ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 1997

No. 96-1344
No. 96-1363

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

_____

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2986,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3006,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent
_____

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

ANN M. BOEHM
Attorney

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

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 1997

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties

Case No. 96-1344:

Petitioner below: American Federation of Government Employees, Local 2986

Respondent below: U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon

Petitioner in this Court: American Federation of Government Employees, Local 2986

Respondent in this Court: The Federal Labor Relations Authority

Case No. 96-1363:

Petitioner below: American Federation of Government Employees, Local 3006

Respondent below: U.S. Department of Defense, National Guard Bureau, Idaho National Guard, Adjutant General, State of Idaho

Petitioner in this Court: American Federation of Government Employees, Local 3006

Respondent in this Court: The Federal Labor Relations Authority

B. Rulings under review

Case No. 96-1344:

The Authority issued its Decision in American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, Case No. 0-AR-2550 on July 19, 1996. The Authority's decision is reported at 51 FLRA (No. 126) 1549.

Case No. 96-1363:

The Authority issued its Decision in American Federation of Government Employees, Local 3006 and U.S. Department of Defense, National Guard Bureau, Idaho National Guard, Adjutant General, State of Idaho, Case No. 0-AR-2571 on July 31, 1996. The Authority's decision is reported at 51 FLRA (No. 142) 1693.

C. Related Cases

These cases have not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to these cases within the meaning of Local Rule 28(a)(1)(C).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

DECISION OF THE MERIT SYSTEM PROTECTION BOARD

STATUTES

CODE OF FEDERAL REGULATIONS

LEGISLATIVE HISTORY

MISCELLANEOUS

Cases or authorities chiefly relied upon are marked by asterisks.

GLOSSARY

AFGE American Federation of Government Employees,
Local 2986 Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA 1549 (1996)

AFGE American Federation of Government Employees,
Local 3006 Local 3006 and U.S. Department of Defense, National Guard Bureau, Idaho National Guared, Adjutant General, State of Oregon, 51 FLRA 1693 (1996)

AFGE or American Federation of Government Employees,
petitioners Locals 2986 and 3006

Arkansas Army U.S. Department of Defense, National Guard Bureau,
National Guard Arkansas Army National Guard, North Little Rock,
Arkansas and National Federation of Federal
Employees, Local 1671, 48 FLRA 490 (1993)

Bureau of Prisons United States Dep't of Justice, U.S. Federal Bureau of Prisons v. FLRA, 981 F.2d 1339 (D.C. Cir. 1993)

Customs Service United States Dep't of the Treasury, United States Customs Serv. v. FLRA, 43 F.3d 682 (D.C. Cir. 1994)

DCAA American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Defense Contract Audit Agency, Central Region, 49 FLRA 1482 (1994)

DOJ United States Dep't of Justice v. FLRA, 792 F.2d 25 (2d Cir. 1986)

Fanning Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492 (D.C. Cir. 1980), cert. denied, 450 U.S. 917 (1981)

Griffith Griffith v. FLRA, 842 F.2d 487 (D.C. Cir. 1988)

Leedom Leedom v. Kyne, 358 U.S. 184 (1958)

Local 1923 American Fed'n of Gov't Employees, Local 1923 v. FLRA, 675 F.2d 612 (4th Cir. 1982)

Local 2986 American Federation of Government Employees, Local 2986

Local 3006 American Federation of Government Employees, Local 3006

Marshals Serv. United States Marshals Serv. v. FLRA, 708 F.2d 1417 (9th Cir. 1983)

NGB or agency National Guard Bureau

OEA Overseas Educ. Ass'n v. FLRA, 824 F.2d 61 (D.C. Cir. 1987)

OPM Office of Personnel Management

Oxy USA Oxy USA, Inc. V. FERC, 64 F.3d 679 (D.C. Cir. 1995)

Statute Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp II 1996)

ULP unfair labor practice

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 1997

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

No. 96-1344
No. 96-1363

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2986,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3006,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

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

BRIEF FOR THE
FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

In Case No. 96-1344, the decision under review was issued by the Federal Labor Relations Authority ("Authority" or "FLRA") on exceptions to an arbitration award in American Federation of Government Employees, Local 2986 and U.S. Department of Defense, National Guard Bureau, The Adjutant General, State of Oregon, 51 FLRA 1549 (AFGE, Local 2986) (Joint Appendix ("JA") at 10), on July 19, 1996. In Case No. 96-1363, the decision under review was issued by the Authority on exceptions to an arbitration award in American Federation of Government Employees, Local 3006 and U.S. Department of Defense, National Guard Bureau, Idaho National Guard, Adjutant General, State of Idaho, 51 FLRA 1693 (AFGE, Local 3006) (JA at 22), on July 31, 1996.[1]

This Court lacks subject matter jurisdiction to review these Authority decisions involving arbitrators' awards because section 7123(a) of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. §§ 7101-7135 (1994 & Supp. II 1996) ("Statute") bars such review.[2]

STATEMENT OF THE ISSUES

I. Whether this Court lacks subject matter jurisdiction, pursuant to section 7123(a), to review the Authority's decisions setting aside arbitrators' awards under 5 U.S.C. § 7122 that do not involve an unfair labor practice.

II. Whether any of the few exceptions to the general bar to judicial review of Authority arbitration decisions under section 7122 are applicable to this case.

III. Assuming, for the sake of argument, that the Court has jurisdiction, whether the Authority properly determined that it had jurisdiction under 5 U.S.C. § 7122(a) to review arbitrators' awards resolving grievances over

severance pay.

STATEMENT OF THE CASE

I. Nature of the Case

Petitioners in these cases, American Federation of Government Employees, Locals 2986 and 3006 (collectively referred to as "AFGE" or "petitioners"), improperly seek to invoke the jurisdiction of this Court to review the Authority's decisions overturning arbitrators' awards in AFGE, Local 2986 and AFGE, Local 3006. In both decisions, the Authority (former Member Armendariz dissenting) determined that it had jurisdiction to consider the agency's exceptions to the arbitrators' awards pursuant to section 7122(a) of the Statute. The arbitrators' awards ruled that the National Guard Bureau ("NGB" or "agency") improperly denied the grievants severance pay pursuant to 5 U.S.C. § 5595 and 5 C.F.R. pt. 550, subpt. G. The Authority thereafter determined that the awards were contrary to law and regulation and set them aside. AFGE filed petitions for review in both cases, which the Court consolidated.[3]

II. Statement of the Facts

A. Background

1. Pertinent National Guard Technician statutes and regulations

The factual backgrounds of the two cases are similar. Both cases concern the removal of the grievants from National Guard Civilian Technician positions for failure to maintain military membership and the agency's subsequent denial of severance pay to the grievants.

National Guard Civilian Technicians are employed pursuant to the National Guard Technician Act of 1968, 32 U.S.C. § 709 (1994). Section 709(e)(1) provides: "[A] technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard . . . shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned." 32 U.S.C. § 709(e)(1). The grievants in these cases were employed in such positions.

Severance pay is governed by 5 U.S.C. § 5595, which provides that an employee is entitled to severance pay if the employee "is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency." 5 U.S.C. § 5595(b)(2). According to the severance pay regulations, an employee must be "removed from Federal service by involuntary separation" in order to be entitled to severance pay. 5 C.F.R. § 550.704. The regulations define "involuntary separation" as "separation initiated by an agency against the employee's will and without his or her consent for reasons other than inefficiency." "Inefficiency" is defined as "unacceptable performance or conduct that leads to a separation under part 432 or 752 of this chapter or an equivalent procedure." 5 C.F.R. § 550.703.

2. Factual background

The specific factual background for each of these cases is set forth below.

a. AFGE, Local 2986

i. Facts

The agency terminated the grievants from their employment as National Guard Civilian Technicians due to their failure to maintain military membership in the Oregon National Guard. (JA at 10, 41-42.) Specifically, the grievants failed to comply with military weight standards. The agency determined that their noncompliance did not result from a medical condition beyond their control. (JA at 11, 41.) They were therefore discharged from the military, and consequently, their civilian positions. (Id.)

The agency denied the grievants severance pay under 5 U.S.C. § 5595, because the agency determined that their separation from military status was voluntary. (JA at 42.) In making this determination, the agency relied primarily on Technician Personnel Regulation (TPR) 990-2. (JA at 11, 42.)

TPR 990-2 provides, "[s]eparation due to loss of military membership for failure to comply with the weight control program bars a technician's entitlement to severance pay." (JA at 42.) Local 2986 filed a grievance challenging the agency's denial of severance pay. (JA at 11, 30.)

ii. The arbitrator's award

The arbitrator determined that the grievants were entitled to severance pay because, according to the arbitrator and in contrast to the agency's finding, their separation from service was involuntary. (JA at 55, 59.) In his opinion and award, the arbitrator analyzed the applicable statutes and regulations. He concluded that TPR 990-2 conflicts with 5 U.S.C. § 5595 and 5 C.F.R. § 550.703,[4] and that the grievants were "'involuntarily separated'" from employment. (JA at 59.) As a result, the arbitrator directed that the grievants be paid severance pay in accordance with 5 U.S.C. § 5595. (JA at 60.)

iii. The Authority's decision

The agency filed exceptions to the arbitrator's award with the Authority asserting, among other things, that the arbitrator's award was deficient because it conflicted with the controlling regulation, TPR 990-2, and because the arbitrator's interpretation of the statute and regulations was in error. (JA at 10, 12.) In its opposition to these exceptions, Local 2986 alleged, as relevant to this appeal,[5] that the Authority should dismiss the agency's exceptions for lack of jurisdiction. (JA at 12-13.) According to Local 2986, the Authority did not have jurisdiction to consider the agency's exceptions under section 7122(a), because the award "relat[ed] to a matter described in section 7121(f)"--the grievants' removal from employment.[6] (Id.)

In its decision setting aside the arbitrator's award, the Authority first addressed and rejected Local 2986's jurisdictional argument. (JA at 13-14.) The Authority concluded that it had "jurisdiction to review exceptions to an award resolving a grievance over severance pay," (JA at 14), because the arbitrator's award did not "relate[] to a matter described in section 7121(f)," as set forth in section 7122(a) (JA at 13). In making this determination, the Authority considered the language in the Statute, congressional intent, and policy considerations. (JA at 15.)

The Authority next considered the merits of the arbitrator's award and, finding the award to be contrary to law, set it aside. In making this decision, the Authority considered and followed the advisory opinion it requested from the Office of Personnel Management ("OPM") regarding the application of the severance pay statute and regulations to civilian technicians. (JA at 12, 98.) Consistent with OPM's opinion, the Authority concluded that the grievants were not entitled to severance pay and that the arbitrator's award was contrary to 5 U.S.C. § 5595 and 5 C.F.R. pt. 550, subpt. G. (JA at 17.)

b. AFGE, Local 3006

i. Facts

The agency terminated the grievant from his employment as a National Guard Civilian Technician due to his failure to maintain military membership in the Idaho National Guard. (JA at 23, 72.) As in AFGE, Local 2986, the subsequent denial of severance pay to the affected employee precipitated the grievance and arbitration in this case. (JA at 23, 72-73.)

The grievant was discharged from the National Guard because the Idaho National Guard declined to remove a bar to the grievant's reenlistment. (JA at 23, 72.) In 1989, the Idaho National Guard had extended grievant's military reenlistment for only three years because of incidents that "reflected negatively on his leadership abilities and performance." (JA at 67.) In 1992, the agency's continuing concern about the grievant's attitude and performance resulted in the bar to the grievant's reenlistment[7] and the grievant's eventual discharge from the National Guard. (JA at 70, 72.)

The agency denied the grievant severance pay under 5 U.S.C. § 5595, because the agency determined that "his loss of military membership was for cause."

(JA at 72.) In making this determination, the agency relied primarily on TPR 990-2. (JA at 23, 72.) TPR 990-2, subchapter S7-4 provides that a civilian technician is not entitled to severance pay "when it can be reasonably established and documented that failure to accept the application [for reenlistment] is for reason of misconduct, delinquency, or inefficiency." (JA at 23, 84.) Because the grievant's denial of reenlistment was "for cause," the agency concluded that, pursuant to TPR 990-2, he was not entitled to severance pay. (JA at 72.) Local 3006 filed a grievance challenging the agency's denial of severance pay. (JA at 23, 73.)

ii. The arbitrator's award

The arbitrator determined that the grievant was entitled to severance pay because his separation from service was involuntary. (JA at 95.) In his opinion and award, the arbitrator analyzed the severance pay statute and regulations, 5 U.S.C. § 5595 and 5 C.F.R. § 550.703, as well as TPR 990-2. (Id.) The arbitrator concluded that the agency did not reasonably establish and document that the grievant was discharged for misconduct, delinquency, or inefficiency, as required for denial of severance pay under TPR 990-2. (Id.) As a result, the arbitrator found the grievant's separation was involuntary and ruled that the grievant was entitled to severance pay in accordance with 5 U.S.C. § 5595 and 5 C.F.R. § 550.703. (Id.)

iii. The Authority's decision

The agency filed exceptions to the arbitrator's award with the Authority. (JA at 22.) The agency asserted, among other things, that the arbitrator's award was deficient because the arbitrator exceeded his authority by ruling on the substance of the military's decision not to remove the bar to reenlistment and by substituting his judgment for that of the military leadership. (JA at 24.) The agency also maintained that the arbitrator's decision was deficient because it conflicted with TPR 990-2 and was based on non-facts. (Id.)

In its opposition, Local 3006 alleged, as relevant to this appeal,[8] that the Authority should dismiss the agency's exceptions for lack of jurisdiction. (JA at 24-25.) According to Local 3006, the Authority did not have jurisdiction to consider the agency's exceptions under section 7122(a),

because the award "relat[ed] to a matter described in section 7121(f) of the Statute." (Id.)

In its decision setting aside the arbitrator's award, the Authority first addressed Local 3006's jurisdictional argument and determined that it had jurisdiction to review the arbitrator's award regarding severance pay. (JA at 25-26.) The Authority concluded, as it had done in AFGE, Local 2986, "that awards resolving grievances over denials of severance pay do not relate to any matters described in section 7121(f), within the meaning of section 7122(a) of the Statute." (JA at 26.) The Authority next considered the merits of the arbitrator's award, and, finding the award to be contrary to agency regulation, set it aside. (JA at 22, 26-27.)

STANDARD OF REVIEW

The principal question in this case is whether the Court has subject matter jurisdiction, a matter to be decided by the Court in the first instance. Ramey v. Bowsher, 9 F.3d 133, 136 n.7 (D.C. Cir. 1993). In the event that the Court determines that it has jurisdiction to consider the Authority's own jurisdictional determination regarding its review of the arbitrators' awards here involved, the standard of review is narrow. As the Supreme Court has stated, the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the [Statute] to the complexities of federal labor relations.'" Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 97 (1983). Further, this Court has held that "an agency's interpretation of the limits of its

jurisdiction is entitled to 'Chevron deference.'" Oxy USA, Inc. v. FERC, 64 F.3d 679, 701 (D.C. Cir. 1995) (Oxy USA); Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

This Court is without subject matter jurisdiction over the petitions for review. The language and legislative history of section 7123(a)(1) of the Statute, 5 U.S.C. § 7123(a)(1), make clear that Congress intended to bar judicial review of Authority decisions reviewing arbitration awards that do not involve an unfair labor practice. All courts of appeals to have considered this issue, including this one, have recognized this statutory jurisdictional bar.

None of the few exceptions to the section 7123(a) jurisdictional bar are applicable here. Petitioners incorrectly suggest in this regard that this Court has jurisdiction based upon its Customs Service decision, and based upon the Supreme Court's decision in Leedom v. Kyne. The Customs Service exception does not apply because the severance pay laws and regulations involved in these cases, as well as the related statutory provisions analyzed by the Authority, are integrally related to employee working conditions. In contrast, as the Customs Service Court indicated, jurisdiction under Customs Service is available only when the particular legal authority relied upon by the arbitrator or the Authority was not "fashioned for the purpose of regulating the working conditions of employees." (43 F.3d 682, 691.)

The Leedom exception is also inapplicable. Petitioners have not demonstrated that there is a clear statutory mandate that the Authority has violated. Further, jurisdiction under the Leedom exception is properly in the federal district court and not the court of appeals.

Finally, even assuming that judicial review is available in these cases, the Authority's jurisdictional decisions challenged by petitioners should be affirmed. The Authority correctly and reasonably interpreted the Statute in holding that it had jurisdiction to review these arbitration awards involving severance pay. In making its decisions, the Authority carefully considered the plain language of section 7122(a), other relevant statutory provisions, and congressional intent. This reasonable interpretation by the Authority of its own Statute, which is entitled to deference, should be affirmed.

ARGUMENT

I. Pursuant to 5 U.S.C. § 7123(a), this Court lacks subject matter jurisdiction to review the Authority's decisions setting aside arbitrators' awards issued under 5 U.S.C. § 7122 that do not involve an unfair labor practice

A. Introduction

As this Court has recognized, Authority arbitration decisions issued pursuant to section 7122 are not subject to judicial review in the courts of appeals under section 7123(a), unless the order involves an unfair labor practice ("ULP"). United States Dep't of Justice, U.S. Federal Bureau of Prisons v, FLRA, 981 F.2d 1339, 1342 (D.C. Cir. 1993)(Bureau of Prisons); Griffith v. FLRA, 842 F.2d 487, 490-91 (D.C. Cir. 1988) (Griffith).[9] This holding is supported both by the plain language of the Statute and its legislative history. Because the instant petitions for review involve just such Authority decisions, and because it is undisputed that no ULPs are involved, they must be dismissed as an attempt to evade the specific strictures Congress placed on judicial review of Authority decisions reviewing arbitrators' awards.

B. The Statute's language and legislative history make clear that Congress intended to bar judicial review of Authority decisions on exceptions to arbitrators' awards

It is axiomatic that federal court jurisdiction is conferred by Congress and that Congress may limit or foreclose review as it sees fit. American Fed'n of Labor v. NLRB, 308 U.S. 401 (1940); Wydra v. Law Enforcement Assistance Admin., 722 F.2d 834, 836 (D.C. Cir. 1983). With respect to the Statute, examination of its language and legislative history provides "a clear and convincing showing that Congress intended to prohibit judicial oversight" of Authority decisions in arbitration cases not involving a ULP. 5 U.S.C. § 7123(a); DOJ, 792 F.2d at 27. As noted by this Court in Griffith, there is "unusually clear congressional intent generally to foreclose review." 842 F.2d at 490.

1. The Statute's language

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

> 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[10] of this title, ...
>
> . . . .
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a). Thus, the plain language of 5 U.S.C. § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards, narrowly restricting the jurisdiction of the courts of appeals to review an FLRA arbitration decision to those instances that "involve[] an unfair labor practice" under the Statute.[11] Overseas Educ. Ass'n v. FLRA, 824 F.2d 61, 63 (D.C. Cir. 1987) (OEA). This broad jurisdictional bar to the review petitioners seek here has been recognized by all of the courts of appeals, including this one, that have considered the issue. See cases cited supra, n.9.

2. The Statute's legislative history

The legislative history of section 7123(a) underscores the tight restrictions Congress placed on review of Authority decisions in arbitration cases issued under section 7122. Congress strongly favored arbitrating labor disputes, and sought to create a scheme characterized by finality, speed, and economy. To this end, the conferees discussed judicial review in the following terms:

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

H.R. Rep. No. 1717, 95th Cong., 2d Sess. 153 (1978), reprinted in Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978, at 821 (1978) (Legis. Hist.) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final and binding," it is "not subject to further review by any . . . authority or administrative body" other than the FLRA. Id. at 826 (emphasis added). Thus, "[t]he rationale for circumscribed judicial review of such cases is not hard to divine." OEA, 824 F.2d at 63. See generally Griffith, 842 F.2d at 491-92; DOJ, 792 F.2d at 28-29; Marshals Serv., 708 F.2d at 1420.

Accordingly, the language and legislative history of the Statute establish conclusively that Congress intended that there be "no judicial review of the Authority's action on . . . arbitrators awards . . . ." Legis. Hist. at 821. Because the Authority's decisions on review of the arbitrators' awards

in these cases concededly did not involve any unfair labor practice, and because no other jurisdictional basis exists, no review of the decisions is available in this Court. The petitions for review must therefore be dismissed.

II. None of the few exceptions to the general bar to judicial review of Authority arbitration decisions under section 7122 are applicable to this case

The few exceptions that have been recognized to the general bar to judicial review of Authority arbitration decisions are not applicable in this case. In addition to the express exception in section 7123(a)(1), concerning Authority decisions involving a ULP, this Court has indicated that an exception to the jurisdictional bar may be present where the Authority exceeds its jurisdiction by upholding an arbitrator's award dealing with a grievance claiming a violation of a law that was not issued for the purpose of affecting working conditions, United States Dep't of the Treasury, United States Customs Serv. v. FLRA, 43 F.3d 682, 689 (D.C. Cir. 1994) (Customs Service); where the Authority exceeds its delegated powers and acts contrary to a clear statutory mandate, Griffith, 842 F.2d at 492-93 (citing Leedom v. Kyne, 358 U.S. 184 (1958) (Leedom)); and where the Authority's proceedings clearly violate a party's constitutional rights.[12]

Petitioners have failed to show that any of the potential exceptions to section 7123(a)'s jurisdictional bar is applicable.

A. The Customs Service exception is inapplicable

1. This Court's holding in Customs Service does not apply to this case and thus does not provide a basis for jurisdiction

Contrary to petitioners' contentions, this Court's decision in Customs Service, 43 F.3d 682, provides no basis for finding jurisdiction in this case. In Customs Service, the Court found limited jurisdiction to review an Authority arbitration decision. Id. at 690-91. The Authority's decision on review in Customs Service upheld the arbitrability of a grievance alleging a violation of a customs law that, the Court held, was not issued for the "purpose of affecting the working conditions of employees . . . ."[13] Id. at 689. In these cases, however, the grievances are predicated on a law integrally related to an employee working condition--severance pay.

The Customs Service Court made clear that its jurisdiction to consider the Authority's arbitration review decision was based on the nature of the law that the grievance alleged had been violated. Id. at 689. As the Court indicated, its jurisdiction was only available if the particular legal authority relied upon by the arbitrator or the Authority was not "fashioned for the purpose of regulating the working conditions of employees." Id. at 691.

In contrast to the law involved in Customs Service, all of the laws and regulations implicated by the Authority's decisions challenged in this proceeding are "directed toward employee working conditions . . . ." Id. at 689. In the instant cases, the Authority considered federal laws and regulations concerning severance pay, and the Labor Statute itself.

These cases, therefore, are comparable to the Griffith case, distinguished by the Court in Customs Service, in which the Court held that judicial review was not appropriate. 43 F.3d at 689 (citing Griffith, 842 F.2d at 494). Griffith involved the Authority's review and modification of an arbitrator's award of back pay under the Back Pay Act, 5 U.S.C. § 5596. Griffith, 842 F.2d at 489. As the Customs Service Court stated, and as applicable here, "further judicial review of the statutory claim [in Griffith] was barred," because Griffith "concerned the interstices of a federal statute that undisputedly was designed to deal directly with employee working conditions." 43 F.3d at 689.

Moreover, it cannot be said in these cases that the Authority exceeded its power as the Court found that it did in Customs Service. In Customs Service, the Court determined that the Authority found grievable and arbitrable a law not "fashioned for the purpose of regulating the working

conditions of employees." Id. at 691. The Court explained that "a 'grievance' predicated on a claim of violation of a law that is not directed toward employees working conditions is outside both the arbitrator's and the FLRA's jurisdiction." Id. at 689. Although petitioners have challenged the Authority's jurisdiction to consider the exceptions to the award under section 7122(a), unlike the excepting agency in Customs Service, id. at 686, petitioners never alleged that the grievance was not arbitrable. The arbitrability of the grievances was not, nor should it have been, an issue. Thus, for this reason as well, the Customs Service jurisdictional exception does not apply.

In short, the Customs Service exception does not apply because these cases involve a law issued for the purpose of affecting employee working conditions. Thus, the Court's reasoning in Customs Service, addressing a law that lacked that purpose, does not apply here.

2. AFGE mischaracterizes and wrongly relies upon the Customs Service jurisdictional exception to the bar to review of Authority arbitration decisions

Petitioners' reliance upon Customs Service is misplaced for two additional reasons. First, petitioners erroneously contend that Customs Service ruled that the Court always has jurisdiction to review Authority arbitration decisions to determine whether the Authority exceeded its jurisdiction. (Brief at p. 9, citing Customs Service, 43 F.3d at 691.) However, in so doing, petitioners focus upon statements by the Court taken out of context. Although the Customs Service Court stated that its review of Authority arbitration decisions "is available for the limited purpose of determining whether the Authority exceeds its jurisdiction," the Court did not go so far as to suggest that any Authority arbitration decision proceeding in which a party challenges the Authority's jurisdiction to review an arbitration award, as in these cases, is subject to judicial review. Id. at 691. Indeed, under petitioners' theory, any party dissatisfied with the Authority's action on exceptions to an arbitration decision would be encouraged to seek judicial review in a court of appeals and assert that the court had jurisdiction for the limited purpose of determining if the Authority properly exercised jurisdiction. Instead, as shown above, the Court in Customs Service indicated that its jurisdiction was available only if the law in question was not "fashioned for the purpose of regulating the working conditions of employees." Id.

Second, petitioners posit a general presumption favoring judicial review, contending that this presumption trumps section 7123(a)'s express bar to judicial review of Authority arbitration decisions. Petitioners assert in this regard that the Customs Service determination reflects this Court's acknowledgment of such a presumption.

What petitioners ignore in making this argument is the fact that this Court has considered the Court's lack of jurisdiction to review an Authority arbitration decision under 7123(a) in connection with the general presumption favoring judicial review and has reconciled the two. Griffith, 842 F.2d at 490. In finding in Griffith that "Congress intended to cut off judicial review of FLRA decisions regarding arbitral awards," id. at 492, the Court noted that its "construction of this [section 7123(a) language] is informed by the general presumption favoring judicial review in the absence of 'clear and convincing evidence of a contrary legislative intent.'" Id. at 490 (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)).

In sum, petitioners' suggestions that this Court has jurisdiction to consider the Authority's decisions reviewing arbitration awards in these cases based upon Customs Service are without merit and should be rejected.

B. The narrow Leedom v. Kyne exception to nonreviewability of Authority arbitration decisions is inapplicable here because an "open" violation of a "clear" statutory mandate cannot be shown

The only other theoretical exception to section 7123(a)'s jurisdictional bar raised by petitioners--the doctrine articulated in Leedom, 358 U.S. 184--is also inapplicable in this case. The Leedom exception is extremely narrow.

To establish jurisdiction, Leedom requires a showing that the Authority "openly violate[d] a clear mandate" of the Statute. Customs Service, 43 F.3d at 688. See also Bureau of Prisons, 981 F.2d at 1343; Griffith, 842 F.2d at 493-94. This petitioners cannot do.

In Leedom, the Supreme Court set forth a narrow exception to the general rule of nonreviewability of National Labor Relations Board ("Board") representation proceedings. The Court found that district court equity jurisdiction existed where the Board had violated a clear mandate of its enabling statute. 358 U.S. at 188.[14] In that instance, the Court reasoned, "'[i]f the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control.'" Id. at 190 (quoting Switchmen's Union of North America v. National Mediation Bd., 320 U.S. 297, 300 (1943)).

There are two reasons why this Court should reject any attempt by petitioners to invoke jurisdiction on the authority of Leedom. First, only federal district courts, not the courts of appeals, have original jurisdiction to consider the merits of such claims under general jurisdictional provisions such as 28 U.S.C. §§ 1331, 1337 (1994). Leedom, 358 U.S. at 189; Customs Service, 43 F.3d at 688, n.6; Physicians Nat'l House Staff Ass'n v. Fanning, 642 F.2d 492, 495 (D.C. Cir. 1980), cert. denied, 450 U.S. 917 (1981) (Fanning). Second, even if the claims were in the proper forum, under Leedom, petitioners have failed to identify a specific provision of the Statute which, "although . . . 'clear and mandatory,' . . . has nevertheless been violated by the [Authority]." Fanning, 642 F.2d at 496 (emphasis added).

As to the first point, in seeming recognition that a Leedom argument must be raised in the federal district courts, petitioners ask this Court to "consider transferring the petitions to the United States District Court for the District of Columbia . . . ." (Brief at 16.) Petitioners maintain that the federal district court "could exercise nonstatutory review of the FLRA's unauthorized actions" based upon Leedom. (Brief at 16.) However, this Court could only properly transfer these cases to the District Court if proper jurisdiction lies in that court. Workplace Health & Safety Council v. Reich, 56 F.3d 1465, 1469 (D.C. Cir. 1995) ("federal court which lacks jurisdiction over petition for review of agency action 'shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought . . . .'"); Wellife Products v. Shalala, 52 F.3d 357, 359 (D.C. Cir. 1995) (same). Leedom provides for jurisdiction in federal district court only if the Authority has violated a clear statutory mandate. Because petitioners have failed to make even a colorable Leedom claim, and therefore have not shown that it would be "in the interest of justice" for this Court to transfer these cases, id., the Court should deny petitioners' request.

With regard to petitioners' failure to identify the Authority's violation of a "clear and mandatory" provision of the Statute, Fanning, 642 F.2d at 496, petitioners suggest, albeit not in specific reference to the Leedom analysis, that the Authority's section 7122(a) analysis is a violation of the Statute. (Brief at 14-16.) However, petitioners do not identify any specific "clear and mandatory" language that the Authority has violated. Moreover, petitioners' disagreement with the Authority's interpretation of the "relating to" language in section 7122(a) does not constitute such a showing. Cf. Customs Service, 43 F.3d at 688 (rejecting the Customs Service's reliance on Leedom, despite the fact that the Court ultimately disagreed with the Authority's interpretation of the Statute).[15]

Petitioners' additional assertions, without further explanation, that the Authority exceeded its jurisdiction do not amount to a colorable Leedom argument. Petitioners state in this regard that the Authority's actions in these cases were ultra vires (Brief at 7, 15); that the Authority "violated

statutory limitations on its appellate power" (Brief at 7); and that "the Statute does not give the FLRA authority to review arbitration awards related to adverse actions" (Brief at 8). Petitioners' claims consist of nothing more than bald assertions that the Authority erroneously or arbitrarily exerted its authority or that it committed an error of law. Such assertions do not meet the narrow Leedom exception to nonreviewability of Authority arbitration decisions. Bureau of Prisons, 981 F.2d at 1343; Griffith, 842 F.2d at 493.

As described in more detail in section III below, the Authority has fulfilled all aspects of its statutory mandate in these cases. Consistent with its obligations under the Statute, it considered its authority to review these arbitration awards based upon section 7122(a). After analysis of the relevant statutory provisions and consideration of congressional intent, the Authority determined that it had jurisdiction to review these awards. In these circumstances, there is no basis for applying the Leedom exception to these cases.

In sum, the Authority's actions were well within the legal limits imposed by the Statute. Petitioners' mere disagreement with the merits of the Authority's jurisdictional determination in this regard does not rise to the level of a colorable Leedom claim. Because petitioners can present no basis for finding that either the District Court or this Court has jurisdiction based on Leedom, petitioners' transfer request should be denied and the petitions dismissed for lack of subject matter jurisdiction.

III. Even if this Court determines that it has jurisdiction to review the Authority's jurisdictional determination, the Authority properly found that it had jurisdiction to review these arbitrators' awards involving severance pay

These cases presented the Authority with the jurisdictional issue of whether the arbitrators' awards involving severance pay disputes were awards "relating to a matter described in section 7121(f)" and thus excepted from review by the Authority under section 7122(a). The Authority correctly held, contrary to the unions' argument, that it had jurisdiction to review the awards because severance pay issues do not "relate[] to" the matters in section 7121(f). To supply a context for a discussion of the issues resolved by the Authority, a brief review of the relevant statutory provisions is necessary.

A. The statutory scheme concerning grievance arbitration

Grievance procedures established in a collective bargaining agreement are, with certain exceptions,[16] the exclusive administrative means for resolving grievances within the agreement's coverage. 5 U.S.C. § 7121. See Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.) (en banc), cert. denied, 498 U.S. 811 (1990). A grievance may allege a violation of the collective bargaining agreement, or the misapplication of a law, rule or regulations "affecting conditions of employment." 5 U.S.C. § 7103(a)(9). Unresolved grievances may be submitted to binding arbitration. 5 U.S.C. § 7121(b)(1)(C)(iii). Congress has entrusted the Authority with the responsibility for resolving exceptions to arbitrators' awards. 5 U.S.C. § 7105(a)(2)(H). Either party to arbitration may file an exception to the arbitrator's award with the Authority. 5 U.S.C. § 7122(a).

Particularly pertinent to these cases, the Authority has jurisdiction to consider exceptions to an arbitrator's award, unless, as discussed at p. 7 above, the award "relat[es] to a matter described in section 7121(f)." 5 U.S.C. § 7122(a). If the award "relat[es] to" a section 7121(f) matter - a removal pursuant to 5 U.S.C. § 4303 or § 7512, or a similar matter under another personnel system - the United States Court of Appeals for the Federal Circuit has jurisdiction to review the award as it would a decision of the Merit Systems Protection Board ("MSPB") regarding such a removal. See 5 U.S.C. §§ 7121(f), 7703.

B. The Authority correctly held that an arbitration award resolving a severance pay dispute is not an award "relating to a matter described in section 7121(f)" of the Statute

Finding that it had jurisdiction under sections 7122(a) and 7121(f) of the Statute to review arbitrators' awards concerning severance pay, the Authority focused primarily on the meaning of the phrase "relating to" in section 7122(a). The Authority's decision in this regard is consistent with the language of section 7122(a) of the Statute, as well as other relevant statutory provisions and congressional intent. In particular, the Authority's decision respects Congress's intent that federal personnel issues receive consistent and uniform treatment when they are reviewed administratively and judicially, and that a multiplicity of litigation be avoided. Similarly, the Authority's decision prevents the possibility that parties to arbitrators' awards involving severance pay issues would be deprived of a forum in which to seek review of such awards.

Section 7122(a) is the fundamental statutory provision defining the Authority's jurisdiction in these cases. Among other things, section 7122(a) limits the Authority's jurisdiction to review arbitrators' awards by excluding awards "relating to" the matters described in section 7121(f) of the Statute. Section 7121(f) provides the procedure for review of arbitration awards resolving grievances filed pursuant to section 7121(e). Section 7121(e) in turn refers to matters covered under sections 4303 and 7512 of title 5, United States Code, as well as "[s]imilar matters which arise under other personnel systems . . . ." 5 U.S.C. § 7121(e). These section 7121(e) matters encompass particular personnel actions, generally of a serious character, such as removals from employment and lengthy suspensions for employee misconduct or poor work performance.

Thus, the question for purposes of these cases is the breadth of the phrase "relating to." As the Authority observed, the phrase "relating to" is not defined by the Statute, and the phrase "itself is ambiguous." (JA at 14.) Depending upon how broadly that phrase is interpreted, section 7122(a) might exclude from the Authority's jurisdiction only awards dealing with matters that are specifically covered by sections 4303 and 7512 and similar matters under other personnel systems, or, alternatively, it might be read to eliminate from the Authority's jurisdiction other matters that are separate from section 4303 and 7512 personnel actions, but are still connected in some manner. Id. Because of the phrase's inherent ambiguity, the Authority appropriately looked for guidance to other indications of congressional intent.

As the Authority recognized, section 7121(e) establishes an option for an employee who decides to challenge an adverse action under section 4303 or section 7512 of title 5, or a similar matter arising under other personnel systems. 5 U.S.C. § 7121(e). According to section 7121(e), an employee can file a grievance under the negotiated grievance procedure, or can appeal the matter to the MSPB or through the comparable appellate procedure under another personnel system. Id. Section 7121(f) then provides the procedure for review of arbitration awards resolving grievances filed pursuant to section 7121(e). Thus, a grievance regarding a matter that could have been appealed to the MSPB will be subject to the same review as if the matter had been considered by the MSPB in the first instance--by the U.S. Court of Appeals for the Federal Circuit rather than the Authority.

This statutory scheme reflects a strong congressional intent to secure a consistent appellate forum for review of arbitration awards and administrative decisions involving section 4303 or 7512 actions or similar matters under other personnel systems, regardless of whether a particular action is contested through the applicable administrative procedure or in a grievance before an arbitrator. See also H. Rep. No. 1717, 95th Cong., 2d Sess. 157 (1978), reprinted in 1978 U.S.C.A.N. 2891 (same). Similarly, the scheme advances Congress' intent to discourage forum shopping. Id. Petitioners acknowledge, in this regard, that Congress intended for these provisions to ensure "'uniformity of direct review of adverse personnel actions.'" (Brief at 9, quoting AFGE v. FLRA, 850 F.2d 782, 784 (D.C. Cir. 1988).)

Analyzing the severance pay issue with such policy considerations in mind, the Authority properly determined that severance pay did not "relate to" the matters set forth in section 7121(f). Consistent with the obvious congressional intent to avoid multiple proceedings, no other forum has jurisdiction over severance pay disputes. See, e.g., Ward v. U.S. Consumer Product Safety Comm'n, 8 MSPR 603, 604 (1981). In this circumstance, for the Authority to decline jurisdiction would deprive the parties of the opportunity to have severance pay awards reviewed, clearly not a result "required by the Statute nor needed to further any discernible public policy." (JA at 16.)

Based upon the factors set forth above, the Authority reasonably concluded that a narrow interpretation of the "relating to" phrase in section 7122(a) was most appropriate. As a consequence, the Authority correctly asserted jurisdiction to review these arbitration awards involving severance pay issues. Because the Authority's interpretation of the Statute it administers was reasonable, and its opinion as to the limits of its own jurisdiction is entitled to deference, Oxy USA, 64 F.3d at 701, the Authority's conclusion should be affirmed.

C. AFGE's contentions regarding the Authority's jurisdictional determination are without merit

Petitioners' contentions that the Authority has improperly disregarded its prior precedent are erroneous. The Authority explicitly reconciled any such conflicts in its AFGE, Local 2986 decision.

As petitioners point out, the Authority's jurisdictional determination in AFGE, Local 2986, which was followed in AFGE, Local 3006, overturned the Authority's previous conclusion in American Federation of Government Employees, Local 3529 and U.S. Department of Defense, Defense Contract Audit Agency, Central Region, 49 FLRA 1482 (1994) (DCAA). The Authority ruled in DCAA that it lacked jurisdiction to consider an arbitration award involving a severance pay issue.

Contrary to petitioners' assertions, the Authority sufficiently explained its departure from its DCAA precedent. The Authority specifically noted that, based upon its careful reexamination of the relevant statutory provisions, it determined that the DCAA decision "interpreted the phrase 'relating to' in section 7122(a) more broadly than is warranted by the Statute." (JA at 14.) The Authority is "free to alter its past rulings and practices," but, in making such alterations, "must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . ." Local 32, American Federation of Government Employees v. FLRA, 774 F.2d 498, 502 (D.C. Cir. 1985). That is precisely what the Authority has done with regard to DCAA.

Petitioners' additional contention (Brief at 17-21) that the Authority's decisions in these cases are inconsistent with prior precedent that the Authority did not overturn is also incorrect. As the Authority recognized, it has declined jurisdiction over arbitration awards that are "'inherently related'" to section 7121(f) matters. See, e.g., Overseas Educ. Ass'n and U.S. Dep't of Defense Dependents Schools, 46 FLRA 1145 (1993) (declining jurisdiction to review supplemental attorney fee awards when the underlying arbitration award involved a section 7512 removal); U.S. Dep't of the Army, Army Reserve Personnel Center, St. Louis, Mo. and American Federation of Government Employees, Local 900, 34 FLRA 96 (1989) (declining jurisdiction to review exception to arbitrator's award involving a backpay issue related to grievants' section 7512 removal action).

Severance pay, however, is not "inextricably intertwined with a section 4303 or 7512 matter." By regulation, severance pay is not available in a "separation under part 432 or 752 of this chapter [section 4303 and 7512 adverse action regulations] or an equivalent procedure." 5 C.F.R. § 550.703. Furthermore, as the Authority pointed out, eligibility for severance pay depends upon a variety of factors that have no connection to an employee's removal from service, such as the employee's type of

appointment and the length of the employee's service. See 5 C.F.R. § 550.704 (1997). Severance pay issues are thus distinguishable from such issues as attorney fees and back pay, that are typically resolved in close conjunction with the resolution of the 4303 or 7512 matters upon which they depend.

Petitioners' disagreements with the Authority regarding its interpretation of the Statute are without merit. The Authority reasonably interpreted the Statute, and properly determined that it had jurisdiction to review these arbitration awards.

CONCLUSION

AFGE's petitions for review should be dismissed for lack of subject matter jurisdiction. If the Court finds that it has jurisdiction over the consolidated cases, the petitions should be denied.

Respectfully submitted.

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

ANN M. BOEHM
Attorney

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

October 3, 1997

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

_____

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2986,
Petitioner

v. No. 96-1344

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3006,
Petitioner

v. No. 96-1363

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

_____

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

Mark Roth, Esq.
Anne M. Wagner, Esq.
American Federation of Government Employees, AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001

Thelma Brown
Paralegal Specialist

October 3, 1997

I certify that the Final Brief of the Federal Labor Relations Authority does not exceed 12,500 words, the maximum amount allowed under Circuit Rule 28(d).

Ann M. Boehm
Attorney

October 3, 1997

[1] On November 1 and November 12, 1996, respectively, the Authority moved this Court to dismiss the petitions for review in Case No. 96-1344 and Case No. 96-1363 on the ground that the Court lacks subject matter jurisdiction under section 7123(a). By order dated May 8, 1997, the Court ordered the cases consolidated and referred the motions to dismiss to the merits panel. The Court also directed the parties to include in their briefs the arguments raised in the motions to dismiss.

[2] Relevant statutory and regulatory provisions are set forth in Addendum A.

[3] In this appeal, AFGE does not challenge the Authority's decision on the merits, but only the Authority's determination regarding its jurisdiction to review the arbitrators' awards. (Petitioners' Brief ("Brief") at 12, n.6.)

[4] The arbitrator acknowledged the Authority's decision in U.S. Department of Defense, National Guard Bureau, Arkansas Army National Guard, North Little Rock, Arkansas and National Federation of Federal Employees, Local 1671, 48 FLRA 480 (1993) (Arkansas Army National Guard), in which the Authority found TPR 990-2 controlling regarding severance pay. (JA at 11-12, 59-60.) Nonetheless, the arbitrator did not follow the Arkansas Army National Guard

decision, because he found that the Authority had failed to consider the conflict between TPR 990-2 and the severance pay provisions in 5 U.S.C. § 5595 and 5 C.F.R. § 550.703. (Id.)

[5] Because, as noted supra, n.3, AFGE does not challenge the Authority's decision on the merits, AFGE's merits arguments before the Authority are not detailed here.

[6] Section 7121(f) establishes the review procedures for arbitration awards resolving grievances "[i]n matters covered under sections 4303 and 7512" of title 5 and "[i]n matters similar to those covered under sections 4303 and 7512 . . . which arise under other personnel systems." Section 4303 deals with removals and reductions-in-grade based upon performance, and section 7512 deals with removals, suspensions for more than fourteen days, reductions in grade or pay, and furloughs of thirty days or less based upon employee misconduct. 5 U.S.C. §§ 4303, 7512. The Authority determined that "there is no question that disputes over severance pay are not covered under section 4303 or 7512." (JA at 15.)

[7] A bar to reenlistment "is a non-punitive probationary device intended to serve notice that a soldier is not a candidate for reenlistment, immediate reenlistment or extension and may be discharged if the circumstances that led to the bar are not overcome." (JA at 82 (quoting National Guard Regulation 600-200, section IV, para. 7-19a).)

[8] As in the companion case, AFGE Local 3006 does not challenge the merits aspect of the Authority's decision.

[9] Numerous other circuits have also given effect to Congress' intent to bar judicial review of Authority arbitration review decisions. NTEU v. FLRA, 112 F.3d 402, 405 (9th Cir. 1997); United States Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region v. FLRA, 1 F.3d 1059 (10th Cir. 1993); Philadelphia Metal Trades Council v. FLRA, 963 F.2d 38, 40 (3d Cir. 1992); United States Dep't of Justice v. FLRA, 792 F.2d 25, 27 (2d Cir. 1986) (DOJ); Tonetti v. FLRA, 776 F.2d 929, 931 (11th Cir. 1985); United States Marshals Serv. v. FLRA, 708 F.2d 1417 (9th Cir. 1983) (Marshals Serv.); American Fed'n of Gov't Employees, Local 1923 v. FLRA, 675 F.2d 612, 613 (4th Cir. 1982) (Local 1923).

[10] As the Tenth Circuit has noted, although the text of the Statute refers to section 7118, that reference "has generally been recognized as an inadvertent miscitation." American Fed'n of Gov't Employees, Local 916 v. FLRA, 951 F.2d 276, 277, n. 4 (10th Cir. 1991). Section 7116 of the Statute is the correct reference. Id.

[11] Petitioners acknowledge that "[t]his case does not involve an allegation of an unfair labor practice." (Brief at p.8, n.3.) Thus, this Court's jurisdiction cannot be derived from the ULP proviso of section 7123(a)(1).

[12] Petitioners have not asserted that the Authority deprived them of a constitutional right, thus warranting judicial intervention notwithstanding the jurisdictional bar in section 7123(a)(1). As a result, this exception to the general bar to judicial review will not be addressed herein.

[13] In a subsequent case, the Authority acquiesced in this Court's conclusion that the law at issue in Customs Service was not a law "affecting conditions of employment" under section 7103(a)(9)(C)(ii) of the Statute. U.S. Dep't of the Treasury, U.S. Customs Serv., Pacific Region and National Treasury Employees Union, 50 FLRA 656 (1995), aff'd sub nom. NTEU v. FLRA, 112 F.3d 402 (9th Cir. 1997).

[14] Specifically, the Board had approved a mixed bargaining unit of professional and nonprofessional employees without first affording the professionals an opportunity to elect whether to be separately represented or included in the mixed unit as required by section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1).

[15] The Dart case relied upon by petitioners in their Customs Service argument was decided along the lines of the Leedom exception. 848 F.2d 217, 222. In finding that it had jurisdiction to review the administrative action in

that case, this Court found that, because the action constituted a "'facial'" violation of the statute involved, its review should not be precluded. Id. Among the examples manufactured by the Court to illustrate "facially invalid" administrative actions were the Veterans' Administrator's issuance of oil drilling permits and the Secretary of Labor's rescission of television licenses. Id. at 224. Obviously, no such flagrant violation of the Statute is present in these cases.

[16] Under 5 U.S.C. § 7121(d) and (e), an employee has the option of challenging certain adverse personnel actions covered under 5 U.S.C. §§ 2302(b)(1), 4303, and 7512 either under the negotiated grievance procedure or under applicable statutory appeal procedures.