ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1111

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

ANTILLES CONSOLIDATED EDUCATION ASSOCIATION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

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

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority") were the U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools, Puerto Rico ("Agency") and the Antilles Consolidated Education Association ("Union"). In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. RULING UNDER REVIEW

The Union seeks review of the Authority's decision in *Department of Defense, Domestic Dependent Elementary & Secondary Schools Fort Buchanan, Puerto Rico and Antilles Consolidated Education Association*, 71 FLRA (No. 24) 127 (May 22, 2019) (Member DuBester dissenting), *reconsideration denied*, 71 FLRA (No. 66) 359 (Sept. 30, 2019) (Member DuBester concurring).

C. RELATED CASES

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for Respondent is aware.

/s/ Noah Peters
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GLOSSARY OF ABBREVIATIONS

Agency	**U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools, Puerto Rico**
ALJ	**Administrative Law Judge**
APA	**Provisions of the law allowing for judicial review of Administrative Procedure Act decisions, 5 U.S.C. §§ 701-706 (2018)**
Authority	**The Federal Labor Relations Authority's three-member adjudicatory body**
Br.	**Petitioner's opening brief**
CBA	**Collective-bargaining agreement**
Factfinder	**Matthew M. Franckiewicz**
GC	**The General Counsel of the Federal Labor Relations Authority**
Panel	**Federal Service Impasses Panel**
FLRA	**Respondent, the Federal Labor Relations Authority**
JA	**Joint Appendix**
R&R	**Factfinder's 2016 written report and recommendations**
SA	**The Federal Labor Relations Authority's Supplemental Appendix**
Successor CBA	**The CBA that the Panel imposed in Case No. 16 FSIP 52 as a successor to the 2011 CBA between the Agency and the Union**
The Statute	**The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)**

ULP	**Unfair Labor Practice**
Union	**Petitioner, Antilles Consolidated Education Association**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION[1]

This case concerns whether the Federal Labor Relations Authority[2] reasonably determined that the Federal Service Impasses Panel ("Panel") lacked the authority to impose certain provisions of a successor collective-bargaining agreement ("Successor CBA") on the U.S. Department of Defense, Domestic Dependent Elementary and Secondary Schools, Puerto Rico ("Agency") and the Antilles Consolidated Education Association ("Union" or "Petitioner"), and whether the Authority reasonably granted the parties' requests to renegotiate Successor-CBA provisions affected by the Panel's errors.

The Authority had subject matter jurisdiction over this unfair labor practice ("ULP") case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) ("the Statute"). 5 U.S.C. § 7105(a)(2)(G). The Authority's decision on review is published at 71 FLRA (No. 24) 127 (May 22, 2019) (Member DuBester dissenting). A copy of that decision is included in the Joint Appendix ("JA") at JA271-304. The Union's Petition for Review was timely filed within 60 days of the Authority's decision. 5 U.S.C.

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[1] Portions of the record not included in the Joint Appendix are contained in the Supplemental Appendix and are cited as "SA__."

[2] The Federal Labor Relations Authority will hereinafter be referred to as the "FLRA," while the FLRA's three-member adjudicatory body will be referred to as the "Authority."

§ 7123(a). The Agency—which is not a party to this appeal—filed a motion for reconsideration of the Authority's decision on review, and the Authority's order denying the Agency's motion for reconsideration is published at 71 FLRA (No. 66) 359 (Sept. 30, 2019) (Member DuBester concurring).

STATEMENT OF ISSUES PRESENTED

1. Whether the Authority reasonably determined that the Panel lacked the authority to impose on the parties Article 19, Section 1 of the Successor CBA because that section was not substantively identical to any wording that the Authority had previously found negotiable.

2. Whether the Authority reasonably determined that the Panel lacked jurisdiction to order the parties to incorporate into the Successor CBA matters about which they were not at impasse.

3. Whether the Court lacks jurisdiction to consider the Union's arguments regarding: (a) the scope of the Authority's remand of Article 19, Section 1 to the parties' for renegotiation, (b) the interpretation of the Union's remedial request, and (c) the effects of the parties' ground rules on the parties' tentative agreements, because the Union did not present those arguments to the Authority.

4. Whether the Authority reasonably exercised its wide remedial discretion in granting the parties' requests to renegotiate provisions of the Successor CBA that were affected by the Panel's errors, and reasonably determined that the Union's

exception to recommended decision of the Administrative Law Judge's ("ALJ") was moot due to the order granting the parties' requests to renegotiate the compensation provisions of the Successor CBA.

RELEVANT STATUTORY PROVISIONS

The Statutory Addendum contains all relevant statutory and regulatory provisions. (Add. 1.)

STATEMENT OF THE CASE

This case arose from the negotiations between the Agency and the Union for the Successor CBA. (JA271.) The parties achieved tentative agreement on many issues, but they reached impasse on several provisions—including those governing work hours and employee compensation. (JA272.)

The Union requested assistance from the Panel, and the Panel asserted jurisdiction over all unresolved issues in the Successor CBA negotiations. (JA82.) As relevant here, the Panel referred the parties to a factfinder of their choice, (JA82-83), and the parties chose Matthew M. Franckiewicz (the "Factfinder") to issue a written report and recommendations (the "R&R") on the unresolved issues, (JA135, 182).

The Factfinder issued recommendations on the work hours and compensation disputes, and he recommended that the parties adopt all of the tentative agreements that they had reached before and after seeking Panel assistance. (JA139-45 (work hours), 146-56 (compensation), 135 (tentative agreements).) After receiving the R&R

and the parties' objections to the R&R, the Panel ordered the Agency to show cause why the Panel should not impose all of the Factfinder's recommendations on the parties. (JA164-66.) Although the Agency argued that the recommendations on work hours and compensation were unlawful, (JA167-69 (work hours), 171-76 (compensation)), the Panel adopted the R&R in full, including the recommendation to impose the tentative agreements on the parties, (JA195-97.)

The Agency refused to comply with the Panel's decision, contending that it was unlawful. (SA027-33.) The Union filed a ULP charge alleging that the Agency's actions violated the Statute, and the FLRA's General Counsel ("GC") issued a complaint alleging that the Agency violated § 7116(a)(1), (5), and (6) of the Statute. (JA273, 283.) In motions for summary judgment before an FLRA ALJ, the GC and the Union asked for an order to the Agency to implement the Panel's decision. (JA283.) In a cross-motion for summary judgment, the Agency contended that the portions of the Panel's decision regarding work hours and compensation were unlawful, and that the Panel exceeded its jurisdiction by ordering the parties to incorporate their tentative agreements into the Successor CBA. (SA034-57.) The ALJ recommended rejecting the Agency's arguments and granting the GC's and Union's motions for summary judgment. (JA272-75.) Thereafter, the Union filed an exception to the ALJ's recommended decision with the Authority (SA062-65), and the Agency filed cross-exceptions. (SA066-88.)

In resolving the Agency's cross-exceptions, the Authority noted that, where the negotiability of proposed contract wording is contested before the Panel, the Panel can impose that wording only if the Authority has previously held that a substantively identical contract provision was negotiable. (JA277.) As mentioned, the Agency had contested the negotiability of the work hours provisions of the Successor CBA before the Panel. (JA167-69.) The Authority found that those work hours provisions were not substantively identical to any previously-adjudicated contract wording; consequently, the Authority found that the work hours provisions of the Panel's decision were unenforceable. (JA276.)

In addition, the Authority found that both parties asked—albeit for different reasons—to resume negotiations on the Successor CBA's compensation provisions. (JA277-78.) The Authority granted those requests. (JA278.) As the Union's exception to the ALJ's recommended decision concerned the compensation provisions that the parties would be renegotiating, the Authority dismissed that exception as moot. (JA279.)

Returning to the Agency's cross-exceptions, the Authority found that the Panel lacked jurisdiction to order the parties to incorporate their tentative agreements into the Successor CBA because the parties were not at impasse on those matters. (JA278.) As to the remaining portions of the Panel's decision, the Authority found them lawful and ordered the Agency to implement and comply with them. (JA278-79.)

Finally, the Authority ordered both parties to resume negotiations, to the extent required by the Statute and other applicable law, on the matters addressed in the work hours and compensation provisions, as well as those matters addressed in other Successor-CBA provisions that were held deficient. (JA279.)

STATEMENT OF THE FACTS

A. The Request for Panel Assistance and the Factfinder's R&R

This case arose from negotiations between the Union and Agency concerning a CBA that would replace its previous 2011 CBA. When the Union requested Panel assistance in April 2016, the parties had already reached tentative agreements on 22 Successor CBA articles, 14 Successor CBA appendices, and various sections within other Successor CBA articles and appendices. (JA127.) The Union's request for assistance stated that "[t]he parties ha[d] reached impasse on 26 sections of 14 articles," (SA003), as well as a few appendices, (*e.g.*, SA019 ("[A]ppendix J")). The request provided a "summation of the issues [at impasse] and the [U]nion's position on them," (SA003), but that summation never mentioned the parties' tentative agreements.

In response to the Union's request, the Panel "assert[ed] jurisdiction over all unresolved issues." (JA82.) Given the size of the parties' dispute, the Panel referred them to the Factfinder to facilitate a settlement or issue an R&R. (JA82-83.)

The Factfinder assisted the parties in reaching tentative agreement on some of the contract provisions the parties brought to the Panel, but he could not facilitate a

complete settlement. (JA135.) As a result, the Factfinder considered the parties' arguments on the remaining unresolved issues, including a negotiability argument from the Agency. (JA135, 139-42.) He considered, *inter alia*, the Agency's argument that the Factfinder should not recommend the re-adoption of Article 19, Section 1(a) and (b) from the parties' 2011 CBA. (SA021-22.) In pertinent part, Article 19, Section 1(a) and (b) of the 2011 CBA stated:

ARTICLE 19
HOURS OF WORK AND SCHEDULING

> *Section 1.* **Workday.**
>
> a. The workday for full-time bargaining unit members shall consist of eight (8) hours. Unit members must be physically present at the work site for a seven and one-half (7½) hour duty day which includes a 30-minute non-paid duty-free lunch period.
>
> b. Salaries in this contract were negotiated with the realization and expectation that bargaining unit members will perform one (1) hour per workday of preparation and professional tasks for completion of their assigned eight (8) hour workday. While this one (1) hour of preparation and professional tasks may typically be performed at or away from the work site at the election of the unit member, the Agency reserves the right to require that this eighth hour on a particular workday be accomplished at the school site for activities such as training, staff development, or faculty meetings. . . .

(JA64.)

The Agency proposed that the Factfinder recommend changing Section 1(a) to require teachers "to be physically present at the work site" for their entire workday, (JA139), and recommend eliminating from Section 1(b) the dedicated hour each workday for preparatory and professional tasks, (*id.*). In support of its requested

changes, the Agency argued that Section 1(b) from the 2011 CBA allowed teachers to choose *when* to perform their daily hour of preparatory and professional tasks, and that, consequently, Section 1 violated the Agency's right to assign work under § 7106(a)(2)(B) of the Statute. (SA021-22.) The Union opposed the Agency's requested changes to Section 1(a) and (b). (JA110-17.)

The Factfinder determined that the existing wording of Article 19, Section 1(a) and (b) merely "establish[ed] the basic workday for compensation purposes." (JA140 (citing *U.S. DOD, Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 349-50 (1994).) He further stated that, under Authority precedent, such provisions are negotiable as long as management retains the ability to assign work beyond the "basic workday" for "additional compensation." (JA140.) Since other provisions of Article 19 recognized the Agency's ability to assign employees additional hours of work for additional compensation, the Factfinder found that the wording of Article 19, Section 1(a) and (b) in the expired agreement was negotiable. (JA141.) Thus, the Factfinder recommended that the parties re-adopt Article 19, Section 1(a) and (b) from the 2011 CBA. After noting that "hours of work and compensation are tethered together" (JA140), the Factfinder turned to the parties' compensation disputes.

Regarding compensation, the Factfinder recommended that the parties amend their negotiated pay rates and salary schedule—in Article 26 and Appendix F—to mirror the compensation provisions that the Agency had negotiated with another

bargaining unit represented by a different union. (JA150-56.) The Factfinder further recommended that the parties incorporate into the Successor CBA all of the provisions to which they had tentatively agreed—those to which they agreed before requesting the Panel's assistance, and those to which they agreed as a result of the Factfinder's settlement efforts. (JA135.)

The Factfinder provided copies of the R&R to the parties and the Panel, at which point the Panel directed the parties to explain whether they accepted the R&R or objected to any of its provisions. (JA158.) The Union informed the Panel that it would accept the R&R only if it was implemented in its entirety, because the provisions on work hours and pay were closely interrelated. (JA159.) The Agency objected to several portions of the R&R, including the recommendations concerning Article 19, Section 1; and Article 26 and Appendix F concerning compensation. (JA161-62.)

B. The Panel's Order to Show Cause and Its Decision in 16 FSIP 52

As the Agency did not agree to adopt the R&R in full, the Panel ordered the Agency to show cause why the Panel should not order the parties to adopt the R&R, and the Panel gave the Union an opportunity to file a rebuttal to the Agency's response to the order. (JA164-66.) The Panel stated that "[a]fter considering the entire record, the Panel . . . shall take whatever action it deems appropriate to resolve the impasse, which may include the issuance of a *Decision and Order*." (JA165.)

In response, the Agency reiterated its complaint that Article 19, Section 1(b) gave employees the sole discretion to determine when they would perform one of their hours of work, thereby violating management's right to assign work under § 7106(a)(2)(B) of the Statute. (JA167-68.) The Agency also argued that the Factfinder's compensation recommendations for Article 26 and Appendix F were unlawful. (JA172-76.) In its rebuttal concerning Article 19, Section 1, the Union did not dispute the Agency's argument that Section 1(b) allowed employees to determine when to perform their dedicated hour of preparation and professional activities. (SA023-26.)

The Panel reviewed the parties' responses to the show-cause order, and, on January 25, 2017, the Panel issued its decision. (*See* JA181.) The Panel stated that, "[a]t the time of the Panel's decision to assert jurisdiction over the [parties'] outstanding issues, there were *29 provisions at impasse*, within 14 articles and 4 appendices." (JA182 n.1 (emphasis added).) By contrast, the Panel did not state that it had asserted jurisdiction over an impasse that encompassed the parties' tentative agreements, or the entire Successor CBA.

The Panel's decision expressly acknowledged the Agency's argument that Article 19, Section 1(b) violated management's right to assign work because it allowed employees to perform their preparatory and professional tasks "at a time of their choosing," (JA185), but the Panel rejected that argument. (*Id.*) Instead, the Panel found that Section 1(b) protected management's right to determine when work would

be performed because that subsection allowed the Agency to require that, on a particular workday, employees must remain at the school site for an additional hour to performing duties *other than* preparatory tasks. (*Id.*) Thus, the Panel found that there was "no colorable negotiability claim preventing the Panel from addressing the merits of the Agency's disagreements with the Factfinder's recommendations in Article 19." (*Id.*) The Panel adopted the Factfinder's recommendation to retain the 2011 CBA's wording for Section 1(a) and (b). (JA186, 195.)

Although the Panel also acknowledged the Agency's arguments that the compensation provisions of the R&R were unlawful (JA191-92), the Panel adopted the Factfinder's compensation recommendations, finding that the R&R had carefully balanced the work hours provisions in Article 19 and the compensation provisions in Article 26 and Appendix F (JA190-92, 194-96).

Finally, the Panel wrote that "in addition to the . . . orders" relating to matters over which the parties were at impasse, "the parties [we]re ordered to . . . [a]dopt the Factfinder's recommendation that all of the tentative agreements reached be put into the [Successor] CBA," and "[a]dopt[] the Factfinder's recommendations that were not challenged." (JA197.)

C. The Agency's Failure to Comply with 16 FSIP 52

When the Agency failed to implement the Successor CBA that the Panel ordered, the Union filed a ULP charge. (JA283.) The GC issued a ULP complaint alleging that, by failing to implement the Successor CBA, the Agency had failed and

refused to negotiate in good faith with the Union, in violation of § 7116(a)(1) and (5) of the Statute. (*Id.*) Further, the complaint alleged that, by failing to comply with the Panel's decision, the Agency had violated § 7116(a)(1) and (6) of the Statute, (*id.*), which requires "cooperat[ion] in impasse procedures and impasse decisions," 5 U.S.C. § 7116(a)(6).

D. The ALJ's Recommendations[3] and the Authority's Decision

The GC and Union filed motions for summary judgment with the ALJ, asking for an order that the Agency implement the Panel's decision in full. (JA283.) The Union's motion also argued that the Agency's failure to implement the Panel decision had indefinitely delayed the compensation increases that the Panel ordered in Article 26 and Appendix F—some of which were retroactive to the expiration of the 2011 CBA, and some of which were prospective. (JA303.) As an order to comply with the Panel's decision would belatedly implement those compensation increases, the Union asked the ALJ to order interest on the backpay that the Agency would owe employees. (*Id.*)

The Agency filed a cross-motion for summary judgment with the ALJ. (JA283.) The Agency's cross-motion made several arguments that challenged the

[3] The Agency filed, with the ALJ, a motion to dismiss the ULP complaint on the basis that the GC had not alleged that the Panel ordered the parties to incorporate negotiable wording into the Successor CBA. (JA296-97.) The ALJ recommended denying that motion because the Authority could make the legal determinations necessary to support any finding that the Agency violated § 7116(a)(6) of the Statute. (*Id.*)

enforceability of the Panel decision. First, the Agency reiterated its negotiability objection to Article 19, Section 1, which the Agency asserted would "allow[] [a] bargaining unit teacher to decide that s/he will work at home . . . at a time of his/her choice." (SA056.) Given that management's right to assign work under § 7106(a)(2)(B) of the Statute includes the right to determine when work will be performed, the Agency asserted that the wording in Section 1(b) allowing employees to choose when to perform their preparatory work violated § 7106(a)(2)(B). (SA054-57.)

The Union filed a response to the Agency's cross-motion for summary judgment, but that response did not dispute the Agency's assertion that Section 1(b) allowed employees to choose when to perform their dedicated hour of professional and preparatory tasks. (*See* SA058-61 (arguing in favor of enforcing the Panel's decision concerning Article 19, Section 1).)

Second, the Agency's cross-motion alleged that the compensation provisions of the Panel's decision in Article 26 and Appendix F were unlawful and, therefore, unenforceable. (SA036-42, 047-52.) According to the Agency, sovereign immunity precluded the Panel from ordering retroactive pay increases, and the pay rates that the Panel established did not comply with 10 U.S.C. § 2164, which governs setting compensation for members of the bargaining unit. (SA036-44.)

Third, the Agency's cross-motion alleged that the Panel lacked the jurisdiction to order the parties to incorporate their tentative agreements into the Successor CBA

because the parties were "not at impasse" on those matters. (SA044-45.) Thus, the Agency argued that the Panel's decision was unenforceable as to the tentative agreements. (*Id.*)

The ALJ recommended rejecting each of the Agency's arguments against the enforceability of the Panel's decision. The ALJ recommended finding that Article 19, Section 1 was negotiable and, thus, enforceable. (JA300-01.) Further, the ALJ recommended finding that the compensation provisions were lawful. (JA301-03.)

Moreover, the ALJ recommended holding that the Panel had jurisdiction to order the parties to incorporate their tentative agreements into the Successor CBA because he found that "the parties intended the Factfinder and the Panel to resolve all matters encompassing the [S]uccessor [CBA] when resolving the impasse." (JA298.) The ALJ wrote that the Panel's exercise of jurisdiction over the tentative agreements was consistent with the Panel's "investigatory authority[, which] 'is based upon the request of a party to consider a "matter" rather than any specific impasse issue . . . technically identified . . . in an initial request.'" (*Id.* (quoting *NASA, Headquarters, Wash., D.C.*, 12 FLRA 480, 497 (1983) ("*NASA*")).) The ALJ noted that the Agency had failed to argue before the Panel that ordering the incorporation of the tentative agreements into the Successor CBA would exceed the Panel's jurisdiction. (JA300-01.)

For those reasons, the ALJ recommended granting the GC's and Union's motions for summary judgment to the extent that they requested complete

enforcement of the Panel's decision, and recommended finding that the Agency violated § 7116(a)(1), (5), and (6) of the Statute. (JA303-04.)

As for the Union's request to direct the Agency to pay interest on backpay, the ALJ found that such an order was unnecessary because the order to comply with the Successor CBA would provide the legal basis to require the Agency to pay bargaining-unit employees all that they were owed under the Successor CBA and the Back Pay Act, 5 U.S.C. § 5596. (JA303.)

The Union filed with the Authority an exception to the ALJ's recommended decision, and the Agency filed cross-exceptions. The Union's exception argued that the ALJ should have ordered the Agency to pay interest on the backpay that it owed employees due to the Agency's failure to implement the pay raises that the Successor CBA required. (SA063-64.)

The Agency's cross-exceptions reiterated its arguments alleging a deficiency in the Union's ULP complaint, *see* above note 3; alleging the nonnegotiability of Article 19, Section 1; alleging that the compensation provisions were illegal; and asserting that the Panel lacked jurisdiction to order the parties to incorporate the tentative agreements into the Successor CBA.[4] (SA067-88.) Significantly, neither the Union's exception, nor the Union's opposition to the Agency's cross-exceptions,

[4] However, the Agency clarified that it was contesting the Panel's jurisdiction to order incorporation of only the tentative agreements that the parties reached *before* the Union requested Panel assistance—not those reached *after* the assistance request, through the Factfinder's settlement efforts. (JA278 & n.80.)

disputed the Agency's contention that "Article 19, Section 1(b) . . . obligates the Agency to let the employee choose when s/he will perform th[e] hour of work" for preparatory and professional tasks. (SA073; *see also* SA062-65 (Union's Exception to ALJ's Recommended Decision); SA088-98 (Union's Opp'n to Agency's Cross-Exceptions (arguments concerning Article 19)).)

As for the desired remedies, the Agency argued that if the Authority agreed that any provisions in the Panel's decision were unenforceable—including the compensation provisions—then the Authority should order the parties to renegotiate those matters. (SA088.) In its opposition to the Agency's cross-exceptions, the Union stated that:

> in the event that the Authority determines that the language of Article 19, concerning the length of the at-school duty day, is not enforceable, the Authority is *requested not to direct the parties to implement the pay rates* recommended by the Factfinder, as the *duty hours and pay rates are not severable*. As the Factfinder explained when he initially recommended the language of Article 19 and the adoption of the [compensation] schedule:
>
> > The topics of Article 19 (hours), Article 26 (compensation)[,] and [an appendix about definitions] relate to one another like the pants, coat[,] and vest of a suit. *None can be considered . . . on its own, but only in the context of one another*. . . .
>
> When the [Union] notified the Panel . . . that it was accepting the Factfinder's [R&R], it did so in recognition that the "recommendations for a new agreement [were] a finely balanced whole" and that "[t]he [Union's] acceptance [was] conditioned upon implementation of the entirety of [the] Fact[f]inder's recommendations, *as pay and working hours are interrelated*."

> Further, if the Authority sustains the [Agency's e]xceptions and invalidates the Panel's decision . . . in whole or in part, the [Union] agrees with the Respondent that it is more appropriate in this case to *direct the parties to return to the bargaining table* . . . .

(JA268-69.)[5]

Addressing the Agency's cross-exceptions, the Authority began with the Agency's negotiability argument—the assertion that Article 19, Section 1 interfered with management's right to assign work. The Authority determined that, unless the section functioned in a manner "substantively identical" to contract wording that the Authority had previously found negotiable, then the Panel lacked the authority to resolve the negotiability objections to Article 19, Section 1. (JA277 (internal quotation marks omitted) (quoting *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 624 (1988) ("*Carswell*")).) The Authority therefore concluded that the Panel could not have lawfully imposed that section on the parties. (JA277.) The Authority found that Article 19, Section 1(a)—which stated that "[t]he workday . . . shall consist of eight (8) hours," excluding a "30-minute non-paid duty-free lunch period"—was substantively identical to provisions that the Authority had found negotiable. (JA276.) The Authority determined that such wording merely established the "duty day for compensation purposes only," (*id.* (emphasis omitted)), and that other

[5] (Fourth and seventh alterations in penultimate paragraph in original) (all emphases added) (citations omitted) (quoting JA25; then quoting JA159.)

wording in the Successor CBA preserved management's right to change or extend the duty day, provided that the Agency paid additional compensation. (JA276-77).

However, as for Article 19, Section 1(b), the Authority considered the Agency's argument—set forth before the Factfinder, the Panel, the ALJ, and then the Authority on exceptions—that this wording allowed employees to determine *when* to perform their dedicated hour of professional and preparatory services. (JA277.) The Authority observed that although the Union had multiple opportunities during the "long history of litigation" over Article 19, Section 1 to assert that the Agency retained the authority to determine when employees would perform their hour of professional and preparatory duties each day, the Union had not done so. (JA276 n.61.) Therefore, the Authority found that the Agency's explanation of the operation of Section 1(b) was undisputed, and the Authority credited that explanation. (JA276.)

The Authority determined that it had not previously found negotiable any contract provision that gave employees the discretion to determine when to perform their duties, as Section 1(b) did. (JA277.) Since Article 19, Section 1 was not substantively identical to contract wording previously held negotiable, the Authority found that the Panel lacked the power to impose it on the parties, and, consequently, the portion of the Panel's decision concerning Section 1 was unenforceable. (*Id.*)

As the parties would need to return to the bargaining table concerning the matters addressed in Article 19, Section 1, the Authority recognized that it could "expedite the resolution" of the parties' dispute over work hours by rendering a

negotiability determination on Section 1(b). (*Id.*) The Authority relied on the Agency's undisputed explanation to find that Section 1(b) gave employees discretion to determine when to perform certain work. Consequently, the Authority found that Section 1(b) affected management's right to assign work under § 7106(a)(2)(B) of the Statute. (*Id.*) Further, the Union had not argued that a statutory exception to management's rights applied that would allow the re-adoption of Section 1(b) despite its effect on management's right to assign work. (*Id.*) The Authority therefore found that Section 1(b) was nonnegotiable due to its interference with management's right to assign work. (*Id.*)

The Authority recognized that, under its precedent, parties could be ordered to resume negotiations over matters that the Panel had improperly resolved. (*Id.*) Thus, the Authority ordered the parties to resume negotiations over the matters addressed in Article 19, Section 1, to the extent required by the Statute and applicable law. (JA277, 279.)

The Authority's resolution of the duty-to-bargain question surrounding Article 19, Section 1 also affected the resolution of the parties' other arguments. In particular, the Union requested that, if the Authority found Section 1 unenforceable, the Authority order the parties to resume negotiations over compensation, because the Successor CBA provisions concerning work hours and compensation were not severable. (JA277 & n.79 (citing JA269).) The Agency also requested that the Authority order further negotiations over compensation, although the Agency based

its request on its arguments that the Panel-imposed compensation provisions were unlawful. (JA277 & n.78.) As both parties had asked the Authority to order further negotiations over compensation, the Authority granted their requests, and ordered them to bargain over the matters addressed in Article 26 and Appendix F, to the extent required by the Statute and applicable law. (JA277-78, 279.)

Turning to the Agency's argument that the Panel lacked jurisdiction to order the incorporation of the parties' tentative agreements into the Successor CBA, the Authority acknowledged that the Agency had failed to raise this argument before the Factfinder or Panel. (JA278.) The Authority, however, found that the Statute and the Panel's Regulations limited the Panel's jurisdiction to matters over which the parties were at *impasse*. (*Id.* (citing 5 U.S.C. § 7119(c)(5)(A)(ii); 5 C.F.R. § 2471.6).) The Authority correctly determined that the Agency's silence before the Panel could not imbue the Panel with jurisdiction that it did not possess—such as the power to order the parties to adopt contract provisions about which they had already tentatively agreed and thus were not at impasse. (JA278 & n.83.) Thus, the Authority found that the Panel exceeded its authority when it ordered the parties to incorporate into the Successor CBA all of the tentative agreements that they had reached before requesting Panel assistance. (JA278.) To remedy that deficiency, the Authority ordered the parties to resume negotiations over the matters addressed in those tentative agreements, to the extent required by the Statute and other applicable law. (JA279.)

The Authority then denied as moot the Union's argument regarding interest on backpay because it was ordering the parties to renegotiate the compensation provisions of the Successor CBA, in accordance with their requests. (*Id.*) The Authority determined that the parties would determine the amounts of backpay and interest owed to employees, if any, via this renegotiation process. (*Id.*)

Except for the portions of the Panel's decision addressing Article 19, Section 1; Article 26; Appendix F; and the tentative agreements reached before requesting Panel assistance, the Authority found that the Agency had not established a valid ULP defense for its failure to implement the Successor CBA that resulted from the Panel's decision. (JA278-79.) Therefore, the Authority found that the Agency violated § 7116(a)(1), (5), and (6) of the Statute, and the Authority ordered the Agency to implement the Panel's decision to the extent consistent with the Statute and any other applicable law. (JA279.)

The Agency filed a motion for reconsideration of the decision, asking the Authority to resolve: (1) additional management-rights objections to Article 19, Section 1; and (2) the merits of the Agency's arguments that the Panel-ordered compensation provisions of the Successor CBA were unlawful. *See Dep't of Def., Domestic Dependent Elementary & Secondary Sch., Fort Buchanan, P.R.*, 71 FLRA 359, 359-60 (2019). The Authority found that resolving those questions would not change the remedial order in the underlying decision, because no matter how the Authority answered the questions, the parties would still need to renegotiate the Successor CBA

provisions on work hours and compensation. *Id.* at 360. Consequently, the Authority unanimously denied the motion for reconsideration. *Id.* at 361.

SUMMARY OF ARGUMENT

The Authority reasonably determined that Article 19, Section 1 was not substantively identical to any contract provision previously found negotiable. (JA276-77.) The Authority's determination of how that section operated was supported by substantial evidence and admissions in the record, including the Agency's undisputed assertion that employees could choose when to perform their hour of preparatory and professional activities. Moreover, the Authority's decision to order the parties to negotiate further on the "matters addressed in" Article 19, Section 1 (JA279) was a reasonable exercise of the Authority's wide remedial discretion.

In addition, the Authority reasonably granted the parties' requests to renegotiate the compensation provisions of the Successor CBA, given that the Authority had determined that Article 19, Section 1 was unenforceable. (JA277-78.) The Union's attempt to recharacterize its request by claiming it contained several finely-drawn caveats is without merit because the wording of the Union's request does not support its argument. (*See* Br. at 44-45 & n.3, 55-56.) Further, because the Authority could not have reasonably understood the Union's request to contain such caveats, the Union's failure to file a motion for reconsideration challenging the

Authority's interpretation deprives this Court of jurisdiction to consider the issue now.

Moreover, the Authority's finding that the parties were not at impasse over their tentative agreements is supported by substantial evidence. (JA134; *see also* JA182 n.1 (Panel's decision).) The Court should defer to the Authority's legal determination that the Panel lacked jurisdiction, under the Authority's organic Statute, to order the parties to incorporate their tentative agreements into the Successor CBA. (JA134.) Contrary to the Union's arguments (Br. at 46-47), the Authority is not bound to apply judicial doctrines about when jurisdictional matters may be addressed during multi-stage proceedings.

Similarly unavailing are the Union's arguments concerning the effects of the parties' ground rules on the tentative agreements (Br. at 48-49) because the Union never presented those arguments to the Authority. Consequently, the Court lacks jurisdiction to consider them. Even if the Court considers those arguments, however, nothing in the Authority's decision prevents the Union from seeking to enforce the parties' ground rules in an appropriate venue, such as a grievance arbitration.

Finally, the Authority reasonably found that the Union's argument regarding interest on backpay was moot because given the Authority's order granting the parties' requests to renegotiate compensation matters, those provisions of the Successor CBA were not, and are not, finalized. (JA279.) Thus, the Authority

reasonably declined to speculate about whether employees will be entitled to backpay with interest after the parties negotiate and implement new compensation provisions.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering the Statute. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644–45 (1990) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). When judicial review is permitted under § 7123(a) of the Statute, this Court reviews Authority decisions "in accordance with section 10(e) of the [APA]" and will uphold an Authority decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union 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. § 7123(c) (incorporating by reference APA standards of review).

However, "[n]o objection that has not been urged before the Authority . . . shall be considered by the [C]ourt, unless . . . excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). Where a particular objection could not have been anticipated until the Authority issued its decision, a party must file a motion for reconsideration to "urge[]" that objection "before the Authority" in order to preserve it for judicial review under § 7123(c). *Nat'l Ass'n of Gov't Emps., Local R5-136 v. FLRA*, 363 F.3d 468, 479 (D.C. Cir. 2004) (citing *U.S. Dep't of Commerce, Nat'l Oceanic*

& Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA, 7 F.3d 243, 245-46 (D.C. Cir. 1993)); *Ga. State Chapter Ass'n of Civilian Technicians v. FLRA*, 184 F.3d 889, 892 (D.C. Cir. 1999); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982) (interpreting wording in National Labor Relations Act that parallels the bar under § 7123(c), and finding that such wording requires a party to file a motion for reconsideration in order to preserve unanticipated objections for court review).

The Authority's factual findings, such as its finding that the parties were not at impasse regarding their tentative agreements, are "'conclusive' if 'supported by substantial evidence on the record considered as a whole.'" *Sec. & Exch. Comm'n v. FLRA*, 568 F.3d 990, 995 (D.C. Cir. 2009) (quoting 5 U.S.C. § 7123(c)); *see Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1089 (D.C. Cir. 2012) (citing *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011)) (finding that the existence of an impasse is a question of fact). The Supreme Court has

> defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966) (internal quotations and alterations omitted); *see also Am. Fed'n of State, Cnty. & Mun. Emps. Capital Area Council 26 v. FLRA*, 395 F.3d 443, 447 (D.C. Cir. 2005) ("Under [the substantial-evidence standard], the Authority's judgments need not be right in our

eyes, but they must come with 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))). Moreover, that two different decision-makers might "draw[] two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'" *Sec. & Exch. Comm'n*, 568 F.3d at 995 (quoting *Consolo*, 383 U.S. at 620).

The Court defers to the Authority's reasonable interpretations of contract wording in the context of negotiability determinations, and the Authority may rely on the party's representations to support its interpretations. *See, e.g.*, *Dep't of the Army, U.S. Army Aberdeen Proving Ground Installation Support Activity v. FLRA*, 890 F.2d 467, 472-73 (D.C. Cir. 1989) ("Our review of the FLRA's order must be based on the FLRA's reading of the proposals . . . ."); *Nat'l Treasury Emps. Union v. FLRA*, 848 F.2d 1273, 1278 (D.C. Cir. 1988) ("Indeed, the [u]nion's own statements to the Authority as to the meaning of its proposal suggest an interpretation broader than the one . . . . advance[d] here.") Further, this Court will defer to an administrative agency's reasonable interpretation of a party's filing with the agency. *See Burlington N. R.R. Co. v. Interstate Commerce Comm'n*, 985 F.2d 589, 594-95 (D.C. Cir. 1993) (conducting arbitrary-and-capricious review of the Interstate Commerce Commission's interpretations of complaints filed with it).

Finally, the Statute entrusts the Authority with the responsibility to "take any remedial action *it* considers appropriate to carry out the policies" of the Statute,

including taking actions to remedy ULPs. *Nat'l Treasury Emps. Union v. FLRA*, 910 F.2d 964, 968 (D.C. Cir. 1990) ("*NTEU 1990*") (en banc) (internal quotation marks omitted; emphasis in original) (quoting 5 U.S.C. § 7105(g)(3)). Thus, this Court has said that it "will uphold the remedial orders of the [Authority] 'unless it can be shown that the order is a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies'" of the Statute. *Id.* (emphasis in original) (quoting *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 585 (D.C. Cir. 1982) ("*PATCO*")).

ARGUMENT

I. THE AUTHORITY REASONABLY FOUND THAT ARTICLE 19, SECTION 1 WAS NOT SUBSTANTIVELY IDENTICAL TO ANY PREVIOUS, NEGOTIABLE CONTRACT PROVISION

The Court should defer to the Authority's reasonable determination that Article 19, Section 1 operates in a manner that is not substantively identical to any contract wording that the Authority previously found negotiable.

A. The Panel lacked the power to order the parties to adopt Article 19, Section 1.

The Authority was not required to find that Article 19, Section 1 affected management's rights in order to find that the Panel lacked the power to impose that wording. Instead, Authority precedent barred the Panel from ordering the adoption of Section 1 if (1) either party contested the section's negotiability in a non-frivolous

fashion, and (2) no previous decision of the Authority found a substantively identical provision negotiable. *See Carswell*, 31 FLRA at 623-25.

The Authority's decision in *American Federation of Government Employees, National Border Patrol Council*, 51 FLRA 1308, 1336-38 (1996) ("*Border Patrol*") illustrates how the "substantively identical" standard prevents the Panel from resolving unsettled duty-to-bargain questions, which are the province of the Authority alone. *Amer. Fed'n of Gov't Emps. v. FLRA*, 778 F.2d 850, 854 (D.C. Cir. 1985) (citing 5 U.S.C. § 7105(a)(2)(E)). In *Border Patrol*, an interest arbitrator, acting under the Panel's authority, ordered the parties to adopt a contract provision that the Authority later found negotiable. 51 FLRA at 1311 (discussing *Carswell* and appointment of interest arbitrator), 1332-36 (finding arbitrator-ordered provision 7 negotiable). However, the Authority held that the Panel lacked the power to order the parties to adopt this negotiable provision because (1) the agency in *Border Patrol* had asserted throughout the proceedings that the provision was nonnegotiable, and (2) "the record [was] devoid of any reference to clearly controlling precedent from which it could have been determined that the [u]nion's proposal was within the duty to bargain." *Id.* at 1337. A similar conclusion should be drawn in this case.

The Union erroneously accuses the Authority of misrepresenting the record when interpreting Article 19, Section 1(b). (Br. at 27, 32-33.) The record shows that, on at least four occasions—before the Factfinder, the Panel, the ALJ, and the Authority on exceptions—the Agency asserted that employees had the discretion to

determine *when* they would perform their dedicated hour of preparatory and professional tasks under Section (1)(b). The record also shows that the Union never contradicted the Agency's assertion by stating that management could, in fact, determine when employees would perform this hour of preparatory and professional tasks each day. Instead, the Union repeatedly deflected that issue by discussing a different clause in Section (1)(b), or discussing Article 19, Section 3(d), neither of which concern *when* employees perform their dedicated hour of preparatory and professional tasks. (JA64 (CBA Art. 19, § 1(b) (allowing the Agency to occasionally require employees to spend an extra hour at the school site "for activities such as training, staff development, or faculty meetings")); JA65-66 (CBA Art. 19, § 3(d) ("The Agency is also free to assign additional work hours. When additional work hours are assigned, the bargaining unit member will be compensated . . . ."); *see* Br. at 38-40 (employing the same deflections).) Under those circumstances, the Authority reasonably relied on the Agency's undisputed assertion regarding the operation of Section 1(b). This Court should therefore defer to the Authority's interpretation, which was made in the context of a negotiability determination. *See Dep't of the Army*, 890 F.2d at 472-73.

Based on its interpretation of Section 1(b), the Authority reasonably concluded that there were no substantively identical contract provisions that it had previously found to be negotiable. (JA276.) Indeed, the most similar, previously-adjudicated contract wording that either party identified came from a decision in which the

Authority found that a proposal was *nonnegotiable* because it gave employees discretion to decide when to perform certain duties. (JA277 n.74 (citing *Nat'l Treasury Emps. Union*, 66 FLRA 584, 584-86 (2012)).) In fact, the Union concedes that Section 1(b) is "differen[t]" than contract provisions that the Authority has previously found negotiable. (Br. at 26.) Therefore, the Authority faithfully applied its precedent and found that the Panel lacked the power to order the parties to adopt Article 19, Section 1 because it was not substantively identical to any previously adjudicated, negotiable provisions.[6] *Border Patrol*, 51 FLRA at 1336-38; *Carswell*, 31 FLRA at 623-25.

B. This Court should defer to Authority's reasonable decision about how to remedy the deficiency in Article 19, Section 1.

The Authority remedied the deficiency in Article 19, Section 1 by directing the parties to "bargain to the extent required by the Statute and any other applicable law concerning *those matters addressed in Article 19, Section 1*." (JA279 (emphasis added) (Authority's remedial order).) The Union argues that this portion of the remedial order is unreasonable or unlawful because the Authority did not find that every

[6] As noted in its decision, the Authority offered its assessment of whether Section 1(b) was consistent with management rights to expedite the future resolution of the parties' dispute. (JA277.) The Authority's management-rights analysis was separate from, and in addition to, the Authority's determination that Section 1 was not substantively identical to any previous, negotiable provisions. (*Id.*) In other words, the management-rights assessment did not control whether the Panel had jurisdiction to order the parties to adopt Section 1. *See Border Patrol*, 51 FLRA at 1336-38 (even though a provision was negotiable, Panel lacked the authority to impose it).

subsection of Article 19, Section 1 was unenforceable, yet the Authority ordered the renegotiation of the entire section. (Br. at 42-43.) The Union's argument fails for at least three reasons.

First, the Union specifically requested that the Authority order renegotiation concerning "the topics of Article 19" in the event it determined that its language concerning the length of the school day was unenforceable. (JA268-69.) The Union's remedial request to the Authority did not contain the caveats the Union now attempts to import into that request. Contrary to the Union's present contentions, the Union did not specify that the Authority should only order the parties to recommence negotiations concerning one provision of Article 19 (Br. 55), or only negotiations concerning prospective, not retrospective, pay (*see* Br. at 44 n.3, 56). Instead, the Union's request to the Authority was as follows:

> in the event that the Authority determines that the language of Article 19, concerning the length of the at school duty day, is not enforceable, the Authority is requested not to direct the parties to implement the pay rates recommended by the Factfinder, as the duty hours and pay rates are not severable. As the Factfinder explained . . . "The topics of Article 19 (hours) [and] Article 26 (compensation) . . . relate to one another like the pants, coat[,] and vest of a suit. None can be considered . . . on its own, but only in the context of one another. . . ."

(JA268-69.) Given this language, the Authority could not have reasonably understood the request to include the caveats the Union now asserts. As the Union failed to present this argument to the Authority in a motion for reconsideration (so that the Authority could consider it in the first instance), this Court lacks jurisdiction

to consider it. 5 U.S.C. § 7123(c); *Nat'l Ass'n of Gov't Emps., Local R5-136*, 363 F.3d at 479.

Second, even if this Court had the jurisdiction to consider the argument, the Authority reasonably exercised its wide remedial discretion to order renegotiation of Article 19, Section 1 of the Successor CBA. The Union asserts that the Authority was compelled to order renegotiation only of subsection (b) of Section 1. (Br. at 42-43.) But, under the Union's line of reasoning, a such a remedial order would be equally subject to criticism that it was insufficiently narrow. That is because Section 1(b) has four sentences, and the Authority would have failed to specify which of those sentences must be renegotiated. And even ordering renegotiation of specific sentences would be indefensible, according to the Union's logic, as the Authority would not have identified the particular words or phrases that were deficient, and ordered the parties to renegotiate only those terms. In addition, a remedial order that passed on the merits of each subsection and term of Article 19, Section 1 would deprive the parties of a full and fair chance to renegotiate its provisions.

Given the impossibility and undesirability of seeking to micro-manage the parties' renegotiation process, the Authority acted reasonably in identifying Article 19, Section 1 as a deficient area of the Successor CBA and ordering its renegotiation. The Authority's line-drawing in this instance was not "'a *patent attempt* to achieve ends other than those which can fairly be said to effectuate the policies'" of the Statute. *NTEU 1990*, 910 F.2d at 968 (emphasis in original) (quoting *PATCO*, 685 F.2d at

585). The Authority's reasonable exercise of its remedial discretion warrants deference.

Third, the Authority's order does not compel the parties to renegotiate all of the subsections of Section 1. Instead, it directs the parties to negotiate further on the "matters addressed in" Section 1, in order to make that section consistent with the Statute and other applicable laws. (JA279.) Thus, it will be up to the parties to determine whether changes to Section 1(b)'s wording might require related changes in other subsections.

II. THE AUTHORITY REASONABLY GRANTED THE PARTIES' REQUESTS TO RENEGOTIATE COMPENSATION

The Authority reasonably granted the parties' requests to renegotiate the compensation provisions of the Successor CBA, in light of the Authority's finding that Article 19, Section 1 was unenforceable.

A. The Court lacks jurisdiction to consider the Union's argument that the Authority misinterpreted the Union's request to negotiate further on Article 26 and Appendix F.

If the Union believed that the Authority had erred in its interpretation of the Union's remedial request, then § 7123(c) obligated the Union to raise that alleged error in a motion for reconsideration before the Authority, in order to preserve it for court review. 5 U.S.C. § 7123(c); *Nat'l Ass'n of Gov't Emps., Local R5-136*, 363 F.3d at 479. The Authority interpreted the Union's request based on a careful reading of the relevant section of the Union's opposition brief. (JA268-69 (Union's request);

JA277-78 (Authority granting request).) Even assuming that the Authority's interpretation was somehow mistaken, 5 U.S.C. § 7123(c) requires that the Union provide the Authority an opportunity to address that alleged mistake. As the Authority did not have the opportunity to consider the Union's new arguments, this Court lacks jurisdiction to consider those arguments under § 7123(a). *Cf. U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315, 1319-21 (D.C. Cir. 2012) (even where the Authority raises a matter in a decision *sua sponte*, a party must file a motion for reconsideration in order to later challenge the Authority's determination on that matter in court).

B. The Authority's reasonable interpretation of the Union's remedial request warrants the Court's deference.

The Union's argument about its remedial request focuses on an isolated phrase from that request—its statement that, "'in the event that the Authority determine[d] that the *language of Article 19, concerning the length of the at-school duty day*, is not enforceable,'" the Union wished to negotiate further on compensation. (Br. at 44 (quoting JA268).) Based on that snippet, the Union contends that the Authority should have understood that the Union wished to reopen negotiations on compensation *only if* the Authority found Article 19, Section 1*(a)* unlawful. (Br. at 44-45 & n.3, 55-56.) As the Authority did not find Section 1(a) unlawful, the Union contends that the Authority should have known that the Union did not wish to engage in additional negotiations on Article 26 and Appendix F. (*Id.*)

Moreover, although the compensation provisions of the Successor CBA involved both retroactive and prospective pay increases, the Union contends that the "only reasonable reading" of its remedial request was that, if further negotiations over compensation were to occur, those negotiations would have to be limited to *prospective* compensation rates. (Br. at 56; *see also id.* at 44 n.3 (making the same argument).) But even with the benefit of hindsight, the actual remedial request does not support the Union's contentions.

The Union claims that the following italicized wording clearly refers only to Article 19, Section 1(a): "'in the event that the Authority determines that the *language of Article 19, concerning the length of the at-school duty day*, is not enforceable,'" the Union wished to negotiate further on compensation (Br. at 44 (quoting JA268).) That assertion, however, is flawed.

First, the italicized wording refers generically to all of Article 19, without specifying a section or subsection. Second, subsection (a) is not the only part of Section 1 that concerns the "at-school duty day." Subsection (b) addresses the Agency's right to extend the at-school duty day on particular occasions. (*See* JA64 (citing CBA Art. 19, § 1(b)).) Third, beyond the isolated phrase, the remainder of the Union's remedial request referred multiple times, in general terms, to work hours and pay rates being inseparable, without regard to particular contractual subsections. (*See* JA268-69 (stating that "hours and pay rates are not severable"; quoting Factfinder's observation that Articles 19 and 26 are like the pants, coat and vest of a suit; and

noting that the Union's acceptance of the R&R was "conditioned upon implementation of the entirety of [the] . . . recommendations, as pay and working hours are interrelated").) Thus, the Union's assertion that its remedial request was clearly meant to apply only if the Authority found Article 19, Section 1(a) unlawful is unsupported.

As for the Union's argument that the Authority should have known that the Union wanted to renegotiate compensation rates on a prospective basis only (Br. at 56), nothing in the Union's request even implied such a limitation. (*See* JA268-69.) This argument is also undercut by Article 26, the article devoted to employee compensation, because Article 26 addresses both retroactive and prospective pay rates. (JA190-92.) Thus, this argument lacks merit.

This Court has stated that it will defer to an agency's reasonable interpretation of a party's filing before the agency. *Burlington N. R.R. Co.*, 985 F.2d at 594-95. For the reasons just explained, the Authority reasonably understood the Union's remedial request to apply in the event that any portion of Article 19, Section 1 was found unlawful, and reasonably understood the request for further negotiations on compensation to apply to both retroactive and prospective compensation matters. Therefore, this Court should sustain the Authority's reasonable interpretation of the Union's remedial request.

III. CONSISTENT WITH ITS DUTIES UNDER THE STATUTE, THE AUTHORITY REASONABLY FOUND THAT THE PANEL COULD NOT IMPOSE THE TENTATIVE AGREEMENTS

Substantial evidence supports the Authority's finding that the parties were not at impasse over the tentative agreements that they reached before requesting Panel assistance. In addition, nothing in the Authority's precedent requires it to ignore a jurisdictional deficiency solely because the parties failed to raise the deficiency.

A. The Authority reasonably found that the parties were not at impasse over tentative agreements.

A determination about whether parties are at impasse is a factual finding that must be supported by substantial evidence on the record as a whole. *Monmouth Care Ctr.*, 672 F.3d at 1089. To determine whether parties reached an impasse during negotiations, the Authority may examine all of the parties' conduct from the inception of negotiations. *Davis-Monthan Air Force Base, Tucson, Ariz.*, 42 FLRA 1267 (1991); *see id.* at 1268 (Authority adopted ALJ's decision), 1278-79 (ALJ's description of how to recognize an impasse). The record in this case supports the Authority's conclusion that the parties were not at impasse over tentative agreements.

Initially, the very fact that the parties had come to the tentative agreements undermines the notion that the parties were at impasse concerning them. (JA278 & nn.82-83.) In addition, the Union's request for assistance did not mention the tentative agreements or the Union's position regarding them. While the ALJ and the Union correctly noted that the Panel's jurisdiction is not limited to items specifically

identified on a request for assistance, the Authority has never stated that an assistance request should be ignored when determining the scope of an impasse. *See NASA*, 12 FLRA at 488 ("A Panel request must be considered in its entirety, together with other documents submitted to the Panel, and the Panel factfinding, to determine whether . . . an issue has been properly posed for [Panel] resolution."). Further, when the parties were before the Panel, the Agency gave no indication that it would refuse to honor the tentative agreements. *Cf. NASA*, 12 FLRA at 497-500 (parties reached tentative agreement before requesting Panel assistance, but agency stated unequivocally that it would not honor that agreement, because of which Authority found the parties were at impasse on that issue). Moreover, the Panel's decision identified the matters over which it had asserted jurisdiction, and the tentative agreements were not among those matters. (JA182 n.1.) Considering all of those factors, the Authority reasonably concluded that the parties were not at impasse over the tentative agreements.

Circuit precedent dictates that deference is owed to the Authority's conclusion. *See Nat'l Ass'n of Gov't Emps., Local R7-23 v. FLRA*, 893 F.2d 380, 382 (D.C. Cir. 1990) (holding that the Court owes deference to the Authority's determinations about whether a party properly invoked the Panel's jurisdiction to resolve an impasse). The Union cites *International Organization of Masters, Mates & Pilots*, 36 FLRA 555 (1990) as an example of a case where the Panel exercised jurisdiction over tentative agreements. (Br. at 52.) But in that case, both parties affirmatively requested that the arbitrator,

acting under the Panel's authority, exercise jurisdiction over the tentative agreements. 36 FLRA at 561-62. The Agency did not make a similar request in this case.

Similarly, the Union asserts that the Authority erred in finding that the parties could be at impasse over some provisions of the Successor CBA, and not at impasse over others. (Br. at 50.) According to the Union, an "impasse" does not describe the "status of individual proposals." *Id.* That assertion is wrong. As the Authority noted in the decision under review, the Panel itself sometimes deliberately exercises jurisdiction over particular provisions while refusing to assert jurisdiction over other provisions in the same agreement. (JA278 n.82 (citing *Nat'l Treasury Emps. Union*, 63 FLRA 26, 27 (2008).)

Indeed, this Court has assessed the Panel's exercise of jurisdiction over "two distinct groups" of contract provisions that an interest arbitrator ordered to be adopted in a single CBA article addressing performance appraisals. *Patent Office Prof'l Ass'n v. FLRA*, 26 F.3d 1148, 1151 (D.C. Cir. 1994). In that case, the Court found that an interest arbitrator acting on the Panel's authority had properly exercised jurisdiction over one group of proposals, but "had no authority" to order the adoption of the second group of proposals because the parties had not reached impasse on that group. *Id.* at 1153-54. Thus, the Court's approach in that case paralleled the Authority's analysis in the decision on review—finding that the Panel had jurisdiction over one group of contract provisions, but not another group. Therefore, the Court should reject the Union's challenge to the Authority's finding

that the parties in this case were at impasse over certain proposals, but not others, when the Union requested Panel assistance.

B. The Authority properly addressed the Agency's jurisdictional argument.

In the Decision, the Authority acknowledged that the Agency failed to argue to the Factfinder or the Panel that there was no impasse jurisdiction requiring the parties to incorporate their tentative agreements into the Successor CBA. (JA278.) However, the Authority correctly recognized that the Panel's jurisdiction was limited to matters over which the parties were at impasse (*id.* (citing 5 U.S.C. § 7119(c)(5)(A)(ii); 5 C.F.R. § 2471.6)) and properly determined that the Agency's earlier "silence could not create Panel jurisdiction where it would not otherwise exist." (*Id.*) For the reasons discussed above, the Authority found that the parties were not at impasse over the tentative agreements, which meant that the Panel "lacked the authority to order the parties" to incorporate the tentative agreements into the Successor CBA. (*Id.*)

Similarly unavailing is the Union's argument that the Authority could not address any jurisdictional arguments that the Agency failed to raise before the Panel because "[c]hallenges to an agency's jurisdiction may be raised for the first time on review *only* when they concern the very composition or 'constitution' of the agency." (Br. at 28.) The principles that govern judicial review of agency actions do not necessarily apply to intra-agency review, such as the review that the Authority

conducted over the Panel in this case. That is why the cases the Union cites for that proposition do not apply to this case. (*See id.* at 46 (*USAIR, Inc. v. Dep't of Transp.*, 969 F.2d 1256, 1259-60 (D.C. Cir. 1992) (recognizing that a *statutory bar* precluded considering arguments that were not presented to the agency); *Salt Lake Cmty. Action Program, Inc. v. Shalala*, 11 F.3d 1084, 1087-88 (D.C. Cir. 1993) (discussing the *judicially created waiver rule* that prevents a litigant from presenting to a court an argument that it did not present to an agency); *Mitchell v. Christopher*, 996 F.2d 375, 378-79 (D.C. Cir. 1993) (same)).)

Indeed, the Authority's ULP decisions have addressed issues related to the Panel's jurisdiction even when the parties had not litigated those issues at the earliest stage of the proceedings. *See, e.g.*, *U.S. Army Aeromed. Ctr., Fort Rucker, Ala.*, 49 FLRA 361, 361-66 (1994) (Authority reviewed negotiability of matters in Panel decision, even though respondent failed to challenge negotiability in an answer to the ULP complaint), *overruled as to other matters*, (JA275-76); *Dep't of Def., Nat'l Guard Bureau, Ind. Air Nat'l Guard, Indianapolis, Ind.*, 17 FLRA 23, 24 (1985) (Authority, acting *sua sponte*, modified ALJ's recommended decision on § 7116(a)(1) and (6) complaint). As the Authority properly addressed the jurisdictional issue related to the tentative agreements, its Decision should be affirmed.

C. The Court lacks jurisdiction to consider the Union's arguments regarding how the parties' ground rules affected the tentative agreements.

The Agency argued before the ALJ and the Authority that the Panel could not order the adoption of the tentative agreements as part of the Successor CBA. (SA044-46 (Agency's Br. In Support of Cross-Mot. for Summ. J.); SA082-86 (Agency's Br. In Support of Cross-Exceptions to ALJ's Recommended Decision).) Thus, the Union had the opportunity to argue to the Authority, as the Union does in its brief to this Court, that "[w]hether the Panel had jurisdiction over the provisions to which the parties tentatively agreed [was] immaterial, because they were not subject to renegotiation" under the parties' ground rules. (Br. at 48.) But the Union never presented that argument to the Authority, and consequently, the Court lacks jurisdiction to consider it under § 7123(c). 5 U.S.C. § 7123(c); *Nat'l Ass'n of Gov't Emps., Local R5-136*, 363 F.3d at 479.

Even if the Court considered the Union's arguments on this point, however, it should reject them on the merits. The Authority held that the Panel lacked the power to impose the tentative agreements on the parties. (JA278.) The portion of the Authority's order addressing that deficiency directed the parties to "[b]argain *to the extent required by the Statute* and any other applicable law concerning . . . matters addressed in" the tentative agreements. (JA279 (emphasis added) (Authority's remedial order).) If, as the Union contends, the parties' ground rules precluded renegotiation of the tentative agreements, then the Statute would not require the

parties to engage in any further bargaining on those matters in order to satisfy the Authority's order. Moreover, the Authority's decision would not preclude the Union from pursuing the enforcement of the ground rules with respect to the tentative agreements in another venue such a grievance arbitration.

The Union's new ground rules arguments are barred because they were not presented to the Authority. Even if the Court considers those arguments, however, they do not undermine the Authority's decision.

IV. THE AUTHORITY CORRECTLY FOUND THAT THE UNION'S EXCEPTION CONCERNING INTEREST WAS MOOT

The Union contends that its exception to the ALJ's recommended decision was not moot, so the Authority erred in holding otherwise. (Br. at 52.) However, as described more fully above, the Authority granted the parties' requests to renegotiate the compensation provisions of the agreement. (JA277-78.) In the absence of finalized compensation provisions in the Successor CBA, the Agency does not currently owe any specific amount of backpay to employees under Article 26 and

Appendix F of the Successor CBA.[7] Similarly, the Agency does not owe employees interest on backpay because the Agency does not currently owe them any specific amount of backpay. Therefore, the Authority correctly determined that the Union's exception was moot, (JA135), and the Court should reject the Union's arguments otherwise.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that this Court deny the Union's Petition for Review.

Respectfully submitted,

/s/Noah Peters
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Solicitor

/s/Rebecca J. Osborne
REBECCA J. OSBORNE
Deputy Solicitor

[7] The Authority did not direct the parties to comply with the Panel-ordered "pay raises until they are renegotiated." (Br. at 55.) The Authority expressly declined to evaluate the merits of the Agency's arguments that the Panel-ordered pay raises were unlawful because the Authority was granting the parties' requests to renegotiate the compensation provisions in Article 26 and Appendix F. (JA277-78, 279.) If the Authority had intended for the Panel-ordered pay rates to go into effect pending the completion of renegotiations, then the Authority would have addressed the Agency's objections to those rates. *See Dep't of Def., Domestic Dependent Elementary & Secondary Sch., Fort Buchanan, P.R.*, 71 FLRA 359, 360-61 (2019) (denying Agency's motion for reconsideration that requested that the Authority address the merits of its arguments against the Panel-ordered pay provisions).

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 10,625 words excluding exempt material.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

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

ADDENDUM 1

STATUTORY PROVISIONS

5 U.S.C. § 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 U.S.C. § 7116(a). Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency–

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

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

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

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

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

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

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall

investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice-

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of–

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order–

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs

(A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

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.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary

relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.