] would not execute a final agreement until the parties have finalized the unsigned [a]rticles and resolved the dispute over [the Panel's] jurisdiction." *DOD I,* 72 FLRA at 602 & n.10. The Agency denied both grievances. (JA 153-57.)

The Arbitrator consolidated the grievances and held arbitration hearings on them on September 11, and September 12, 2019. (JA 7). In its post-arbitration brief, the Union argued, "FSIP Exceeded Its Authority by Adopting the Agency's Proposed Article 18, Section 3(f)." (JA 302.) The Union's argument that Article 18, Section 3(f) was a permissive subject was premised on its position—previously rejected by

the Panel—that Article 11, Section 5(a) covered the same subject matter regarding weather-related absences. (JA 302-03.)

On January 20, 2020, the Arbitrator issued his Award. The Arbitrator framed the issues as whether Article 18, Section 3(f)—which FSIP had already imposed—was enforceable, and whether the Union could lawfully withdraw its previous approval of Article 18, Section 1(a). (JA 12.)

The Arbitrator's resolution of the grievance hinged on his initial findings that the "*The Union had a right not to accept FSIP's order* and, in turn, to file grievances leading to arbitration." (JA 21-22 (emphasis added).) On the merits of the Union's objections to FSIP's order, the Arbitrator found the "Union was correct in its argument that FSIP should not have issued a decision ordering the parties to accept the Agency's proposed version of Article 18, Section 3(f), as it was a permissive subject of bargaining." (JA 21-22.)

From these determinations, the Arbitrator made his remaining findings. Having invalidated the Panel's imposition of Article 18, Section 3(f), the Arbitrator concluded that bargaining over Article 18 as a whole was incomplete. Consequently, the Arbitrator found that the

parties' ground-rules agreement permitted the Union to withdraw from Article 18, Section 1(a). (JA 21.) He then found that the Agency violated the ground-rules agreement and the Statute by submitting an unsigned agreement for Agency-head review. (JA 22-23.) Finally, he found that the Agency's unilateral implementation of the successor MLA (which the Agency implemented based on the FSIP decision) resulted in a repudiation of the 2005 MLA in violation of the ground-rules agreement and the Statute. (JA 22-24).

D. Appeal to Authority

On February 3, 2020, the Agency filed exceptions to the award with the Authority, and on March 3, 2020, the Union filed an opposition to the Agency's exceptions. (JA 27-57; JA 202-60.)

On December 20, 2021, the Authority issued its decision in *DOD I* setting aside the Arbitrator's award and finding it contrary to § 7119 and § 7114 of the Statute. 72 FLRA 601. First, the Authority found that "[i]n the second grievance, and before the Arbitrator, the Union contested the Panel's imposition of Article 18, Section 3(f) by repeatedly claiming that the Panel 'lacked jurisdiction' or 'exceeded its authority.'" *Id.* at 603 (internal citations omitted). Noting that the "Authority has

repeatedly stated that Panel orders are not directly reviewable," the Authority found that "[t]he Union's grievances directly contesting the Panel's order fail to respect the statutory framework for review of Panel orders and circumvent the procedure set in § 7119." *Id.* Accordingly, the Authority concluded that the award was contrary to § 7119. *Id.*

Next, the Authority found that no further action was required to finalize the successor MLA after the Panel issued its order. *Id.* at 604. The Authority determined that "the Arbitrator found that the only unresolved bargaining issues were Article 18, Sections 1(a) and 3(f)." *Id.* at 604. It further found that "[b]ecause the Arbitrator's conclusion that the Union properly withdrew from Article 18, Section 1(a) hinged on the erroneous conclusion that Article 18, Section 3(f) was unenforceable, there were no unresolved bargaining issues after the Panel issued its order." *Id.* As a result, the Authority concluded the Agency properly conducted Agency-head review within 30 days of the Panel's order as required by § 7114, and the Agency's actions did not constitute a repudiation of the 2005 MLA. *Id.* Because the Authority determined that the Arbitrator's contrary conclusions conflicted with § 7114, the Authority set aside the Arbitrator's award. *Id.* at 605.

On December 27, 2021, the Union filed a Motion for Reconsideration of *DOD I*. (JA 372-80.) The Authority denied that motion on August 16, 2022. *DOD II,* 73 FLRA 149. The Authority first found there had been no change in law regarding the statutory scheme for reviewing FSIP decisions. *Id.* at 150. It reiterated that "the Authority and courts have repeatedly held that Panel orders are not subject to direct review. . . ." *Id.* Rather, the Authority held that parties may challenge the circumstances surrounding a Panel decision in a ULP proceeding that may ultimately be appealed to the Courts. *Id.* The Authority addressed the Union's contention that the Statute's lack of a direct appeal procedure is "irrational" by noting that "the scheme of review is statutory in nature and any changes to it must come from Congress, not the Authority." *Id.*

The Authority rejected the Union's contention that it did not have the opportunity to brief why it collaterally attacked the Panel's decision. *Id.* at 151. The Authority distinguished the decisions relied upon by the Union, observing that the Union's ULP grievances constituted a direct attack on the Panel's decision. *Id.* In support, the Authority cited the Union's arguments to the Arbitrator, including the Union's post-

arbitration brief that stated, "It is the Union's position that the Panel lacked jurisdiction over Article 18, Section 3(f)" and "The Panel exceeded its authority by adopting the Agency's proposed Article 18, Section 3(f)." *Id.* at 152 n.19 (alterations and citations omitted).

The Authority also addressed the Union's contention that intervening litigation, and more specifically the Authority's briefs in federal District Court litigation, were evidence that the "union is not relegated to waiting for an agency to file a charge against it." *Id.* at 151. A majority of the Authority found that the Union's avenues for challenging matters pertaining to a Panel decision were broader than "waiting for an agency to file a charge against it." *Id.* at 152 n.32. It specifically found:

> Member Grundmann notes, and the Chairman's concurrence acknowledges, the majority decision does not limit the methods by which a union can challenge matters pertaining to an order by the Panel and should not be viewed as such.

Id. In his concurrence, then-Chairman DuBester outlined some of those "methods by which a union can challenge matters pertaining to an order by the . . . Panel":

> a union may challenge matters pertaining to a Panel decision by bringing an unfair labor practice charge alleging

> that an agency action related to the Panel proceeding constituted an unfair labor practice.
>
> For instance, it is well-established that a party commits an unfair labor practice by bargaining to impasse over permissive subjects. Additionally, an agency could be found liable for failing or refusing to bargain in good faith over matters left unresolved by a Panel decision.

Id. at 153 (internal citations omitted). The Authority noted that its decisions should not be read as limiting the ability of unions to pursue such ULPs. *Id.* at 152, 153 (concurrence of then-Chairman DuBester).

Finally, the Authority rejected the Union's argument that the parties had not resolved Article 22, Section 3 of the CBA before the Panel issued its decision. As in *DOD I*, the Authority rejected this argument because: (1) the Arbitrator had not adopted the Union's argument that Article 22, Section 3 was unresolved and (2) the Union had not challenged the Arbitrator's decision before the Authority. *Id.* at 152, 153.

On August 24, 2022, the Union filed the Petition for Review of the Authority's decisions in *DOD I* and *DOD II*.

SUMMARY OF THE ARGUMENT

The Court should dismiss and/or deny the Petition for Review because it seeks direct review of a Panel decision and the Authority's determinations that it does so were neither arbitrary nor capricious.

The Statute makes the Panel's orders "binding on [the] parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C). Panel orders are not directly reviewable by the Authority or courts. *See id.* § 7105; *Brewer*, 735 F.2d at 1499 (finding "the [S]tatute gives every reasonable indication that orders by the Impasses Panel are final and nonreviewable"); see also *State of N.Y.,* 2 FLRA at 188 (direct review of Panel orders is unavailable). Parties may challenge the circumstances surrounding Panel orders through ULP proceedings.

Although the Union argues that its grievances were collateral attacks (Br. 48), its grievances are inconsistent with the statutory framework for limited review of Panel orders. Moreover, the grievances plainly sought direct review of the Panel's decision. That the legal theories underlying the Union's grievances hinged entirely on the Arbitrator finding the Panel lacked jurisdiction to impose Article 18,

Section 3(f) demonstrates that the grievances required the Arbitrator to *directly* review the Panel's decision. To the extent that the Union challenged the Agency's conduct, the success of that challenge was contingent on the Union *first* establishing that the Panel decision was unlawful. The Union cannot dispute that in its second grievance and post-hearing brief, the Union argued that the Panel lacked jurisdiction over Article 18, Section 3(f) of the MLA. This constituted a direct attack on the Panel's December 14, 2018, decision. The Arbitrator relied on the Union's arguments in making the two main rulings in his decision: (1) that the Union was correct that the Panel lacked jurisdiction over Article 18, Section 3(f); and (2) that the Union could therefore withdraw its approval of Article 18, Section1(a). (JA 21-24.)

It is for these reasons that the Authority decided that the Union's grievance and the Arbitrator's award constituted an impermissible direct attack on the Panel's decision in violation of § 7119. *DOD I,* 72 FLRA at 603. And as the majority clarified on reconsideration, its decision did not limit the avenues by which unions can challenge agencies' conduct pertaining to FSIP decisions. *DOD II,* 73 FLRA at 152 n.32 (note of then-Member Grundmann) & 153 (then-Chairman

DuBester concurring). Rather the Authority simply did not believe that the Union followed such an avenue or prevailed in such an argument. *Id.*

For example, despite repeatedly claiming FSIP lacked jurisdiction over Article 18, Section 3(f), the Union never filed an ULP grievance against the Agency alleging that it violated § 7116(a)(5) by bargaining to impasse on a permissive subject of bargaining. (JA 120-21, JA133-34.) As then-Chairman DuBester observed, such a grievance would have been a lawful way that the Union could have challenged the Agency's conduct. *DOD II,* 73 FLRA at 153 & n.5 (citing *AFGE, Local 3937*, 64 FLRA at 21-22 (party that bargained to impasse a matter covered by existing agreements between the parties—a permissive subject of bargaining—committed a ULP).

But the Union did not make that claim. *DOD II,* 43 FLRA at 153; JA 120-121, JA 133. Instead, it claimed that the Agency had unlawfully submitted the MLA for Agency Head review and allegedly repudiated the former MLA while the parties "resolved the dispute over FSIP's jurisdiction." (JA 133; JA 120-21.)

Similarly, the Union's grievances do not establish that there were matters left unresolved by the FSIP decision that the Agency failed to negotiate in good faith. *DOD II,* 73 FLRA at 153; (JA 120-121, JA 133). That is because the allegedly "unresolved" matters either flow from the Union's argument that the Panel lacked jurisdiction over Article 18, Section 3(f) or were not substantive. Thus, the grievances sought direct review of the Panel decision in a manner not authorized by law.

Indeed, the Authority properly found that the Panel's decision addressed all remaining bargaining issues between the Union and Agency. Among those issues, FSIP addressed the Union's claim that Article 18, Section 3(f) was covered by Article 11, Section 5(b), and determined the claim was unsupported. (JA 178.) Specifically, FSIP found that Article 11, Section 5(c), was different from Article 18, Section 3(f) because:

> Article 11, Section 5(c) — which the Union omits from its analysis — states that employees "on a seasonal work schedule will be compensated in accordance with Article 20, for all days required to be made up *beyond the work year requirements as described in Article 18*." (emphasis added). This language establishes that compensation under this Article goes to days "beyond" the work requirements already set forth in Article 18. And as noted earlier, the parties have already agreed to a 190-day work year in Article 18. Thus, it

> is clear that Article 11 is meant to address those situations above the agreed to 190-day window, as the Agency argues.

(JA 178.)

Having decided that the proposal in Article 18, Section 3(f) was not covered by Article 11, FSIP turned to the parties' proposals concerning that provision. As the Union failed to provide any proposal regarding Article 18, Section 3(f), FSIP ordered the parties to adopt the agency's proposal regarding Article 18, Section 3(f) and made determinations regarding all remaining bargaining issues. Congress intended determinations such as this to be unreviewable. *See Brewer*, 735 F.2d at 1499. The Panel's decision is therefore the final word on the subject and the Authority's determination to that effect was reasonable.

As the Panel's decision addressed all remaining bargaining issues, the Authority properly determined the Agency submitted the MLA for agency-head review in accordance with §§ 7114 (related to agency-head review) and 7119 (related to the powers of FSIP). Section 7119(c)(5)(B) of the Statute permits the Panel to "take whatever action is necessary and not inconsistent" with the Statute to resolve impasses—including imposing collective bargaining terms on the parties without their

consent. The Authority has therefore long held that, in the context of impasse proceedings, a CBA is executed on the date the Panel issues its order. *See Am. Fed'n of Gov't Emps., Nat'l VA Council ("VA Council")*, 39 FLRA 1055, 1057 (1991). Thus, "the date on which the [Panel] decision was issued to, and served on, the parties constitutes the date on which the parties' agreement was executed, for purposes of agency[-]head review under [§] 7114(c) of the Statute." *Id.*

The Union's argument that a successor MLA could not take effect until the parties agree to sign it ignores the structure and purpose of statutory provisions concerning FSIP. FSIP proceedings are expressly designed for situations, such as this, where there is no agreement between the parties. Permitting a party to side-step a FSIP decision by simply refusing to sign an agreement, would reward that party for refusing to comply with a FSIP decision and undermine the entire statutory scheme. The Authority correctly refused to permit such an abrogation of the Statute in this case, as it has done in the past. *See Am. Fed'n of Gov't Emps. AFL-CIO Loc. 1815 ("AFGE, Loc. 1815")*, 69 FLRA 309, 309 & 320 (2016) ("If, by refusing to sign the deal it had already initialed, the Union could successfully prevent the execution of

the CBA, a party would be rewarded for its own unlawful conduct. . . . It was for just this sort of case that the Authority reserved the possibility of considering an agreement executed without requiring it to be signed.").

The Union's remaining arguments, that the Authority's decisions overturned its own precedent and that the decisions conflicted with arguments that it made to U.S. District Courts in relation to FSIP appointment clause claims, are without merit. As the Authority clarified in *DOD II,* 73 FLRA at 152 n.32 & 153, "the majority decision does not limit the methods by which a union can challenge matters pertaining to an order by the Panel and should not be viewed as such. This case addresses only the statutory framework for 'review of Panel orders' and does not pertain to the types of ULPs described by the concurrence." *DOD II,* 73 FLRA at 152. This meant that the Union's claims fail not because of the form or forum in which those claims were made. They fail because they are a direct attack on the substance of the FSIP decision, which is precluded by the Statute. And the Authority has never held, nor has it argued, that such direct attacks are lawful.

Based on the foregoing, the Authority's decisions were neither arbitrary nor capricious. This Court should therefore dismiss or deny the Petition to Review.

STANDARD OF REVIEW

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

At *Chevron* step two, "'the question for the [C]ourt is whether the agency's interpretation is based on a permissible construction of the [S]tatute in light of its language, structure, and purpose.'" *Id.* at 1042 (quoting *Am. Fed'n of Govt' Emps. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005)). The Court "need not conclude that the Authority's

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

Chevron step two analysis "overlaps with" the Administrative Procedure Act's arbitrary and capricious standard. *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 96 (2005) (quotation omitted). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the [Authority] failed to consider relevant factors or made a clear error in judgment[.]" *Cellco P'ship v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004) (internal quotation marks and citations omitted).

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

Procedure Act standards of review). The scope of such review is narrow. *See, e.g., Am. Fed'n of Gov't Emps., Loc. 2303 v. FLRA*, 815 F.2d 718, 721-22 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

ARGUMENT

I. The Authority reasonably set aside the Arbitrator's award because it was contrary to law.

The Authority properly set aside the Arbitrator's award because the Union's grievances and the arbitration award constituted direct attacks on the Panel's decision. This is apparent from the Union's second grievance, the Union's arguments concerning the grievance, and the Arbitrator's award. As the grievances and arbitration award were direct attacks on the Panel decisions, denial of the Petition is appropriate under *Chevron* step one because, "Congress has spoken directly to the precise question at issue" in this case. *Shays*, 414 F.3d at 96. Specifically, Congress clearly intended to preclude both the Authority and Courts from directly reviewing Panel decisions. *Brewer*, 735 F.2d at 1497 & n.9.

But even if the law on this point were ambiguous—and it is not—the Authority should prevail on *Chevron* step two because the

Authority's interpretation and application of § 7119 was reasonable. First, the Authority set the arbitration award aside because the Arbitrator based his decision on the erroneous *legal* conclusion that he had the power to review a FSIP decision. 72 FLRA at 603 & n.18.[3] The Authority did not set aside the Arbitrator's award based on his factual findings—the Union's arguments to the contrary (Br. 33-41) notwithstanding. Second, the "unresolved issues" that the Union claims existed after the FSIP decision were addressed *by the FSIP decision*—they were only "unresolved" to the extent that the Union refused to accept the FSIP decision as binding.

A. The Union's grievances, and the Arbitrator's award, were direct attacks on the FSIP decision.

The Union's grievances and the Arbitrator's award were direct, not collateral, attacks on the FSIP decision because they were aimed at overturning the FSIP decision. To the extent the grievances alleged

[3] The Union's citation to *Department of Army Corps Engineers*, 64 FLRA 405 (2010) and *American Federal of Government Employees, Local 3254*, 73 FLRA 325 (2022), for the proposition that the Authority defers to arbitrator factual findings concerning a CBA (Br. 33) is thus inapposite. *Department of Energy, Office of Science & Technical Information*, 63 FLRA 219, 221 (2009), which the Union cites for the proposition that arbitrators do not have to set forth their specific factual findings in their decisions (Br. 38-39) is inapplicable for the same reason.

that the Agency engaged in wrongdoing, these allegations were all premised on the illegality of the FSIP decision. The Arbitrator lacked the authority to decide whether the Panel erred by imposing a permissive subject of bargaining. In so holding, the Authority relied on longstanding precedent holding that Congress did not intend for Panel orders to be directly reviewable.

Congress created the Panel to resolve impasses without the need for strikes, which are prohibited in federal-sector employment. *See* 124 Cong. Rec. H. 9698 (daily ed. Sept. 13, 1978) (discussing the Statute's effect on 5 U.S.C. § 7311 and 18 U.S.C. § 1918, which bar federal worker strikes). The Panel was designed by Congress to serve "as a forum 'of last resort in the speedy resolution of disputes' between a federal agency and the exclusive representatives of its employees 'after negotiations have failed.'" *NATCA 2006*, 437 F.3d at 1257-58 (quoting *Brewer*, 735 F.2d at 1501). In order to ensure "swift and final Panel authority" Congress provided that FSIP decisions are not subject to direct review by the Authority or this Court. *Brewer*, 735 F.2d at 1497 & n.9. "While § 7123 specifically provides for judicial review of orders by the *Authority,* there is no provision for such review of *Panel* orders,

and Panel orders are not appealable even to the Authority." *Id.* at 1499 (emphasis in the original).

Rather parties may challenge the circumstances surrounding a Panel decision through ULP proceedings. *Id.*; *AFGE 1985*, 778 F.2d at 854. In other words, the Statute only permits collateral attacks on decisions. However, this Court has held that claims are not wholly collateral if they serve as the "vehicle by which" a party seeks to prevail. *Jarkesy v. Secs. & Exch. Comm'n,* 803 F.3d 9, 23 (D.C. Cir. 2015) (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 21-22 (2012)).

Here, the Union's ULP claims were the vehicle by which the Union directly attacked the Panel decision. The Union's grievance, post-hearing briefs, and the Arbitrator's award all demonstrate that the Union's primary target was the Panel decision. *DOD I,* 72 FLRA at 603. The Union claimed the Agency's compliance with an allegedly unlawful Panel decision created a cause of action. Such a claim can only be characterized as seeking direct review of the Panel's decision.

Highlighting the centrality of the Union's direct attack on the Panel's decision to its claims, the Union specifically stated in the second grievance that it "would not execute a final agreement until the parties

have finalized the unsigned [a]rticles and resolved the dispute over [the Panel's] jurisdiction . . . to adopt the Agency's proposed Article 18, [S]ection 3(f)." *Id.* at 603 & n.25. The Authority found that the Union's challenge of the Panel decision continued "before the arbitrator" as the Union "contested the Panel's imposition of Article 18, Section 3(f) by repeatedly claiming the Panel 'lacked jurisdiction' or 'exceeded its authority.'" *Id.* at 603 & nn.27 & 28.

The Union's second grievance and arguments to the Arbitrator thus laid the basis for the Arbitrator's finding that "FSIP should not have issued a decision ordering the parties to accept the Agency's proposed version of Article 18, Section 3(f), as it was a permissive subject of bargaining . . . the Union had a right not to accept FSIP's order. . . . , and the Union was within its rights to withdraw its acceptance of Article 18, Section 1(a) under the parties' Ground Rules." (JA 21-22.) These determinations are the core and primary substance of the Arbitrator's award, and all other conclusions in the decision flow from them. That is why the Authority concluded that the Arbitrator's award constituted a direct attack on the FSIP decision.

The grievances also demonstrate that the Union only attacked the Agency's actions to the extent that the Agency attempted to comply with the FSIP decision. As then-Chairman DuBester observed, the Union did not claim that the Agency had unlawfully negotiated a permissive subject to impasse. *DOD II,* 73 FLRA at 153; JA 120-121, JA 133. Instead, it claimed that Agency had unlawfully submitted the MLA for Agency Head review and allegedly repudiated the former MLA while the parties "resolved the dispute over FSIP's jurisdiction" in its decision. (JA 133; JA 120-21.) Similarly, the Union's grievances do not establish that there were matters left unresolved by the FSIP decision that the Agency failed to negotiate in good faith. *DOD II,* 73 FLRA at 153; (JA 120-121, JA 133). As discussed at greater length below, that is because the matters that the Union claims were "unresolved" were either the result of the Union's challenges of the FSIP decision or were not substantive. The grievances therefore demonstrate that the Union's claims depended on persuading the Arbitrator to directly review the Panel's analysis and conclude that the Panel lacked jurisdiction over Article 18, Section 3(f).

The Union's ULP proceedings served as a "vehicle by which" the Union sought to appeal the Panel's decision resolving the parties' impasse regarding Article 18, Section 3(f) and thus constituted a direct attack on the Panel decision. As FSIP decisions are final, binding, and not subject to direct review, the Authority properly set aside the Arbitrator's award as contrary to § 7119.[4]

B. The Authority correctly found that the FSIP decision resolved all outstanding issues, and that the Union's claims to the contrary merely reflect its attempts to overturn the FSIP decision.

The Union's arguments that there were unresolved issues following the issuance of the FSIP decision (Br. 33-41) are attempts to obscure the reality that its ULP claims were direct attacks on the FSIP decision. The truth is that the FSIP decision resolved all outstanding

[4] The Union's reliance on *National Labor Relations Board ("NLRB")*, 72 FLRA 334 (2021) is unavailing because that case is distinguishable from this case. In *NLRB*, the Authority determined, in relevant part, that "the Arbitrator is authorized to determine the *legality of the Agency's actions* in bringing the allegedly permissive subject to FSIP." 72 FLRA at 339 (emphasis added). Here, the Union's ULP proceedings challenged the validity of the Panel decision by claiming the Panel lacked jurisdiction over Article 18, Section 3(f), not the Agency's actions in bringing Article 18, Section 3(f) to the Panel.

unresolved issues related to the MLA, and that the alleged outstanding issues related to the Union's attempt to overturn the FSIP decision.

i. The FSIP decision resolved all outstanding issues

The Panel's December 18, 2018, decision resolved all remaining bargaining issues related to the MLA.

At the time the Union and the Agency provided written submissions to FSIP, there were 10 matters over which the Union and the Agency could not reach an agreement. (JA 173.) FSIP considered each of those matters including the parties' dispute concerning Article 18, Section 3(f). The Union argued to FSIP that Article 18, Section 3(f) was covered by Article 11, Section 5. (JA 176-77.)

Resolution of the legal issues related to Article 18, Section 3(f) was significant because it affected FSIP's jurisdiction over the provision. If the substance of a proposed CBA provision overlaps with the substance of an existing provision, the proposed provision is deemed to be "covered by" the existing provision. *AFGE, Loc. 3937*, 64 FLRA at 21-22. A proposal that is covered by an existing provision of a contract cannot be negotiated to impasse. *Id.* Consequently, if the proposal is covered by another provision, FSIP does not have jurisdiction over that proposal,

because FSIP has jurisdiction only over matters that have been negotiated to impasse.

In this case FSIP, however, determined Article 18, Section 3(f) was not covered by Article 11. (JA 178.) FSIP therefore found that it had jurisdiction over resolution of the proposal. (JA 178.) Because the Union failed to provide any proposal regarding Article 18, Section 3(f), FSIP ordered the parties to adopt the agency's proposal regarding Article 18, Section 3(f). (JA 178.) FSIP then made determinations regarding all remaining issues. (JA 174-175.)

At that point, there were no other bargaining issues left outstanding. As described more fully below, the only bargaining issues that existed after the FSIP decision were those the Union created by refusing to accept the decision.

ii. The Union created disputes resolved by the FSIP decision—it did not engage in substantive negotiations after that decision.

The Union's contention that negotiations continued after the FSIP rendered its decision (Br. 38-39) are without merit. The Authority addressed this contention in both *DOD I,* 72 FLRA at 604 and *DOD II,* 73 FLRA at 151. In his twenty-page award, the Arbitrator never

mentioned unresolved issues other than those springing from the Union's continued insistence that the Panel did not have jurisdiction over Article 18, Section 3(f). (JA 7-26.) That question had already been answered by the Panel—and the Panel's decision could not be directly reviewed by the Authority or this Court—let alone an Arbitrator.

The Union's argument that the arbitration award's silence regarding unresolved bargaining issues should be interpreted to mean that there were possibly other outstanding bargaining issues (Br. 38-39) strains the text of the award. A more natural reading of the award would be that the other alleged "unresolved" terms were not the subject of substantial negotiations after the FSIP decision. That is borne out by the facts surrounding the two other terms the Union claims were "unresolved." (Br. 39-40.)

The Union claims that Article 18, Section 1(a) was one such term. (Br. 39-40.) But as the Authority found, "the Arbitrator's conclusion that the Union properly withdrew from Article 18, Section 1(a) hinged on the erroneous conclusion that Article 18, Section 3(f) was unenforceable." *DOD I,* 72 FLRA at 604. Thus, the term was only "unresolved" to the extent that the Union challenged FSIP's decision.

With respect to Article 22, Section 3 (Br. 39-40), the Authority properly rejected as untimely the Union's argument that the provision was unresolved at the time of the award. *DOD I,* 72 FLRA at 604 & n.45. But even if the Union had timely raised that argument, it would have been unavailing. The Agency notes in a January 10, 2019, email that a four-word difference in the opening paragraphs of Article 22, Section 3 was the only outstanding issue with respect to that term. (JA 141-42.) The Agency's February 11, 2019 email makes it clear that the four-word difference in Article 22, Section 3 was "course and 24-hour" versus "subject area or one (1) day" and that the parties opted to use the former language (JA 137). Clarifying the four-word difference between these two proposals can hardly be characterized as "substantive negotiations."[5] In light of these circumstances, it is not surprising that the Arbitrator did not mention Article 22, Section 3 as an unresolved issue.

The three provisions: Article 18, Section 3(f); Article 18, Section 1(a); and Article 22, Section 3, are the only provisions mentioned in the

[5] *See AFGE, Loc. 1815*, 69 FLRA at 309 (adopting ALJ's finding that changes made after a Panel order were not substantive).

Union's brief and emails the Union claims reflected communications the parties had concerning "outstanding issues" in January 2019. (Br. 39-41; JA 137-142.)[6] Thus, even addressing the Union's argument on its own terms, the Authority correctly concluded that "there were no unresolved bargaining issues after the Panel issued its order." *DOD I*, 72 FLRA at 604.

As the Authority reasonably found that there were no unresolved issues following the FSIP decision, denial of the Petition for Review is appropriate.

II. The Authority reasonably determined that agency-head review was appropriate after FSIP issued its decision.

The Authority properly found that the Agency lawfully submitted the MLA to the Agency Head for review pursuant to § 7114 of the Statute after the Panel resolved the remaining terms of the agreement under § 7119. The Union's argument that agency-head review was inappropriate because the parties had not voluntarily executed the

[6] The emails also mention the need for a revised index (JA 139), but the Union has never alleged that was an unresolved issue.

agreement (Br. 41-47), is contrary to the Authority's long-established precedent.

Section 7114 of the Statute permits agency-head review 30 days from the date an agreement is executed. The term "executed" is not defined by the Statute, so the issue of when an agreement has been executed cannot be resolved at *Chevron* step one. *Cf. Shays*, 414 F.3d at 96. The Authority correctly held the default interpretation is that agreements are executed when they are signed by the parties. 72 FLRA at 604. However, as this Court noted in *National Treasury Employees Union v. FLRA ("NTEU 2022")*, 45 F.4th 121, 125 (D.C. Cir. 2022), a statutory directive may overcome a default rule that agreements require the mutual consent of parties. The Authority's interpretation of the interplay of the statutory directives in Sections 7114 and 7119 is such a situation.

As this Court observed in *Brewer*, parties appear before the Panel because they cannot come to an agreement. 735 F. 2d at 1499. In § 7119, Congress empowered the Panel to impose terms on parties that they would not voluntarily choose. Giving parties the option whether to execute contracts containing Panel-imposed terms would unravel the

statutory scheme that Congress put in place when it gave the Panel the power to resolve impasses under § 7119. It would mean that an unwilling party could countermand a Panel decision under § 7119 and stop agency-head review under § 7114—rendering both provisions meaningless. And this case demonstrates what happens when a party believes that its signature trumps § 7119.

The case at bar is not the first case where the Authority was faced with this type of recalcitrance. In *AFGE, Loc. 1815*, the union argued that a CBA did not become binding when a FSIP decision was rendered because additional terms were left to be argued. 69 FLRA at 309, 320. The Authority adopted an ALJ's finding that the union's claims were without merit. Specifically, "the Union here was unreasonably holding out its execution of the CBA in order to extract concessions it had already signed away. If, by refusing to sign the deal it had already initialed, the Union could successfully prevent the execution of the CBA, a party would be rewarded for its own unlawful conduct" in refusing to be bound by the Panel decision at issue in that case. *Id.* at 320. "It was for just this sort of case that the Authority reserved the

possibility of considering an agreement executed without requiring it to be signed." *Id.*

This is why the Authority has found that the imposition of a CBA on the parties by a Panel order triggers the 30-day period for agency-head review under § 7114(c) by operation of law. *DOD I,* 72 FLRA at 604 (citing *AFGE, Loc. 1815*, 69 FLRA at 318; *VA Council*, 39 FLRA at 1057); *see also Pat. Off. Pro. Ass'n*, 41 FLRA 795, 804 (1991) (agreement deemed executed for the purpose of agency head review 30 days after "last portion of the interest arbitrator's award was issued"); *Int'l Org. of Masters, Mates & Pilots*, 36 FLRA 555, 559–62 (1990) (where interest arbitrator's decision encompassed the parties' entire agreement, the date of the arbitrator's award was the date of execution for agency head review); *Am. Fed'n of Gov't Emps., Nat'l VA Council*, 40 FLRA 195, 201 (1991) (where no further actions were necessary for the parties to

"execute" the Panel decision, CBA became final and subject to agency head review as of the date the Panel decision). [7]

The Agency lawfully submitted the successor MLA to the Agency Head for review within 30 days of the Panel's decision, as required by § 7114(c)(2) of the Statute. Accordingly, the Authority's determination that the Agency properly submitted the successor MLA for agency-head review was neither arbitrary nor capricious.

III. The Authority's decisions do not reflect a change in Authority precedent or positions.

As described more fully above, the Authority correctly found that the Union's ULP proceedings constituted an impermissible direct appeal of the Panel's December 14, 2018, decision. But the Authority's decisions did not limit the methods by which parties may collaterally attack FSIP decisions going forward. Nor did the Authority abandon the positions it had previously taken before the U.S. District Court.

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[7] In its brief, the Union contends the application of *DOD I* cannot be reconciled with the Authority's decisions in *Association of Civilian Technicians, Kentucky Long Rifle Chapter*, 70 FLRA 968 (2018) and *Fort Bragg Association of Teachers*, 44 FLRA 852, 857-58 (1992), in which the Authority reaffirmed that "parties may set the conditions on the execution of their agreements before triggering agency-head review." (Br. 42) Once again, these cases are distinguishable because neither case involved a Panel decision.

The Union's arguments to the contrary are without merit and should be rejected by this Court.

A. The Authority's decisions are consistent with the statutory framework and do not limit the means by which a union may challenge matters pertaining to a Panel order.

The Authority's decisions in *DOD I* and *DOD II* are consistent with the statutory framework for judicial review of Panel decisions and applicable precedent. The Union's claims that *DOD I* and *DOD II* unfairly curtail union options for challenging FSIP decisions while leaving open agency options for challenging those decisions (Br. 56-58), ignore the text and legislative history of the Statute, this Court's precedent, and the text of the Authority's decision in *DOD II*.

As previously noted, the framework for judicial review of Panel decisions is statutory. Under § 7119, a final Panel order "shall be binding on [both] parties during the term of the agreement, unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C). Panel orders are not directly reviewable by the Authority or the courts. *Brewer*, 735 F.2d at 1499. Instead, Section 7116(a)(6) provides that it is an ULP for an agency or a labor organization "to fail or refuse to cooperate in impasse procedures and impasse decisions." 5 U.S.C. § 7116(a)(6). Therefore, a

party that fails or refuses to comply with a Panel order may be charged with an ULP. However, a party charged with such an ULP may defend the lawfulness of its noncompliance by alleging the unlawfulness of the Panel's order, *i.e.*, seek indirect review of the validity of the Panel's order as part of its ULP defense.

The Union contends there is "no incentive for an agency to file a ULP charge that would provide a union with an opportunity to challenge the Panel's decision." (Br. 57.) However, then-Chairman DuBester's concurrence and then-Member Grundmann's footnote, there are other methods by which a union can challenge matters pertaining to a Panel order. *DOD II,* 73 FLRA at 152 & n.32, 153. Then-Chairman DuBester's concurrence, in which then-Member Grundmann joined, specifically states that "a union may challenge matters pertaining to a Panel decision by bringing an unfair labor practice charge alleging that an agency action related to the Panel proceeding constituted an unfair labor practice." *Id.* at 153. The decision declined to list all specific ways that a union could allege ULPs. It noted, however, that the Union could have filed a ULP charge alleging that the Agency bargained to impasse over permissive subjects of bargaining. *Id.* As described more fully

above, instead of accusing the *Agency* of unlawfully bargaining a permissive subject to impasse, (*See* JA 120-121, 133-134.) the Union asked an arbitrator to find that the *Panel* unlawfully asserted jurisdiction over a permissive subject. (JA 133.)

Even if there were a disparity in the options unions and agencies have for challenging FSIP decisions, that does not mean that the Authority erred in its decisions. Indeed, this Court held in *Brewer*:

> We recognize, however, the shortcomings of the unfair labor practices proceeding as the exclusive means for assuring judicial review of Panel orders. . . . [I]n many situations—for instance, where an employee benefit rather than a burden is at issue—it is difficult to see what the union could do to challenge the disputed contract term, since it may not resort to a "strike, work stoppage, or slowdown" under pain of decertification. *See id.* § 7120(f).
>
> Presented with such a choice, it is most likely that a union would often go along with the contract, and relinquish the opportunity for judicial review, rather than risk such calamities. Perhaps Congress wished to pay this price in return for swift and final Panel authority. In any event, our decision today adheres to the language and legislative history of the Act. Of course, Congress remains free to alter the scheme of review as it sees fit.

Brewer, 735 F.2d at 1502 n.9. The Authority's decisions are consistent with *Brewer* and do "not limit the methods by which a union can challenge matters pertaining to an order by the Panel and should not be

viewed as such." *DOD II,* 73 FLRA at 152 n.32. Denial of the Petition for Review is therefore appropriate.

B. The Authority's decisions are consistent with arguments it made in District Court litigation concerning constitutional challenges to the appointment of FSIP Members.

The District Court briefs cited by the Union are consistent with the Authority's decisions in *DOD I* and *DOD II*. The Union's claims of judicial estoppel (Br. 59) are therefore without merit.

The doctrine of judicial estoppel provides, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position[.]" *Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 733 (D.C. Cir. 2019) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)). This Court has set forth three key factors that "inform the decision" whether "the balance of equities" favors applying the doctrine: (1) whether the party's later position is "clearly inconsistent" with its earlier position; (2) "whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the

second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 733.

The first factor weighs against finding judicial estoppel in this case. The Union contends, and the Authority denies, that its decisions in *DOD I* and *DOD II* are inconsistent with briefs that the Authority filed in *Association of Administrative Law Judges v. Federal Service Impasses Panel ("AALJ")*, Case No. 1:20-cv-01026-ABJ and *National Weather Service Employees Organization v. Federal Services Impasses Panel ("NWSEO")*, Case 1:20-cv-1563-TJK.

In both cases, the plaintiff unions challenged FSIP decisions in U.S. District Court on the ground that the Panel was unlawfully composed of members appointed in violation of the Constitution's Appointments Clause. The Authority and intervenor government agencies moved to dismiss both cases on the ground that the plaintiff unions failed to follow the statutory review procedure whereby unions could seek indirect review of Panel decisions through ULP processes and from there (if necessary) a court of appeals. *AALJ*, 1:20-cv-01026-ABJ, ECF No. 22 at 21; *NWSEO*, 1:20-cv-1563-TJK, ECF No. 13 at 22.

In both cases, the Authority and intervenor government agencies addressed concerns as to whether the unions had meaningful options to affirmatively exhaust their constitutional claims through ULP proceedings against their agencies.[8] And they argued that the unions might be able to bring affirmative ULP claims against their agencies.

The arguments in *AALJ* and *NWSEO* are consistent with the Authority's decisions in this case. Both the briefs and *DOD II*

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[8] In *AALJ,* 1:20-cv-01026-ABJ, ECF No. 22 at 21, the Motion to Dismiss argued in relevant part:

> [I]f SSA declines to pursue an ULP charge or grievance against AALJ, it still may have an open path to judicial review. AALJ itself may attempt to file a charge or grievance against SSA based on SSA simply imposing terms in a new CBA in the face of AALJ's refusal to abide by the Panel's decision. To the extent AALJ believes that any Panel-imposed provisions are contrary to law, it may argue as much in the ensuing ULP proceeding. Additionally, AALJ could seek to reopen bargaining with SSA on the Panel-imposed articles, and, if SSA refuses to respond, then file an ULP charge or grievance.

Similarly, in *NWSEO,* 1:20-cv-1563-TJK, ECF No. 13 at 22 the Motion to Dismiss argued:

> The Union may have affirmative options for bringing an ULP charge as well, where it could raise the same arguments against the validity of the Panel decision. Those options may depend on how the parties' ongoing negotiations and finalization of a CBA evolve.

acknowledged that the Union was not limited to waiting for the Agency to file a ULP charge against it. Indeed, the Authority affirmed in *DOD II* that, "the majority decision does not limit the methods by which a union can challenge matters pertaining to an order by the Panel and should not be viewed as such." 73 FLRA at 152 n.32 & 153.

But in acknowledging the variety of fact-specific opportunities unions may encounter for challenging matters pertaining to a Panel decision, the Authority has never conceded that unions may directly challenge FSIP decisions. It could not, because doing so would overturn nearly 40 years of this Court's and the Authority's precedent. *Brewer*, 735 F.2d at 1499 (remarking that Panel orders are "not appealable even to the Authority"); *U.S. Army Corps of Eng'rs, Kan. City Dist., Kan. City, Mo.*, 16 FLRA at 459 ("a party to a proceeding before the FSIP may not appeal directly to the Authority"); *State of N.Y.*, 2 FLRA at 188-89 ("the Statute . . . does not sanction review of a Panel Decision and Order, except through the unfair labor practice procedures set forth in the Statute. . .").

As the Authority's positions in this case and in prior litigation are consistent, the Union's claim of judicial estoppel fails at step one of the test.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court dismiss the Union's Petition for Review because it seeks direct review of the Panel's decision or deny the Petition for Review in its entirety.

Respectfully submitted,

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February 10, 2023

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Century Schoolbook font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 11,276 words excluding exempt material.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Acting Solicitor
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ADDENDUM

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STATUTES

5 U.S.C. § 7105. Powers and duties of the Authority

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

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

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

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

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

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

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

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

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

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

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

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e) (1) The Authority may delegate to any regional director its authority under this chapter--

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of--

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may--

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

5 U.S.C. § 7114. Representation rights and duties

(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if--

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

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.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization--

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

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

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

(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

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

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure--

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) 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.

(e) The expression of any personal view, argument, opinion or the making of any statement which--

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

5 U.S.C. § 7118(a). Prevention of unfair labor practices

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

shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

5 U.S.C. § 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c) (1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either--

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may--

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

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

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

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

(2) section 7112 of this title (involving an appropriate unit determination),
may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

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

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

5 U.S.C. § 7311. Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he--

> (1) advocates the overthrow of our constitutional form of government;
>
> (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or
>
> (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

18 U.S.C. § 1918. Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he--

> (1) advocates the overthrow of our constitutional form of government;
>
> (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined under this title or imprisoned not more than one year and a day, or both.

REGULATION

5 C.F.R. § 2471.6. Investigation of request; Panel procedures; approval of binding arbitration.

(a) Upon receipt of a request for consideration of an impasse, the Panel or its designee will promptly conduct an investigation, consulting when necessary with the parties and with any mediation service utilized. After due consideration, the Panel shall either:

(1) Decline to assert jurisdiction in the event that it finds that no impasse exists or that there is other good cause for not asserting jurisdiction, in whole or in part, and so advise the parties in writing, stating its reasons; or

(2) Assert jurisdiction and

(i) Recommend to the parties procedures for the resolution of the impasse; and/or

(ii) Assist the parties in resolving the impasse through whatever methods and procedures the Panel considers appropriate. The procedures utilized by the Panel may include, but are not limited to: informal conferences with a Panel designee; factfinding (by a Panel designee or a private

> factfinder); written submissions; show cause orders; oral presentations to the Panel; and arbitration or mediation-arbitration (by a Panel designee or a private arbitrator). Following procedures used by the Panel, it may issue a report to the parties containing recommendations for settlement prior to taking final action to resolve the impasse.

(b) Upon receipt of a request for approval of a binding arbitration procedure, the Panel or its designee will promptly conduct an investigation, consulting when necessary with the parties and with any mediation service utilized. After due consideration, the Panel shall promptly approve or disapprove the request, normally within five (5) workdays.