ORAL ARGUMENT SCHEDULED FOR MARCH 18, 2015

No. 14-1052

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

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, UNITED STATES CUSTOMS AND BORDER PROTECTION, SCOBEY, MONTANA
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY
Respondent

and

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 231
Intervenor

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority") were the U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana ("Agency") and the National Treasury Employees Union, Chapter 231 ("Union"). In this Court proceeding, the Agency is the petitioner; the Authority is the respondent; and the Union is an intervenor.

B. Rulings Under Review

The Agency seeks review of the Authority's orders in the following cases:

- *National Treasury Employees Union, Chapter 231 and U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana*, 66 FLRA 1024, 2012 FLRA LEXIS 114 (Sept. 25, 2012); and
- *National Treasury Employees Union, Chapter 231 and U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana*, 67 FLRA 247, 2014 FLRA LEXIS 21 (Feb. 11, 2014).

As discussed below, the Authority contends that the Court does not possess subject matter jurisdiction to review the Authority's orders in this case.

C. Related Cases

The Agency previously filed a petition for review of the Authority's September 25, 2012 order and the Authority's order in *National Treasury Employees Union, Chapter 231 and U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana*, 67 FLRA 247, 2014 FLRA LEXIS 21 (Feb. 11, 2014), which was docketed in

this Court as *U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana v. Federal Labor Relations Authority*, No. 13-1024 (D.C. Cir.). By order dated August 2, 2013, this Court granted the Authority's motion for remand. *U.S. Dep't of Homeland Sec. v. FLRA*, No. 13-1024, 2013 U.S. App. LEXIS 16063 (D.C. Cir. Aug. 2, 2013). The petition for review in this case arises from the Authority's decision on that remand.

/s/ Fred B. Jacob
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GLOSSARY OF ABBREVIATIONS

Agency	Petitioner, United States Department of Homeland Security, United States Customs and Border Protection, Scobey, Montana
Authority	Respondent, the Federal Labor Relations Authority
Award	The decision of the arbitrator in this case
Br.	Petitioner's Opening Brief
J.A.	The parties' Joint Appendix
The Policy	The Agency's Revised National Inspectional Assignment Policy
The Statute	The Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101-7135
The Union	Intervenor, the National Treasury Employees Union

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BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This Court has no jurisdiction over the petition for review. This case is about an overtime opportunity that the U.S. Department of Homeland Security, U.S. Customs and Border Protection, Scobey, Montana ("Agency")

denied to Customs Officer Brian Hutson on May 4, 2011. Officer Hutson's union grieved the denial, an arbitrator found it unjustified under the Agency's operative internal policy, and the Federal Labor Relations Authority ("Authority") exercised its power under the Back Pay Act, 5 U.S.C. § 5596, to modify the arbitration award to grant back pay for the missed shift. *See* 5 U.S.C. § 7122. The Agency now challenges the Authority's orders awarding back pay. The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2012) ("the Statute"), however, prohibits judicial review of Authority orders resolving exceptions to arbitration awards. 5 U.S.C. § 7123(a)(1). Moreover, in attempting to establish jurisdiction in the face of that statutory bar, the Agency proffers an untenable interpretation of the Back Pay Act that would allow it – or any agency – to unilaterally establish internal regulations that erase the Back Pay Act's protections. Accordingly, this Court should dismiss the Agency's petition for review for lack of jurisdiction or, if it reaches the merits, deny it.

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(H) of the Statute. 5 U.S.C. § 7105(a)(2)(H). To the extent the time limit to file a petition for review under Section 7123 applies here, the Agency's petition was timely filed within 60 days of the Authority's order denying the motion for reconsideration. The National Treasury Employees Union, Chapter 231 ("Union") intervened on the side of the Authority.

STATEMENT OF THE ISSUES PRESENTED

1. Whether, under § 7123(a) of the Statute prohibiting petitions for review of Authority arbitration orders, the Court lacks subject matter jurisdiction to review Authority orders that apply the Back Pay Act to remedy an arbitration award finding an unwarranted denial of overtime.

2. If this Court stretches the bounds of § 7123(a) of the Statute to exercise jurisdiction in this case, whether the Agency fails to show that the Authority erred in granting Officer Hutson back pay.

RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. Att 1.

STATEMENT OF THE CASE

This case arises out of a grievance filed by the Union alleging that the Agency improperly failed to assign an overtime shift to Officer Hutson. The case was submitted to an arbitrator, who found that the Agency violated one of its internal policies when it failed to assign the overtime. In his award, however, the arbitrator did not provide a remedy of back pay. The Union filed an exception to the arbitrator's award with the Authority under § 7122 of the Statute. 5 U.S.C. § 7122. In its decision on the exception, the Authority, while agreeing with the arbitrator that the Agency violated its policy, modified the award by directing the Agency to pay Officer Hutson back pay compensation.

NTEU, Chapter 231 and U.S. Dep't of Homeland Security, U.S. Customs and Border Prot., Scobey, Mont., 66 FLRA 1024 (Sep. 25, 2012) ("*NTEU I*") (JA 057-61).

The Agency filed a motion for reconsideration, which the Authority denied. *NTEU, Chapter 231 and U.S. Dep't of Homeland Security, U.S. Customs and Border Prot., Scobey, Mont.,* 67 FLRA 67 (Dec. 12, 2012) ("*NTEU II*") (JA 062-63). The Agency then petitioned this Court for review. On the Authority's motion, however, the Court remanded the case for further evaluation of the motion for reconsideration. *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir. Aug. 2, 2013).

On remand, the Authority reaffirmed its order in *NTEU I* and denied the Agency's motion for reconsideration. *NTEU, Chapter 231 and U.S. Dep't of Homeland Security, U.S. Customs and Border Prot., Scobey, Mont.*, 67 FLRA 247 (Feb. 11, 2014) ("*NTEU III*") (JA 064-67). The Agency now challenges the Authority's orders in *NTEU I* and *III* ("Orders"), claiming that the Authority violated the Back Pay Act and the principle of sovereign immunity in modifying the arbitrator's award to grant Officer Hutson back pay.

STATEMENT OF THE FACTS

A. The Arbitrator Finds that the Agency's Failure to Assign Officer Hutson Overtime was More than a "Mere Mistake"

The Union's grievance, filed pursuant to the parties' collective-bargaining agreement, alleged that the Agency violated its Revised National

Inspectional Assignment Policy ("Policy") when it denied Officer Hutson an opportunity to earn overtime pay for an overnight shift on May 4, 2011. (Award, JA 009.) Earlier that day, Hutson had told his chief officer that he was first in line for an available overtime assignment under the Policy's "low earner" allocation provision, and that he was able to work the shift in question. (*Id.*, JA 013.) Although the chief officer "initially intended to assign the overtime" to Hutson, a "series of events" transpired at the end of the workday, culminating in a disagreement between Agency supervisors regarding whether Hutson, who lived fifteen minutes from the port, would be able to return within one hour of the end of his shift, and whether he was eligible for "callback and commute." (*Id.*, JA 014-15, 034-35.) As a result, the Agency failed to call in Hutson to work the overtime shift to which he was entitled under the Policy, but instead called in the Port Director. (*Id.*, JA 013-15.) In consequence, Hutson lost the expected overtime pay. The Union requested a back pay remedy. (*Id.*, JA 009.) The parties were unable to resolve the grievance, and it proceeded to arbitration. (*Id.*)

The arbitrator framed the issue as follows:

> Whether the Agency violated the [Policy] . . . when it failed to assign the overtime assignment to the [grievant]? If so, what should be the appropriate remedy?

(*Id.*, JA 010.) The arbitrator concluded that the Agency violated the Policy, finding that there was "no question" that Officer Hutson was entitled under

the Policy to the disputed overtime assignment. However, he declined to award back pay. As the arbitrator recognized, under the Back Pay Act, an employee is entitled to back pay when he is found to have been affected by "'an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee . . . .'" (Award, JA 039 (quoting 5 U.S.C. § 5596(b)(1).) In the arbitrator's opinion, even though the Agency's breach of the Policy was "more than a mere mistake," the violation did not rise to the level of "an unjustified or unwarranted personnel action." (*Id.*) He therefore directed the Agency to offer Hutson the next available overtime assignment in lieu of back pay. (*Id.*, JA 034-40.) Yet, in doing so, the Arbitrator nonetheless noted that the Policy's directed remedy of the next available overtime opportunity "[wa]s not exclusive." (*Id.*, JA 038.)

B. Adopting the Arbitrator's Factual Findings, the Authority Holds in *NTEU I* and *II* that the Arbitrator Erred in Denying Officer Hutson Back Pay

Pursuant to § 7122 of the Statute, the Union filed an exception with the Authority contending that the award was contrary to the Back Pay Act because it failed to award Hutson back pay. (*NTEU I*, JA 057-58.) The Agency did not except to the arbitrator's conclusion that it violated the Policy, but it did file an opposition to the Union's exceptions contending, *inter alia*, that the arbitrator

correctly found no entitlement to back pay under the Back Pay Act. (*Id.*, JA 059.)

The Authority determined that the arbitrator's refusal to order back pay was contrary to the Back Pay Act. (*Id.*, JA 060.) Applying its precedent, the Authority observed that a violation of an internal, or "governing," agency regulation covering employment matters – like the Agency's uncontested violation of the Policy – is "an unjustified or unwarranted personnel action" for purposes of the Back Pay Act. (*Id.* (citing *U.S. Dep't of Transp., Fed. Aviation Admin.*, 64 FLRA 922, 923 (2010)).) The Authority also held that the arbitrator's finding of a causal connection between the Agency's violation of the Policy and a loss of pay to Hutson satisfied the Back Pay Act's requirement that the agency action "resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." (*Id.*) Having determined that, "as a matter of law, the requirements of the [Back Pay Act] were met," the Authority held that, "consistent with . . . Authority precedent, [Hutson] was entitled to back[]pay," and the arbitrator exceeded his discretion under the Back Pay Act in declining to issue such an award. (*Id.*) The Authority therefore modified the award to direct the Agency to make Officer Hutson whole for the overtime he lost as a result of the Agency's violation of the Policy. (*Id.*)

The Agency filed a motion for reconsideration of *NTEU I*, which the Authority denied. *NTEU II,* 67 FLRA 67 (Dec. 12, 2012) (JA 062-63). The Agency then petitioned this Court for review. However, the Court remanded the case, on the Authority's motion, for further evaluation of the motion for reconsideration. *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir. Aug. 2, 2013).

C. *NTEU III*: On Remand, the Authority Again Denies the Agency's Motion for Reconsideration, Re-affirming its Award of Back Pay

Following this Court's remand, the Agency renewed its motion for reconsideration of *NTEU I* with the Authority, asking for reconsideration of the Authority's decision because it purportedly violated Subsection (b)(4) of the Back Pay Act. (*NTEU III*, JA066.) Subsection(b)(4) provides that:

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

5 U.S.C. § 5596(b)(4). Though the Agency "concede[d] that the [Back Pay] Act waives sovereign immunity for certain back[] pay claims," it argued that Subsection (b)(4) limits the Back Pay Act's waiver to the relief authorized by

the underlying policy that was allegedly violated – here, the Policy. (*Id.*) According to the Agency, the Policy's only permissible remedy for a lost overtime opportunity is assignment of the next overtime opportunity, not back pay. (*Id.*) Therefore, the Agency contended, because the Authority misapplied the Back Pay Act, the Act's waiver of sovereign immunity does not apply. (*Id.*)

In *NTEU III*, the Authority denied the Agency's motion for reconsideration. First, the Authority found that the Agency's interpretation of Subsection (b)(4) was incorrect. Reviewing the legislative history of the Act, the Authority determined that Congress' motivating factor for including Section (b)(4) was to create time limits for a remedy; it did not, according to the Authority, include the section to limit the substantive back pay remedies, as the Agency suggested. (*NTEU III*, JA 067.) As to the Agency's sovereign immunity claim, the Authority explained that, "[g]iven the Agency's concession that the [Back Pay Act] waives sovereign immunity for back pay awards consistent with its terms" – which the award here was – the Back Pay Act provided "the necessary waiver of sovereign immunity to support" the award of back pay. (*Id.*)

Second, the Authority held that, even if the Agency's reading of Subsection (b)(4) were correct, the Authority did not err in awarding Officer Hutson back pay. (*NTEU III*, JA 066-67.) The Policy, the Authority reasoned, states that the "remedy for a missed overtime opportunity *due to administrative*

error shall be provision of the next overtime opportunity to the affected employee." (*Id.*, JA 067; Policy, JA 046.) But the arbitrator had found that the Agency's policy violation was "more than a mere mistake." (*NTEU III*, JA 067.) And he explicitly rejected the Agency's contention that the *exclusive* remedy for all Policy violations is assignment of the next overtime opportunity. (*NTEU III*, JA 067; Award, JA 038.) Thus, the Authority found that the Agency did not demonstrate that *NTEU I* exceeded the remedies that the Policy authorizes, and therefore was consistent with the Back Pay Act, even under the Agency's interpretation. (*NTEU III*, JA 067.) It therefore denied the motion for reconsideration of the Authority's arbitral review decision.

The Agency's petition for review in this case followed. The Authority and the Union filed timely motions to dismiss the petition, and the Court referred those motions to this Panel by order dated September 15, 2014.

SUMMARY OF THE ARGUMENT

When Congress spoke, it spoke loud and clear: When it comes to the review of arbitration awards, the buck stops at the Authority. The limited exceptions to the explicit statutory preclusion of judicial review in arbitration cases are inapplicable here. It is undisputed that the arbitration order does not "involve[] an unfair labor practice," and, therefore, that the only statutory exception to the bar on judicial review does not apply. 5 U.S.C. § 7123(a)(1). Moreover, the case on which the Agency relies, namely, *U.S. Department of the*

Treasury, U.S. Customs Service v. FLRA, 43 F.3d 682 (D.C. Cir. 1994) ("*Treasury*"), does not provide for review in this case. To the contrary, *Treasury* reinforces this Court's prior holding in *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988) ("*Griffith*"), that challenges to the Authority's routine application of the Back Pay Act in reviewing an arbitration award are not subject to judicial review. The sovereign immunity and Appropriations Clause cases the Agency cites do not alter that rule for the reasons set out below. Simply put, this Court has no jurisdiction over the Agency's petition for review. But even if an exception to the statutory bar on judicial review of Authority arbitration orders did apply here, the doctrine of constitutional avoidance dictates that the Court should not exercise jurisdiction because the case may be decided on dispositive factual and narrow legal grounds that would otherwise be unreviewable – not a constitutional claim of sovereign immunity. As the Authority found, even under the Agency's interpretations of the Policy and the Back Pay Act, the Agency's failure to assign overtime was not an "administrative error" under the Policy, and consequently, back pay was permissible.

If this Court were to broaden the scope of 5 U.S.C. § 7123 to exercise jurisdiction in this case and reject the constitutional avoidance doctrine, the Authority did not violate the Back Pay Act in awarding Officer Hutson back pay. The Agency's argument rests on a misinterpretation of Subsection (b)(4) of the Back Pay Act borne of the Agency's failure to give effect to all of its

words. In fact, the plain language, legislative history, and case law of Subsection (b)(4) demonstrate that the subsection establishes an outermost time limit of six years on back pay awards, while allowing for a shorter recovery period where "authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted personnel action" was found. 5 U.S.C. § 5596(b)(4). The Agency's claim, despite the weight of that authority, that Subsection (b)(4) provides restrictions on an award of back pay above and beyond a time restriction on recovery is simply implausible. Accordingly, even if the principle of sovereign immunity requires the Authority to "adopt a *plausible* interpretation of [a] statute that would not authorize damages against the [g]overnment," the Authority was not bound to adopt the Agency's version of Subsection (b)(4) here. (Br. at 38 (internal quotation marks omitted and emphasis added).) Because the Authority properly interpreted Subsection (b)(4) as a statute of limitations, not a restriction on remedial authority generally, its award of back pay to Officer Hutson did not violate the Back Pay Act, and this Court should deny the Agency's petition for review.

But even if this Court agrees with the Agency's cut-and-paste reading of Subsection (b)(4), the Authority still correctly interpreted the Policy as limiting the remedy available to a grievant only when the missed overtime opportunity was the result of administrative error. (*NTEU III*, JA067.) And, because the Authority found, as a matter of fact, that Officer Hutson's missed overtime

opportunity was *not* the result of administrative error, the Policy did not prohibit the Authority from awarding Hutson back pay. (*Id.*)

Next, the Agency's claim that the Authority failed to defer to the Agency's interpretation of the Policy is not properly before the Court under 5 U.S.C. § 7123(c) because the Agency never asked the Authority to defer in the proceedings below. In any event, given that the Policy's meaning is clear, the Authority properly declined to defer to the Agency's interpretations of the Policy. As an unambiguous internal agency policy passed without the vestiges of formal rulemaking, even if the Policy were ambiguous, the Agency's interpretations of the Policy would, at best, be due "respect" under *Skidmore v. Swift*, 323 U.S. 134 (1944) ("*Skidmore*") to the extent they have the power to persuade. But the Agency's interpretations are not persuasive. They conflict with the plain meaning of the Policy's language, as recognized by the U.S. courts of appeals, as well as with the Agency's explanation of the Policy's language to the arbitrator. An agency interpretation of an informal regulation that is illogical and inconsistent is, again, implausible, and deserves neither deference nor *Skidmore* respect.

In sum, this is exactly the kind of back pay dispute about overtime that Congress intended to end at the Authority – and nothing in the Agency's brief succeeds in obscuring that fact.

STANDARDS OF REVIEW

This Court reviews Authority decisions "in accordance with section 10(e) of the Administrative Procedure Act" and will uphold an Authority order unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *NTEU v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 706(2)(A), 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The factual findings of the Authority are conclusive, provided that they are supported by "substantial evidence on the record considered as a whole." 5 U.S.C. § 7123(c). With respect to the Authority's legal conclusions, because Congress delegated to the Authority the responsibility to construe the Statute in the first instance, this Court grants Authority interpretations of the Statute deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Id.* The Court reviews the Authority's interpretations of general statutes not committed to its administration and other agencies' regulations de novo. *Social Sec. Admin. v. FLRA*, 201 F.3d 465, 471 (D.C. Cir. 2000). Thus, because the Authority does not administer the Back Pay Act, the Court does not extend deference to the Authority's interpretation of what the Back Pay Act does and does not require. *Id.* But the Agency also does not administer the Back Pay Act. Thus,

this Court owes no deference to the Agency's interpretation of that statute, either.

Finally, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee," unless "the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) ("We have enforced section 7123(c) strictly . . . .").

ARGUMENT

I. BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW AUTHORITY ORDERS RESOLVING EXCEPTIONS TO ARBITRATION AWARDS, IT MUST DISMISS THE PETITION FOR REVIEW

The Agency cannot overcome the explicit statutory bar to judicial review of arbitration awards – including those applying the Back Pay Act – that this Court has repeatedly recognized.[1] Accordingly, the Court should dismiss the Agency's petition for review.

A. Congress Intended the Authority to be the Final Stop When Reviewing Arbitration Awards

The Statute's language embodies the strict limits Congress set on judicial review of Authority decisions concerning arbitrators' awards. Section 7123(a) of the Statute, which the Agency all but ignores in its brief, specifically precludes judicial review of certain Authority decisions and orders, including arbitration orders. This section states, in relevant part:

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[1] *See Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014) ("fundamental principle of federal labor relations law: arbitration awards are presumed final and not subject to judicial review"); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Newport, R.I. v. FLRA*, 665 F.3d 1339, 1345 (D.C. Cir. 2012); *Ass'n of Civilian Technicians, N.Y.S. Council v. FLRA*, 507 F.3d 697, 698-99 (D.C. Cir. 2007) ("*ACT*"); *Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 501-02 (D.C. Cir. 2006) ("*AFGE, Local 2510*"); *Am. Fed'n of Gov't Emps., Local 2986 v. FLRA*, 130 F.3d 450, 451 (D.C. Cir. 1997); *U.S. Dep't of Justice, Fed. Bureau of Prisons v. FLRA*, 981 F.2d 1339, 1342 (D.C. Cir. 1993); *Griffith v. FLRA*, 842 F.2d 487, 490-91 (D.C. Cir. 1988); *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987).

> Any person aggrieved by any final order of the Authority *other than an order under* –
>
> > (1) section 7122 of this title (*involving an award by an arbitrator*), unless the order involves an unfair labor practice under section [7116][2] of this title . . .
> >
> > . . . .
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a) (emphasis added). Thus, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the jurisdiction of the courts of appeals to review an Authority arbitration decision to those instances that "involve[] [a ULP]" under the Statute.[3] *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987) ("*OEA*"). This broad jurisdictional bar has been recognized by all of the courts of appeals, including this one, that have considered the issue.[4]

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[2] Although the text of the Statute refers to § 7118, that reference has generally been recognized as an inadvertent miscitation. *AFGE, Local 2510,* 453 F.3d at 502 n *. Section 7116 of the Statute is the correct reference. *Id.*

[3] Where a statutory ULP has not "actually been considered or addressed by the Authority," however, the requirement of § 7123(a)(1) is not met, and the Court lacks jurisdiction. *See ACT,* 507 F.3d at 699-700; *AFGE, Local 2510*, 453 F.3d at 503-04; *OEA*, 824 F.2d at 63-67.

[4] *See* n.1, *supra* (citing in-circuit precedent). *See also Begay v. Dep't of the Interior*, 145 F.3d 1313, 1315-16 (Fed. Cir. 1998); *NTEU v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *U.S. Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region v. FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Philadelphia Metal Trades Council v. FLRA*, 963 F.2d 38, 40 (3d Cir. 1992); *U.S. Dep't of Justice v. FLRA*, 792 F.2d 25, 27 (2d Cir. 1986); *Tonetti v. FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *U.S.*

The legislative history of § 7123(a)'s provisions for limited judicial review underscores the tight restrictions Congress intentionally placed on appellate scrutiny of Authority decisions involving an arbitration award. As this Court has observed, "[t]he rationale for circumscribed judicial review of such cases is not hard to divine." *OEA*, 824 F.2d at 63. Congress strongly favored arbitrating labor disputes and sought to create a scheme characterized by finality, speed, and economy. *Id.* To this end, the conferees discussed judicial review in the following terms:

> [T]here will be *no judicial review* of the Authority's action on those *arbitrators*['] *awards in grievance cases which are appealable to the Authority*. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined *it would be inappropriate for there to be subsequent review by the court of appeals in such matters*.

H.R. REP. NO. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any . . . authority* or administrative body" other than the Authority. *Id.* at 826

Marshals Serv. v. FLRA, 708 F.2d 1417, 1420-21 (9th Cir. 1983); *Am. Fed'n of Gov't Emps., Local 1923 v. FLRA*, 675 F.2d 612, 613 (4th Cir. 1982).

(emphasis added). In seeking review of the Authority's order on the arbitration award here, the Agency's petition squarely runs into this settled jurisdictional bar.

B. This Court Held in *Griffith*, and Affirmed in *Treasury*, That Challenges to the Authority's Routine Application of the Back Pay Act in Reviewing an Arbitration Award are Not Subject to Judicial Review

The limited exceptions to the statutory bar on judicial review of Authority arbitration decisions do not apply here. To begin, it is undisputed that the only statutory exception permitting judicial review does not apply: This case does not involve an unfair labor practice. *See* 5 U.S.C. § 7123(a)(1). Instead, the Agency contends that *U.S. Department of the Treasury, U.S. Customs Service v. FLRA*, 43 F.3d 682 (D.C. Cir. 1994), permits review. However, for the reasons set out below, the Agency's reliance on that decision is misplaced. *Treasury* does not create jurisdiction in this case; in fact, it confirms its absence.

According to the Agency, *Treasury* creates an exception permitting judicial review whenever the Authority "exceeds its jurisdiction," and "the Authority exceeded its jurisdiction" here by awarding Officer Hutson back pay. (Br. at 14 (internal quotation marks omitted).) But in the same breath as creating the "exceeds its jurisdiction" exception in *Treasury*, the Court affirmed its prior holding in *Griffith v. FLRA* that challenges to the Authority's routine application of the Back Pay Act in reviewing an arbitration award are not

subject to direct judicial review. *Treasury*, 43 F.3d at 689; *see also* Griffith *v. FLRA*, 842 F.2d 487, 493-94 (D.C. Cir. 1988). Accordingly, *Griffith* provides, and *Treasury* confirms, that the limited exceptions to Congress's preclusion of judicial review of Authority decisions do not apply here, where the Authority simply awarded Officer Hutson back pay after the Agency undisputedly denied him an overtime opportunity in violation of the Policy.[5]

It is uncontested that the Back Pay Act effects a waiver of sovereign immunity for back pay claims to remedy overtime violations. *See* 5 U.S.C. § 5596(b)(1), (5) (2012). Under the Back Pay Act, "[a]n employee of an agency who . . . has been affected by an unjustified or unwarranted personnel action . . . is entitled, on correction of the personnel action, to receive . . . an amount equal to all or any part of the pay, allowances, or differentials, as

[5] The Ninth Circuit has rejected *Treasury* altogether, declining to create an exception to the bar on judicial review of arbitration awards, even to review whether the Authority exceeded its jurisdiction. *NTEU v. FLRA*, 112 F.3d 402, 404-05 (9th Cir. 1997). As the Court explained:

> [T]his is an intramural dispute between two executive branch agencies and executive branch employees. We do not find it at all inconceivable for Congress to have decided that the executive branch should work out its internecine disputes without interference from the judicial branch. After all, everyone involved in this dispute is ultimately answerable to the President who has various informal remedies available if he is dissatisfied with FLRA decisions – such as refusing to reappoint members when their terms expire. It's thus quite likely that Congress intended just what it said – that the judicial branch stay out of the business of reviewing FLRA decisions involving an arbitration award.

Id. at 405.

applicable which the employee normally would have earned or received during the period if the personnel action had not occurred . . . ." 5 U.S.C. § 5596(b)(1)(A)(i). Here, there is no dispute that the Agency violated the Policy when it failed to assign Officer Hutson an overtime opportunity to which the Policy clearly "entitle[d]" him, and the Authority accordingly ordered the Agency to compensate Hutson for the overtime opportunity the Agency wrongly denied him. (*See NTEU III,* JA 065.)

In resolving the contractual grievance and ordering back pay, the Authority acted in strict concert with the statutory scheme Congress enacted in the Civil Service Reform Act of 1978. There, Congress vested arbitrators and the Authority with jurisdiction over federal-sector grievance arbitration. Civil Service Reform Act of 1978, §§ 701, 702, Pub. L. No. 95-454, 92 Stat. 1111, 1211-13 (1978) (codified at 5 U.S.C. §§ 7121-22)). At the same time, it specifically amended the Back Pay Act – and waived the federal government's sovereign immunity – to empower arbitrators and the Authority to remedy those grievances with back pay. *Id.*, 92 Stat. at 1216 (codified at 5 U.S.C. § 5596(b)(1)). And, Congress explicitly stated that the Authority's decisions in arbitration cases would not be subject to judicial review. *Id.*, 92 Stat. at 1213 (codified at 5 U.S.C. § 7123(a)). *Cf. McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf.*, 264 F.3d 52, 59-63 (D.C. Cir. 2001) (examining statutory language, legislative history, congressional

understanding, and availability of other review to hold that Congress precluded judicial review of as-applied constitutional objections to a judicial committee report disciplining federal judge).

In light of Congress's decision to foreclose judicial review to further the policies favoring swift resolution of labor disputes in the federal sector, this Court conclusively held in *Griffith* that it lacked jurisdiction to review a challenge to the Authority's interpretation of the Back Pay Act in resolving exceptions to an arbitration award. 842 F.2d at 494. Although it is true that *Griffith* did not directly address a *sovereign immunity* challenge to a Back Pay Act ruling, *Griffith*'s discussion of the Back Pay Act nevertheless demonstrates why the Agency's plea for judicial review of *all* back pay awards in arbitration cases – and, make no mistake, that is exactly what the Agency requests – is not justified under the Statute.

The plaintiff in *Griffith* sought a rule allowing judicial review on any alleged Back Pay Act misapplication, contending that, because the Authority must act "consistent with applicable laws," an "erroneous construction of the Back Pay Act placed [the Authority] beyond the pale of its statutory authority." 842 F.2d at 494. As this Court recognized, however, "where the legal error, if any, is at most one of failing to capture some marginal nuance of the Back Pay Act . . . [a]ccepting such a claim would turn *every* error of law into a basis for review." *Id.* Rather, when the Authority engages in "a colorable"

"construction of the statutory language" in applying the Back Pay Act, its interpretation "is not the sort of plain error" requiring review. *Id.* That holding properly carries out Congress's delegation to the Authority of the exclusive responsibility to administer the grievance process for Executive Branch employees, including the discretion Congress granted the Authority to award back pay.

Contrary to that Congressional intent and the holding of *Griffith*, however, the Agency contends that any purported misapplication of the Back Pay Act would justify this Court's jurisdiction under the guise of a sovereign immunity violation. Indeed, the Agency could not have made the breadth of its argument clearer: "[T]his Court has jurisdiction over all the articulated rationales for the Authority's decision [to award back pay] under *Treasury* because all those rationales implicate sovereign immunity and are thus jurisdictional in nature." (Br. at 45; *see also* Br. at 14-29 (asserting that the Authority's rejection of the Agency's reading of (b)(4) of the Back Pay Act invokes sovereign immunity principles justifying judicial review despite the Statute's clear prohibition); Br. at 43-45 (arguing that the dispute over the interpretation of "administrative error" is a dispute about the "applicable law, rule [or] regulation" under (b)(1) of the Back Pay Act vesting the Court with jurisdiction).)

As *Griffith* properly found in rejecting essentially the same argument posed through a slightly different lens, the Agency's position is incompatible with the scheme Congress set forth in the Civil Service Reform Act, empowering the Authority to administer the Back Pay Act in arbitration cases and withholding appellate review of those decisions. In asserting that this Court could review any putative misapplication of the Back Pay Act, the Agency provides no limiting principle to stem the tide of arbitration appeals to this Court. Even a quick search reveals numerous routine arbitration cases involving back pay that, under the Agency's theory, would be ripe for judicial review.[6]

[6] *See, e.g.*, *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Laredo, Texas,* 66 FLRA 567, 568 (2012) (denying agency's exception to the arbitrator's finding that the agency violated a collective bargaining agreement, thereby committing an "unjustified or unwarranted personnel action" under the Back Pay Act); *Fed. Aviation Admin.,* 64 FLRA 76, 78 (2009) (denying agency's exception claiming the arbitrator misinterpreted a Memorandum of Understanding between the agency and union which led to the erroneous finding of an adverse personnel action under the Back Pay Act; because Authority found that the arbitrator properly applied the Back Pay Act, it rejected the Agency's claim that "the award . . . is barred by sovereign immunity"); *Dep't of Def., Educ. Activity, Arlington,* 56 FLRA 901, 904-05 (2000) (denying agency's exception to the arbitrator's finding that breach of an employee's contractual right to a timely payment of living quarters allowance was an unjustified personnel action under the Back Pay Act). Indeed, days before this brief was filed, the Government filed a petition for review in another arbitration case, presumably relying again on the challenged award of a monetary remedy as a "sovereign immunity" violation to justify jurisdiction *See U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary Coleman II Florida v. FLRA*, No. 14-1300 (D.C. Cir., filed Dec. 24. 2014).

Griffith properly concluded that the Authority's colorable interpretations of the Back Pay Act are immune from direct judicial review, and its holding should apply symmetrically to union and agency appeals. *See Treasury*, 43 F.3d at 687. Even if there were no direct judicial review of sovereign immunity claims arising out of the Back Pay Act in arbitration cases, the Authority's power under the Statute is not entirely unchecked, as the Agency suggests. (Br. at 23). In *Griffith,* this Court recognized that a patent misconstruction of the Back Pay Act potentially could justify district court jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958). *See Griffith*, 842 F.2d at 943-44. But the Agency has made no jurisdictional claim under *Leedom*, with its heightened requirement to demonstrate that the Authority acted patently outside its authority. And, contrary to the Agency's claims, the Authority's routine application of the Back Pay Act here – which is entirely consistent with the interpretation of all other courts that have applied Subsection (b)(4), *see* p. 44 *infra* – would not meet that standard.

Griffith's approach – respecting Congress's simultaneous empowerment of the Authority to apply the Back Pay Act in arbitration cases and its intentional withholding of judicial review – best effectuates the administrative scheme Congress established in the Civil Service Reform Act of 1978. Indeed, stopping this case at the Authority ensures that Officer Hutson receives a prompt resolution and remedy for the Agency's unwarranted denial of his

overtime shift and allows the parties to return to the business of government, consistent with the Statute's purpose. *See* 5 U.S.C. § 7101 ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government."). Moreover, as the Agency's cases like *Social Security Administration, Baltimore, Maryland v. FLRA*, 201 F.3d 465 (D.C. Cir. 2000), show, the Agency's sovereign immunity concerns will not indefinitely evade review, as they often arise in the judicially-reviewable unfair labor practice context (*see* 5 U.S.C. § 7123(a)(1)), where speed and finality were of less concern to Congress. In this light, any minor encroachment on sovereign immunity from following *Griffith* would "amount[] to little, if any, broadening of the congressional waiver." *Irwin v. Dep't of Veterans' Affairs*, 498 U.S. 89, 96 (1990).

Nothing in *Treasury*, on which the Agency relies, challenges these holdings from *Griffith*. To the contrary, *Treasury* explicitly affirms them. *Treasury*, 43 F.3d at 689 (approvingly citing *Griffith*, 842 F.2d at 494). In that case, the Court held that the Authority did not have subject matter jurisdiction to consider a grievance claiming a violation of a customs inspection statute, which was not a law issued "for the very purpose of affecting working conditions of unit employees." *Treasury*, 43 F.3d at 689. Instead, the Court ruled that the statute at issue affected working conditions only "incidentally." *Id.* That law was "a statute governing international trade which could hardly be

thought to have been crafted with any regard for Customs Service employees." *Id.* Applying the definition of "grievance" set forth in § 7103(a)(9)(C)(ii) of the Statute, that is, "any complaint . . . concerning . . . any law, rule, or regulation affecting conditions of employment," the Court concluded that the claim at issue was not a "grievance" under the Statute. *Id.* at 684, 690-91 (internal quotation marks omitted). Therefore, the Court held that the Authority exceeded its subject matter jurisdiction when it denied exceptions to the arbitration award. *Id.* at 690-91. There is no dispute in this case that Officer Hutson's challenge to the Agency's overtime violation was a grievance within the meaning of the Statute.

In its determination that the customs inspection statute before it was not a law "affecting conditions of employment," the *Treasury* Court contrasted that non-germane law with the employment-related Back Pay Act. *Id.* at 689. As the Court explained, the Back Pay Act is "a federal statute that undisputedly was designed to deal directly with employee working conditions," and the Court had already concluded in *Griffith* that "any further judicial review of the statutory claim was barred" where the Authority merely modified "an arbitrator's award based on a different interpretation of the Back Pay Act." *Id.* (citing *Griffith*, 842 F.2d at 494).

Thus, the Agency's reliance on *Treasury* is misplaced. It is undisputed – and indisputable – that both the Back Pay Act and the Policy "deal directly with

employee working conditions." *Id.* at 689 (citing *Griffith*, 842 F.2d at 494); *see also* Policy, JA 041-50 (stating that "[t]he purpose of this Handbook is to revise and update the policy governing the assignment of [] personnel" and covering topics such as scheduling, staffing levels, and procedures for overtime assignments). As such, the Authority's routine interpretations of the Back Pay Act and the Policy in this case fall squarely outside the realm of judicial review, as set forth in *Treasury*.

In suggesting that *Treasury* held constitutional claims arising in federal sector arbitration proceedings always directly reviewable (Br. at 23), the Agency elevates dicta to holding. *Treasury* merely observed that the Court enjoyed jurisdiction to review "collateral constitutional claims" like the due process property right to a within grade pay increase asserted in *Griffith*. As the Court stated, however, judicial review of the plaintiff's due process property claim was necessary because "an arbitrator interpreting a collective-bargaining agreement would not be expected to apply constitutional law." *Treasury*, 43 F.3d at 688.[7] But that is not the case here. As noted above, Congress *did*

[7] To the extent the Court's reasoning in *Treasury* is premised on a limited view of the role of arbitrators, that view has been rejected by recent Supreme Court case law. Specifically, the *Treasury* Court assumed that "an arbitrator in the private sector would not be expected to apply a federal statute . . . [but] must confine himself to interpreting the [parties'] agreement; so long as he does his award is virtually unreviewable." *Treasury*, 43 F.3d at 689. But in today's legal landscape, arbitrators regularly interpret federal statutes – and the courts

expect the Authority to apply the Back Pay Act, giving the Authority discretion to do so in arbitration cases and simultaneously closing those decisions off from judicial review. *See* pp. 21-22, *supra.* The Court implicitly acknowledged this point in *Treasury*. *See* 43 F.3d at 689 (observing that, "in *Griffith,* which in part involved the FLRA's modification of an arbitrator's award based on a different interpretation of the Back Pay Act, we concluded that any further judicial review of the statutory claim was barred" because "[t]hat case . . . concerned the interstices of a federal statute that undisputedly was designed to deal directly with working conditions," well within the Authority's portfolio).

The Agency's case thus rests on its repeatedly cherry-picking a sentence from the case's closing paragraph: "Our review is available for the limited purpose of determining whether the Authority exceeds its jurisdiction." *Treasury*, 43 F.3d at 691. Read in context, however, *Treasury* stands for the proposition that this Court may review the Authority's interpretation of its organic statute in determining the scope of the Authority's original subject matter jurisdiction. To that point, the Court's analysis is dedicated to determining whether the Statute's definition of "grievance" includes a complaint regarding a violation of § 1448(a) of the federal customs laws, for if it did not, then – under the Court's analysis – the complaint in the case was not

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routinely bless their doing so. *E.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009).

properly before the Authority. *See, e.g.*, *id.* at 689 ("It seems clear to us that § 7123(a) (the preclusion of judicial review of arbitrated disputes) must be read in light of § 7103(a) (the definition of permissible grounds for grievances)."). Nowhere in *Treasury* does the Court discuss whether it would review the Authority's colorable interpretation of the Back Pay Act on sovereign immunity grounds, and its discussion of *Griffith* suggests otherwise. In sum, even if, as the Agency contends, "[q]uestions of the Authority's 'jurisdiction' are obviously broader than the circumstances presented under the facts in *Treasury*," it does not mean, ipso facto, that the Court's narrow decision in *Treasury* should be interpreted as a broad edict establishing review over questions of the Authority's "jurisdiction" in all instances. (Br. at 22-23.) *See, e.g.*, *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 419 (2009) (rejecting petitioners' reading of a case as "far too broad"); *Sample v. Bureau of Prisons*, 466 F.3d 1086, 1089 (D.C. Cir. 2006) (rejecting party's reading of case as "too broad").

C. The Sovereign Immunity and Appropriations Clause Cases the Agency Cites are Inapposite

The Agency attempts to shoehorn *Treasury* and *Griffith* into supporting its jurisdictional argument by insisting that "[s]overeign immunity makes a difference." (Br. at 21.) But the Agency's sovereign immunity cases involving the Authority are inapposite. First, in both *Social Security Administration, Baltimore, Maryland v. FLRA* and *Department of the Army v. FLRA*, the agencies

presented their sovereign immunity challenges pursuant to the Statute's specific investiture of appellate jurisdiction to review unfair labor practice orders. *See Soc. Sec. Admin.*, 201 F.3d 465, 467 (D.C. Cir. 2000) (noting unfair labor practice findings); *Dep't of the Army*, 56 F.3d 273, 274-75 (D.C. Cir. 1994)(same); *see also* 5 U.S.C. § 7123. Thus, those cases did not address – and therefore provide no guidance on – whether this Court has jurisdiction over an Authority order on exceptions to an arbitration award that does not involve an unfair labor practice. That an agency may raise a novel sovereign immunity claim in a case properly presented before the court of appeals – as the agencies did in *Social Security Administration* and *Department of the Army* – is of no significance.

Second, the judicial inquiries in *Social Security Administration* and *Department of the Army* presented issues of first impression concerning whether Congress purportedly authorized entire classes of remedies. *See Soc. Sec. Admin.*, 201 F.3d at 468-73 (analyzing whether the Back Pay Act's language allowing back pay only for lost "pay, allowances, or differentials" allows an award of interest on liquidated damages); *Dep't of the Army*, 56 F.3d at 277-79 (considering whether the Statute's grant of remedial power to the Authority encompasses the ability to order compensatory money damages against the federal government for a failure to bargain in good faith). Here, however, it is indisputable that the Back Pay Act waives the government's sovereign immunity as to back pay for missed overtime, and the Authority decided the

arbitration case on narrow factual and legal grounds under a colorable and universally-accepted interpretation of the Back Pay Act, as described in further detail below.

The Appropriations Clause jurisprudence to which the Agency makes passing reference similarly does not require the Court to exercise jurisdiction over an Authority order on an arbitration award. (Br. at 24-25.) The Agency seems to suggest that the Authority's purportedly erroneous application of the Back Pay Act has created an ancillary constitutional problem, requiring "an award of money in violation of the Appropriations Clause." (*Id.* at 25.) Yet, the Agency well knows that, if the Authority's award stands, federal law contemplates payment out of the Agency's regular appropriations. If no money remains to pay, then the Agency may request that Congress allocate a deficiency appropriation. *See* III Government Accounting Office, *Principles of Federal Appropriations Law* 14-47 (3rd ed. 2008), *available at* http://www.gao.gov/legal/redbook/redbook.html (last visited January 9, 2015). It is almost unfathomable to think that, if the Court finds no jurisdiction to consider the Agency's petition for review, the Agency would simply defy a valid Authority order, as it suggests (Br. at 28).

D. The Agency's Claim That Denial of Direct Review Would be "Senseless" is Based on a Misreading of *Treasury*

The Agency further argues that, "as in *Treasury*, denial of direct review would be 'senseless' in this case." (Br. at 26.) According to the Agency, the *Treasury* Court held that "forcing an [a]gency to commit an unfair labor practice to obtain review of an unenforceable order" would be senseless, and so this Court should exercise jurisdiction to review the Authority's Orders now, rather than waiting to do so on an enforcement action in an unfair labor practice case. (Br. at 27.)

Here, the Agency appears to be putting words into the court's mouth. In fact, the *Treasury* Court held – in the very language the Agency cites – that with respect to appeals of Authority arbitration orders on the merits and Authority orders in unfair labor practice enforcement actions, this Court's jurisdiction should be symmetrical. *Treasury*, 43 F.3d at 687. That is, if this Court lacks jurisdiction over an appeal of an Authority arbitration decision on the merits of a case, it similarly lacks jurisdiction to review the underlying Authority arbitration order in an enforcement action. Specifically, the Court reasoned: "it would have been senseless for Congress to preclude judicial review of arbitration awards except when they are sought to be enforced by the only means available." *Id.*

Treasury, itself, directly negates the Agency's argument that this Court should assert jurisdiction in the interests of judicial efficiency. Because this Court lacks jurisdiction over this case now, the Court similarly would lack jurisdiction over the merits of the Authority's Orders in any subsequent enforcement action. *Id.* at 688 ("[W]e are obliged to consider carefully whether we have jurisdiction now because, if not now it would be, as the Authority argues, never.").

E. Even if an Exception to the Statutory Bar on Judicial Review Applied Here, No Constitutional Issue is Squarely Presented for the Court's Review Because the Authority Decided this Case on Narrow Factual and Non-Constitutional Legal Grounds

As discussed below, the Authority decided that, even if the Agency's interpretation of Subsection (b)(4) of the Back Pay Act (to which it hitches its sovereign immunity argument) were correct, the underlying facts did not support the Agency's theory of the case. Consequently, under the doctrine of constitutional avoidance, the Court need not review the underlying Orders – even if jurisdiction were otherwise justified – because the case may be decided on dispositive factual and narrow legal grounds that would otherwise be unreviewable, not on a constitutional claim of sovereign immunity.

The Agency argues that the Authority ordered relief not "authorized" by the Back Pay Act because the Policy allows only a replacement overtime shift to remedy a missed one, and, in turn, Subsection (b)(4) of the Back Pay Act

ostensibly limits relief to "that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified personnel action is found." (Br. at 30 (internal quotation marks omitted).) But the Authority decided this case on its facts, essentially assuming that, even if the Back Pay Act *did* restrict the remedy to that which the Policy allows, the Agency's failure to assign overtime was "more than a mere mistake." (*NTEU III*, JA 065.) The Agency's actions, therefore, were not "administrative error" under the Policy, and consequently, back pay was permissible. (*Id.*, JA 067.)

Thus, even if the Court had jurisdiction over the Agency's Back Pay Act claims, the canon of constitutional avoidance provides that no constitutional issue is squarely presented for the Court's review because the Authority decided this case on narrow factual and legal grounds that would not alone justify appellate jurisdiction. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) ("It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." (internal quotation marks and alteration omitted)); *United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997) (refusing to reach sovereign immunity question when case could be decided on non-constitutional grounds); *accord Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Perhaps implicitly recognizing that the Authority decided the case on the narrow factual and non-constitutional legal grounds described above, the Agency urges the Court to extend jurisdiction to review those findings, attempting to make the Authority's interpretation of "administrative error" in the Policy a separate constitutional ground for review. (Br. at 45-49.) But the Authority's interpretation of the Policy, an overtime regulation indubitably "designed to deal directly with employee working conditions," is indistinguishable from the class of decisions this Court held unreviewable in *Treasury*. 43 F.3d at 689. Under the circumstances of this case, the constitutional avoidance doctrine and Section 7123 of the Statute require this Court to refrain from exercising jurisdiction over this case *at all*, given the Authority's dispositive resolution on grounds that do not implicate constitutional concerns. *See, e.g., Hughes-Bechtol, Inc. v. West Virginia Bd. of Regents*, 737 F.2d 540, 544 (6th Cir. 1984) (affirming district court's dismissal for lack of jurisdiction on diversity grounds and under doctrine of constitutional avoidance).

F. The Agency's Pendent Jurisdiction Argument Lacks Traction

If this Court nevertheless exercises jurisdiction, rejecting the canon of constitutional avoidance, the Agency's argument that this Court should exercise pendent jurisdiction to review the Agency's interpretation of the Policy, in

addition to its interpretation of the Back Pay Act, gets the Agency nowhere. On the one hand, if the Court exercises jurisdiction (which, the Authority contends, it should not) over the Authority's interpretation of the Back Pay Act and agrees that Subsection (b)(4) merely provides a time limit for recovery under the Act, *see* discussion *infra* at 38-42, then there is no reason for the Court to review the Authority's construction of the Policy. On the other hand, if the Court exercises jurisdiction and concludes that the Authority's interpretation of the Back Pay Act violates sovereign immunity, this Court's precedent indicates that the Court will review the Authority's construction of the Policy *as part of that inquiry*. *See, e.g., Soc. Sec. Admin.*, 201 F.3d at 464-73.

That is hardly surprising. Indeed, the alternative makes no sense: if the Court exercised jurisdiction over the sovereign immunity claim, but then stopped short of reviewing the Authority's otherwise dispositive applications of Subsection (b)(4) and the Policy against the Agency, there would be no case or controversy to support the Agency's standing. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *accord Sierra Club v. Envtl. Prot. Agency*, 699 F.3d 530, 535 (D.C. Cir. 2012). This simple fact underscores why the Court should avoid unnecessarily addressing a constitutional issue and refrain from exercising jurisdiction at all, given the existence of dispositive non-constitutional grounds for disposing of the case. *See* pp.34-36, *supra.*

II. EVEN IF THIS COURT STRETCHES THE BOUNDS OF § 7123(a) OF THE STATUTE TO EXERCISE JURISDICTION IN THIS CASE, THE AGENCY FAILS TO SHOW THAT THE AUTHORITY ERRED IN GRANTING OFFICER HUTSON BACK PAY

Beneath its cries of ambiguity and sovereign immunity, the Agency's argument boils down to this: Congress amended the Back Pay Act to allow an agency to effectively erase the Back Pay Act from the United States Code by unilaterally passing an internal policy denying employees the back pay to which the Act entitles them. But the language of Subsection (b)(4) of the Back Pay Act makes clear that this is not the case. The Agency cannot show that the Authority erred in granting Officer Hutson back pay, either by misinterpreting the Back Pay Act or the Policy.

A. Subsection (b)(4) of the Back Pay Act Merely Places Time Limits on Recovery Under the Act

Even if this Court reviews the Authority's Orders, the Agency's challenge to the Authority's interpretation of Subsection (b)(4) of the Back Pay Act must fail. According to the Agency, Subsection (b)(4) not only provides a time limit on recovery of back pay, but further provides that back pay is limited to the amount "authorized" by the Policy. (Br. at 32.) However, under both the statute's plain language and its legislative history, that reading is untenable.

Subsection (b)(4) provides, in full, that:

> The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel

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

5 U.S.C. § 5596(b)(4). It contains two independent clauses: the "for the period" clause, describing the time period in which the unjustified or unwarranted personnel action occurred, and the "6 years" clause. Those clauses are connected by the conjunction "except that." When "except" is used as a conjunction, it is "used to introduce a statement that indicates the only person or thing that is not included in or referred to by a previous statement." MERRIAM-WEBSTER DICTIONARY, *available at* http://www.merriam-webster.com/dictionary/except. The Agency does not dispute that the "6 years" clause provides a fallback, six-year limitations period on back pay awards. Thus, basic principles of logic and sentence structure indicate that the "6 years" clause is intended to limit a broader temporal provision contained in the "for the period" clause. Or, put another way, § 5596(b)(4) establishes an outermost time limit of six years on back pay awards, while allowing for a shorter duration "for the period for which an unjustified or unwarranted personnel action was in effect" where "'authorized by the applicable law, rule, regulations, or . . . agreement under which the unjustified or unwarranted

personnel action'" was found.[8] (*NTEU III*, JA 067 (quoting 5 U.S.C. § 5596(b)(4)).)

As the Authority recognized, this meaning is confirmed in the legislative history and the case law. (*NTEU III*, JA 067.) Both the House of Representatives committee report and the conference committee report on the Back Pay Act amendment that added Subsection (b)(4) specified that the subsection "would clarify that any award of back pay . . . under" § 5596 "shall not exceed six years, *unless a shorter limitation period applies*." H.R. REP. NO. 105-532, at 342 (1998) (U.S. House Comm. Rep.) (emphasis added); H.R. REP. NO. 105-736, at 725 (1998) (Conf. Rep.) (emphasis added). The committee report explained that this amendment was necessary because "[a]rbitrators and administrators [acting under § 5596] have, in some cases, applied the six[-]year limit found [in other titles of the U.S. Code]," but in other cases, "have applied no time limit, since none is specified within [§ 5596]." H.R. REP. NO. 105-532, at 342 (1998) (U.S. House Comm. Rep.).[9] The committee reasoned that Subsection (b)(4) "would remove the ambiguity . . . by establishing a standard

[8] *See, e.g.,* 42 U.S.C. § 2000e-5(g)(1) (providing two-year limit on recovery of back pay under Title VII of the Civil Rights Act of 1964).

[9] *See, e.g.*, *Int'l Ass'n of Firefighters Local 13*, 43 FLRA 1012, 1025-28 (1992) (finding that arbitrator's award of backpay for period of approximately 10 years under the Fair Labor Standards Act did not violate the Back Pay Act); *Allen Park Veterans Admin. Med, Ctr.*, 34 FLRA 1091, 1103 (1990) (denying agency's exception that award of back pay for period of over 8 years was contrary to the Back Pay Act).

six[-]year limit in title 5." *Id.* The Back Pay Act's legislative history, therefore, confirms the plain meaning of its text: Subsection (b)(4) merely places time limits on recovery under the Act. So, too, does the case law. Notably, no court has found that Subsection (b)(4) is ambiguous, nor that it does anything other than impose a time limit on recovery of back pay. *See, e.g.*, *In re Levenson*, 587 F.3d 925, 937 (9th Cir. 2009) (interpreting § 5596(b)(4) as providing a time limit on recovery of back pay); *Hernandez v. Dep't of the Air Force*, 498 F.3d 1328, 1332 (Fed. Cir. 2007) (same).

The Agency's argument to the contrary rests – and falls – on two well-placed ellipses. Specifically, the Agency would have the Court truncate Subsection (b)(4) to read as follows:

> "The pay allowances or differentials granted under this section . . . shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found . . . ."

(Br. at 30.) As an initial matter, this styling of Subsection (b)(4) is problematic because, as the Agency so aptly argued, "[i]t is elementary that subsection (b)(4) must be read so as to give effect to *all* its language." (Br. at 37.) *Cf. Deal v. United States*, 508 U.S. 129, 132 (1993) (noting the "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used" (internal citations omitted)). And here, the Agency's

omissions are telling. First, it omits the temporal language from the "for the period" clause (namely, "for the period for which an unjustified or unwarranted personnel action was in effect"). Second, and crucially, the Agency eliminates the "except that" conjunction, which directs the reader that the "6 years" clause must be read as limiting the broader temporal provision contained in the "for the period" clause. 5 U.S.C. § 5596(b)(4). In other words, the Agency's rendition of Subsection (b)(4) is like a "Cliff Notes" version of MOBY DICK: It doesn't tell the whole story.

The Agency's review of Subsection (b)(4)'s legislative history is similarly deficient. The Agency alleges that it "ha[s] found no other legislative history on" Subsection (b)(4) other than the House committee report, House Report No. 105-532, and claims that report "does not purport to address, much less discuss" the "authorized by applicable law" clause. (Br. at 40.) But the Agency is – presumably – aware of the Authority's Orders from which it appeals. *NTEU III* cites the House committee report *and* the conference committee report, House Report No. 105-736. (*NTEU III*, JA 067.) Both documents, as noted above, address the "authorized by applicable law" clause in explaining that Subsection (b)(4) "would clarify that any award of back pay . . . under" § 5596 "shall not exceed six years, *unless a shorter limitation period applies*." H.R. REP. NO. 105-532, at 342 (1998) (U.S. House Comm. Rep.) (emphasis added); H.R. REP. NO. 105-736, at 725 (1998) (Conf. Rep.) (emphasis added). The

legislative history of Subsection (b)(4), therefore, is not silent, nor does it conflict with the statutory text. Rather, it affirms it.

In sum, even if the Authority is "compelled by principles of sovereign immunity" to "adopt a plausible interpretation of [a] statute that would not authorize damages against the [g]overnment," it was not bound to adopt the Agency's version of Subsection (b)(4) here. (Br. at 38 (internal quotation marks omitted).) A statutory interpretation that conflicts with the statute's plain wording, legislative history, and case law cannot be plausible.

B. The Agency's Claims that the Authority-Ordered Back Pay "Exceeds" the Recovery "Authorized" by the Agency's Policy are Unsubstantiated

Even under the Agency's carefully-pruned version of Subsection (b)(4), where the language of the Policy controls the remedy, the Agency's claim that the back pay granted by the Authority "exceeds" the recovery "authorized" by the Policy is wrong. (Br. at 32-35.) As noted above, the Policy provides that the "remedy for a missed overtime opportunity due to administrative error shall be provision of the next overtime opportunity to the affected employee." (JA 046.) But the Authority found that Hutson's missed overtime opportunity was *not* the result of administrative error. Specifically, the arbitrator found that the agency's denial of overtime to Hutson was due to a confluence of factors, including a misunderstanding of contractual responsibilities and the failure to call in Hutson despite his proximity to the workplace, all of which the

arbitrator concluded "was more than a mere mistake." (Award, JA 039.) The Authority deferred to that factual finding when reasoning that "the [a]rbitrator did not find that [Hutson] lost his overtime due to administrative error." (*NTEU III*, JA 067; *see also id.*, JA 065.)[10] Where the denial of overtime is not due to administrative error, the Policy places no limits on the remedy available to an employee. (*Id.*, JA 067.)

Indeed, there is no indication in the Policy that "administrative error" should be interpreted in any way other than its plain meaning, as recognized by the courts of appeals: an inadvertent mistake. *See, e.g., United States v. Kelley*, 402 F.3d 39, 42 (1st Cir. 2005) ("The court correctly found this was an inadvertent administrative error and that there was no willful violation."); *Hawkins v. Freeman*, 195 F.3d 732, 737-38 (4th Cir. 1999) (equating "administrative error" with "mere negligence and mistake"); *Switzer v. Wal-Mart Stores*, 52 F.3d 1294, 1296 (5th Cir. 1995) (using terms "administrative error" and "mistake" interchangeably); *United States v. Beebe*, 835 F.2d 670, 672 (6th Cir. 1987) (same); *United States v. Skulsky*, 786 F.2d 558, 564 (3d Cir. 1986)

[10] The Agency contends that the Authority (1) incorrectly determined that the arbitrator found the Agency's action was not an administrative error; and (2) erroneously deferred to that finding. (Br. at 60-63.) But this is a simple misreading of the Authority's order. The Authority deferred only to the Arbitrator's factual finding that the denial of overtime to Hutson was more than a "mere mistake," and applied its *de novo* interpretation of the Policy's language in holding that the Agency's actions were not "administrative error." (*NTEU III*, JA 067.)

(same); *Williams v. Rogers*, 449 F.2d 513, 522 (8th Cir. 1971) (equating "administrative error" with "mistake . . . through inadvertence and oversight"). That the Agency can point to one anomalous regulatory context in which the phrase may have a broader meaning does not imbue it with ambiguity in the context of the Policy. (Br. at 57-58 (citing *McCrary v. OPM*, 459 F.3d 1344, 1349 (Fed. Cir. 2006) (interpreting "administrative error" as used in Office of Personnel Management Regulation governing deposits for military service for credit in civilian pension benefits, 5 C.F.R. § 831.2107)).) Thus, the Authority's remedy, reasonably providing back pay to an employee whom the Agency improperly denied an assignment of work for unjustified reasons, did not exceed any remedy the Policy authorizes.

In addition, the Agency erroneously asserts that "if back pay is required, as the Authority holds, and the Policy continues to apply, then the Agency pays twice for that administrative error" when it awards Hutson both back pay and the next overtime opportunity. (Br. at 34.) Not only is the Agency's double-remedy argument purely speculative – no record evidence shows whether the Agency assigned Hutson the next overtime opportunity or whether Hutson would still be the low earner after receiving back pay – but it also is not properly before this Court. (Br. at 34.) Under 5 U.S.C. § 7123(c), "[n]o objection that has not been urged before the Authority . . . shall be considered by the court, unless the failure or neglect to urge the objection is excused

because of extraordinary circumstances." This Court recently affirmed that it "enforce[s] section 7123(c) strictly, recognizing that if a party were permitted to raise an argument for the first time in its petition for review, 'the initial adjudicatory role Congress gave to the Authority would be transferred in large measure to this court, in plain departure from the statutory plan.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir. 2014) (quoting *Dep't of the Treasury v. FLRA*, 707 F.2d 574, 580 (D.C. Cir. 1983)); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) (affirming this Court's interpretation of § 7123(c)). The Agency did not raise its double-remedy claim before the Authority, and does not cite any extraordinary circumstances that would allow this Court to consider it in the first instance. Accordingly, the Court must disregard the argument.

C. The Agency's Claims that the Authority Erred in Failing to Defer to Its Interpretations of the Policy Are Not Properly Before this Court and Have No Merit

The Agency devotes substantial time to arguing that the Authority erroneously failed to defer to the Agency's interpretations of the Policy[11] under *Auer v. Robbins*, 519 U.S. 452 (1997) ("*Auer*"). (Br. at 50-63). *Auer* holds that a

[11] Specifically, the Agency claims that the Authority should have deferred to its positions that: (1) the Policy's remedy was the only remedy available to a grievant who was wrongfully denied an overtime opportunity, regardless of whether that denial was due to "administrative error;" and (2) "the erroneous denial of the overtime opportunity in this case was due to an 'administrative error' *within the meaning of the Policy*." (Br. at 43.)

court will generally defer to an agency's interpretation of its own regulation "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Northwest Envtl. Def. Ctr.*, __ U.S. ___, 133 S. Ct. 1326, 1337 (2013) (internal quotation marks omitted).

1. The Court Should Not Consider the Agency's Deference Arguments Because the Agency Failed to Raise Them to the Authority in the First Instance

As an initial matter, the Agency's failure to raise its deference argument to the Authority during the proceedings below precludes it from doing so now. In its pleadings before the Authority, the Agency made no mention of *Auer*, and, although it offered an interpretation of the Policy to the Authority, it did not ask the Authority to provide administrative deference to it. *See* Opposition to the Union's Exceptions (Supp. App'x at 1-11), Motion for Reconsideration (Supp. App'x at 12-21), Supplement to Motion for Reconsideration (Supp. App'x at 22-24), or Motion to Vacate Order and Stay the Initial Decision (Supp. App'x at 25-31).[12] Moreover, the Agency cites no extraordinary circumstances for its failure to do so. Thus, as noted immediately above (pp. 45-46 *supra),* pursuant to 5 U.S.C. § 7123(c), the Court should not consider the Agency's claim that the Authority failed to provide proper deference.

[12] We have attached these documents in a Supplemental Appendix.

The only mention the Agency made of deference – prior to filing its opening brief in this case – was in its opposition to the Authority's motion for remand in *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot., Scobey, Mont. v. FLRA*, No. 13-1024 (D.C. Cir., filed Apr. 3, 2013) (doc. #1428897). Even there, the Agency did not assert that *the Authority* erred in failing to grant its interpretations of the Policy deference, but asserted that *the Court* should defer to the Agency's interpretations. (Supp. App'x at 45.) And, in any event, because the Agency had failed to present its deference argument in any pleading before the Authority, that issue was not properly before this Court in Case No. 13-1024, and it is not properly before the Court now. 5 U.S.C. § 7123(c); *see* pp. 45-46 *supra*.

Finally, that the Authority raised the deference question *sua sponte* in *NTEU III* is immaterial: This Court has consistently held that "[w]here the Authority makes a *sua sponte* determination," though "the parties will not have had an opportunity to address the relevant issue," § 7123(c) "precludes [the Court] from considering a pertinent objection if the petitioner has not raised the objection before the Authority." *NAGE, Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004); *accord U.S. Dep't of the Treasury v. FLRA*, 670 F.3d 1315, 1319 (D.C. Cir. 2012). *Cf. Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 348-50 (D.C. Cir. 2011) ("[T]o preserve objections for appeal a party must raise them in the time and manner that the [National Labor

Relations] Board's regulations require . . . [which] bar applies even though the Board has decided the issue." (internal quotation marks omitted)). Accordingly, this Court should dismiss the Agency's deference claims under § 7123(c) for lack of subject matter jurisdiction. *E.g.*, *U.S. Dep't of the Treasury v. FLRA*, 670 F.3d at 1321.

2. In any event, the Authority Properly Refused To Defer to the Agency's Interpretation of the Policy

Assuming *arguendo* that the Agency's deference arguments were properly before this Court, the Authority reasonably declined to defer to the Agency's self-serving interpretation of the Policy, and the Court should affirm that decision. First, any degree of deference is inappropriate in this case because the Policy is not ambiguous. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("*Christensen*") ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("While deference is normally due an agency's interpretation of its own rules, that is not the case where an alternative reading is compelled by the regulation's plain language.") (quotation marks omitted). As explained above, the Policy dictates a remedy for grievants who are denied overtime opportunities *as a result of administrative error*. (*NTEU III*, JA 067; Policy, JA 046.) While silence may create ambiguity in some contexts, this is not one. As the Authority found, in agreement with the Arbitrator, the Policy does not

limit the remedies available to a grievant denied an overtime opportunity on a different basis. (*NTEU I*, JA 058; *NTEU III*, JA 067.) Furthermore, as set out on p. 44 *supra*, nowhere does the Policy hint that "administrative error" should be interpreted in any way other than its plain meaning. Indeed, the only thing that is ambiguous about the term "administrative error" is the Agency's argument about how it should be defined, which vacillates among vague suggestions that include "inadvertent Agency mistake," "more than mere mistake," but not "knowing and intentional" action (exactly what the Arbitrator found occurred here). (Br. at 56-57.) In this light, deference to the unambiguous meaning of the Policy is unwarranted.

Even if the Agency persuades this Court to read ambiguity into the Policy, the Authority correctly determined that the Agency's interpretation is not due deference. (*NTEU* III, JA066.) To begin, as the Authority explained, the Agency's failure to publicly articulate its interpretation of the Policy prior to litigation undermines the justification for deference. (JA 066.) *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, __ U.S. ___, 132 S. Ct. 2156, 2166 (2012) ("*Christopher*") (deference is unwarranted when the court has reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question," including where "it appears that the [agency's] interpretation is nothing more than a convenient litigating position" or a "post hoc rationalization" (internal quotation marks omitted)).

Indeed, far from adhering to a public, consistent, and longstanding interpretation of the Policy, the Agency has proffered conflicting interpretations *in this litigation*. In its closing brief before the arbitrator, the Agency stated that "[the Policy] does not define the phrase[] 'administrative error;' likely, it is meant to signify an error that is unintentional." (Closing Br., Supp. App'x at 67 n.11.) But, now that the arbitrator found the error to be "more than a mere mistake," the Agency insists that the phrase means something more. (Br. at 54-60.) Compounding this discrepancy, the Agency provides no citations to support its claim that it has consistently interpreted the Policy as it now does before the Court, and its brief to the Arbitrator undermines that claim. (*Compare* Br. at 54-57 *with* Supp. App'x at 67 n.11.) As the Supreme Court recently reinforced, deference is unwarranted when "the agency's interpretation conflicts with a prior interpretation." *Christopher*, 132 S. Ct. at 2166 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)). Thus, while positions taken in legal briefs may sometimes receive deference, particularly when the government is not a party with a pecuniary interest in the litigation's outcome, this is not one of those cases. *Cf. Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 131 S. Ct. 871, 872 (2011) ("As in *Auer*, there is no reason to believe that the [agency]'s interpretation is a 'post hoc rationalization' taken as a litigation position. The [agency] is not a party to this case.").

Deference is also inappropriate because neither the underlying regulation, nor the interpretation, reflect the Agency's expertise in an area committed to its discretion by Congress. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006) ("In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary *was charged with enforcing* and reflected the considerable *experience and expertise* the [DOL] had acquired over time." (emphasis added)); *see also Porter v. Califano*, 592 F.2d 770, 780 n.15 (5th Cir. 1979) ("Judicial deference to agency fact-finding and decision-making is generally premised on the existence of agency expertise in a particular specialized or technical area."). Applying that principle, this Court has denied deference to agency interpretations of statutes of limitations and a rider to a federal appropriations statute, finding that agencies lacked expertise or experience with respect to either. *See, e.g., AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 767 (D.C. Cir. 2012) (declining to defer to agency's interpretation because "statutes of limitations are not the sort of technical provisions requiring or even benefiting from an agency's special expertise"); *Sherley v. Sebelius*, 689 F.3d 776, 786 (D.C. Cir. 2012) (holding that "a rider to a federal appropriations statute[] is not within any agency's area of expertise and therefore a particular agency's interpretation thereof receives no deference"(internal quotation marks and alteration omitted)). Under that line of precedent, this Court similarly should not defer to the Agency's interpretations of the Policy because the labor

law and back pay issues therein are not Congressionally-designated areas of expertise for the Department of Homeland Security, Customs and Border Protection.

Moreover, deference is also inappropriate because neither the Policy nor its "interpretation" is the kind of administrative rule to which the courts and the Authority typically defer. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Christensen*, 529 U.S. at 587; *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) ("*Skidmore*"); *Public Citizen, Inc. v. Dep't of Health and Human Servs.*, 332 F.3d 654, 660 (D.C. Cir. 2003) ("*Public Citizen*"). The Policy is not the product of notice-and-comment rulemaking or formal agency proceedings.[13] Rather, the Agency described the Policy to the Authority as "an Agency policy," (Opp. to Exceptions, Supp. App'x at 8), contrasting it with a federal statute or agency regulation, (*id.* at 7 n.3, 8). In fact, the Policy – entitled "National Inspectional Assignment Policy (NIAP) Handbook" – is merely an agency manual governing its internal personnel operations. The Supreme Court has made clear that, because they "lack the force of law," "[i]nterpretations contained in policy statements, agency manuals, and

[13] Although the Authority calls the Policy a "governing agency regulation," *see NTEU I*, JA 060, this does not transform the Policy into anything more than an internal, informal regulation, much less formal rulemaking, the interpretation of which would be worthy of *Auer* deference. *See, e.g., Mead Corp.*, 533 U.S. at 234.

enforcement guidelines . . . do not warrant *Chevron*-style deference."[14] *Christensen*, 529 U.S. at 587.[15] It is hard to believe, if deference to an agency manual's interpretations of *statutes or regulations* is inappropriate because of the informal nature of that guidance, that it would be appropriate to defer to an *unwritten interpretation* of a unilaterally-promulgated *internal agency personnel manual.*

At best, if the Policy's language were ambiguous, the Agency's interpretations thereof would only be "entitled to respect" under *Skidmore* to the extent that those interpretations have the "power to persuade." *Christensen*, 529 U.S. at 587. Even under that standard, however, the Authority did not err in declining to adopt the Agency's interpretation of the Policy. In evaluating an agency interpretation under *Skidmore*, the Authority weighs "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *Skidmore*, 323 U.S. at 140.

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[14] *See also Decker*, 133 S. Ct. at 1339-40 (Scalia, J., dissenting in part) ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." (citation omitted)).

[15] Indeed, "the Supreme Court has twice cited 'agency manuals' as an archetype of the kind of document that is not entitled to such deference." *Public Citizen*, 332 F.3d at 660 (citing *Mead*, 533 U.S. at 234 and *Christensen*, 529 U.S. at 587); *see also Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, ___ (2003) (applying *Skidmore*, rather than *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 437 U.S. 837 (1984), to statutory interpretations contained in the Social Security Administration's Program Operations Manual System); *Patent Office Prof'l Ass'n*, 59 FLRA 331, 341-42 (2003) (applying *Skidmore*, not *Auer* deference, to regulatory interpretation in Office of Government Ethics memorandum).

Here, as noted, there is no evidence in the record that the Agency's unwritten interpretations of the meaning of "administrative error" and the exclusiveness of the Policy's remedy for lost overtime opportunities were thorough or public; the Agency's reasoning is invalid; and the Agency has propounded inconsistent interpretations of the Policy that changed to suit the circumstances throughout the course of this litigation. (*See* pp. 50-51, 44-45, 51, *supra.*) In sum, the Authority properly withheld deference to the Agency's implausible claims that the Policy restricted remedies for an intentional failure to assign overtime to Officer Hutson and defined administrative error beyond its ordinary meaning.

* * *

But, ultimately, there is no reason for the Court to reach the deference issue at all. As noted above, the Court has no jurisdiction over the Agency's petition for review; the Authority properly interpreted Subsection (b)(4) as a statute of limitations on remedies, not a limit on back pay altogether; and, as the Authority found, the Agency's failure to assign Officer Hutson overtime was neither a mistake nor administrative error under the Policy, even under the Agency's vision of Subsection (b)(4). The Authority respectfully requests that Court deny the Agency's petition for review on all, or any, of these grounds.

CONCLUSION

The petition for review should be dismissed for lack of jurisdiction. If, however, the Court chooses to exercise jurisdiction in this case, the petition for review should be denied because the Authority did not err in granting Officer Hutson back pay.

Respectfully submitted,

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January 9, 2015

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

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 13,364 words excluding exempt material.

/s/ Fred B. Jacob
Fred B. Jacob
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2015, 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/ Stephanie J. Sverdrup Stone
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ATTACHMENT 1
STATUTORY ADDENDUM

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

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;

(3) the Library of Congress;

(4) the Government Printing Office;

(5) the government of the District of Columbia;

(6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and

(7) the United States Botanic Garden.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701(g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

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

(B) Such interest—

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

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

(iii) shall be compounded daily.

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

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

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

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

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

5 U.S.C. § 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient:

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

5 U.S.C. § 7123. Judicial review; enforcement

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

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

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.