No. 00-1417

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3936,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY RESPONDING TO THE AMICUS-CURIAE BRIEF OF THE COMMONWEALTH OF PUERTO RICO

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JUDITH A. HAGLEY
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

TABLE OF CONTENTS

Page No.

INTRODUCTION 1

I. Arguments Raising Issues Other Than the Impact of Section 709(f) of the Technicians Act on the Authority's Jurisdiction to Review Technician Terminations Are Outside the Scope of the Current Proceeding, and, Therefore, Are Not Properly Before This Court 3

II. The Commonwealth's Arguments Lack Logical and Legal Support 4

A. Collateral estoppel is not appropriate in this appellate proceeding 4

B. When administering the technician program, the Guard is a federal agency and thus was a proper party in the Authority proceeding 7

C. This case does not raise Eleventh Amendment concerns 8

CONCLUSION..9

CERTIFICATION PURSUANT TO FRAP RULE 32 10

ADDENDUM

Page No.

Order of Court, *American Fed'n of Gov't Employees, Local 3936, AFL-CIO v. FLRA*, No. 00-1417 (1st Cir. May 25, 2000) A-1

Judgment (vacating district court's judgment), *Edward S. Davidson v. Puerto Rico Nat'l Guard*, No. 00-1015 (1st Cir. May 12, 2000) B-1

Order of Court, *FLRA v. Puerto Rico Nat'l Guard*, No. 99-1293 (1st Cir. Nov. 23, 1999)..C-1

Order of Court, *FLRA v. Puerto Rico Nat'l Guard*, No. 99-1293 (1st Cir. Dec. 21, 1999) D-1

TABLE OF AUTHORITIES

CASES

Page No.

EEOC v. FLRA, 476 U.S. 19 (1986) 6

Lane v. First Nat'l Bank of Boston, 871 F.2d 166 (1st Cir. 1989) 3

Marshall v. A & M Consol. Indep. Sch. Dist., 605 F.2d 186
(5th Cir. 1979).. 9

McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13 (1st Cir. 1991) 4

Parks v. United States, 784 F.2d 20 (1st Cir. 1986) 8

United Servs. Auto. Ass'n v. Paul Arpin Van Lines, Inc.,
652 F.2d 198 (1st Cir. 1981) 6

United States v. Sturm, Ruger & Co., 84 F.3d 1 (1st Cir. 1996) 3

U.S. Bancorp Mort. Co. v. Bonner Mall Partnership,
513 U.S. 18 (1994) 7

U.S. Dep't of Commerce, Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv., Silver Spring, Md. v. FLRA,
7 F.3d 243 (D.C. Cir. 1993) 6

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

National Fed'n of Gov't Employees, Local 1669 & U.S. Dep't of Defense, Ark. Air Nat'l Guard, 188th Fighter Wing, Fort Smith, Ark.,
55 FLRA 63 (1999), *enf'd sub nom.*, *FLRA v. Arkansas Nat'l Guard*,
No. 99-1974 (8th Cir. October 14, 1999) 8

TABLE OF AUTHORITIES
(Continued)

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Page No.

Puerto Rico Nat'l Guard, 15 FLRA 482 (1984), *aff'd sub nom., AFGE, Local 3936 v. FLRA*, 762 F.2d 183 (1st Cir. 1985) 8

Puerto Rico Nat'l Guard & Puerto Rico Air Nat'l Guard, San Juan, Puerto Rico, Case No. AT-CA-70505 (May 15, 1998), *enf'd sub nom., FLRA v. Puerto Rico Nat'l Guard* , No. 99-1293 (1st Cir. May 25, 2000) 8

STATUTES

Federal Service Labor- Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. IV 1998) 1

5 U.S.C. § 7123(c) 6

National Guard Technicians Act of 1968, as amended, 32 U.S.C.A. § 709 (West Supp. 2000) 1, 3

CODE OF FEDERAL REGULATIONS

5 C.F.R. § 2429.17 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1417

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 3936,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

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

SUPPLEMENTAL BRIEF FOR THE FEDERAL LABOR RELATIONS
AUTHORITY RESPONDING TO THE AMICUS-CURIAE BRIEF OF THE
COMMONWEALTH OF PUERTO RICO

INTRODUCTION

This supplemental brief responds to an amicus-curiae brief filed by the Commonwealth of Puerto Rico in this review proceeding initiated by petitioner American Federation of Government Employees, Local 3936 (the union). The union has challenged an aspect of a ruling of the Federal Labor Relations Authority (Authority) in an unfair labor practice (ULP) proceeding brought against the Puerto Rico Air National Guard (the Guard) pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. IV 1998) (Statute). The final decision and order under review in this case

was issued by the Authority in 56 FLRA 174 (2000), a copy of which is attached as an addendum to Petitioner's Brief (Pet. Add.) 1-33.

The Authority held that the Guard committed various ULPs, and ordered appropriate remedies. The Authority also held, however, that it lacked jurisdiction to review the termination of a dual-status technician. The Authority based its finding on section 709(f)[1] of the National Guard Technicians Act of 1968, as amended, 32 U.S.C.A. § 709 (West Supp. 2000) (Technicians Act), which reserves to the Guard's adjutant general final authority over technician terminations.

The union filed a petition for review in this Court, challenging the Authority's determination that it lacks jurisdiction to review technician terminations. The Guard chose not to appeal any aspect of the Authority's decision and order.

The Commonwealth of Puerto Rico (Commonwealth) initially sought to intervene in this proceeding on behalf of the Guard. By order dated May 25, 2000, this Court denied the Commonwealth's motion to intervene, recognizing that the United States Department of Justice has sole litigating authority for the Guard in matters arising under the Statute. A copy of the May 25, 2000 order is

---

[1] Section 709(f)(4) states that "[n]otwithstanding any other provision of law . . . a right of appeal which may exist with respect to [certain adverse personnel actions, such as terminations] shall not extend beyond the adjutant general of the jurisdiction concerned." Because the Authority's decision and the Commonwealth's brief refer to this section as 709(e)(5), we point out for the Court here, as we did in our principal brief (page 4 n.2), that Congress recently amended the Technicians Act, redesignating and reorganizing section 709(e) as 709(f). However, the language of the former section 709(e)(5) is identical to that of the current section 709(f)(4).

attached as Addendum A to this Brief. In this order, the Court granted the Commonwealth leave to file an amicus-curiae brief.

The Commonwealth makes the following arguments: (1) the Authority lacks jurisdiction to review technician terminations (Commonwealth Br. 25-27); (2) the Authority should be collaterally estopped by a federal district court ruling that found that the court lacked jurisdiction to review technician terminations (*id*. at 22-25); (3) the Guard is a state agency and was not a proper party in the proceeding before the Authority (*id*. at 12); and (4) the Eleventh Amendment is implicated by this case (*id*. at 16). The Commonwealth's first argument supports the Authority's decision – the Authority expressly held in this case that it lacks jurisdiction to review technician terminations. Therefore, it will not be discussed further herein.[2] As demonstrated below, the Commonwealth's other arguments are outside the scope of this proceeding and, in any event, lack merit.

I. Arguments Raising Issues Other Than the Impact of Section 709(f) of the Technicians Act on the Authority's Jurisdiction to Review Technician Terminations Are Outside the Scope of the Current Proceeding, and, Therefore, Are Not Properly Before This Court

As a general rule, "an amicus cannot introduce a new argument into a case." *United States v. Sturm, Ruger & Co.*, 84 F.3d 1, 6 (1st Cir. 1996). The role of the amicus is to assist the Court in resolving the "issues raised by the parties." *Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989).

[2] However, the Commonwealth's assertion (Commonwealth Br. 28), that absent the section 709(f) bar the Authority would order the reinstatement of twenty-six technicians, finds no support in the Authority's decision.

The union, petitioner herein, has raised one main issue before this Court – whether the Authority properly found that it lacks jurisdiction to review technician terminations.[3] To the extent that the Commonwealth's brief addresses that issue (*see* Commonwealth Br. 25-27), it is appropriately within the scope of the instant litigation. However, any argument extraneous to that issue is not properly part of this appellate proceeding. *See McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 23 n.9 (1st Cir. 1991) ("To the extent that the amicus raises different grounds in support of reversal," a court should "decline to consider those grounds.").

II. The Commonwealth's Arguments Lack Logical and Legal Support

A. Collateral estoppel is not appropriate in this appellate proceeding

The Commonwealth (Commonwealth Br. 22-25) argues that, prior to the Authority's ruling in this case, the United States District Court of Puerto Rico determined that the court lacked jurisdiction to review challenges to the technician termination at issue here, and that the Authority should be estopped by this determination from ruling differently.

[3] The union also complains, as a subsidiary matter, that the Authority should have addressed more than the one termination that was the subject of the administrative complaint in this case. *See* Petitioner's Brief 5, 54-55 & Authority's Brief 20-21.

In order to understand the Commonwealth's argument, and why it lacks merit, it is necessary to briefly summarize the pertinent factual background. After filing a ULP charge with the Authority, the union in this case filed a complaint in district court (Civ. No. 99-1367) claiming that the termination of the technician violated the technician's constitutional rights and was contrary to the Guard's procedural regulations. Complaint, Civ. No. 99-1367, Commonwealth Addendum 1-8. After the Authority's administrative law judge (ALJ) ruled that the technician's termination violated the Statute, the Boston Regional Director of the Authority also filed a complaint in the same district court (Civ. No. 99-1478) seeking, pursuant to the Statute, an injunction to preserve the status quo while the Authority reviewed the ALJ's decision. Complaint, Civ. No. 99-1478, Commonwealth Addendum 18-23. The district court dismissed the union's complaint, finding that the court lacked jurisdiction. *Id*. at 17. The court also dismissed the Boston Regional Director's complaint for lack of jurisdiction.[4] *Id*. at 38.

The Commonwealth's reliance on the doctrine of collateral estoppel is misplaced for a number of reasons. First, as applied to the Authority's determination that it lacks jurisdiction to review a technician termination, there is nothing to estop. The Authority and the district court reached comparable conclusions – each decided that it lacked jurisdiction over technician

[4] By order dated May 12, 2000, this Court vacated the district court's judgment in Civ. No. 99-1478. *Edward S. Davidson v. Puerto Rico Nat'l Guard*, No. 00-1015 (1st Cir. May 12, 2000) (unpublished). A copy of the May 12, 2000 order is attached as Addendum B to this Brief.

terminations. Accordingly, the Commonwealth's assertion of the collateral estoppel doctrine in this respect raises no issue regarding the Authority's order. Consistent with the district court's order, the Authority has declined to assert its jurisdiction to review the termination of the technician involved in this case.

Second, as it relates to the entire Authority decision, collateral estoppel was not raised by the Guard to the Authority, and therefore, that objection is not properly before this Court. Pursuant to 5 U.S.C. § 7123(c), "[n]o objection that has not been urged before the Authority . . . shall be considered by the court [of appeals] . . . ." *See, e.g., EEOC v. FLRA*, 476 U.S. 19, 23 (1986); *see also 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) (noting that even where the Authority raises an issue *sua sponte*, section 7123(c) still requires a party wishing to preserve the issue for judicial review, to first raise the issue before the Authority – and in such circumstance by a motion for reconsideration). Cognizant of the fact that the Authority's decision did not address the district court's ruling, the Guard nevertheless chose not to move the Authority for reconsideration under the Authority's regulations. *See* 5 C.F.R. § 2429.17. The Guard has not – and cannot – argue that "extraordinary circumstances" exist in this case. *See* 5 U.S.C. § 7123(c). Therefore, because no arguments regarding collateral estoppel were made to the Authority, the Commonwealth may not present them here. *See also United Servs. Auto. Ass'n v. Paul Arpin Van Lines, Inc.*, 652 F.2d 198, 200

n.2 (1st Cir. 1981) (When the defense of collateral estoppel is not raised in the proceeding below, it may not be asserted on appeal.).[5]

B. When administering the technician program, the Guard is a federal agency and thus was a proper party in the Authority proceeding

The Commonwealth argues (Commonwealth Br. 12) that the Guard is a state agency and that, therefore, the Authority does not have jurisdiction over it. For the purposes of the Statute, however, the Guard is also a federal agency and must comply with the Statute's mandates. As the Authority determined in this case, when the state National Guards administer the technicians program, they act in their federal capacity. *See* Pet. Add. 10-12 and cases cited therein. In this regard, the Authority noted that this Court has held, "in a case related to this one, that *in matters arising under the Statute*, 'the Guard is being sued in its capacity as a federal agency.'" *Id*. at 11 (quoting *FLRA v. Puerto Rico Nat'l Guard*, No.

[5] Finally, in its brief, the Commonwealth anchors its collateral estoppel argument in both district court decisions. Commonwealth Br. 22-25. To the extent that the Commonwealth is arguing that the Authority should be bound by the district court's decision in Civ. No. 99-1478 (the Regional Director's case), that decision has been vacated by this Court. *Edward S. Davidson v. Puerto Rico Nat'l Guard*, No. 00-1015 (1st Cir. May 12, 2000) (unpublished). Therefore, the Commonwealth's reliance on that decision is improper because vacated decisions have no preclusive effect. *See U.S. Bancorp Mort. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 22-23 (1994). To the extent that the Commonwealth is arguing that the Authority should be bound by the district court's decision in Civ. No. 99-1367 (the union's case), collateral estoppel is not applicable. First, the Authority was not a party to that case. Second, the case involved different issues: the union's case alleged that the Guard's conduct violated the Constitution and Guard regulations; the Authority proceeding concerned allegations that the Guard violated the Statute.

99-1293 (1st Cir., order filed Nov. 23, 1999)) (emphasis added). A copy of this November 23, 1999 order is attached as Addendum C to this Brief. It is not disputed that this ULP case involves "matters arising under the Statute."

Similarly, the Commonwealth argues (Commonwealth Br. 16-17) that the Authority has sued the wrong party and that the caption in the ULP proceeding should have referred to the Adjutant General and not to the Guard. This Court has recently rejected this argument in a related case in which the Court enforced an Authority order against the Guard. *See FLRA v. Puerto Rico Nat'l Guard*, No. 99-1293 (1st Cir., order filed Dec. 21, 1999) (denying the Commonwealth's Motion to strike the Guard from the caption).[6] A copy of this December 21, 1999 order is attached as Addendum D to this Brief.

C. This case does not raise Eleventh Amendment concerns

The Commonwealth's argument (Commonwealth Br. 16) that this case conflicts with the Eleventh Amendment is meritless. First, the Authority is not proceeding against the Guard in court. Second, even if the Authority were seeking judicial enforcement against the Guard, this claim fails because the Eleventh Amendment does not apply to cases filed by the United States, including

[6] The Authority's identification of the National Guard unit in its administrative order followed its common practice in such cases. *See*, *e.g.*, *Puerto Rico Nat'l Guard,* 15 FLRA 482 (1984), *aff'd sub nom*., *AFGE, Local 3936 v. FLRA*, 762 F.2d 183 (1st Cir. 1985); *National Fed'n of Gov't Employees, Local 1669 & U.S. Dep't of Defense, Ark. Air Nat'l Guard, 188th Fighter Wing, Fort Smith, Ark.*, 55 FLRA 63 (1999), *enf'd sub nom.*, *FLRA v. Arkansas Nat'l Guard*, No. 99-1974 (8th Cir. October 14, 1999); *Puerto Rico Nat'l Guard & Puerto Rico Air Nat'l Guard, San Juan, Puerto Rico*, Case No. AT-CA-70505 (May 15, 1998), *enf'd sub nom., FLRA v. Puerto Rico Nat'l Guard* , No. 99-1293 (1st Cir. May 25, 2000).

federal agencies suing in their own name. *See Parks v. United States*, 784 F.2d 20, 23 (1st Cir. 1986); *Marshall v. A & M Consol. Indep. Sch. Dist.*, 605 F.2d 186, 188 (5th Cir. 1979).

In sum, as demonstrated above, the Commonwealth is improperly attempting to step into the Guard's shoes and challenge the Authority's decision before this Court. However, this Court has already determined that the only entity that may represent the Guard in this case is the United States Department of Justice, which has chosen not to appeal the Authority's decision. The Commonwealth should not be allowed, in the guise of an amicus, to end-run that determination.

CONCLUSION

This Court should disregard those issues raised by the amicus curiae that do not relate to the issue in the instant proceeding.

Respectfully submitted,

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

JUDITH A. HAGLEY
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

August 18, 2000

CERTIFICATION PURSUANT TO FRAP RULE 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 2,322 words.

August 18, 2000

____
Judith A. Hagley

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES,)
LOCAL 3936,)

Petitioner)
)
v.) No. 00-1417
)
)
FEDERAL LABOR RELATIONS)
AUTHORITY,)

Respondent)

CERTIFICATE OF SERVICE

I certify that copies of the Supplemental Brief for the Federal Labor Relations Authority Responding to the Amicus-Curiae Brief of the Commonwealth of Puerto Rico and one copy of the brief in electronic format, have been served upon the following counsel:

BY FEDERAL EXPRESS

Stuart A. Kirsch
Assistant General Counsel - Litigation
AFGE, AFL-CIO
6724 Church Street, Ste. 2
Riverdale, GA 30274-4711

Mark D. Roth
General Counsel
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001-1583

LTC David Carrion Baralt
Puerto Rico National Guard
PO Box 9023786
San Juan, PR 00902

Juan A. Lopez Conway
Garcia & Fernandez Law Offices
10th Floor, Suite 1001
254 Munoz Rivera Ave.
Hato Rey, PR 00918

I certify that copies of the Supplemental Brief for the Federal Labor Relations Authority Responding to the Amicus-Curiae Brief of the Commonwealth of Puerto Rico and one copy of the brief in electronic format, have been mailed by first-class mail to the Clerk of the First Circuit.

____

Jennifer Baker
Paralegal Specialist

August 18, 2000