CASE SCHEDULED FOR ORAL ARGUMENT ON FEBRUARY 7, 2002

No. 01-5170

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

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,
Appellant

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Appellee

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the proceeding before the district court were the Association of Civilian Technicians, Inc. (plaintiff) and the Federal Labor Relations Authority (defendant). The Association of Civilian Technicians, Inc., is the appellant in this court proceeding; the Authority is the appellee.

B. Ruling Under Review

The ruling under review in this case is the district court's March 31, 2001, Memorandum Opinion and Order dismissing the union's complaint seeking review of an Authority's decision declining to order consolidation of bargaining units. *U.S. Dep't of Defense, Nat'l Guard*, 55 FLRA 657 (1999).

C. Related Cases

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

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GLOSSARY

APA	Administrative Procedures Act
App.	Appendix
Authority	Federal Labor Relations Authority
BATF	*Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89 (1983)
Br.	Brief
Crowley	*Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994)
Customs Service	*United States Dep't of the Treasury, United States Customs Serv. v. FLRA*,43 F.3d 682 (D.C. Cir. 1994)
Fanning	*Physicians National House Staff Association v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980)
Hartz	*Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308 (D.C. Cir. 1984)
Leedom	*Leedom v. Kyne*, 358 U.S. 184 (1958)
McNary	*McNary v. Haitian Refugee Ctr.*, 498 U.S. 479 (1991)
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board

GLOSSARY
(Continued)

Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Union	Association of Civilian Technicians
United Food and Commercial Workers	*NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112 (1987)

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STATEMENT OF JURISDICTION

The judgment of the district court under review in this case was issued on March 31, 2001. A copy of the district court's unpublished memorandum opinion and order is at Appendix (App.) 53. The district court concluded that it was without subject matter jurisdiction over the complaint and dismissed the action. The appellant filed its notice of appeal of the district court's judgment on May 23, 2001,

within the 60 day period for filing such an appeal under Fed. R. App. P. 4(a)(1). This Court has jurisdiction to review the district court's decision and order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that it was without subject matter jurisdiction over a complaint seeking review of a Federal Labor Relations Authority decision in a union representation case, when that type of decision is expressly barred from direct judicial review by statute, and no exception to the bar is applicable.

STATEMENT OF THE CASE

This case arose from a petition filed with the Appellee Federal Labor Relations Authority (Authority) by the Appellant Association of Civilian Technicians (union) under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] The union's petition sought to consolidate into a single unit various bargaining units of National Guard civilian technicians in forty-two individual states and territories. These individual units at that time were represented by the union as exclusive bargaining agent. The

[1] Relevant statutory and regulatory provisions are set out in the addendum to this brief.

Authority denied the petition on the ground that the proposed consolidated unit was not appropriate under the statutory criteria for making such determinations. The union then filed the instant law suit in the district court, alleging that the Authority had committed various legal errors in its decision warranting review. The Authority moved to dismiss the complaint for lack of subject matter jurisdiction, and the district court granted the Authority's motion. This appeal followed.

STATEMENT OF THE FACTS

A. Factual Background

This case originated with the union's petition under § 7112(d) of the Statute, 5 U.S.C. § 7112(d), to consolidate into a single unit various bargaining units of National Guard civilian technicians in forty-two individual states and territories.[2] At the time the petition was filed, these individual units were represented by the union as exclusive bargaining agent.[3] (App. at 35.)

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[2] Section 7112(d) provides as follows:

> (d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

[3] National Guard dual status technicians are full-time civilian employees of the federal government, but they are employed and administered by the Adjutant

General of the State Guard for whom they work under the National Guard Technicians Act of 1968, 32 U.S.C. § 709. Technicians are required, as a condition of their civilian employment, to maintain military membership of appropriate rank in the State Guard in which they are employed. *United States Dep't of Defense, Nat'l Guard Bureau* v. *FLRA*, 982 F.2d 577, 578 (D.C. Cir. 1993). Thus, they are "hybrid" employees, i.e., federal civilian employees who work in a military environment under the immediate control of state officers. *State of Neb., Military Dep't, Office of the Adjutant Gen.* v. *FLRA*, 705 F.2d 945, 951 (8th Cir. 1983).

An Authority Regional Director considered the union's consolidation petition and concluded that the proposed consolidated unit would not be appropriate for exclusive recognition under the Statute. He therefore dismissed the petition. (App. at 49.)

The Regional Director based his conclusion on the criteria specified in § 7112(a) of the Statute for making such appropriate unit determinations, 5 U.S.C. § 7112(a), and on established Authority precedent applying that statutory provision. Specifically, the Regional Director considered whether under § 7112(a) the proposed consolidated unit would ensure a "clear and identifiable community of interest among the employees in the unit," and whether it would "promote effective dealings with, and efficiency of the operations of, the agency involved." (App. at 46.) After weighing all the record evidence, both in favor of and against consolidation, the Regional Director held that the proposed consolidated unit would not satisfy these appropriate unit criteria. (App. at 47.)

The Regional Director found that certain evidence in the case, such as the interchange of technicians among the various state National Guards, supported a finding that a consolidated unit would be appropriate. (App. at 47.) However, the Regional Director found that other record evidence did not support an appropriate unit finding. In this connection, he determined, among other things, that each of the

state Guards "has an individual mission unique to its state or territory and each performs slightly different functions based on that mission." (*Id.*)

The Regional Director also ruled that under the Technicians Act, 32 U.S.C. § 709(c), each individual state Adjutant General has "overall authority over all personnel and labor relations matters arising in their respective State Activities." (App. at 41.) As a result, because the decision making authority for setting working conditions was at the state level, the Regional Director held there would not be sufficient commonality of working conditions to ensure a community of interest among technicians nationwide. (App. at 48.) This was an additional factor contributing to the Regional Director's finding that a consolidated unit is inappropriate.

B. The Authority's Decision

On appeal the Authority affirmed the Regional Director's dismissal of ACT's consolidation petition, finding that the Regional Director "properly construed the provisions of the Technicians Act and properly applied the appropriate unit test." (App at 29.) More specifically, the Authority first held that the Regional Director correctly found that the State Adjutants General are the locus of labor relations and personnel functions for technicians. (App. at 31.)

Next, the Authority concluded that the Regional Director properly applied established law in determining that the proposed consolidated unit is not appropriate. (App. at 31.) In this connection, the Authority stated that the proposed consolidated unit met neither the "community of interest" nor the "effective dealings and the efficiency of [agency] operations" criteria for establishing a consolidated unit under § 7112 of the Statute. (App. at 31-33.)

The Authority also rejected the union's contention that the Authority should find the proposed consolidated unit appropriate because if the Authority did so find, the union would be able to enjoy expanded representational rights under § 7117(a)(3) of the Statute. (App. at 32.) That section provides that if a union represents a majority of employees who are subject to an agency regulation for which a compelling need exists, the union can bargain on the subject matter of the regulation. Thus, if the consolidation petition was granted by the Authority, the union would be able to bargain with the National Guard Bureau on the substance of all regulations issued by the Bureau governing dual status National Guard technicians nationwide.[4] The Authority held that such expanded bargaining rights

[4] As the Regional Director found (App. at 41), the National Guard Bureau is responsible for "liaison and coordination" between the United States Department of Defense and the various state National Guards. It issues regulations governing, among other things, working conditions for dual status technicians.

come about only after a unit is found appropriate under the criteria set out in § 7112(a). The expanded rights are not themselves a basis for finding a unit appropriate in the first place. (*Id.*) Accordingly, the Authority denied the union's Application for Review of the Regional Director's decision. (App. at 33.)

C. The District Court's Decision

The union filed suit in the district court seeking judicial review of the Authority's decision. The district court, on the Authority's motion, dismissed the complaint for lack of jurisdiction. (App. at 66.)

First, the court held that the statutory ban on judicial review of Authority representation case decisions in § 7123(a)(2) of the Statute applies both to suits brought by a petition for review directly in a court of appeals under § 7123(a), and to suits like this one, brought by complaint in a district court under general jurisdictional statutes. (App. at 56 - 59.)

Second, the court held that the exception to the bar on judicial review in § 7123(a)(2), based on *Leedom* v. *Kyne*, 358 U.S. 184 (1958) (*Leedom*), does not apply in this case. (App. at 61.) The district court ruled that there was not the kind of open violation of a clear mandate of a statute on which *Leedom* jurisdiction must be based. (App. at 59-60.) Specifically, the union claimed that the Authority violated § 7112(a) of the Statute, which states in relevant part that the Authority

shall make appropriate unit determinations in each case consistent with ensuring employees the "fullest freedom in exercising their rights" guaranteed under the Statute. (App. at 60.) The district court concluded that, regardless of whether the Authority correctly interpreted § 7112(a), it is not the kind of provision that can form the basis for *Leedom* jurisdiction. (App. at 61.)

Finally, the district court rejected the union's argument that the court had jurisdiction to review certain "legal interpretations" in the Authority's otherwise unreviewable final decision, pursuant to this Court's decision in, among other cases, *Crowley Caribbean Transport, Inc.* v. *Peña*, 37 F.3d 671 (D.C. Cir. 1994) (*Crowley*); and *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991) (*McNary*). The district

court held that the Authority's decision "evaluated a specific set of facts . . . ; nowhere in the decision is there a conclusion by the Authority that the Technicians Act, 32 U.S.C. § 709, 'prohibits' the existence of a consolidated technician bargaining unit as a matter of law under all circumstances." (App. at 62-65.) Thus, the court held that the Authority's decision was "simply the kind of analysis and explanation used in the ordinary course of adjudicating a particular case, not the kind of 'general policy' pronouncement that would subject the decision (or any portion thereof) to judicial review under the narrow exceptions established in *Crowley* and *McNary*." (App. at 65.)

Based on the foregoing, the district court dismissed the union's complaint for lack of subject matter jurisdiction. This appeal then followed.

STANDARD OF REVIEW

The standard for this Court's review of the district court's dismissal of the complaint for lack of jurisdiction is *de novo*. *Nat'l Taxpayers Union* v. *United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995); *Herbert* v. *Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992). However, to the extent that the Court finds it necessary to construe and apply provisions of the Statute, the Court must defer to the Authority's

interpretation of those provisions. *E.g.*, *Bureau of Alcohol, Tobacco, and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983) (*BATF*).

SUMMARY OF ARGUMENT

1. The district court correctly held that the prohibition on judicial review of Authority representation case decisions in § 7123(a)(2) of the Statute extends to a suit brought in a district court under the Administrative Procedures Act (APA). Contrary to the union's claim, § 7123(a)(2) is not limited to barring just a petition for review of a representation case decision filed directly in a circuit court of appeals. This conclusion is supported by § 701(a)(1) of the APA, which bans suits under the APA if, as here, "statutes preclude judicial review." The lower court's holding is also supported by the Supreme Court's decision in *NLRB* v. *United Food and Commercial Workers Union*, 484 U.S. 112, 133 (1987) (it would be "absurd" to allow an APA suit when Congress has barred judicial review under a specific review scheme like the Statute). The cases cited by the union are inapplicable to this case because they do not involve a prohibition on judicial review like § 7123(a)(2) of the Statute.

2. The district court also correctly rejected the union's claim that the Authority made supposedly reviewable holdings that can be "carved out" of the Authority's otherwise unreviewable decision. The Supreme Court has squarely

rejected this approach to judicial review in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987).

Moreover, the cases relied on by the union do not have even threshold relevance to this case. *Crowley Caribbean Transport, Inc.* v. *Peña*, 37 F.3d 671 (D.C. Cir. 1994) (*Crowley*), concerned judicial nonreviewability under § 701(a)(2) of the APA, based on an agency's discretionary decision not to take enforcement action. It did not implicate § 701(a)(1) of the APA, concerning nonreviewability based on an express statutory bar to judicial review, as is involved in the instant case. *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (*McNary*), concerned a law suit that challenged on constitutional grounds an agency's across-the-board procedures applied to an entire class of cases. The suit did not challenge an individual agency action in a particular case, which challenge would have been barred by a statutory prohibition on judicial review of individual agency actions. Thus, both *Crowley* and *McNary* are readily distinguished from the instant case.

Even assuming that those two cases have some threshold relevance to this case, they are nonetheless distinguishable. The Authority did not make the kind of general policy decision that the courts in *Crowley* and *McNary* suggested might be subject to judicial review. Instead, the Authority here made an individualized adjudication,

based on the specific facts of this case and how established law applies to those facts. There is no basis to conclude that the Authority might not reach a different result, given a different factual record. This is not the kind of agency action that, under *Crowley* and *McNary*, can be subject to judicial review in the face an express prohibition on such review as set out in § 7123(a)(2) of the Statute.

3. The court below also correctly held that the Authority did not disclaim jurisdiction, abdicate enforcement responsibility, or violate a "clear mandate" of the Statute. The Authority asserted jurisdiction over the union's consolidation petition, and simply reached a decision on the merits of the matter that the union does not like. Further, the Authority did not improperly fail to assert enforcement responsibility. Authority representation cases are not enforcement actions, but rather are nonadversarial fact gathering proceedings. 5 C.F.R. § 2422.18(a) (2001). Finally, the Authority did not violate a clear mandate of the Statute, such that jurisdiction under *Leedom* v. *Kyne*, 358 U.S. 184 (1958), is properly invoked.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER A COMPLAINT SEEKING REVIEW OF AN AUTHORITY DECISION IN A UNION REPRESENTATION CASE, WHEN THAT TYPE OF DECISION IS EXPRESSLY BARRED FROM DIRECT JUDICIAL REVIEW BY STATUTE, AND NO EXCEPTION TO THE BAR IS APPLICABLE

The district court correctly held: 1) the prohibition on judicial review of Authority representation case decisions in § 7123(a) of the Statute cannot be circumvented by a law suit brought in district court under the Administrative Procedures Act (APA), 5 U.S.C. §§ 701, *et seq.*; 2) there is no judicially reviewable "legal interpretation" in the Authority's otherwise unreviewable decision; and 3) the *Leedom* v. *Kyne* exception to the bar on judicial review in § 7123(a) is not applicable here, nor has the Authority improperly declined to assert jurisdiction or enforcement power over this matter. The union's contrary arguments are without merit and should be rejected.

A. The Express Statutory Ban On Judicial Review of Authority Representation Case Decisions Cannot Be Avoided By A District Court Suit Under the APA

1. It is axiomatic that federal court jurisdiction is conferred by Congress and that Congress may limit or foreclose review as it sees fit. *Am. 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). The district court correctly recognized (App. at 56-59) that Congress in the Statute prescribed a specific statutory scheme for judicial review of Authority orders. The only provision for judicial review jurisdiction is set forth at § 7123 of the Statute. 5 U.S.C. § 7123.

Pursuant to § 7123(a), a party who is aggrieved by a final Authority order may petition a United States Court of Appeals for judicial review. However, Congress limited the opportunity for judicial review in two areas, one of which is relevant here:

> Any person aggrieved by any final order of the Authority *other than* an order under--
> . . .
> (2) *section 7112 of this title (involving an appropriate unit determination)*,
> may . . . institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a)(2) (emphasis added). Thus, the plain language of § 7123(a)(2) bars judicial review of Authority decisions involving appropriate unit determinations, such as is involved in the instant case.[5]

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[5] However, an underlying unit determination by the Authority can be reviewed by a court of appeals if the Authority subsequently renders an unfair labor practice holding based on a refusal to bargain. *Cf. Physicians Nat'l House Staff Ass'n* v. *Fanning*, 642 F.2d 492, 495 (D.C. Cir. 1980) (*en banc*) (*Fanning*), *cert. denied*,

450 U.S. 917 (1981). Contrary to the union's claim (Br. at 21-22), the adequacy of this indirect review scheme is irrelevant to determining whether Congress intended to bar all direct review of Authority representation case decisions in § 7123(a)(2) of the Statute. The district court noted the availability of this indirect review scheme (App. at 59 n.5, 66 n.11), but did not find it determinative of the district court's holding on the application of § 7123(a)(2).

As the district court also recognized (App. at 57-58), the legislative history of § 7123(a)(2) provides further support for this conclusion. A House-Senate Conference Committee, on the bill that eventually became the Statute, said that "[a]s in the private sector, there will be no judicial review of the Authority's determination of the appropriateness of bargaining units" under § 7123(a)(2). H.R. Rep. No. 95-1717, at 153 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 2860, 2887. This provides further proof, if any was necessary, of Congress' intent to bar judicial review of the kind of Authority decision at issue in this case.

2. The district court correctly rejected the union's argument that § 7123(a)(2) only bars petitions for review of Authority orders filed directly in the circuit courts under § 7123(a). (App. at 57-58.) Contrary to the union's claim (Brief (Br.) at 20-22), in addition to foreclosing circuit court review of certain types of Authority decisions, the specific statutory scheme in § 7123(a) for judicial review of Authority orders also renders inapplicable general jurisdictional grants that might otherwise provide original jurisdiction in federal district courts. *See Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984) (in a case involving a component of the FLRA, this Court held that the specific review procedure in § 7123(a) bars general federal question and mandamus jurisdiction over district court

suit); *see also Columbia Power Trades Council* v. *United States Dep't of Energy*, 671 F.2d 325, 327 (9th Cir. 1982).[6] This includes suits brought under the APA.

The union's argument is patently wrong under the terms of the APA itself, as well as case law of the Supreme Court and the D.C. Circuit, as the district court recognized. (App. at 57-58.) Under § 701(a)(1) of the APA, 5 U.S.C. § 701(a)(1), judicial review under the APA is unavailable if "statutes preclude judicial review." It could not be plainer that § 7123(a)(2) of the Statute does just that. Thus, by its own terms, APA review is unavailable, as the district court correctly held.

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[6] The courts have reached the same conclusion in analogous cases involving other labor statutes. *See Switchmen's Union of N. Am.* v. *Nat'l Mediation Bd.*, 320 U.S. 297, 301 (1943) (federal district court was without jurisdiction to review a National Mediation Board representation decision where Congress specified how the representation rights it created were to be enforced); *Hartz Mountain Corp*. v. *Dotson*, 727 F.2d 1308, 1311 (D.C. Cir. 1984) (*Hartz*) ("except in the rarest of circumstances, district courts are without jurisdiction to entertain direct appeals of [National Labor Relations] Board actions in representation" cases).

The Supreme Court has also made abundantly clear that a party cannot "end run" a congressional prohibition on judicial review in a specific statutory scheme by bringing a case under the general review provisions of the APA. In *NLRB* v. *United Food and Commercial Workers Union*, 484 U.S. 112 (1987) (*United Food and Commercial Workers*), a union sought judicial review of a determination by the General Counsel of the National Labor Relations Board (NLRB) to enter into an informal settlement agreement after having issued an unfair labor practice complaint, but before a hearing was held on the complaint. Such a determination, like the Authority appropriate unit decision here at issue, is barred from judicial review under the National Labor Relations Act (NLRA). The Court held that it would be "absurd" to allow judicial review in a district court under the APA, thereby destroying Congress's purpose of barring direct judicial review in the courts of appeals under the NLRA. *United Food and Commercial Workers*, 484 U.S. at 133; *see also Council of Prison Locals* v. *Brewer*, 735 F.2d at 1501. As the district court correctly recognized (App. at 57-58), it would be equally absurd to do so here.

The Supreme Court decisions relied on by the union (Br. 21-23) are inapposite, as neither involves an express prohibition on judicial review like § 7123(a)(2) in this case. *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), involved an action for equitable relief that was found not to come within the meaning of the

APA's bar on suits for money damages. The issue then became whether the action should have been filed

under the APA or another statute that may have provided a jurisdictional basis for the suit. This situation is irrelevant to the instant case.

Similarly, *Darby* v. *Cisñeros*, 509 U.S. 137 (1993), is inapposite, as the district court held (App. at 59 n.6). That case concerned whether a plaintiff who had failed to take a discretionary administrative appeal before filing suit in district court had exhausted his administrative remedies as called for under the APA. The Court found that he was not required to take the discretionary agency appeal to satisfy the exhaustion requirement. Because exhaustion is not an issue in this case, *Darby* is irrelevant.

In sum, the district court correctly concluded that the ban on judicial review of Authority representation case decisions in § 7123(a)(2) of the Statute applies to this suit brought under the APA.

B. The District Court Correctly Rejected the Union's Argument That Certain Authority Rulings In This Case Constitute Reviewable "Legal Interpretations"

The union also erroneously argues (Br. 23-31) that the district court erred in not finding subject matter jurisdiction to review two supposedly reviewable "legal interpretations" in the Authority's otherwise unreviewable decision in this case. The two supposed Authority "interpretations" the union asserts are reviewable are that:

1) the Technicians Act, 32 U.S.C. § 709, prohibits a consolidated unit; and 2) the enhanced bargaining rights that would result from the Authority's finding a consolidated unit appropriate are not a basis for determining appropriateness. The district court again correctly rejected these union claims. (App. at 62-66.)

First and foremost, the union's entire premise of "carving out" reviewable holdings in an otherwise unreviewable agency decision was squarely rejected by the Supreme Court in *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987). The union tries to overcome this obstacle by relying on *Crowley Caribbean Transport, Inc.* v. *Peña*, 37 F.3d 671 (D.C. Cir. 1994) (*Crowley*); and *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991) (*McNary*). As discussed below, and as the district court pointed out, neither of these decisions is applicable to the instant case. (App. at 62-66). Moreover, the Authority did not make the kind of general policy decisions in this case that the courts have suggested might be subject to judicial review.

1. The *Crowley* And *McNary* Cases Upon Which The Union Relies Are Inapposite

a. *Crowley* is inapposite because there was no express bar to judicial review at issue in that case, as there is here in the form of § 7123(a)(2) of the Statute. As previously discussed at p. 16, above, this express bar to review implicates

§ 701(a)(1) of the APA, which prohibits judicial review under the APA if review is precluded by statute.

Furthermore, *Crowley* concerned an agency decision not to seek enforcement action. The case therefore implicated the APA's prohibition on judicial review of agency action that is "committed to agency discretion by law" under § 701(a)(2) of the APA. Accordingly, all of the Court's discussion in *Crowley*, 37 F.3d at 676, concerning distinctions between non-reviewable "single shot non-enforcement decision[s]" versus reviewable "general enforcement policy" expressed in regulations, is entirely irrelevant in this case. These distinctions concerning discretionary agency enforcement action have never been applied in cases where, as here, there is an express statutory bar to judicial review. *See Patent Office Prof'l Ass'n* v. *FLRA*, 128 F.3d 751, 753 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998).[7]

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[7] The court below chose not to distinguish *Crowley* on the basis set out in the text above. Rather, the court below relied on this Court's distinction in *Crowley*, 37 F.3d at 676-77, between general agency statements of enforcement policy contained in regulations or interpretive rules, which may be judicially reviewable; and "single shot" discretionary agency enforcement decisions, which are not reviewable. As set out at pp. 21 to 24, below, even applying this aspect of *Crowley*, the district court ruled correctly.

b. *McNary* is equally far afield. That case concerned a class action law suit alleging a pattern of procedural due process violations by an agency in its administration of a program. The Court held that a statutory prohibition on judicial review of individual agency actions was inapplicable to the class action suit, which did not focus on reversing such an individual agency action.

This is obviously distinguishable from the instant case, where the union attacks only the Authority's specific resolution of how the facts of the case before it relate to the statutory criteria for appropriate unit determinations. The union is not pursuing a claim that the Authority has adopted procedures that are violating parties' constitutional rights in representation cases across-the-board. *McNary* is therefore not applicable here either.

2. The Authority Did Not Make A Reviewable General Policy Decision In This Case

Even if the circumstances of this case were comparable to *Crowley* and *McNary*, the Authority did not make the kind of general policy decision in this case that the courts in *Crowley* and *McNary* suggested might be subject to judicial review. *E.g.*, *Crowley*, 37 F.3d at 676-77. The union's contrary claim (Br. at 24-25) should therefore be rejected.

The types of decisions reviewable under the rulings cited by the union are commonly embodied in regulations or interpretive rules, "abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings." *Id*. Instead, the Authority here made an individualized adjudication decision, based on a "mingled assessment[] of fact, policy, and law that drive[s] an individual [agency] decision," that the Court recognized is not subject to judicial review. *Id.*

Even the most cursory review of the Regional Director's and the Authority's decisions in this case makes clear the individualized, adjudicative nature of those decisions. For example, the Regional Director discussed at length the particular facts and circumstances in the case, and how they supported, or did not support, a finding of appropriateness of the proposed consolidated unit under the Statute's criteria for making such determinations. (App. at 46-49.) This analysis of the facts under the statutory appropriate unit criteria was adopted by the Authority. (App. at 29.)

a. The Authority certainly did not hold, as the union claims (Br. at 24), that the Technicians Act "prohibit[s], as a matter of law" nationwide consolidation of technician bargaining units. Thus, although the Regional Director and the

Authority did consider that the state Adjutants General employ and administer the technicians

under the Technicians Act, and that the proposed consolidated unit would therefore "require a structuring of the National Guard inconsistent with the dictates of the Technicians Act" (App. at 30-31, 33, 47-48), this was only one of a number of factors that went into the eventual decision to find the consolidated unit inappropriate. For example, if a future unit consolidation proceeding were to establish a marked increase in the movement of technicians from state to state, this could theoretically be sufficient to outweigh the Adjutants' General authority to employ and administer technicians, resulting in a finding by the Authority that a consolidated unit is appropriate.[8]

[8] Because of its faulty premise as to what the Authority held, the union's lengthy critique of the Authority's decision concerning the significance of the Technicians Act (Br. at 25-31) is much ado about nothing. As indicated in the text, the Authority viewed the Adjutants' General role in employing and administering technicians as established in the Technicians Act as only one of a number of factors in applying the appropriate unit criteria of § 7112(a) of the Statute.

b. Additionally, the Authority did not make a reviewable general policy decision when it held that the enhanced bargaining rights to which the union would be entitled under § 7117(a)(3), if a consolidated unit was found appropriate, were not a basis for finding the consolidated unit appropriate in the first place. (App. at 32.) The Authority determined that the enhanced bargaining rights that might accrue under § 7117(a)(3) apply only *after* the proposed unit is found appropriate under the criteria of § 7112(a).[9] (*Id.*)

The Authority reached this conclusion solely by way of rejecting the union's reliance on § 7117(a)(3), that enhanced bargaining rights should be a factor in determining the appropriateness of a unit under § 7112(a). Such an agency ruling concerning the applicability of a particular legal provision to a case's facts in an individual adjudication is not the kind of generalized policy action that the *Crowley*

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[9] Although the merits of this Authority holding are not properly before the Court, it is noteworthy that, contrary to the union's assertion (Br. at 31-33), the Authority reasonably rejected the union's claim on this point. First, the Authority's holding involves a construction of the Statute which is entitled to deference from a reviewing court. *E.g.*, *BATF*, 464 U.S. at 97. Second, the Authority reasonably concluded that bargaining rights enjoyed *after* a unit is found appropriate are not a factor in deciding *whether* a unit is appropriate in the first instance. As the Authority pointed out (App. at 32), the expanded bargaining rights established in § 7117(a)(3) presume the existence of an appropriate unit. This is so notwithstanding Congress's urging in § 7112(a) to apply appropriate unit criteria "to ensure employees the fullest freedom in exercising the rights guaranteed" under the Statute. That provision is reasonably construed as being limited only to application of the appropriate unit criteria in § 7112(a) itself, as the Authority did here.

and *McNary* Courts suggested may be subject to judicial review. This is so even if, as the union suggests (Br. at 25), the agency consistently adheres to that response in subsequent adjudications in which a party raises the same legal argument.

In sum, the district court correctly held that no aspect of the Authority's decision-making in this case comes within the scope of reviewable agency actions discussed in *Crowley* and *McNary*. Indeed, if the lower court held otherwise, virtually every Authority representation case decision would be subject to judicial review. This is so because the instant case is by no means unique in terms of the Authority's application of law to facts. Therefore, if this case contains reviewable Authority holdings, then so will virtually every Authority representation case decision. This untenable result must be rejected.

C. The District Court Correctly Held That the Authority Did Not Erroneously Disclaim Jurisdiction, Abdicate Enforcement Authority, Or Openly Violate the Clear Mandate of § 7112(a)

The union's final effort at pounding the square peg of this case into the round hole of judicial review is to argue (Br. 33-35) that the two Authority "legal interpretations" mentioned at p. 19, above, constitute improper disclaimers of jurisdiction, abdication of enforcement responsibility, and "open[] violat[ion] [of]

the clear mandate" of § 7112(a) by the Authority. Again, the district court correctly rejected these union arguments. (App. at 59-62.)

It could not be plainer that the Authority in no way disclaimed jurisdiction or abdicated enforcement authority in this case.[10] Rather, as indicated at pp. 22 to 24, above, the Authority merely ruled on the merits of the Union's consolidation petition, consistent with the record in the case, the provisions of the Statute, and Authority case law. The Authority never even hinted that it was without jurisdiction to resolve the Union's consolidation petition on the merits. The union's inaccurate claim is simply a reflection of its displeasure with the Authority's determination on the merits of the union's petition. This is obviously not a basis for the Court to assert jurisdiction.

[10] Authority representation case proceedings are not in the nature of enforcement. Rather, they are nonadversarial fact gathering proceedings, to enable the Authority to make a determination as to the applicability of the statutory criteria for appropriate units. 5 C.F.R. § 2422.18(a) (2001) (Authority representation case hearings are "considered investigatory and not adversarial").

None of the cases cited by the union (Br. at 33) support its jurisdictional claim. As the district court pointed out (App. at 61 n.9), *Heckler* v. *Chaney*, 470 U.S. 821 (1985), concerned an agency decision not to seek enforcement of a statutory provision. However, the Authority here has not refused to take enforcement action. Similarly, the Authority did not find itself to be without jurisdiction to act, as was the case with the Authority's General Counsel in *Montana Air Chapter No. 29* v. *FLRA*, 898 F.2d 753 (9th Cir. 1990).

The district court correctly held (App. at 62) that the union's reliance on *Leedom* to establish jurisdiction is also misplaced because the union cannot establish that the Authority "openly violate[d] a clear mandate" of the Statute. *United States Dep't of the Treasury, United States Customs Serv.* v. *FLRA*, 43 F.3d 682, 688 (D.C. Cir. 1994) (*Customs Service*). The *Leedom* exception is "intended to be of extremely limited scope." *Griffith* v. *FLRA*, 842 F.2d 487, 493 (D.C. Cir. 1988) (*Griffith*).

The circumstances of this case are not comparable to *Leedom*. In making its decision, the Authority followed its ordinary process of considering and interpreting the relevant statutory provisions regarding appropriate unit determinations; applying the provisions to the facts in the record; and making the bargaining unit determination with which the union now disagrees. At most, the union's challenge

to the Authority's decision merely raises the "'garden-variety' error of law" claims that fall outside the *Leedom* exception. *United States Dep't of Justice, Fed'l Bureau of Prisons* v. *FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993) (quoting *Griffith*, 842 F.2d at 493). The union's mere disagreement with the merits of the Authority's holding in this regard does not rise to the level of a colorable *Leedom* claim because, as the district court held (App. at 61), under *Leedom*, whether the Authority's statutory interpretation is correct is irrelevant for jurisdictional purposes.

The union alleges (Br. at 34-35) that the *Leedom* standard for review is met because the Authority held that the goal of § 7112, i.e., to ensure employees the "fullest freedom in exercising the rights guaranteed" under the Statute, was not a factor in determining the appropriateness of the consolidated unit. This claim does not establish *Leedom* jurisdiction.

The "fullest freedom" passage in § 7112(a) does not mandate that the expanded bargaining rights of § 7117(a)(3) be considered in determining unit appropriateness. Yet this is the kind of clear statutory mandate that the union would have to identify, to be able to prevail on this issue. As pointed out at page 23, fn. 9, above, the Authority reasonably construed § 7117(a)(3) rights not to apply to appropriate unit determinations. In other words, the Authority held that it "puts the cart before the horse" to say that a right gained, if consolidation is otherwise

appropriate, is a basis for granting the petition. The union's mere disagreement with the Authority's reasonable interpretation of the Statute is not a basis for *Leedom* jurisdiction, as the district court correctly recognized.

CONCLUSION

The district court's dismissal of the union's complaint for lack of subject matter jurisdiction should be affirmed.

Respectfully submitted.

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OCTOBER 2001

CERTIFICATION PURSUANT TO FRAP RULE 32 AND CIRCUIT RULE 28

Pursuant to Federal Rule of Appellate Procedure 32 and Circuit Rule 28, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 6,215 words.

_____
William E. Persina

October 17, 2001

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

ASSOCIATION OF CIVILIAN TECHNICIANS, INC.,	)	
Appellant	)	
	)	
v.	)	No. 01-5170
	)	
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Appellee	)	

SERVICE LIST

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

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October 17, 2001

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§ 7112. Determination of appropriate units for labor organization representation

(a) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved.

* * * * * * *

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

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

* * * * * * *

(a)(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

* * * * * * *

§ 7123. Judicial review; enforcement

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

* * * * * * *

(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.

* * * * * * *