Nos. 98-70838 & 98-71031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF CIVILIAN TECHNICIANS,
SILVER BARONS CHAPTER, ET AL.,
Petitioners

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

and

STATE OF NEVADA, OFFICE OF THE MILITARY AND
THE NEVADA NATIONAL GUARD,
Intervenor

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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

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MISCELLANEOUS

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STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") in 54 FLRA (No. 62) 595 (July 24, 1998). The Authority exercised jurisdiction over the case pursuant to section 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. II 1996) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to section 7123(a) of the Statute.

I. Jurisdiction Over the Petition for Review in No. 98-71031

[1] Pertinent statutory and regulatory provisions are set forth in Addendum A to this brief.

On July 24, 1998, the Authority issued its decision on reconsideration, published at 54 FLRA (No. 62) 595. This is the final decision and order in this case. Petitioners Silver Barons Chapter and Silver Sage Chapter of the Association of Civilian Technicians ("petitioners" or collectively "the union") filed a petition for review (No. 98-71031) of this final order within the 60-day time limit provided by section 7123(a) of the Statute. Therefore, this Court has jurisdiction over No. 98-71031.

II. Jurisdiction Over the Petition for Review in No. 98-70838

The petition in No. 98-70838 seeks review of an earlier, non-final decision and order of the FLRA, published at 54 FLRA (No. 39) 316 (May 29, 1998). Because the petition in No. 98-70838 does not concern review of a final decision and order, this Court lacks jurisdiction over that petition for review. *See Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407 (9th Cir. 1996) (*Acura*) (dismissing as premature notice of appeal from non-final agency order), *cert. denied*, 117 S. Ct. 945 (1997); *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911 (9th Cir. 1991) (same).

The Authority's decision dated May 29, 1998 is not a final order because the FLRA's General Counsel moved for reconsideration on June 16, 1998. Excerpts of Record ("ER") 3. *See Acura*, 90 F.3d at 1407 ("a motion for reconsideration renders an agency action nonfinal under Section 10(c) of the APA"); *Brotherhood of Ry. Carmen Div., Transp. Communications Int'l Union v. Pena*, 64 F.3d 702, 703 (D.C.

Cir. 1995) (where there is a pending request for reconsideration of an agency order, a petition for review of that order is "incurably premature"). Because No. 98-70838 was prematurely filed, the FLRA requested that the Court dismiss that petition for review and proceed on the basis of No. 98-71031 alone. *See* FLRA's Response to Petitioners' Motion to Consolidate, dated September 1998. On November 17, 1998, the Appellate Commissioner denied the FLRA's request without prejudice. The FLRA renews its request that the Court dismiss the premature petition for review, No. 98-70838.

Petitioners' arguments in support of their premature petition for review are baseless. First, petitioners' reliance on *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995) (Petitioners' Opposition to FLRA's Motion to Dismiss No. 98-70838 ("Pet. Opp.")) is misplaced. As this Court has recognized, *Stone* is limited to judicial review of deportation orders under the Immigration and Nationality Act (INA). *See Acura*, 90 F.3d at 1407 n.1. Indeed, as the Court in *Stone* pointed out, "in amending the INA Congress chose to depart from the ordinary judicial treatment of agency orders under reconsideration." 514 U.S. at 393. This case does not involve a deportation order under the INA. Therefore, the petitioners' suggestion that the *Stone* rule might apply to this case is wrong and misleading. Second, petitioners contend that they should be allowed to avoid the finality rule because they did not file the motion for reconsideration. Pet. Opp. at 1. The policy behind

the rule for treating orders as non-final for purposes of review during the pendency of a motion for reconsideration is based on judicial economy -- that is, there is the possibility that the order complained of will be modified in a way that renders judicial review unnecessary. *Id.* at 392. This policy of judicial economy remains the same regardless of which party filed the motion for reconsideration.

STATEMENT OF THE ISSUE

Whether the Authority properly determined that a contract provision for official time for lobbying by union representatives is not within an agency's duty to bargain because the provision conflicts with a statute that expressly prohibits, without exception, any use of appropriated funds for lobbying.

STATEMENT OF THE CASE

This case arose as an unfair labor practice (ULP) proceeding concerning allegations that the Nevada Air National Guard and Nevada Army National Guard (collectively the "agency" or "National Guard") refused to implement a Federal Service Impasses Panel ("FSIP" or "Panel") order to include in the contract a union proposal for official time for lobbying. ER 6. The National Guard believed that the proposal conflicts with several statutes that restrict the use of federal funds for lobbying and similar activities, specifically 18 U.S.C. § 1913 and both section 8001 and section 8015 of the 1996 Department of Defense (DOD) Appropriations Act. Because an agency's

duty to bargain in good faith does not extend to proposals insofar as they are "inconsistent with any Federal law or any Government-wide rule or regulation," 5 U.S.C. § 7117(a)(1), the National Guard deemed the union's proposal nonnegotiable. ER 9-10.

The union filed a charge with the FLRA's General Counsel, who issued a complaint. The complaint alleged that the agency violated section 7116(a)(1), (5), (6), and (8) of the Statute. ER 8. The Authority concluded, and then reaffirmed on reconsideration, that the agency did not commit the unfair labor practice alleged and, accordingly, dismissed the complaint.

ER 14, 38.

STATEMENT OF THE FACTS

I. Background

A. The Federal Service Labor-Management Relations Statute

The Statute governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representation election matters, and resolving exceptions to arbitration awards. *See* 5 U.S.C. § 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered

to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. § 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93; *U.S. Dep't of Interior, Bur. of Indian Affs. v. FLRA*,
887 F.2d 172, 173 (9th Cir. 1989) (*Dep't of Interior*).

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93. Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97. *See California Nat'l Guard v. FLRA*, 697 F.2d 874, 876 (9th Cir. 1983).

Where the collective bargaining process between an agency and a union fails to resolve an issue, the Statute provides for resolution through the Panel. The Panel can suggest and, if necessary, order terms of settlement between agencies and unions when they cannot agree. 5 U.S.C. § 7119.

The Statute makes it a ULP for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," to refuse to "negotiate in good faith," or to "refuse to cooperate" in Panel decisions. 5 U.S.C. § 7116(a)(1), (5) and (6). The duty to bargain over contract language exists only "to the extent 'not

inconsistent with any federal law or any government-wide rule or regulation.'" *Dep't of Interior*, 887 F.2d at 173. *See also California Nat'l Guard v. FLRA*, 697 F.2d 874, 879 (9th Cir. 1983). Accordingly, an agency need not accept a Panel-ordered contract provision if it is inconsistent with any federal law. *See U.S. Dep't of Energy, Washington, D.C.*, 51 FLRA 124, 126-27 (1995). If an agency and union should agree on a matter not authorized by law, such an agreement is void and unenforceable. *See Department of the Navy, U.S. Marine Corps*, 34 FLRA 635, 638-39 (1990).

The instant case involves ULP allegations under section 7116(a)(1), (5), (6), and (8), and the Authority's interpretation of its own organic statute as it relates to another agency's appropriation act.

B. Official Time

In the federal sector, many unions rely on employees in the agencies in which the unions hold recognition to perform representational functions either in addition to or instead of staff employed by the union. Section 7131 governs the extent to which agency employees representing a union may conduct representational activities on "official time." *NTEU and U.S. Dep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 45 FLRA 339, 365 (1992). A grant of official time allows employees performing union representational

functions to be paid as if they were at work, without being charged for annual leave.

In subsections (a) and (c) of section 7131, not involved in this case, Congress authorized use of official time for, respectively, negotiating collective bargaining agreements, and participating in proceedings before the FLRA. 5 U.S.C. § 7131 (a) and (c). In subsection (b), also not directly involved here, Congress expressly prohibited the use of official time for conducting activities relating to internal union business and stated that such activities shall be performed only when the employee is in a non-duty status. 5 U.S.C. § 7131(b). In subsection (d), which is at the heart of this case, Congress provided that union representatives should be granted official time "in connection with any other matter covered by" the Statute "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d).

Representational lobbying is one such "matter covered by" the Statute. Section 7102(1) provides that employees, acting in their representational capacity, have the right to present the views of their labor organization to Congress. 5 U.S.C. § 7102(1).

Section 7131(d) supplies the authority to negotiate proposals that employees be granted official time for union-related activities. Parties may negotiate under section 7131(d) for a variety of matters,

as long as they are otherwise consistent with the Statute and other applicable laws and regulations. *See, e.g., NFFE Local 2015 & U.S. Dep't of the Interior Nat'l Park Servs.*, 41 FLRA 1158, 1185 (1991) (*NFFE Local 2015*) (finding proposal for official time is outside the duty to bargain because the purpose of the official time conflicted with a regulation).

C. Prior Authority Cases on Official Time and Lobbying

In this case the Authority considered whether the proposal for official time for representational lobbying of Congress is consistent with two other laws, 18 U.S.C. § 1913 and the 1996 DOD Appropriations Act. The Authority has addressed the use of official time for lobbying in four prior cases.[2] In *NTEU Chapter 243* and *VA Atlanta*, the Authority found negotiable proposals for official time for lobbying purposes; in neither case, however, was the argument raised that such a proposal conflicted with an anti-lobbying statute. *NTEU Chapter 243*, 49 FLRA at 207; *VA Atlanta*, 47 FLRA at 1126-27.

In the other two cases, *SSA* and *Corps of Engineers*, the Authority considered whether the official time proposal conflicted with 18 U.S.C. § 1913. In *SSA*, the Authority concluded, without discussion,

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[2] *See U.S. Dep't of the Army Corps of Engineers, Memphis District, Memphis, Tennessee and NFFE, Local 259*, 52 FLRA 920 (1997) (*Corps of Engineers*); *NTEU, Chapter 243 and U.S. Dep't of Commerce, Patent & Trademark Office*, 49 FLRA 176 (1994) (*NTEU Chapter 243*); *NFFE, Local 122 and U.S. Dep't of Veterans Affairs, Regional Office*, *Atlanta, Georgia*, 47 FLRA 1118 (1993) (*VA Atlanta*); and *Department of Health & Human Servs., Social Security Admin. and AFGE, Local 3231*, 11 FLRA 7 (1983) (*SSA*).

that an award granting official time for lobbying does not conflict with 18 U.S.C. § 1913, a criminal law that restricts lobbying with federal funds without congressional authorization. *SSA*, 11 FLRA at 8. In *Corps of Engineers*, the Authority found that an arbitration award granting official time to lobby Congress is not contrary to 18 U.S.C.

§ 1913. Noting that section 1913 contains an exception to its prohibition if Congress has authorized the lobbying, the Authority found that the Statute constitutes "express authorization by Congress" within the meaning of section 1913's exception. *Corps of Engineers*, 52 FLRA at 933. None of these cases considered the question at issue in this case: whether a proposal for official time violates a prohibition against lobbying like the prohibition in the 1996 DOD Appropriations Act.

II. The Authority's Decision[3]

During collective bargaining negotiations, the union submitted, as relevant here, a proposal for official time for lobbying. Having failed to reach agreement with the agency, the union filed a request for assistance with the Panel. The Panel issued an order directing the agency and the union to incorporate the following provision into their collective bargaining agreement:

[3] This unfair labor practice case was before the Authority based on the parties' stipulation of facts under section 2429.1(a) of the Authority's Regulations. 5 C.F.R. 2429.1(a) (1997). The parties agreed that no material issue of fact existed. ER 6.

> [Official time may be granted to] Union officials when representing Federal employees by visiting, phoning, and writing to elected representatives in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by ACT.

ER 7.

The agency refused to implement the official time provision because it is inconsistent with provisions of law, specifically 18 U.S.C. § 1913 and both section 8001 and section 8015 of the 1996 DOD Appropriations Act, which restrict lobbying with appropriated funds.[4]

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[4] 18 U.S.C. § 1913 provides, in pertinent part:

> No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress . . . ; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business.

Section 8001 of the 1996 DOD Appropriations Act provides:

> No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress.

DOD Appropriations Act, 1996, Pub. L. No. 104-61, § 8001, 109 Stat. 636, 651 (1996).

Section 8015 of the 1996 DOD Appropriations Act provides:

ER 8-9. Because the proposal conflicts with these laws, the agency contended, it did not violate the Statute by refusing to implement the Panel-imposed official time provision. *Id*.

The Authority first noted that the official time provision and the parties' arguments here were essentially the same as those in *Office of the Adjutant General, New Hampshire National Guard, Concord, New Hampshire*, 54 FLRA (No. 38) 301 (May 29, 1998) (*New Hampshire National Guard*) (a copy of this decision is at ER 19-33), which was decided the same day. Accordingly, the Authority adopted the reasoning developed in *New Hampshire National Guard* and dismissed the official time portion of the complaint. ER 13-14.

The Authority found the proposal consistent with 18 U.S.C. § 1913 and section 8001 of the 1996 DOD Appropriations Act.[5] However, the Authority also found the proposal inconsistent with section 8015 of the DOD Appropriations Act and, therefore, outside the agency's duty to bargain. ER 14.

> None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.

DOD Appropriations Act, 1996, Pub. L. No. 104-61, § 8015, 109 Stat. 636, 654 (1996).

[5] The Authority considered whether the proposal is contrary to only the DOD Appropriations Act for 1996 because the agency's refusal to bargain occurred in 1996. The Authority noted, however, that the DOD Appropriations Act for both 1997 and 1998 contain restrictions identical to sections 8001 and 8015 of the 1996 Act. ER 24 n.5.

The Authority determined that the proposal does not conflict with section 1913 and section 8001 because both of those sections contain an exception -- they do not prohibit the expenditure of federal funds for purposes authorized by Congress. ER 24. In contrast, as the Authority noted, section 8015 includes no exception to its restriction. The Authority held that the plain wording of section 8015 expressly prohibits the use of appropriated funds to directly or indirectly influence legislation pending before Congress. The Authority determined that because section 8015 does not contain an exception like "except as authorized by Congress" -- language that was central to the Authority's finding that section 1913 and section 8001 do not bar official time for representational lobbying -- section 8015 bars the use of appropriated funds for official time for lobbying. The Authority noted in this regard it would refuse to create an exception that Congress had chosen not to include.[6] ER 28-29.

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[6] The Authority noted that the General Accounting Office (GAO) has interpreted provisions similar to section 8015 as "applying primarily to indirect or grass roots lobbying and not to direct contact with Members of Congress." ER 29 (quoting GAO, *Principles of Federal Appropriations Law* 4-171 (2d ed. 1991)). The Authority found that this interpretation does not address the question presented in this case. First, as the Authority stated, GAO's description of the primary application of these provisions does not define their "exclusive" application. Second, GAO's prior interpretations were all rendered in connection with questions regarding activities by agency -- not union -- officials so that the three branches of the government could communicate with each other. ER 29-30.

The Authority rejected the union's claim that the Statute is more specific than section 8015 of the 1996 DOD Appropriations Act and therefore should prevail over the DOD Act. Comparing section 7131(d) of the Statute, which generally authorizes official time for any "matter covered by" the Statute, with section 8015, an "explicit and targeted prohibition," the Authority could not conclude that section 7131(d) is more specific than section 8015. ER 30. The Authority also found support in the rule of statutory construction providing that where two statutes conflict, the later and more specific statute usually controls over the earlier and more general one. Thus, the Authority concluded that the more recent 1996 DOD Appropriations Act prevails over the Statute. ER 30-31.

Based on the above, the Authority determined[7] that the union's proposal is contrary to section 8015 of the 1996 DOD Appropriations Act and therefore the agency did not violate section 7116(a)(1), (5), (6), or (8) of the Statute when it refused to comply with the Panel's order to include a provision for official time for lobbying in the collective bargaining agreement. Accordingly, the Authority dismissed the complaint. ER 14.

STANDARD OF REVIEW

[7] Member Wasserman dissented, finding no evidence that Congress intended in section 8015 to limit the Statute's authorization of official time.

The standard of review of Authority decisions is “narrow.” *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Department of Veterans Affairs Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority’s construction as long as it is reasonable. *See id.* at 845.

Further, 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." *BATF*, 464 U.S. at 97 (citation omitted). *See also AFGE, Local 2986 v. FLRA*, 775 F.2d 1022, 1025 (9th Cir. 1985). As the instant case demonstrates, among the “complexities of Federal labor relations” that the Authority must address as part of its everyday work is the interrelationship of the Statute and other laws governing the federal employment relationship. When the Authority’s work requires interpretation of other statutes, while it is not entitled to deference, the Authority’s interpretation should be given “respect.” *West Point Elementary Sch. Teachers Ass’n v. FLRA*, 855 F.2d 936, 940 (2d Cir. 1988); *Department of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988). In its interpretation

of other federal statutes, the Authority's reasoning should be followed to the extent the reasoning is "sound." *Department of the Treasury*, 837 F.2d at 1167.

SUMMARY OF ARGUMENT

The Authority properly determined that the union's proposal, that the agency agree to provide union representatives official (paid) time to lobby Congress, is contrary to law and hence not within the agency's duty to comply with a Panel decision ordering implementation of that proposal. Section 8015 of the DOD Appropriations Act expressly prohibits using appropriated funds to influence "in any way" -- "directly or indirectly" -- legislation pending before Congress. The Authority correctly concluded that the union's proposal, seeking official time expressly to lobby Congress, is not negotiable because it violates the DOD Appropriations Act.

The Authority's construction of section 8015 heeds the prohibition in the section's plain language that, without exception, DOD may not use any appropriated funds to support lobbying activities. In addition, the Authority's construction draws an appropriate distinction between section 8015 and another section of the DOD Appropriations Act, section 8001, which prohibits using funds for propaganda, but which also contains an exception for such activities if "authorized by the Congress." Noting that Congress expressly included an exception in section 8001, the Authority's reading of section 8015 gives meaning to Congress's omission of a comparable exception in the latter section.

None of the union's arguments justifies ignoring the plain language of section 8015. First, the union is incorrect when it asserts that official time does not involve the use of federal funds. Official

time is not free -- it entails the expenditure of appropriated funds to pay wages for the performance of the designated functions for which the official time is sought, here, lobbying.

Second, contrary to the union's assertion, there has been no repeal by implication. Under the Statute, an agency's duty to bargain over a proposal is limited by a requirement that the proposal be consistent with other laws. Thus, finding a proposal non-negotiable because it is inconsistent with another law does not repeal any part of the Statute but only applies the Statute's own limitation on the bargaining obligation. In any event, while repeals by implication may be disfavored, they are permissible in appropriate circumstances.

Finally, although the union disagrees, section 8015 prevails over section 7131(d) of the Statute, on the particular issue of official time for lobbying because section 8015 is the more specific statute on that issue. Section 8015 expressly prohibits any use of appropriated funds by DOD to support lobbying activities. The union's contentions would require the Court to rewrite a statute that Congress has enacted and eliminate a restriction on the use of appropriated funds that Congress specifically and plainly intended. For these reasons, the union's petition for review should be denied.

ARGUMENT

THE AUTHORITY PROPERLY DETERMINED THAT A PROPOSAL FOR OFFICIAL TIME FOR LOBBYING BY UNION REPRESENTATIVES IS NOT WITHIN AN AGENCY'S DUTY TO BARGAIN BECAUSE THE PROPOSAL CONFLICTS WITH A STATUTE THAT EXPRESSLY PROHIBITS, WITHOUT EXCEPTION, ANY USE OF APPROPRIATED FUNDS FOR LOBBYING.

A party has no duty to bargain over proposals that are inconsistent with a law, rule or regulation. *See, e.g., New Hampshire National Guard*, ER 19; *NFFE Local 2015*, 41 FLRA at 1185; 5 U.S.C. § 7117(a)(1). The question in this case is whether a proposal for official time for

representational lobbying violates a statute that prohibits, specifically and without exception, all lobbying involving in any way the expenditure of appropriated funds.

The Authority correctly determined that this proposal is not within the agency's duty to bargain because it is contrary to Congress's express prohibition in section 8015 of the 1996 DOD Appropriations Act. First, the plain language of section 8015 flatly prohibits what the union asks for in its proposal. Second, rules of statutory construction support this holding. Finally, the union's arguments to avoid the express language of the 1996 DOD Appropriations Act lack merit.

A. The Plain Meaning of Section 8015 Prohibits the Use of DOD Appropriations for the Lobbying Purposes Sought by the Union.

The plain wording of section 8015 of the 1996 DOD Appropriations Act expressly prohibits the use of appropriated funds "in any way," "directly or indirectly," for lobbying activities. It is difficult to imagine how Congress could have drawn the restriction more clearly.

The union's official time proposal would require the agency to violate the clear restriction plainly set forth in section 8015 by using appropriated funds to pay for official time for union representatives to lobby Congress. Indeed, lobbying is the sole and express purpose for which the union seeks the official time. However, it is precisely this use of appropriated funds that section 8015 prohibits. Accordingly, the proposal, requiring the agency to use appropriated funds specifically to fund the union's lobbying activities, is inconsistent with law, and not within the agency's bargaining obligation under the Statute. *See New Hampshire National*

Guard, ER 19; *NFFE Local 2015*, 41 FLRA at 1185; 5 U.S.C. § 7117(a)(1). *See also California Nat'l Guard v. FLRA*, 697 F.2d 874, 879 (9th Cir. 1983) (rejecting bargaining proposal that conflicts with a federal statute because section 7117(a)(1) was "designed specifically for situations where, as here, the sweeping legislative scheme [of the Statute] may come in conflict with other federal statutes").

B. Rules of Statutory Construction Support the Authority's Decision.

Principles of statutory construction support the Authority's determination that section 8015 prohibits the use of appropriated funds to support lobbying activities. First, the primary canon of statutory construction is that where the language of a statute is clear in its application, the reviewing authority must apply its plain meaning as written. *See, e.g., Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted); *U.S. v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996) ("[I]f the statutory language is clear, we need look no further than that language itself in determining the meaning of the statute."), *cert. denied*, 117 S. Ct. 944 (1997); *Pritzker v. Yari*, 42 F.3d 53, 67 (1st Cir. 1994) ("As a fundamental principle of statutory construction, we will not depart from, or otherwise embellish, the language of a statute absent either undeniable textual ambiguity, or some other extraordinary consideration.") (citations omitted). The language of section 8015

is clear and, therefore, the Authority acted correctly when it relied on the plain wording of that section.

Second, the Authority's decision is also consistent with the maxim that a statute must be interpreted to give effect to each of its provisions. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Deteresa v. American Broadcasting Cos., Inc.*, 121 F.3d 460, 464-65 (9th Cir. 1997). As noted in the Authority's decision in *New Hampshire National Guard* (ER 27-28), section 8001 of the 1996 DOD Appropriations Act contains an exception to that section's restriction on "publicity and propaganda"; *i.e.*, that the restriction does not apply if such activity has been "authorized by the Congress." In contrast, section 8015 contains no such exception.[8] Thus, Congress specifically included the exception in section 8001 of the 1996 DOD Appropriations Act and specifically omitted the language in section 8015 of the very same Act. By refusing to graft section 8001's exception onto section 8015, the Authority gave meaning to Congress's action. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) ("[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.") (citation omitted).

Ignoring this critical difference between the sections, the union attempts to read section 8001's exception into section 8015 by arguing (Br. at 14-15) that section 8015, too, does not restrict

[8] The union ignores this critical difference when it claims (Brief for Petitioner ("Br.") at 9 n.7, 15) that section 8015 and 18 U.S.C. § 1913 (which contains essentially the same exception as section 8001) are "nearly identical."

activities that are permitted by other congressional acts. To adopt the union's interpretation of section 8015 would render superfluous the "authorized by the Congress" language in section 8001. By refusing to disregard Congress's actions, the Authority followed the plain meaning of section 8015 and gave effect to the DOD Appropriations Act as a whole. The Authority's adherence to these established principles of statutory interpretation is a further indication of the correctness of the Authority's decision.

C. The Union's Arguments as to Why the Appropriations Act May Be Ignored in this Case Lack Legal and Logical Support.

The union makes several arguments in its efforts to side-step the express language of Congress: the use of official time does not involve an expenditure of federal funds and therefore the Appropriations Act does not apply; the Authority failed to reconcile the statutes and repeal by implication is disfavored; and even if the Appropriations Act applied, the Statute is more specific and therefore should prevail over the Appropriations Act.[9] As explained below, each of these arguments lacks merit.[10]

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[9] The union also suggests that there is something suspect about the fact that in the DOD Appropriations Act, Congress restricted the use of appropriated funds "solely with respect to DOD employees." Br. at 12. This restriction, however, merely reflects the nature of an appropriations act, which generally is agency-specific. *Cf. California Nat'l Guard v. FLRA*, 697 F.2d 874, 879 (9th Cir. 1983)(finding that National Guard technicians could not bargain over certain grievance procedures, even though all other federal employees could bargain over such a proposal). In addition, the union did not raise this argument in its brief before the Authority and, therefore, is precluded from doing so on review. 5 U.S.C. § 7123(c).

[10] *Amicus curiae* National Federation of Federal Employees ("NFFE") raises two points in its brief, neither of which has any merit. First, NFFE points to the fact that GAO has interpreted provisions similar to section 8015 and found that they do not prohibit the direct

communication between agency officials and Congress. Brief of *Amicus Curiae* ("NFFE Br.") at 15-16. As the Authority pointed out in *New Hampshire National Guard* (ER 29), GAO's prior interpretations were all rendered in connection with questions regarding activities by agency -- not union -- officials. GAO's interpretations were necessary to ensure that the three branches of the government could communicate with each other and, thus, do not apply to the case at issue. Petitioners do not challenge the Authority's finding in this regard in their brief on appeal.

Second, NFFE cites some legislative history regarding a proposed amendment to the DOD Appropriations Act that would limit the political activity of defense contractors. NFFE Br. at 17-18. As this history does not relate to section 8015 it is irrelevant. In addition, this argument was not raised before the Authority and, therefore, should not be considered by this Court. 5 U.S.C. § 7123(c).

1. The use of official time involves an expenditure of federal funds.

The union argues -- but cites no authority for the proposition -- that the use of official time does not involve the expenditure of appropriated funds. Br. at 13. The union is simply wrong: the allotment of official time results in the use of federal funds to pay for wages. *See Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 871-72 (9th Cir. 1995) ("The use of any government resources -- whether salaries, employees, paper, or buildings -- to accomplish [an activity prohibited by an appropriations act] would entail government expenditure. The government cannot make expenditures, and therefore cannot act, other than by appropriation.")

The union's comparison of official time to annual leave (Br. at 13) is inappropriate. "Official time" granted an employee by an agency to perform representational functions -- unlike annual leave -- "shall be considered hours of work." 5 C.F.R. § 551.424(b) (Add. A-10). Individuals in an approved leave status like annual leave are not considered employees, but individuals on official time are. *See David v. U.S.*, 820 F.2d 1038, 1043 (9th Cir. 1987) ("Since David was on official time while acting as a union stewardess, she is considered an employee for [Civil Service Reform Act of 1978] purposes.") Further, annual leave is a form of compensation that an employee earns by reason of the fact that one is a federal employee. Indeed, an employee can, upon separation from employment, receive a lump-sum payment for accrued annual leave. *See* 5 U.S.C. § 5551 (1994 & Supp. II 1996).

The union's proposed analogy between official time and annual leave fails for an additional reason. Contrary to the union's

suggestion (Br. at 13), an employee on official time is not a free agent -- controls exist as to what the employee can do. Official time can only be agreed to by the agency and granted for purposes that are consistent with the Statute. *See*

5 U.S.C. § 7131(d). Moreover, as discussed above, the agency and the union cannot agree on a proposal for official time for a purpose that conflicts with a law or regulation.

On the other hand, the purpose for which an individual uses his or her annual leave does not have to be agreed upon. Clearly, there are activities that one may do on annual leave -- such as conduct internal union business or attend a baseball game -- that one may not do on official time. *See* 5 U.S.C. § 7131(b) (no official time may be allowed for internal union business, which must be performed during "nonduty status").[11]

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[11] The union apparently ignores the fact that, as the Authority stated in *New Hampshire National Guard* (ER 27 n.12), the dispositive issue is not whether employees are "on duty" during the lobbying activities for which the union seeks the official time. An agency, like DOD here, that is specifically prohibited from using appropriated funds "in any way" to support lobbying activities, simply may not -- legally -- agree to use its funds for that express purpose, regardless of when that lobbying would take place. In contrast, an agency grants annual leave without consideration to the purpose for which it will be used.

The union's claim in this regard, that employees on official time and those on annual leave are similar because both are on what the union calls "non-duty time," (Br. at 1, 13-14), proposes a similarity without significance. As the Supreme Court recognized in *BATF*, a case on which the union relies (Br. at 14), federal statutes that apply to employees in a duty status may be construed to apply to employees on official time. *BATF*, 464 U.S. at 106 n.16. The union cannot make the same claim regarding employees on annual leave.

Because the union's claim that official time and annual leave are comparable uses of appropriated funds fails, its dependent claim, that the Authority's decision raises constitutional problems, should also be rejected. This case is not about restrictions on First Amendment freedoms -- rather, it concerns who will pay for the exercise of those freedoms. The Authority's decision does not bar union representatives from lobbying Congress. It does, however, recognize that the agency may not subsidize that lobbying when its appropriations act prohibits the use of funds for lobbying. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) (rejecting argument that congressional decision not to subsidize lobbying violates the First Amendment because "Congress is not required by the First Amendment to subsidize lobbying"). The fact that the agency may not agree under section 7131(d) to provide official time for lobbying -- because it violates the DOD Appropriations Act -- does not mean that an individual may not choose to lobby while on annual leave. *See* Exhibit 14 to Stipulation of Facts in this case; ER 118 (Draft National Guard guidance to state guards recognizing that the prohibition against lobbying on official time "does not prohibit a technician or AGR member from lobbying while in leave status, e.g., annual leave, compensatory leave, leave without pay.") *Cf.* 5 C.F.R. § 734.306, Examples 11 and 12 (1998) (union official on official time may not attend political event; individual on annual leave may attend political event).

2. There has been no repeal by implication and reconciliation is unnecessary.

The union seeks to avoid the DOD Appropriations Act's prohibition on the use of federal funds for lobbying by arguing that

"[r]epeal by implication is disfavored" (Br. at 11) and that the Authority "overlooked its obligation to reconcile the statutes" (Br. at 12). As discussed below, there has not been any repeal by implication in this case. The Authority's construction of section 7131(d)'s authorization of official time only to the extent not inconsistent with federal law does not repeal or eviscerate the Statute's official time provisions. Furthermore, even if section 8015 is viewed as suspending the Statute's official time provisions with regard to lobbying, such a result is not prohibited where, as here, Congress has clearly expressed its intentions.

The Authority's application of section 8015's prohibition against the use of appropriated funds for lobbying activities in this case did not "repeal" any of the Statute's provisions. Under the Statute, an agency has a duty to bargain over a proposal, including a proposal for official time under section 7131(d), only if the proposal is "consistent with law, rule, and regulation." *New Hampshire National Guard*, ER 19; *see also NFFE Local 2015*, 41 FLRA at 1185; 5 U.S.C. § 7117(a)(1). Thus, the Statute itself envisions that other laws will place limitations on the duty to bargain. In ruling that the union's lobbying proposal is not within the agency's duty to bargain because it is inconsistent with section 8015's prohibition on the use of agency funds for such activities, the Authority thus merely applied the Statute's own limitation on the bargaining obligation.[12]

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[12] The union's suggestion (Br. at 11-12) that the Statute grants federal employees the absolute right to use official time for lobbying is also inaccurate. As the Authority explained, section 7131(d) of the Statute authorizes agencies to agree to union proposals for official time for a variety of purposes, in an amount that the agency agrees is "reasonable, necessary, and in the public

interest," as long as the union proposal is consistent with law, rule, and regulation. *E.g. New Hampshire National Guard*, ER 19. This authorization of labor-management agreements on the use of official time under section 7131(d) is thus a qualified authorization, which under the Statute's own provisions is subordinate to legal restrictions outside the Statute.

In fact, in section 8015 Congress merely decided not to fund an activity within DOD that section 7131(d) authorizes for the government in general. In such cases, as the Justice Department has explained, the principle of reconciling statutes "carries little force in the appropriations context" because "there is no presumption that Congress has made funds available for every authorized purpose in any given fiscal year." 5 U.S. Op. Off. Legal Counsel 180, 184 (1981) (determining that, under lobbying restriction contained in appropriations act, grantees may not use appropriated funds to engage in lobbying activities, even if grantees are authorized by the organic legislation to use federal money for lobbying purposes). This Court has held that an appropriations act that precluded expenditure of funds on activities mandated by another statute did not "repeal" that statute. *Environmental Defense Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir. 1995) ("The appropriations rider does not remove this statutory duty; instead, it only temporarily removes the funds available for carrying out the duty.")

The Authority has taken the position that there has been no repeal by implication; however, even if section 8015 is viewed, arguendo, as repealing or suspending in part section 7131(d), the resulting suspension is legitimate. Although repeals by implication are disfavored, there is no requirement that a court reconcile two statutes at all costs. *See Preterm, Inc. v. Dukakis*, 591 F.2d 121, 133 (1st Cir. 1979) ("[T]he principle that two statutes should if possible be found capable of co-existence does not suggest that we should approach the statute with blinders and reconcile them at all costs, even when the second enactment is an appropriations measure.")

Moreover, the Supreme Court has upheld modifications to existing laws found in appropriations acts. *See, e.g., Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). In *Robertson*, the Supreme Court noted that although repeals by implication are disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly. *Id.* at 440. *See also United States v. Will*, 449 U.S. 200, 222 (1980) ("[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill.'") (omission in original) (quoting *United States v. Dickerson*, 310 U.S. 554, 555 (1940)). Here, Congress clearly and unequivocally stated that no funds appropriated to the Department of Defense for 1996 could be used in any way to influence pending legislation. Therefore, any right pursuant to section 7131(d) to expend such funds for this purpose has been suspended by the DOD Appropriations Act.

Finally, as argued below, the DOD Appropriations Act is the more specific statute on the subject of use of appropriated funds for lobbying, and therefore prevails over section 7131(d) of the Statute. Thus, the union's contention that the Authority's decision is flawed for failing to reconcile the two statutes should be rejected.

3. Section 8015 prevails over section 7131(d) on the issue of use of appropriated funds for official time for lobbying activities.

The union's claim (Br. at 14-15) that the Statute should prevail over the 1996 DOD Appropriations Act restrictions on the use of appropriated funds for lobbying is without merit. The Authority ruled that it was "unable to conclude that [section 7131(d)] is more specific than the explicit and targeted prohibition in section 8015." ER 30. The Authority's determination is correct and should be upheld.

The language of section 8015 specifically addresses the core issue in the case –- the propriety of the Department of Defense's using appropriated funds for lobbying purposes. In contrast, section 7131(d) contains only a general authorization for all agencies and unions to agree on grants of official time for any "matter covered by" the Statute. The DOD Appropriations Act is clearly the more specific statute in this context.[13]

[13] The Authority's suggestion noted in an earlier decision *(Corps of Engineers*, 52 FLRA 920, 933-34 n.15) that section 7131(d) is more specific than the general prohibition against lobbying in section 1913 is irrelevant to the relationship between section 7131(d) and section 8015. First, the union in this case is unable to establish that the language of section 7131(d) is more specific than the explicit and targeted prohibition of section 8015. Second, section 1913 is not targeted to one agency as section 8015 is. Section 1913 is a criminal statute that applies government-wide. In contrast, section 8015 is a civil act that only applies to the Department of Defense and prohibits -- specifically -- that agency's use of appropriated funds to support actions to influence Congress on pending legislation.

Moreover, consistent with canons of statutory construction, when two statutes are irreconcilable, the later-enacted statute is generally preferred. *See, e.g.*, *U.S. v. Carper*, 24 F.3d 1157, 1159 (9th Cir. 1994). Section 8015 was enacted in 1996. Section 7131(d) was enacted in 1978 as part of the original Civil Service Reform Act. Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1214. Therefore, the “explicit and targeted prohibition in section 8015" should prevail over the earlier, more general provisions of section 7131(d).

CONCLUSION

The union's petition for review in No. 98-70838 should be dismissed for lack of subject matter jurisdiction, and the union's petition for review in No. 98-71031 should be denied.

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

December 1998

CERTIFICATION PURSUANT TO FRAP RULE 32
AND CIRCUIT RULE 32(e)(4),
FORM OF BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 and Ninth Circuit Rule 32(e)(4), I certify that the attached brief is monospaced, has 10.5 or less characters per inch, and contains 7,579 words.

December 7, 1998

_____
Judith A. Hagley

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF CIVILIAN TECHNICIANS, SILVER BARONS CHAPTER, *ET AL.*, Petitioners	)
v.	)Nos. 98-70838 & 98-71031
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)
and	)
STATE OF NEVADA, OFFICE OF THE MILITARY AND THE NEVADA NATIONAL GUARD, Intervenor	)

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:

Daniel M. Schember
Gaffney & Schember, P.C.
1666 Connecticut Ave., N.W.
Suite 225
Washington, D.C. 20009

Lt. David Pennington
Nevada National Guard
2525 S. Carson St.
Carson City, Nevada 89701

Gina A. Taylor, Esq.
National Federation of
Federal Employees
1016 16th Street, N.W.
Washington, D.C. 20036

_____
Thelma Brown
Paralegal Specialist

December 7, 1998

STATUTORY AND REGULATORY ADDENDUM

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§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

* * * * * * * * * *

§ 7105. 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—

* * * * * * * * * *

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

* * * * * * * * * *

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

* * * * * * * * * *

§ 7116. 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;

****

(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;

* * * * * * * * * *

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

****

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * * * * * * * * *

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what matter it shall provide services and assistance.

(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasses, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 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.

* * * * * * * * * *

(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.

* * * * * * * * * *

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.