No. 10-1857

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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STATEMENT OF JURISDICTION

On May 28, 2010, the Federal Labor Relations Authority ("FLRA" or "Authority") issued its decision in *National Treasury Employees Union ("NTEU" or "union") and U.S. Department of the Treasury, Internal Revenue Service ("IRS" or "agency")*, FLRA Docket No. 0-AR-4212. The Authority's decision is published at 64 F.L.R.A. (No. 156) 833. A copy of the decision is included in the Joint Appendix ("JA") at 127-134. The Authority exercised jurisdiction over the

case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute"). This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether the Authority properly upheld the arbitrator's *status quo ante* remedy that ordered the agency to retroactively reimburse to the NTEU all dues of employees who had made the decision to revoke their union fees and withdraw from union membership, and who, nevertheless, wanted reinstatement after being contacted by the union, because their revocation forms had not been initially processed in accordance with the parties' National Agreement ("CBA").

STATEMENT OF THE CASE

A. Course of the Proceedings Below

On July 14, 2006, the union filed a grievance alleging that the agency violated the CBA and committed an unfair labor practice ("ULP") under §§ 7116(a)(1) and (5) of the Statute. Joint Appendix ("JA") at 55, 127. When the matter was not resolved, it was submitted to arbitration pursuant to § 7121 of the Statute and Article 43 of the CBA. JA 47.

Following a hearing held on November 22, 2006, the arbitrator issued an award on February 23, 2007, sustaining in part and denying in part the union's grievance. JA 70. The arbitrator found that the agency had patently breached the CBA and committed a ULP by advising its managers and employees that it would process the forms submitted by employees for the revocation of their union dues (*i.e.*, Standard Form ["SF"]-1188) even if they did not contain the initials or signature of a union official (i.e., the "union sign-off"). JA 65. However, the arbitrator also found that the agency did not illegally interfere with or coerce employees in the exercise of their statutory rights regarding labor organizations. *Id*. The arbitrator directed that the agency cease and desist from committing its violation of the Statute and the CBA and to post a notice of its violation signed by the Commissioner of IRS. JA 66-67; 69. The arbitrator further directed that the agency give the union a list of all employees whose forms were processed without the union sign-off and provide the union with an opportunity to contact those employees to address reinstatement of union membership. The arbitrator then ordered that the agency retroactively reinstate employees upon receiving their signed statements requesting reinstatement, retroactively withhold the dues from those employees' pay, and reimburse the union. JA 68. Finally, finding that the

union had substantially prevailed in its grievance, the arbitrator ordered that the agency pay 75% of the arbitration expenses. JA 69.

The agency and union filed exceptions to the arbitrator's award with the Authority pursuant to § 7122 of the Statute. JA 73-93, 129-30. The agency also opposed the union's exceptions. JA 95-124, 130-31. The Authority denied the exceptions finding that the arbitrator's award and remedy were not contrary to law and that the arbitrator had not exceeded his authority by ordering that the agency's notice be signed by the Commissioner of the IRS. JA 131-134. The union now seeks review of the Authority's decision and order pursuant to § 7123(a) of the Statute.

B. Statement of the Facts

On June 30, 2006, the CBA expired without a successor agreement in place. JA 53-54. The agency notified the union that while it would continue to honor the mandatory provisions of the expired agreement, it would not follow the permissive provisions that it considered to be a violation of law or regulation.[1] JA 54. On July 13, 2006, the agency identified Article 10, Sections 6.A.3 and 6.A.4. as

[1] The agency alleged before the arbitrator that it was willing to negotiate over the impact and implementation of the its new interpretation of Article 10, but the union never requested negotiation or submitted bargaining proposals in this regard. JA 98.

provisions of the expired CBA that it would not honor because, in its view, they were contrary to law. JA 54-55.

Article 10 (entitled "Dues Withholding"), Section 6.A.3 states:

> Revocation notices for employees who have had dues allotments in effect for more than one (1) year must be submitted to the payroll office during USDA pay period fifteen (15) each year. Revocations will become effective during USDA pay period eighteen (18). Revocations may only be effected by submission of a completed SF-1188 that has been initialed by the chapter president or his or her designee. If the SF-1188 is not initialed, the Employer shall return the SF-1188 to the employee and direct the employee to the proper Union official for initialing. To revoke such dues withholding, employees must have had dues withheld for at least one (1) year. (JA 38).

Article 10, Section 6.A.4 instructs employees whose union membership is less than one year to submit their SF-1188s on or before the one-year anniversary date of their dues allotments and repeats the same procedures for revocation as set forth in Section 6.A.3. *Id*. The purposes of these provisions were to give the union an opportunity: (1) To learn why an employee wished to revoke his union dues allotment; (2) to attempt to change the employee's mind; and (3) to facilitate financial planning for the fiscal year. JA 64.

On July 14, 2006, the agency sent an e-mail memorandum to all employees informing them that submitted revocation forms would be

processed even if they did not contain the union sign-off. JA 55. The union promptly filed a grievance alleging that the agency's action was unlawful under the Statute and had illegally terminated the provisions of Article 10 of the CBA. *Id*. The grievance was denied on August 16, 2006, and the parties proceeded to arbitration.

The Arbitrator's Award

The arbitrator's award addressed the following issues stipulated to by the agency and union:

> (1) Did the Agency violate Article 10 of the National Agreement by advising all managers and employees on July 14, 2006, that the Agency would process employees' dues revocation forms (SF 1188) even if the forms lacked a Union official's signature or initials?
> (2) Did the Agency violate the Statute … by (i) patently breaching Article 10 by advising all managers and employees … that the Agency would process employees' dues revocation forms … even if the forms lacked a Union official's signature or initials; (ii) interfering with and/or coercing employees in the exercise of their rights in violation of 5 U.S.C. § 7116(a)(1); and (iii) interfering with the Union's right to dues allotment under 5 U.S.C. § 7115 of the Statute?
> If so, what shall be the remedy?

JA 48.

With regard to the first issue, the arbitrator found that Article 10 of the CBA was a lawful and a mandatory subject of bargaining that continued to be effective past the expiration of the CBA. Thus, the arbitrator concluded that the agency

violated Article 10 by advising managers and employees that it would process employees' revocation forms without the union sign-off. JA 65. In so finding, the arbitrator found unpersuasive the agency's position that Article 10 interfered with employees' rights to refrain from union activity and/or to revoke their allotments in accordance with §§ 7102 and 7115(a) of the Statute. JA 59. The arbitrator reasoned that the employee could obtain the revocation form, SF-1188, from many sources, and was not required to sign the form or obtain a union official's sign-off in the presence of a union official. JA 63.

With regard to the second issue, although the arbitrator found that the agency's patent breach of the CBA was a violation of the Statute, he did not find that the agency's actions illegally interfered with or coerced employees in the exercise of their statutory rights. JA 65. However, to the extent that at least some of the employees might have changed their minds about their revocations had the agency followed the procedures in Article 10, the arbitrator found that the agency violated the union's right to receive some dues. JA 66.

As a remedy for the agency's violation of the CBA and Statute, the arbitrator directed the agency to cease and desist from refusing to follow the procedures for revocation espoused in Article 10, and to post a notice admitting that it committed statutory violations. JA 65, 69. The arbitrator also ordered the agency to pay 75%

of the fees and expenses of the arbitration in accordance with Article 43, Section A.4 of the CBA. JA 69.

The arbitrator acknowledged that a return to the *status quo ante* is the appropriate remedy for the agency's violations. JA 67. However, he disagreed with the union's assessment that the *status quo ante* entails the reinstatement of dues withholding for all employees who personally submitted their revocation forms without the union sign-off. *Id*. He observed: " … the Union's requested remedy is premised on the [speculative] assumption that, but for the Agency's improper processing of the revocations, the affected employees would have opted to withdraw their revocations." *Id*. The arbitrator found that during the years the union sign-off requirement was followed, the incidence of an employee changing his/her mind to withdraw from union membership and revoke union dues had clearly never been 100 percent. *Id*.

The arbitrator recognized that the incidence of employees' revocations was greater by approximately 590 in the year that Article 10 procedures were not followed as compared with the previous year. Thus, he found that the agency may have deprived the union of a contractual opportunity to persuade some employees to change their minds. Id. However, the arbitrator concluded that this did not

constitute a lawful reason to deny employees their statutory rights to withdraw from union membership if they persisted with their original decisions. JA 67-68.

The arbitrator also opined that reimbursing the union for all revocations lacking the union sign-off regardless of the employees' intentions would violate the agency's sovereign immunity. JA 68. He found that case law supported his conclusion that the "agency may only be held liable for dues that should have been, but were not withheld." *Id*.

Concluding that the status quo ante remedy necessitates a return to the point at which the improper action occurred, the arbitrator ordered the following: (1) the agency shall provide the union with the names of those employees whose revocation forms did not contain the union sign-off in 2006; (2) the agency shall give the union the opportunity to contact the affected employees and communicate with them as it would have done in 2006; (3) the union shall give to the agency signed reinstatement authorizations of employees who wished to retroactively cancel their revocations of union dues; and (4) the agency shall process the submitted signed reinstatement authorizations, retroactively withhold dues from the pay of those employees, and pay those dues to the union. JA 68, 70.

The Exceptions

The agency excepted to the Arbitrator's award contending that its processing of employee's voluntary revocation forms without following Article 10's procedures was not contrary to law because the procedures were illegal and an unreasonable interference with an employee's right to freely refrain from joining a union in violation of 5 U.S.C. §§ 7102 and 7115. JA 129-130. The agency also argued that the arbitrator exceeded his authority by ordering that the posted notice admitting to the agency's improper action be signed by the IRS Commissioner. JA 130.

The union excepted to the portion of the award involving the remedy. JA 79-92. The union argued that the arbitrator erred in considering the employee's intent in submitting his/her revocation form rather than the union's statutory right to receive dues absent a revocation processed in accordance with the CBA. JA 79-85. The union also contended that sovereign immunity is not applicable to orders that require an agency to reimburse a union for wrongfully withheld dues. JA 85-89. Finally, the union alleged that the award was contrary to law for its failure to recognize that employees have the right to seek a waiver of their debts to the agency for dues that should have been withheld by the agency in the first instance. JA 89-91. The union asked the Authority to order the agency to reimburse it for

dues of all employees whose revocation forms did not contain the union sign-off and to reinstate those employees to dues-withholding status. JA 92. The union requested that the Authority's order of reimbursement state that employees have the right to seek a waiver of any obligation to repay the agency for dues the agency should have withheld from employee's salaries. *Id*.

In its opposition to the union's exceptions, the agency argued that the arbitrator did not commit legal error by declining to order the agency to repay the union for speculative lost dues. JA 102. The agency reiterated its claim that sovereign immunity prohibits the agency from repaying the union speculative lost dues. JA 102-119. Finally, the agency argued that the arbitrator's broad discretion in fashioning his remedy did not violate law, and the union's requested remedy is not compelled by statute. Accordingly, the agency maintained that the Authority cannot disturb the arbitrator's remedy. JA 119-122.

The Authority's Decision

The Authority held that the award, and more specifically, the arbitrator's remedy, was not contrary to law.[2] JA 131, 132. The Authority deferred to the arbitrator's discretion and judgment in his determination of the remedy because there was no basis to conclude that the union's requested remedy was compelled

[2] The petitioner, NTEU, states that the remedy portion of the Authority's decision is the only issue now before the Court. Petitioner's Brief (PB) at 3.

by statute. JA 132. The Authority found the arbitrator's remedy determination not to be a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Statute. The Authority also found that the union failed to establish that its requested remedy was compelled by law.[3] *Id*. Thus, the Authority concluded that the union failed to establish any legal error in the arbitrator's award.

The Authority also found that the union did not support its contention that the arbitrator erred when he considered the employees' intent in seeking revocation of union dues. The Authority further rejected the union's argument that the award did not preserve an employee's right to seek a waiver of his/her obligation to pay dues retroactively. *Id*. Finally, the Authority found that the arbitrator did not exceed his authority by ordering that the Commission of the IRS sign the public notice of the agency's wrongdoing. An appeal to this Court followed.

STANDARD OF REVIEW

This Court must sustain the FLRA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise unlawful. *See Nuclear Regulatory Comm'n v. FLRA*, 859 F.2d 302, 306 (4th Cir. 1988), *citing AFGE, AFL-CIO,*

[3] The Authority noted that although parties may, under 5 U.S.C. § 7115, set up the procedures by which revocation requests are administered, employees must remain free to revoke their union fee allotments at annual intervals. JA 131.

Local 2303 v. FLRA, 815 F.2d 718, 719 (D.C. Cir. 1987); 5 U.S.C. §§ 706(2)(A), 7123(c). Where the issue under review concerns an administrative agency's choice of remedies to correct a violation of law the agency is charged with enforcing, the standard of review in federal courts of appeals is particularly narrow because courts "must guard against the danger of sliding unconsciously from the narrow confines of law in the more spacious domain of policy." *NTEU v. FLRA*, 910 F.2d 964, 966-67 (D.C. Cir. 1990), *citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

It is well established that in determining whether the Authority's action is "in accordance with law," the FLRA "is entitled to considerable deference when it exercises its special function of applying the general provisions of the [Civil Service Reform] Act to the complexities of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *see also Nuclear Regulatory Comm'n v. FLRA*, 25 F.3d 229, 232 (4th Cir. 1994). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

Despite the deference owed the FLRA, however, courts may not "rubber-stamp ... administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97. Here, the arbitrator's remedy, affirmed by the FLRA, is consistent with the statutory mandate that employees have the freedom of choice to refrain from union activities and revoke union dues at yearly intervals and with case law. Moreover, the Authority properly deferred to the arbitrator's discretion and judgment in his determination of the *status quo ante* remedy for the agency's breach of the CBA and of the Statute. Without denying any of the employees their statutory rights to submit a yearly revocation form, the remedy is lawful in that it requires that the agency rectify its procedural error in failing to demand the union sign-off by giving the union the same opportunity to contact those employees with submitted revocation forms as it had always had under the CBA, and by retroactively reimbursing the lost union dues of those employees who then subsequently change their minds about revocation. Thus, the Authority's decision is consistent with its statutory mandate and the remedy can fairly be said to effectuate the policies of the Statute. Therefore, the Authority's decision is not arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law. Accordingly, the Authority's decision should be affirmed and the agency's petition should be denied under the standard of review.

SUMMARY OF ARGUMENT

Under the particularly narrow standard of review of the Authority's choice of remedies to correct a violation of law it is charged with enforcing, the Court must sustain the Authority's decision. The Authority properly deferred to the arbitrator's discretion in setting forth a *status quo ante* remedy for the agency's failure to follow the procedures of the CBA to process revocation forms that employees voluntarily and timely submitted in accordance with statutory mandates. The petitioner has not met its heavy burden to show that the arbitrator's remedy is a patent attempt to achieve an end in contradiction to the Statute's policies. Nor has the union cited relevant precedent and persuasively argued that its requested remedy was compelled by law.

The union argues, in effect, that the failure to follow negotiated procedures trumps the employee's statutory right to revoke his/her assignment of union-dues allotments and that all revocation forms not conforming to negotiated procedure are null and void. However this argument is untenable because it is contrary to the purpose and terms of the Statute and regulation.

The remedy the union proposed is contrary to the policies of the Statute that allow all employees the freedom of choice to revoke their union-dues allotments at annual intervals and to join or refrain from joining unions. Further, the union's claim, that it is entitled to be retroactively reimbursed for dues from all employees who submitted their revocations without the union sign-off, is based on an illogical assumption that all employees who proceed to obtain the union sign-off change their minds about revocation.

The arbitrator's remedy -- providing the union with the opportunity of contacting the employees who did not follow negotiated procedures, and to then retroactively reimburse the union for dues not withheld upon obtaining signed reinstatement authorizations from those employees -- returned the union to the point at which the agency's improper action occurred. Thus, the arbitrator's remedy that compensates the union for the agency's improper action, but upholds the employee's freedom of choice to be part of a labor organization, effectuates the policies of the Statute. The Authority thus properly upheld the remedy.

ARGUMENT

THE AUTHORITY PROPERLY DEFERRED TO THE ARBITRATOR'S DISCRETION AND JUDGMENT IN FASHIONING A REMEDY FOR THE AGENCY'S VIOLATION OF THE CBA AND STATUTE THAT CAN FAIRLY BE SAID TO HAVE EFFECTUATED THE POLICIES OF THE STATUTE.

A. An employee's personal submission of a revocation of union dues allotment in accordance with statutory mandates cannot be void *ab initio* because it fails to comport with the procedures espoused by the CBA.

The purpose of section 7115 of the Statute ("Allotments to representatives") is to allow employees to establish and to revoke union-dues withholding allotments from their pay in keeping with the Statute's policy to give employees the right to form, join, or assist any labor organization or to "refrain from any such activity, freely and without fear of penalty or reprisal" in accordance with 5 U.S.C. § 7102. *See AFGE, AFL-CIO and Dep't of Veterans Affairs*, 51 F.L.R.A. 1427, 1433-34 (1996). Section 7115, itself, provides no particular means for initiating or revoking an employee's dues-withholding authorization. The only condition that section 7115 imposes on the revocation of an employee's dues is that an employee's authorization "may not be revoked for a period of 1 year." *Id*. Additionally, under regulations of the Office of Personnel Management (which developed SF Form 1188 for revocation), the employee must personally authorize the cancellation of

the allotment. 5 C.F.R. § 550.312(c). Thus, the petitioner's argument that an employee's revocation is void when not pursued through the procedures of a negotiated contract (see PB at 12) is untenable as contrary to the purpose and terms of the Statute and regulation.[4]

Moreover, the petitioner's reliance on *Veterans Admin. Lakeside Med. Ctr. and SEIU, Local 73*, 12 F.L.R.A. 244 (1983) ("Veterans Administration"), does not help its position. *See* PB at 12. In that case, the agency processed the employee's dues revocation requests outside the annual open period negotiated by the parties. There, the agency's failure to act consistent with the negotiated provision constituted a violation of the Statute (*i.e.*, specifically section 7115) because honoring such revocations was contrary to the one condition imposed by the Statute -- that an employee's authorization "may not be revoked for a period of 1 year." Unlike the agency in *Veterans Administration*, the agency here honored only those employee revocations that were timely submitted in accordance with the Statute and OPM regulations. The fact that the agency violated the CBA provision calling for it to follow a specific procedure for revocations does not invalidate the

[4] Despite the petitioner's claims to the contrary (PB at 12, n.2), the instances of summary termination of allotments described by section 7115(b) because of two specific circumstances are irrelevant to the issue here concerning an employee's choice to voluntarily revoke his/her allotment in accordance with Statute. *See* 5 U.S.C. §§ 7102; 7115(a).

employee's statutory right to revoke his/her allotment at annual intervals; and, as discussed more fully below, that the union may have lost some dues because of this breach was remedied by the arbitrator's award.

There is no dispute that the employees here comported with the statutory and regulatory requirements in personally submitting their revocation forms authorizing the cancellation of their allotments at the correct annual time period. In an analogous situation where a Federal statute authorized employees to initiate and revoke union fee allotments, and allowed employers and labor organizations to bargain for arrangements (or procedures) for allotments, the Supreme Court held that negotiated procedures cannot trump the employee's freedom of decision to revoke his/her assignment, and that employers and labor organizations may not "treat as nullities revocation notices which are clearly intended as such and about whose authenticity there is no dispute." *Felter v. Southern Pacific Co.*, 359 U.S. 326, 333-35 (1959). Thus, even where an agency breaches the contractual procedural provisions for revocation, an employee's voluntary revocation in compliance with statute and regulation is not void *ab initio*.[5]

[5] The instant situation, in which an employee was unaware that his/her revocation form was not submitted in accordance with the CBA, may be considered to be analogous to the situation in which an employee enters into a contract without knowing that it fails to include certain requisite terms, making the contract a voidable, not a void, contract. *See Blistein v. St. John's College*, 74 F.3d

B. The union's requested remedy is not compelled by Statute and is contrary to the policies of the Statute.

The arbitrator recognized, and the Authority affirmed, that case law permits the negotiation of procedures for implementing section 7115 as long as those procedures do not infringe on employees' rights. JA 50-51, 62; 131. The arbitrator and the Authority found that Article 10 of the CBA, requiring the employee to obtain a union sign-off on his/her revocation form, was legal in that it did not infringe on the employee's rights to freely choose to join or refrain from joining a union and to accordingly allot or not allot union dues at yearly intervals. JA 128, 132. However, while the union also has a right under section 7115 to receive regular dues from the agency for employees who have made a voluntary written authorization for deductions from their pay for dues allotment, *see, e.g.*, *Dep't of the Navy, Naval Underwater Sys. Ctr. and NAGE, Local R1-144*, 16 F.L.R.A. 1124, 1126 (1984), the union has no right to demand dues from the agency for employees who have voluntarily submitted their revocation forms in compliance with statute and regulation and would not have changed their minds even after being contacted by the union in accordance with the CBA. The union's

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1459, 1466 (4th Cir. 1996). While in *Blistein*, the Court recognized that the employee can either avoid performance of the contract or accept its benefits and thereby ratify the contract, the arbitrator's remedy here similarly allows the employee to ratify his/her revocation or retroactively accept the benefits of union membership and retroactively reinstate salary deductions.

claim that it is entitled to be reimbursed for "lost dues" from all employees who submitted their revocations without the contractual requisite of the union sign-off (*see* PB at 3, 10, 14, 17) is based on the union's rather illogical assumption that all employees who voluntarily choose to submit their timely revocations will change their mind when subjected to the union sign-off. As the arbitrator stated, "It can hardly be assumed that the [employee] did so for the purpose – or likely result of changing his or her mind." JA 67. Thus, the only dues that were "lost" to the union were dues from those employees who may have changed their minds if the procedure of the union sign-off was followed, and these "lost dues" were properly addressed by the arbitrator's award.

Had the arbitrator ordered the remedy sought by the union for retroactive reimbursement of all union dues of employees who submitted their revocation forms lacking the union sign-off, without giving those employees the opportunity to stand fast in their decision to revoke, the remedy would have been "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU and FDIC, Washington, D.C.*, 48 F.L.R.A. 566, 572 (1993) *quoting NTEU*, 910 F.2d at 968. Such a remedy is contrary to the Statute's policies of allowing the employee the choice to refrain from joining a

union and to make revocations of allotments at annual intervals, and it is certainly not compelled by the Statute. *See* 5 U.S.C. §§ 7102 and 7115.

C. The NTEU has not met its heavy burden to show that the arbitrator's remedy was a patent attempt to achieve ends contrary to the policies of the Statute.

Congress clearly intended that the Authority have the responsibility to "take any remedial action it considers appropriate to carry out the policies" of the Statute 5 U.S.C. § 7105(g)(3); *see also NTEU*, 910 F.2d at 968. Recognizing this principle, the FLRA has adopted the rule that it will defer to and uphold the arbitrator's remedy unless a party shows that the remedial order "is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]." *NTEU*, 48 F.L.R.A. at 572. The Authority has recognized that making such a showing "is a heavy burden indeed." *Id*. The Authority's rationale for this rule lies with the fact that when a party chooses to file a grievance rather than an unfair labor practice ("ULP") complaint with the Authority, the party also chooses the judgment and discretion of the arbitrator rather than that of the Authority. *Id*. at 571. Thus, "[u]nless a particular remedy is compelled by the Statute, the Authority reviews the remedy determinations of arbitrators in ULP grievance cases just as the Authority's remedies in ULP cases

are reviewed by the federal courts of appeals." *U.S. Dep't of the Treasury, Internal Revenue Serv. and NTEU*, 64 F.L.R.A. 426, 436 (2010).

Here, the union has not shown that the arbitrator's remedy is any attempt, let alone a "patent attempt" to achieve an end in contradiction to the Statute's policies. Nor has the union persuasively argued that its requested remedy was compelled by law.

Although the union cites to FLRA precedents that it claims compel the remedy of full reimbursement of dues to the union for all processed revocations not containing the union sign-off, an examination of these cases reveals that they do not support the union's claim. Most of the cases cited by the petitioner are irrelevant to the issue presented here regarding the remedy for a contractual breach of procedure in processing statutorily valid revocations. For example, the petitioner cites to *Dep't of the Treasury, U.S. Mint and AFGE, Mint Council*, 35 F.L.R.A. 1095 (1990) (*see* PB at 11) that dealt with remedying the almost opposite situation of the agency failing to honor dues assignments voluntarily submitted by employees in accordance with the Statute. In that case it was proper for the agency to reimburse the union for all dues it would have received from a known quantity of employees, but did not receive, because of the agency's statutory failure to accept and process the signed assignments. That case also stated that "[t]he

legislative history of section 7115 indicates that the employee alone controls the manner of dues payment… ." Dep't of Treasury, U.S. Mint, 35 F.L.R.A. at 1098. This case, instead, concerns the agency honoring statutorily valid revocations (of employees who alone control that decision) that were not processed pursuant to procedures in the CBA. As the arbitrator explained, whether all, or any of these employees might have altered their decisions had the procedures been followed is speculative at best. Although the union rightfully states that the agency has an affirmative obligation to withhold dues and transmit them to the union pursuant to a signed allotment assignment (PB 11), the agency also has an affirmative obligation to decline to withhold dues of employees who have decided to revoke that assignment.

Again, in another case cited by petitioner, *Naval Underwater Sys. Ctr. and NAGE, Local R1-144*, 16 F.L.R.A. at 1126 (*see* PB at 13-14), the issue centered on the agency's refusal to honor the specific dues allotments of employees who had submitted written dues assignments to the agency, and did not involve the issue of revocation. The same can be said of *Defense Logistics Agency and AFGE*, 5 F.L.R.A. 126 (1981); *AFGE, Council 214 v. FLRA*, 835 F.2d 1458 (D.C. Cir. 1987); *AFGE, Local 2612 v. FLRA*, 739 F.2d 87 (2nd Cir. 1984); and *AFGE Local 1816 v. FLRA*, 715 F.2d 224 (5th Cir. 1983); and *Lowry Air Force Base and AFGE*,

Local 1974, 31 F.L.R.A. 793(1988). Thus, case law does not compel the remedy that the union requested in this case.

In summary, the arbitrator's remedy in his award, giving the agency *status quo ante* relief, described above, was certainly not a patent attempt to negate any policies of the Statute. Instead, the status quo ante remedy returned to the point at which the improper action occurred, giving the union the opportunity to contact all employees whose forms were processed without the union sign-off, and giving the union retroactive dues of those employees, who after being contacted, decide to rescind their revocation. This remedy comports with the Statute's policies, and the Authority properly upheld it.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 23, 2010

COMPLIANCE WITH RULE 28.1(e)(2) OR 32(a)(7)(B)

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B). The brief is double spaced (except for extended quotations, headings and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 5,498 words excluding exempt material.

/s/ Joyce G. Friedman
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Attorney for the Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION, Petitioner,	)
v.	)
FEDERAL LABOR RELATIONS AUTHORITY, Respondent.	)

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority have been filed with the Court and served this day, by way of the ECF filing system, and by mail, upon the following:

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