ORAL ARGUMENT NOT YET SCHEDULED

No. 05-1173

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

PATENT OFFICE PROFESSIONAL ASSOCIATION,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

WILLIAM R. TOBEY
Acting Solicitor

WILLIAM E. PERSINA
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7999

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the Patent Office Professional Association (POPA or Union) and United States Department of Commerce, Patent and Trademark Office (PTO or Agency). The Patent Office Professional Association is the petitioner in this court proceeding and the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United States Department of Commerce, Patent and Trademark Office and Patent Office Professional Association*, Case No. 0-AR-3904, decision issued on April 13, 2005, reported at 60 F.L.R.A. (No. 158) 839.

C. Related Cases

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

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

Page No.

ADDENDUM

Page

TABLE OF AUTHORITIES

CASES

Page No.

TABLE OF AUTHORITIES
(Continued)

Page No.

TABLE OF AUTHORITIES
(Continued)

DECISIONS OF THE FEDERAL LABOR RELATIONS

Page No.

TABLE OF AUTHORITIES
(Continued)

Page No.

STATUTES

TABLE OF AUTHORITIES
(Continued)

Page No.

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

MISCELLANEOUS

*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

AFGE Local 2986	*Am. Fed'n of Gov't Employees, Local 2986 v. FLRA*, 130 F.3d 450 (D.C. Cir. 1997)
App.	Appendix
BEP	*Bureau of Engraving and Printing, Washington, D.C.*, 53 F.L.R.A. 146 (1997)
Bureau of Prisons	*United States Dep't of Justice, United States Fed. Bureau of Prisons v. FLRA*, 981 F.2d 1339 (D.C. Cir. 1993)
Defense Mapping	*U.S. Dep't of Defense, Nat'l Imagery and Mapping Agency, St. Louis*, Mo., 58 F.L.R.A. 344 (2003)
Dugway Proving Ground	*Dep't of the Army, Dugway Proving Ground, Dugway, Utah and Nat'l Ass'n of Gov't Employees, Local R14-62*, 23 F.L.R.A. 578 (1986)
FLRA or Authority	Federal Labor Relations Authority
Griffith	*Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988)
Interior	*United States Dep't of the Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994)
JA	Joint Appendix
MA	Millennium Agreement
Marshals Service	*United States Marshals Service v. FLRA*, 708 F.2d 1417 (9th Cir. 1983)
Metal Trades	*Federal Employees Metal Trades Council v. FLRA*, 778 F.2d 1429 (9th Cir. 1985)
NTEU	*National Treasury Employees Union*, 37 F.L.R.A. 147 (1990)

GLOSSARY
(Continued)

OEA	*Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61 (D.C. Cir. 1988)
OPM	Office of Personnel Management
POPA or Union	Patent Office Professional Association
PTO I	*Patent and Trademark Office*, 45 F.L.R.A. 1090 (1992), *Enforcement denied sub nom. Patent and Trademark Office, Department of Commerce v. FLRA*, 991 F.2d 790 (4th Cir. 1993)
PTO II	*Patent and Trademark Office*, 57 F.L.R.A. 185 (2001)
PTO or Agency	United States Department of Commerce, Patent and Trademark Office
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
ULP	unfair labor practices
Wright-Patterson	*Am. Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604, 606 (1980), *enf'd as to other matters sub nom. U.S. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. Am. Fed'n of Gov't Employees* v. *FLRA*, 455 U.S. 945 (1982)

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STATEMENT OF JURISDICTION

The Federal Labor Relations Authority ("FLRA" or "Authority") issued the decision under review in this case on April 13, 2005. The Authority's decision is published at 60 F.L.R.A. (No. 158) 839. (Joint Appendix (JA) at 3.) The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(H) of the Federal Service Labor-Management

Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court is without jurisdiction over the case pursuant to § 7123(a)(1) of the Statute.[2]

STATEMENT OF THE ISSUES

I. Whether the Court is without subject matter jurisdiction in this case under § 7123(a)(1) of the Statute because the Authority decision at issue involves review of an arbitration award, and the Authority's decision does not involve an unfair labor practice.

II. Whether the Authority reasonably held that an arbitration award concerning special pay rates affected management's right to retain employees under § 7106(a)(2)(A) of the Statute, and that the provision was not a negotiable appropriate arrangement pursuant to § 7106(b)(3) of the Statute.

STATEMENTOF THE CASE

This case arose as an arbitration proceeding. The arbitration proceeding was conducted pursuant to § 7121 of the Statute and a collective bargaining agreement covering the Patent Office Professional Association

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[1] Pertinent statutory and regulatory provisions are set forth at Appendix (App.) A to this brief.

[2] The Authority filed a motion to dismiss the petition for review in this case, for lack of subject matter jurisdiction, on July 26, 2005. By order of the Court dated October 18, 2005, this motion was referred to the merits panel. The jurisdictional issues in the case are addressed at pp. 16 to 27, below.

("POPA" or "Union") and the United States Department of Commerce, Patent and Trademark Office ("PTO" or "Agency"). An arbitrator issued an award finding that the Agency violated an agreement provision concerning special pay rates for Patent Examiners. (JA at 13.) The Agency filed exceptions to the award under § 7122 of the Statute. The Authority granted the exceptions and set the award aside. (JA at 12.) The Union then filed the instant petition for review of the Authority's decision.

STATEMENT OF THE FACTS

A. Background and the Arbitrator's Award

This case arose from a grievance filed by the Union, alleging that PTO breached Section A.2. of the parties' so-called Millennium Agreement (MA). (JA at 18.) This agreement provision contains two sentences. The first one requires that PTO request approval from the Office of Personnel Management (OPM) to maintain for 5 years special pay rate differentials of 10% to 15% for Patent Examiners over the General Schedule pay rates that would otherwise apply to Examiner positions.[3] The second sentence

[3] In order to ensure that a federal agency can recruit and retain qualified staff, an agency can request that OPM approve special pay rates for certain positions. 70 Fed. Reg. 31,287 (May 31, 2005) (to be codified at 5 C.F.R. § 530.301 *et seq.*). These special pay rates can be up to 30% higher than the rate that would otherwise be paid for the position under the applicable pay schedule. *Id.* at 31,289. However, employees receiving special pay rates do not receive annual locality pay rate increases given to other employees not

provides that if OPM rejects the request, PTO would enter into "discussions with [the Union] in order to provide substantially equivalent alternatives" to the special pay rate increases denied by OPM. (JA at 30; bracketed material in original.)

In 2001, at PTO's request, OPM approved special pay rates for Patent Examiners. (JA at 16.) However, the next year, OPM denied PTO's request to include, in the special pay rates for Examiners for that year, the locality pay increases provided to non-special rate employees. In its response to PTO, OPM said that PTO was unable to show that it still suffered from recruitment/retention problems. (*Id.* at 17, 59.) Accordingly, since the 10% to 15% pay differential for special rate employees established under the first sentence of Section A.2. could not be maintained for 5 years, they entered into the discussions referenced in the second sentence of Section A.2. (*Id.*)

In these discussions, the Union proposed that PTO give performance awards to Examiners, to make up for the lack of locality pay. (JA at 17.) PTO stated that it could not agree to an alternative to the Patent Examiner special pay rates without the Union agreeing to certain steps to improve Examiner productivity. (JA at 18.) The Union did not construe the

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receiving special rates. 5 C.F.R. § 531.606(a) (2005). Thus, over time, the difference in pay between special rate employees and non-special rate employees will diminish.

agreement provision at issue as requiring such concessions. Accordingly, the discussions were terminated, and the Union filed the subject grievance. (*Id.*) Upon submitting the grievance to arbitration, the Union and PTO stipulated that the issue to be arbitrated was whether PTO violated Section A.2., and if so, what would be an appropriate remedy. (JA at 22.)

The arbitrator sustained the Union's grievance. He found that the purpose of the second sentence of the agreement provision, i.e., the "discussions" requirement, was to compensate for the erosion in the value of special pay rates for Patent Examiners caused by the fact that locality pay allowances were available to non-special rate employees, but not to special rate employees like Patent Examiners. (JA at 25.) The arbitrator further found that PTO's intent in negotiating the provision was to find a way to combat recruitment and retention problems it was experiencing. (*Id.*)

Based on the foregoing, the arbitrator held that the "discussion" requirement of the second part of the agreement provision at issue did not permit PTO to condition agreement to a monetary equivalent for special pay rates on additional considerations from the Union. (JA at 26.) Rather, the "discussion" requirement mandated PTO to engage in discussions to find a way to overcome the lost locality pay differential for the Patent Examiners. (*Id.* at 24.) As a remedy for the breach of this agreement provision, the

arbitrator directed that PTO engage in discussions with the Union "in good faith with a sincere resolve to find a way to make up for the lost locality pay." (JA at 27.) He said further that the goal of the discussions was to "find a lawful way to overcome the lost 2002 locality pay and to compensate bargaining unit members as agreed upon in the MA." (JA at 28.)

PTO filed exceptions to the award with the Authority pursuant to § 7122 of the Statute, 5 U.S.C. § 7122. Among other things, PTO argued to the Authority that the arbitrator's award was contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute, 5 U.S.C. § 7106(a)(2)(A). (JA at 6.)

B. The Authority's Decision

The Authority first noted that the management right to retain employees in § 7106(a)(2)(A) of the Statute entails the "right to establish policies or practices that encourage or discourage employees from remaining employed by an agency." (JA at 8; internal quotations and citations omitted.) This includes the right to refrain from acting as well as the right to act. (*Id.*) Thus, as relevant here, the Authority held that the right to retain employees includes the right to refrain from establishing policies that encourage employees to remain employed by the Agency. (*Id.*)

The Authority then held that special pay rates are, by law, a means for agencies to ameliorate recruitment and retention problems. (*Id.*) Further, the Authority found that Section A.2. of the MA, the negotiated agreement provision that was the focal point of the grievance, was intended to be a means to encourage special rate employees to remain employed by PTO. (JA at 8-9.) Based on the foregoing, the Authority concluded that the arbitration award effectively required PTO to agree to provide compensation that will encourage special rate employees to remain employed. (JA at 9.) Accordingly, the Authority held that the award affected management's right to retain employees. (*Id.*)

The Authority concluded further that the agreement provision applied by the arbitrator was not an arrangement for employees adversely affected by the exercise of a management right, under § 7106(b)(3) of the Statute, 5 U.S.C. § 7106(b)(3). (JA at 9-12.) In this connection, the Authority referenced its two-prong test, established in *Bureau of Engraving and Printing, Washington, D.C.*, 53 F.L.R.A. 146 (1997) (*BEP*), for resolving such issues.

Under the first prong of its *BEP* test, as applicable here, the Authority examines whether an arbitration award provides a remedy for a breach of an

agreement provision that constitutes an appropriate arrangement under § 7106(b) (3) of the Statute. This first prong analysis entails considering whether the agreement provision applied by the arbitrator is an "arrangement," that is, whether it is sufficiently "tailored" to ameliorating the adverse effects of an exercise of a management right. If it is, the Authority then examines whether the agreement provision is an "appropriate" arrangement, that is, whether it excessively interferes with the exercise of a management right. If the agreement provision at issue is held to be both "appropriate" and an "arrangement" under § 7106(b)(3), then the Authority proceeds under the second prong of *BEP* to determine whether the arbitrator's remedy reflects a "reconstruction of what management would have done if management had not violated" the agreement provision. (JA at 9.) If both prongs are met, the arbitration award will not be set aside as contrary to the exercise of a management right.

Turning to the instant case, the Authority noted that the Union argued that the second sentence of Section A.2. of the MA was an appropriate arrangement under § 7106(b)(3) of the Statute. (JA at 11.) Based on its well-established precedent, the Authority first considered whether the second sentence of Section A.2. is an "arrangement" under § 7106(b)(3), i.e.,

is it "tailored" to mitigating adverse effects flowing form the exercise of a management right.[4] (*Id*.) The Authority decided that it was not.

In this connection, the Authority concluded that the second sentence of Section A.2. was intended to ameliorate the adverse effects resulting from the operation of the regulation, 5 C.F.R. § 531.606 (2005), prohibiting locality pay increases to special rate employees, and not a management right. (JA at 11.) For this reason, the Authority held that the second sentence of Section A.2. is not an "arrangement" within the meaning of § 7106(b)(3) of the Statute. The Authority rejected a Union claim that the agreement provision was designed to ameliorate the adverse effects of management's decisions to eliminate paper files on patent applications, and to include a customer service element in employee performance plans. (*Id*.)

The Authority also rejected a Union claim that the Authority had previously found special pay rate bargaining proposals to be negotiable, and therefore that the second sentence of Section A.2. of the MA must be enforceable by the arbitrator in this case. (JA at 11-12.) The Authority

[4] The Authority cited in this connection *Association of Civilian Technicians, Inc., Rhode Island Chapter*, 55 F.L.R.A. 420, 426 (1999).

noted that neither of the two cases cited by the Union[5] in this regard addressed the negotiability or enforceability of proposals or agreement provisions requiring management to attempt to establish alternatives to special rate increases that have been denied by OPM. (*Id.*)

Based on the foregoing analysis, the Authority held that Section A.2. was not an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute.[6] The Authority therefore set aside the arbitrator's award as contrary to management's right to retain employees. (*Id.* at 12.)

STATEMENT OF THE STANDARD OF REVIEW

The Court determines its subject matter jurisdiction in this case *de novo*. *Ruiz-Morales* v. *Ashcroft*, 361 F.3d 1219, 1221 (9th Cir. 2004).

As to the merits, 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 it is "arbitrary, capricious, or an

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[5] The Union cited *Patent and Trademark Office*, 45 F.L.R.A. 1090 (1992), *enforcement denied*, 991 F.2d 790 (4th Cir. 1993) (table) (*PTO I*); and *National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 37 F.L.R.A. 147 (1990) (*NTEU*).

[6] As a result of holding that § A.2. is not an appropriate arrangement under § 7106(b)(3) of the Statute, the Authority did not have to consider whether prong two of *BEP* was met, i.e. whether the arbitrator's award was a reconstruction of what management would have done if it had not violated the contractual provision at issue . (JA at 12.)

abuse of discretion" or "otherwise not in accordance with law." *See* 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). With regard to a decision like the one under review in this case, concerning whether an agreement provision is an appropriate arrangement under § 7106(b)(3), such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted).

SUMMARY OF ARGUMENT

I. The Court is without subject matter jurisdiction in this case. The Union has petitioned for review of an Authority decision reviewing an arbitration award. Under § 7123(a)(1) of the Statute, 5 U.S.C. § 7123(a)(1), judicial review of such an Authority decision is generally prohibited. The only express exception to this prohibition in § 7123(a)(1) is if a statutory unfair labor practice (ULP) under § 7116 of the Statute is either "an explicit ground for, or [is] necessarily implicated by, the Authority's decision." *Overseas Educ. Ass'n* v. *FLRA*, 824 F.2d 61, 67-68 (D.C. Cir. 1987) (*OEA*).

This exception does not apply here. The Authority's decision concerned solely whether an arbitrator's award applying a provision of a negotiated collective bargaining agreement was contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute. The Authority's decision does not even refer to any purported violation of § 7116 of the Statute, much less that a ULP is an "explicit ground for," or "necessarily implicated by," the Authority's decision.

The Union's arguments concerning the ULP exception in § 7123(a)(1) are without merit. The fact that the arbitrator used terminology in his award that is common to ULP cases does not satisfy the *OEA* test. This argument amounts to nothing more than that the grievance could have, but did not, allege a statutory ULP under § 7116(a) of the Statute. This argument was squarely rejected in *OEA*, 824 F.2d at 67-68.

Further, the Union's argument, that two previous Authority ULP decisions are "necessarily implicated" by the present Authority arbitration decision, fails to meet the *OEA* standard. The statutory ULP must be present in the Authority decision under review, and that is not the case here. Moreover, one of those prior ULP cases merely contained an Authority bargaining order on various broad topics, including special pay rates. It did not address, as does the instant case, the lawfulness of a specific agreement

provision as interpreted by an arbitrator. The second case involved an Authority bargaining order that culminated in the MA. However, the genesis of the agreement provision applied by the arbitrator is irrelevant for determining jurisdiction under *OEA*.

II. Assuming the Court does have subject matter jurisdiction, the Authority's decision should be affirmed on the merits. First, the Authority correctly held that the arbitrator's award affected PTO's management right to retain employees. The arbitrator's award in this case directed PTO to enter into discussions with the Union that would necessarily result in PTO making the equivalent of a special rate payment under 5 U.S.C.A. § 5305 (West Supp. 2005). Such special rate payments were specifically devised by Congress solely to assist agencies in addressing employee retention issues. 70 Fed. Reg. 31,287 (May 31, 2005) (to be codified at 5 C.F.R. § 530.301(a)). Thus, the Authority correctly held that the arbitrator's award directly affects PTO's discretion as to whether to take action exercising its statutory management right to retain employees.

The Union's arguments to the contrary were not raised to the Authority, and thus cannot be considered by the Court under § 7123(c) of the Statute. In any event, the arguments are without merit.

The Authority's decision in this case is focused on the specific management right involved, i.e., the right to retain employees, and the specific action by PTO that was mandated by the arbitrator, i.e., making the equivalent of a special rate payment. Contrary to the Union's claim, the Authority did not find that any agreement provision that may have the effect of encouraging employees to remain employed at an agency is, for that reason, contrary to the management right to retain employees.

Authority decisions cited by the Union are inapposite. Those cases address the possible collateral impact of a bargaining proposal or agreement provision on employee retention for purposes wholly unrelated to the instant case. None of those cases involved the management right to retain employees under § 7106(a)(2)(A) of the Statute, as does the present case. Rather, some of the cases involved determining whether a bargaining proposal related to conditions of employment because it had some impact on employee retention. Other cases involved determining whether a bargaining proposal affected the management right to determine the agency's budget under § 7106(a)(1) of the Statute. This analysis included determining whether savings that might be derived from prolonging employee retention as a result of the proposal might reasonably be expected to help offset the proposal's implementation costs.

Finally, the Authority correctly held that the second sentence of § A.2. of the MA was not an "appropriate arrangement" for employees adversely affected by the exercise of a management right, within the meaning of § 7106(b)(3) of the Statute. Rather, the Authority accurately determined that the second sentence of § A.2. of the MA was an arrangement for employees adversely affected by the operation of a regulation, 5 C.F.R. § 531.606 (2005), which regulation was the basis for OPM denial of PTO's request for an increase in special pay rates.

Contrary to the Union's claim, the fact that the MA as a whole may have been negotiated in response to PTO's desire to eliminate paper patent files, and to introduce customer service as a performance evaluation criterion, does not affect the Authority's analysis. In "appropriate arrangement" analysis, the Authority properly focuses only on the specific agreement provision at issue, not the entire agreement of which it is a part.

Accordingly, the petition for review should be dismissed for lack of subject matter jurisdiction. Alternatively, if the Court reaches the merits, the petition for review should be denied.

ARGUMENT

I. THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION IN THIS CASE UNDER § 7123(a)(1) OF THE STATUTE BECAUSE THE AUTHORITY DECISION AT ISSUE INVOLVES REVIEW OF AN ARBITRATION AWARD, AND THE AUTHORITY'S DECISION DOES NOT INVOLVE AN UNFAIR LABOR PRACTICE

This Court has previously recognized that under § 7123(a)(1) of the Statute, Authority decisions on exceptions to arbitrators' awards are generally not subject to judicial review. *See Am. Fed'n of Gov't Employees, Local 2986* v. *FLRA*, 130 F.3d 450, 451 (D.C. Cir. 1997) (*AFGE, Local 2986*); *United States Dep't of the Interior* v. *FLRA*, 26 F.3d 179 (D.C. Cir. 1994) (*Interior*); *United States Dep't of Justice, United States Fed. Bureau of Prisons* v. *FLRA*, 981 F.2d 1339, 1342 (D.C. Cir. 1993) (*Bureau of Prisons*); *Griffith* v. *FLRA*, 842 F.2d 487, 490-91 (D.C. Cir. 1988) (*Griffith*); *Overseas Educ. Ass'n* v. *FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987) (*OEA*). Moreover, the only exception to this general rule of judicial nonreviewability relied on by the Union, *i.e.*, Authority arbitration review decisions that "involve[]" an unfair labor practice, is not applicable here. Accordingly, the Union's petition for review should be dismissed.

A. The Statute's Language And Legislative History Make Clear That Congress Intended To Bar Judicial Review Of Authority Decisions On Exceptions To Arbitrators' Awards In Virtually All Cases

Examination of the Statute's language and legislative history reveals "unusually clear congressional intent generally to foreclose review" of virtually all Authority decisions in arbitration cases pursuant to section 7123(a). *Griffith*, 842 F.2d at 490. Section 7123(a) of the Statute specifically precludes judicial review of certain Authority decisions and orders. This section states, in relevant part:

> Any person aggrieved by any final order of the Authority other than an order under--
>
> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118[7] of this title, . . .
>
> * * * * *
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a). Thus, the plain language of 5 U.S.C. § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards

[7] As this Court has noted, although the text of the Statute refers to § 7118, that reference Ahas been recognized to be an error; the correct reference is to section 7116." *OEA*, 824 F.2d at 63 n.2; *see also Am. Fed'n of Gov't Employees, Local 916 v. FLRA*, 951 F.2d 276, 277 n. 4 (10th Cir. 1991) (calling the reference an "inadvertent miscitation").

and narrowly restricts the jurisdiction of the courts of appeals to review an FLRA arbitration decision to those instances that "involve[] an unfair labor practice" under the Statute. *OEA*, 824 F.2d at 63. This broad jurisdictional bar to the review petitioner seeks here has been recognized by all of the courts of appeals, including this one, that have considered the issue.[8]

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

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

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[8] *See, e.g., NTEU* v. *FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *United States Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region* v. *FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Philadelphia Metal Trades Council* v. *FLRA*, 963 F.2d 38, 40 (3rd Cir. 1992); *United States Dep't of Justice* v. *FLRA*, 792 F.2d 25, 27 (2nd Cir. 1986); *Tonetti* v. *FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *Am. Fed'n of Gov't Employees, Local 1923* v. *FLRA*, 675 F.2d 612, 613 (4th Cir. 1982).

H.R. Rep. No. 95-1717 at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (*Legis. Hist.*) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any* . . . *authority* or administrative body" other than the Authority. *Id.* at 826 (emphasis added).

Accordingly, the language and legislative history of the Statute establish conclusively that Congress intended to restrict review of arbitration awards exclusively to the Authority, and intended that there be "no judicial review of the Authority's action on . . . arbitrators awards," except those involving ULPs. *Legis. Hist.* at 821.

B. The Authority's Order Does Not "Involve[] An Unfair Labor Practice@ Within The Meaning Of § 7123(a) Of The Statute

As indicated above, the one exception to the bar to judicial review that is expressly recognized in the Statute, and the only one relied on by the Union, arises where the Authority=s arbitration decision Ainvolves an unfair labor practice.@ 5 U.S.C. ' 7123(a)(1). This Court has considered the circumstances in which it can be said that an Authority decision Ainvolves

an unfair labor practice@ for purposes of section 7123(a)(1). *See Bureau of Prisons* v. *FLRA*, 981 F.2d 1339, 1342 (D.C. Cir. 1993); *Griffith*, 842 F.2d at 490-91; and *OEA*, 824 F.2d at 63. Where, as here, it cannot be said that a statutory ULP is Aeither an explicit ground for, or [is] necessarily implicated by, the Authority=s decision,@ the Court has no jurisdiction. *OEA*, 824 F.2d at 67-68, 71.[9]

The Authority's decision makes no reference whatsoever to a ULP. Rather, the decision simply finds as a matter of law that the arbitrator's award is contrary to the exercise of a management right. In his award in this case, the arbitrator noted in relevant part that the issue the parties stipulated for resolution was whether the Agency violated a provision of the parties' collective bargaining agreement concerning special pay rates. (JA at 22.) He held that PTO violated the portion of the agreement provision calling for the parties to "discuss[]" alternatives to special pay rates for

[9] The Union badly misstates the *OEA* test in its Summary of Argument (Br. at 12). The Union there says that under *OEA*, "an arbitration award 'involves' an unfair labor practice if *either* an unfair labor practice was a basis of the arbitrator's award, *or* if a related unfair labor practice case was 'necessarily implicated' by the Authority's decision in the arbitration case." (Emphasis in original.) Neither an arbitration award involving a ULP nor a "related" ULP case is sufficient on its own to invoke jurisdiction under *OEA*. The Union correctly states the *OEA* test later, at page 16 of its brief.

certain PTO employees, if, as occurred here, the Office of Personnel Management (OPM) declined to grant special pay rates. (JA at 27.)

In *OEA*, by contrast, the Authority considered in an arbitration review case the merits of a ULP charge filed by an individual to determine whether it involved the same subject matter as a grievance that had also been filed, thereby barring the later filed of the two pleadings under § 7116(d) of the Statute.[10] The Court held that the Authority's substantive consideration of a ULP charge in an arbitration review decision was sufficient to conclude that the Authority's decision involved a ULP under § 7123(a)(1) of the Statute. 824 F.2d at 71. Accordingly, this case does not measure up to the jurisdictional requirements set out by this Court in *OEA*.

C. The Union's Jurisdictional Arguments Are Without Merit

The Union offers two arguments as to why the Authority's decision "involves an unfair labor practice" under § 7123(a)(1) of the Statute: (1) In his award, the arbitrator used terminology that is common to unfair labor practice cases (Br. at 16-19); and (2) the Authority's decision in this case

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[10] Section 7116(d) of the Statute provides in relevant part that:

> issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

"necessarily implicates" two earlier Authority decisions that dealt with unfair labor practices (ULPs) (Br. at 20-24). Both of these arguments lack merit, however, and the Authority's Motion to Dismiss the petition for review should therefore be granted.

1. In considering whether PTO violated the contractual "discussion" requirement mentioned above, the arbitrator used certain terminology (*e.g.*, "PTO did not act in good faith" (JA at 26)), that is also employed in resolving duty to bargain ULP cases arising under § 7116(a)(5) of the Statute.[11] However, this commonality of language between certain portions of the arbitrator's award in this case and Authority ULP case law does not establish that the Authority's decision reviewing the award "involves an unfair labor practice" under § 7123(a)(1).

In fact, the Ninth Circuit squarely rejected the Union's argument on this point in *United States Marshals Service* v. *FLRA*, 708 F.2d 1417 (9th Cir. 1983) (*Marshals Service*). In that case, the Authority affirmed an arbitration award finding that the Marshals Service, the employer in the case, violated certain collective bargaining agreement provisions that incorporated statutory ULP requirements concerning notice and an opportunity to bargain

[11] Section 7116(a)(5) of the Statute provides that is a ULP for an agency employer to "refuse to consult or negotiate in good faith with a labor organization" as required by the Statute.

to the union involved, prior to changing working conditions. 708 F.2d at 1419. The Marshals Service petitioned the Ninth Circuit for review of the Authority's decision.

That court dismissed the petition because "the collective bargaining agreement itself was the basis for both the arbitrator's determination and the Authority's review of the arbitration award." 708 F.2d at 1420. The fact that the dispute could have been arbitrated as a statutory ULP claim, but in fact was not, does not satisfy the statutory requirement that a ULP be present in the Authority's decision.[12] *Id.* This Court expressly adopted and refined the Ninth Circuit's *Marshals Service* ruling on this specific point in *OEA*, 824 F.2d at 67-68.

The Union's argument on this point amounts at best to a claim that the grievance it filed could have alleged a statutory ULP, rather than the contractual violation the grievance in fact did raise.[13] However, *Marshals*

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[12] The Ninth Circuit's holding on this point relied on the Fourth Circuit's decision to the same effect in *American Federation of Government Employees* v. *FLRA*, 675 F.2d 612 (4th Cir. 1982).

[13] Under § 7103(a)(9) of the Statute, a "grievance" that can be arbitrated under a negotiated grievance procedure is defined broadly as including a complaint concerning any "claimed violation . . . of any law . . . affecting conditions of employment." Thus, a grievance can be filed alleging a statutory ULP violation under § 7116(a) of the Statute. *E.g., U.S. Customs Serv.* v. *FLRA*, 43 F.3d 682, 684 (D.C. Cir. 1994). Here, the grievance made no such allegation.

Service and *OEA* make clear that such a possibility of alternate pleading does not satisfy the "involves an unfair labor practice" jurisdictional requirement of § 7123(a)(1). Thus, because the Authority's decision did not in any respect involve a statutory ULP, the Union's argument on this point should be rejected.

2. The Union's second argument is that the Authority's decision "involves an unfair labor practice" because it "necessarily implicates" two previous Authority ULP decisions that ordered bargaining on pay matters, including special pay rates. First, the Union argues (Br. at 20) that the Authority's ruling "cannot be reconciled" with an earlier Authority decision in a ULP case. Second, the Union argues (Br. at 22-23) that an Authority Regional Director recently concluded that the negotiated agreement containing the provision interpreted and applied by the arbitrator in this case was the product of an earlier Authority bargaining order.

The Union's reliance on these two Authority ULP cases misses the mark that this Court set in *OEA* for holding that an Authority arbitration review decision "involves an unfair labor practice." In *OEA*, this Court said that in order to meet this standard, "a statutory unfair labor practice must be either an explicit ground for, or be necessarily implicated by, the Authority's decision." 824 F.2d at 67-68. In *OEA*, as discussed at p. 20, above, the

Authority expressly considered in its arbitration review decision whether a statutory ULP charge was filed prior to a grievance on the same claim. No such statutory ULP appears in the Authority's decision in the present case.

The foregoing argument is sufficient on its own to provide a basis for rejecting the Union's argument on this point. However, a closer look at the two Authority ULP decisions the Union relies on is also telling as to the extent to which the Union misses the point here.

In the first case, *Patent and Trademark Office*, 45 F.L.R.A. 1090 (1992) (*PTO I*), the Authority rejected PTO's argument that it was not obligated to bargain with the Union on broad categories of topics, including special pay rates, because the Union offered its proposals during the term of an existing negotiated agreement which covered those topics. 45 F.L.R.A. at 1091 n.2. Accordingly, the Authority ordered PTO to bargain on "subjects relating to pay," to the extent that the Union submitted negotiable proposals. *Id.* at 1091-92. The negotiability of individual bargaining proposals was not disputed in the case. *Id.* at 1108. Certainly, there was nothing in *PTO I* that said that PTO was required to bargain on a proposal that compelled it to make special pay rates, or their equivalent, to Examiners, as § A.2. of the MA does in this case.

Thus, other than the fact that the instant case and *PTO I* both involve special pay rates, there is no connection between the two cases. This attenuated commonality is insufficient to serve as the basis for concluding that there is jurisdiction here.[14]

In the second case, *Patent and Trademark Office*, 57 F.L.R.A. 185 (2001) (*PTO II*), the Authority in relevant part rejected a PTO claim that it was not obligated to bargain with the Union because the Union-initiated bargaining proposals in that case were not submitted in response to a management-initiated change in working conditions. 57 F.L.R.A. at 197. The Authority therefore issued an order to PTO, requiring it in relevant part to bargain with the Union, "consistent with the Statute over the payment of . . . pay and pay-related proposals." *Id.*

As the Union points out (Br. at 23), an Authority Regional Director recently concluded that the negotiated agreement, containing the provision

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[14] The Union's claim (Br. at 21), that the present case and *PTO I* "cannot be reconciled," is of no significance. The claim appears to be an effort to bootstrap its merits argument, set out at pp. 25 to 37 of its brief, into its jurisdictional analysis. The merits of the Authority's decision are not, however, properly before the Court. Under *Leedom* v. *Kyne*, 358 U.S. 184 (1958), a court can review an otherwise unreviewable agency action if the agency has acted in excess of its delegated powers and contrary to a clear statutory mandate. That, of course, is not the case here. At most, the Union's claim constitutes an allegation of a "[g]arden-variety error[] of law" that does not come within the ambit of *Leedom* jurisdiction. *Griffith*, 842 F.2d at 493 (D.C. Cir. 1988). In any event, as set out in the text, the two cases are easily distinguished, and no legal error was committed.

interpreted by the arbitrator in this case, constitutes compliance with this bargaining order. However, that fact does nothing to warrant a finding of jurisdiction under *OEA* and other cases. The genesis of the agreement provision being interpreted and applied by the arbitrator is irrelevant to a consideration of whether a ULP is an explicit ground for, or is necessarily implicated by, the Authority's decision.

Again, under established precedent, substantive consideration of a statutory ULP must be evident on the face of the Authority's decision itself. As that ingredient is missing here, the petition for review must be dismissed. To conclude, as the Union urges, that any articulable association between an Authority arbitration review decision and a previous Authority ULP decision satisfies the jurisdictional requirement under § 7123(a)(1) of the Statute would effectively eliminate that requirement.

II. THE AUTHORITY REASONABLY HELD THAT AN ARBITRATION AWARD CONCERNING SPECIAL PAY RATES AFFECTED MANAGEMENT'S RIGHT TO RETAIN EMPLOYEES UNDER § 7106(a)(2)(A) OF THE STATUTE, AND THAT THE PROVISION WAS NOT A NEGOTIABLE APPROPRIATE ARRANGEMENT PURSUANT TO § 7106(b)(3) OF THE STATUTE.

As the Authority set out in its decision (JA at 8), when deciding whether an arbitration award violates a management right under § 7106 of the Statute, the Authority first considers whether the award affects the

exercise of the right. If the Authority finds that it does, then the award will be set aside as violative of a management right, unless the award satisfies the two-prong test the Authority established in *BEP*.

Under *BEP*, as relevant here, the Authority first considers whether the arbitration award provides a remedy for a breach of a contract provision that constitutes an appropriate arrangement under § 7106(b)(3).[15] If this first prong is satisfied, then the Authority considers whether the award is a reconstruction of what management would have done if management had not violated the contractual provision at issue. *BEP*, 53 F.L.R.A. at 154.

In the instant case, the Authority correctly held that the arbitrator's award does affect management's right to retain employees under

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[15] Section 7106(b)(3) provides in relevant part:

> (b) Nothing in this section shall preclude any agency and any labor organization from negotiating –
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> * * * * * *
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> (3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by . . . management officials.

As the Authority's *BEP* decision evidences, case law developed in determining whether bargaining proposals are lawful bargaining subjects is equally applicable in many circumstances to determining whether agreement provisions as applied by arbitrators are lawfully enforced. Accordingly, the Union and the Authority properly discuss negotiability case law in briefing the instant case.

§ 7106(a)(2)(A) of the Statute; and that the award did not provide a remedy for a breach of a contract provision that is an appropriate arrangement under § 7106(b)(3) of the Statute.[16] (JA at 8-11.) The Court should therefore uphold the Authority's decision.

A. The Authority Reasonably Held That The Arbitrator's Award Violated The Agency's Management Right To Retain Employees Under § 7106(a)(2)(A) Of The Statute, And The Union's Contrary Claims Are Without Merit

1. The Authority's holding was reasonable

In the single prior case decided solely on the basis of the management right to retain employees, the Authority held that the right encompasses management's establishment of "policies or practices that encourage or discourage employees from remaining employed by an agency." *Am. Fed'n of Gov't Employees, Local 1827 and U.S. Dep't of Defense, Nat'l Imagery and Mapping Agency, St. Louis, Mo.*, 58 F.L.R.A. 344, 346 (2003) (*Defense Mapping*).[17] There is no dispute in the present case that this is a reasonable interpretation of this management right. Moreover, as the Authority pointed out (JA at 8), the congressionally mandated management rights in § 7106

[16] Because the Authority determined that the first prong of the *BEP* test was not met, it did not proceed to consider whether, under the second prong, the award was a reconstruction of what management would have done if it had not violated the agreement provision at issue.

entail both management's right to act, or to refrain from acting, in the areas delineated by these rights. *E.g., U.S. Envtl. Prot. Agency and Nat'l Fed'n of Fed. Employees*, 38 F.L.R.A. 1328, 1330 (1991).[18]

There is also no dispute in this case that, as the Authority noted (JA at 8), Congress intended the discretion to grant special pay rates, conferred on OPM in 5 U.S.C.A. § 5305 (West Supp. 2005), to "address significant recruitment or retention problems" experienced by federal agencies. 70 Fed. Reg. 31,287 (May 31, 2005) (to be codified at 5 C.F.R. § 530.301(a)). Nor is there any dispute in this case that, as found by the arbitrator (JA at 23),

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[17] As the Authority explained in *Defense Mapping*, 58 F.L.R.A. at 345, previous cases involving the right to retain employees were decided in conjunction with the related management right to lay off employees. Thus, the Authority had not, prior to *Defense Mapping*, needed to attribute independent meaning to the right to retain employees. *E.g., Nat'l Fed'n of Fed. Employees, Council of Veterans Admin. Locals and Veterans Admin.*, 31 F.L.R.A. 360, 433-35 (1988) (bargaining proposal requiring agency to allow for attrition before using involuntary staff reduction methods violates management rights to lay off and retain employees under § 7106(a)(2)(A) of the Statute).

[18] The Union suggests (Br. 27, 29) that the statutory management right to retain employees extends only to taking affirmative actions that are designed to induce employees to remain employed. However, this Court has recognized that the management rights conferred in § 7106 are "prerogatives" for management to act. *Dep't of Defense, Army-Air Force Exch. Serv.* v. *FLRA*, 659 F.2d 1140, 1146 and n.26 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). "Prerogatives" connote "power, privilege, or immunity." *Black's Law Dictionary* 1220 (8th ed. 2004). These concepts clearly contemplate discretion to either act or not act in a given area. The "prerogative" nature of these rights would certainly disappear if management could exercise them only by taking affirmative action.

§ A.2. of the MA was negotiated with the express intent of addressing recruitment and retention problems at PTO.

Finally, the Authority correctly held (JA at 9) that the second sentence of § A.2. of the MA, as interpreted and applied by the arbitrator, requires the Agency to "agree to provide compensation that will encourage special rate employees to remain employed by the Agency," if the parties can devise a lawful alternative and the Agency has sufficient funds to pay for it. In this connection, the arbitrator stated in his remedy that the goal of the discussions under the second sentence of § A.2. is to "compensate bargaining unit members" for the lost locality pay equivalent. (JA at 28.)

In light of the above factors, the Authority's conclusion that the arbitrator's award affects PTO's right to retain employees is inescapable. The "substantially equivalent alternatives" discussions the arbitrator directed PTO to engage in under § A.2. of the MA were to have only one outcome – the identification of some manner of payment to Examiners to replace the special rate increase that OPM had turned down. The precise form the payments would take, e.g., performance award or otherwise, were the only items open to discussion.

In short, the arbitrator effectively directed PTO to make a special rate payment to Examiners. The record establishes that the fact that the label on

the payment may have been something else, e.g., performance award, is immaterial. As shown at p. 31, above, special rate payments are solely aimed at providing agency management with a tool to enable them to recruit and retain employees. Thus, the arbitrator trenched on an area that Congress intended to be the exclusive domain of management, and the award therefore affected the exercise of the right.

2. The Union's claims are without merit

The Union makes two attacks on the Authority's holding that the arbitrator's award affects PTO's exercise of the right to retain employees: 1) The holding makes collective bargaining under the Statute "pointless" (Br. at 27-28); and 2) it is inconsistent with Authority precedent (Br. at 29-35). The Union did not specifically raise either of these arguments to the Authority. Accordingly, they are not properly before the Court. 5 U.S.C. § 7123(c); *see also Equal Employment Opportunity Comm'n* v. *FLRA*, 476 U.S. 19, 23 (1986); *Overseas Educ. Ass'n* v. *FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987) (even an argument constituting a "somewhat different twist" on one presented below is not properly before the Court). In any event, neither claim has merit.

a. As to the bombastic claim concerning the supposed "pointless[ness]" of collective bargaining under the Authority's ruling, it

seriously misapprehends what the Authority held in this case. The Authority most emphatically did not hold that any agreement provision that may have the effect of improving conditions of employment, thus encouraging employees to remain employed, is unenforceable. The Authority's decision was far more limited than that.

More specifically, the Authority limited itself to concluding that management's right to retain employees under § 7106(a)(2)(A) of the Statute encompasses decisions about making, or not making, special pay rates or their equivalent available to employees. As discussed at pp. 30 to 31, above, special pay rates were created by Congress for the express purpose of giving agency management a tool to help promote recruitment and retention. It would be difficult to conceive of what meaning the management right to retain employees would have, if it does not encompass the ability of management to decide whether to avail itself of the very tool (special pay rates) created to facilitate its exercise.

This, however, is a far cry from saying, as the Union claims the Authority does (Br. at 27), that any agreement provision that may have the effect of enhancing working conditions is unenforceable. By way of contrast, in *Federal Employees Metal Trades Council* v. *FLRA*, 778 F.2d 1429 (9th Cir. 1985) (*Metal Trades*), cited by the Union (Br. at 28), the court

held that the manner of delivering paychecks to employees was not a "method[]" or "means of performing work" within the meaning of § 7106(b)(1) of the Statute. In so holding, the court noted that not every matter, such as the manner of paycheck delivery, that may have the effect of contributing to a committed work force, thereby becomes a method or means of performing work. Thus, a bargaining proposal dealing with paycheck delivery is not nonnegotiable under § 7106(b)(1).

The key point here is that the proposal itself in *Metal Trades* did not deal with a matter coming within the scope of a management right. Rather, the court rejected the idea that a proposal could be held to be nonnegotiable based merely on speculation concerning how the manner of paycheck delivery would impact on employee job commitment. *Metal Trades*, 778 F.2d at 1431. In the instant case, on the other hand, the arbitrator's award implementing the second sentence of § A.2. of the MA explicitly mandates on its face how PTO management will exercise its right to retain employees. Accordingly, the court's concern in *Metal Trades*, that the diffuse notion that all bargaining subjects affect employee desire to continue employment and are therefore nonnegotiable under § 7106(b)(1) of the Statute, is not present here. The Union's argument is therefore without merit, and should be rejected.

b. The Union's second contention (Br. 29-35), that the Authority's holding is contrary to its own precedent, is also without merit. The bulk of the Union's argument consists of setting forth (Br. 30-33) a compendium of cases in which the Authority found bargaining proposals on a myriad of topics, such as day care centers,[19] post exchange privileges,[20] and government-provided housing,[21] to be negotiable. In those cases, the Authority held that the bargaining proposals at issue concerned "conditions of employment" within the meaning of § 7103(a)(14) of the Statute.[22] As support for these holdings, the Authority considered "the nature and extent of the effect of the matter proposed to be bargained on *working conditions* of

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[19] *Am. Fed'n of Gov't Employees and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604, 606 (1980), *enf'd as to other matters sub nom. U.S. Dep't of Defense* v. *FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied sub nom. Am. Fed'n of Gov't Employees* v. *FLRA*, 455 U.S. 945 (1982) (*Wright-Patterson*).

[20] *Dep't of the Air Force, Eielson Air Force Base, Alaska*, 23 F.L.R.A. 605, 609 (1986).

[21] *Dep't of the Army, Dugway Proving Ground, Dugway, Utah and Nat'l Ass'n of Gov't Employees, Local R14-62*, 23 F.L.R.A. 578, 583 (1986) (*Dugway Proving Ground*).

[22] Section 7103(a)(14) provides in relevant part as follows:

> (14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ."

those employees." *Dugway Proving Ground*, 23 F.L.R.A. at 583 (emphasis in original). The Authority ruled in each case that, given the particular circumstances of the employment setting (*e.g.*, geographical remoteness), these matters were so inextricably bound up with the employment relationship as to be "conditions of employment" under § 7103(a)(14).[23]

None of these cases dealt with the lawfulness of bargaining proposals that on their face mandated how an agency would exercise its management right to retain employees. Rather, the only issue in these cases was whether a matter proposed for bargaining was sufficiently connected to the employment relationship, by way of affecting employee retention, for example, as to make it a proper subject for negotiations. Thus, the Authority was addressing in those cases an issue that is wholly unrelated to the instant case, which involves whether an agreement provision as applied by an arbitrator directly affects management's exercise of its right to retain employees. Accordingly, it cannot be said, as the Union claims, that the Authority departed from this precedent in the instant case.

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[23] The Authority set forth its analysis for determining whether a bargaining proposal concerns a "condition of employment" under § 7103(a)(14) in *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 F.L.R.A. 235 (1986). This Court accepted the Authority's *Antilles* analysis in *American Federation of Government Employees, Local 2094* v. *FLRA*, 833 F.2d 1037, 1043-44 (D.C. Cir. 1987).

Similarly inapposite are the cases cited by the Union (Br. 31-32) concerning management's right to determine the budget under § 7106(a)(1) of the Statute.[24] In those cases, the Authority was addressing the negotiability of bargaining proposals that did not on their face seek directly to establish agency budget policy. However, the Authority had to determine whether the net cost impact of the proposal at issue was such that it would indirectly dictate agency budget policy. *See, e.g., Wright-Patterson*, 2 F.L.R.A. at 608. One of the factors considered in making this net-cost assessment was whether the bargaining proposal's costs would be offset by savings resulting from reduced employee turnover. *Id.*

Again, in these cases, the Authority was not confronted with bargaining proposals that on their face sought to dictate management decision-making as regards employee retention policy. Rather, enhanced employee retention was one of a number of possible collateral consequences of a proposal. Thus, it cannot be said that these decisions are inconsistent with the Authority's decision in this case.

Finally, the Union cites (Br. at 33-35) a "plethora" of Authority cases in which proposals establishing pay and other money-related fringe benefits

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[24] *Wright-Patterson*, 2 F.L.R.A. at 608; *Am. Fed'n of Gov't Employees, Local 1857 and U.S. Dep't of the Air Force, Air Logistics Ctr., Sacramento, Cal.*, 36 F.L.R.A. 894, 905-06 (1990); and *Nat'l Treasury Employees Union and U.S. Nuclear Regulatory Comm'n*, 47 F.L.R.A. 980, 998-1000 (1993).

were found to be negotiable. It certainly is true, as the Supreme Court has recognized, that the Authority has in appropriate circumstances found pay-related bargaining proposals to be negotiable. *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641 (1990) (pay and fringe benefits for Department of Defense dependent school teachers held to be negotiable). However, none of the cases cited by the Union involved bargaining proposals to compel an agency to make special rate payments, as the arbitrator's award did in this case. The *sui generis* nature of the relationship between the management right to retain employees and making special rate payments, *i.e.*, the fact that special rate payments were specifically crafted by Congress to be a means of addressing employee retention issues, (see p. 31, above) distinguishes the instant case from these other cases.

The only special rate case cited by the Union (Br. 34) is *NTEU*, 37 F.L.R.A. 147 (1990). In that case, however, the proposal at issue only required the agency to make recommendations to OPM regarding the establishment and revision of special pay rates. As the Authority noted, the proposal "[did] not require OPM to take, or refrain from taking, any action." *NTEU*, 37 F.L.R.A. at 152 n.1. In the instant case, by contrast, the arbitrator directed PTO to effectively make what amounted to a special rate payment pursuant to the second sentence in § A.2. of the MA. This crucial distinction

between the two cases means there is no inconsistency with precedent, as the Union claims.[25]

In sum, in both the instant case and the precedent cited by the Union, the Authority has engaged in particularized analysis focusing on the specific bargaining proposal or agreement provision at issue, and its effect on the exercise of a management right, if one was asserted. The Authority can in the future be expected to continue this kind of case-specific elaboration of which matters are appropriate for bargaining, and which are not, because of their affect or lack thereof on the exercise of a management right.

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[25] The Union's reliance (Br. 32-33) on this Court's decision in *Association of Civilian Technicians* v. *FLRA*, 370 F.3d 1214 (D.C. Cir. 2004) (*ACT*) is also misplaced. That case involved an agreement provision requiring reimbursement to employees for out-of-pocket losses incurred as a result of management's canceling previously approved leave. The Court noted that improved employee retention resulting from the provision could be one of the factors that would bring it within the scope of "official business," thus authorizing the agency to make the payment. As with the other cases cited by the Union, the agreement provision itself did not compel the agency there involved to exercise the management right to retain employees in any particular fashion. Employee retention was involved in *ACT* only as a possible effect of the provision, which, given the particular legal issues involved, could have an impact on the lawfulness of the provision. Again, this dichotomy means there is no conflict in Authority precedent.

B. The Authority Reasonably Concluded That The Second Sentence Of § A.2. Of The MA, As Applied By The Arbitrator, Does Not Constitute An Appropriate Arrangement Under § 7106(b)(3) Of The Statute

Having held that the award affects the exercise of management's right to retain employees, the Authority proceeded to consider whether the award could nonetheless be sustained because it provides a remedy for an agreement provision, i.e., the second sentence of § A.2., that constitutes an "appropriate arrangement" under § 7106(b)(3) of the Statute. In this regard, parties can negotiate agreement provisions that affect the exercise of a management right, if the provision is negotiated pursuant to § 7106(b) of the Statute. *BEP*, 53 F.L.R.A. at 152 (under the plain terms of § 7106, subsection (b) "constitutes a separate limitation on, or exception to, management rights under section 7106(a)");[26] *see also U.S. Dep't of the Treasury, Office of the Chief Counsel, Internal Revenue Serv.* v. *FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992) (*IRS*) ("[a]rrangements for adversely affected employees will inevitably come at some cost to the exercise of management prerogatives").

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[26] As this passage from *BEP* makes clear, an agreement provision negotiated pursuant to a part of § 7106(b) other than subsection (b)(3) can also form the basis for a lawful arbitration award that affects the exercise of a management right. However, as the Authority noted (JA at 12), the Union in this case has only argued that § A.2. is an appropriate arrangement under subsection (b)(3). Therefore, only that subsection is discussed in this brief.

In assessing whether an agreement provision is an "appropriate arrangement," the Authority first determines whether it is an "arrangement" at all. In this connection, the Authority considers whether the provision seeks to mitigate adverse effects flowing from the exercise of a management right, and whether the provision is sufficiently "tailored" to benefit only those employees adversely affected. *E.g., U.S. Dep't of the Interior, Minerals Mgmt. Serv.* v. *FLRA*, 969 F.2d 1158, 1162 (D.C. Cir. 1992).

The Authority in this case properly concluded (JA at 10-11) that the second sentence of § A.2. of the MA was not an "arrangement" for employees adversely affected by the exercise of a management right. Rather, the Authority correctly found the Examiners were adversely affected by operation of a regulation, 5 C.F.R § 531.606 (2005), which prohibited their receiving locality pay, and not the exercise of a management right. As the above discussion makes clear, Congress did not intend in § 7106(b)(3) to allow for bargaining on otherwise nonnegotiable matters, if the source of the adverse effect is something other than the exercise of a management right. Hence, the Authority clearly ruled correctly on this point, and should be affirmed.

The Authority also reasonably rejected the Union's claim (JA at 11-12), repeated to this Court (Br. 37), that § A. of the MA "as a whole" was

designed to obtain special pay rates for Examiners, to compensate for the increased burdens imposed on Patent Examiners as a result of PTO management having changed work requirements. These management changes entailed such things as eliminating paper files in favor of computerized images, and introducing a customer service requirement for Examiners.

Even assuming, as the Union contends (Br. 37), that § A. of the MA was, as a general matter, the product of the parties' negotiations to address these work place changes, this does not undermine the Authority's analysis. The Union's broad-brush assertion, that the underlying rationale for the agreement as a whole should be considered in appropriate arrangement analysis, is well off the mark. Rather, as the Authority correctly recognized (JA at 10), the analysis must focus on deciding whether the *specific agreement provision* the arbitrator applied in fashioning his award seeks to "mitigate adverse effects flowing from the exercise of a management right." *IRS*, 960 F.2d at 1173.

In this case, it is apparent that the harm suffered by employees was diminution of the amount of extra pay Examiners would receive over the compensation of employees receiving regular pay rates. This harm resulted from the joint operation of 5 C.F.R. § 531.606, which bars special rate

employees from receiving locality pay increases; and OPM's denial under applicable regulations of PTO's 2002 request to make up for this shortfall. The second sentence of § A.2. of the MA was aimed at remedying just this kind of action, i.e., OPM's denial of a PTO special pay rate request. As is evident from these facts, the exercise of a management right played no part in causing the harm experienced by the Examiners. Rather, as the Authority correctly noted (JA at 11), the adverse effect the second sentence of § A.2. is intended to address stems from regulatory actions by OPM.

This specific analytical framework employed by the Authority is consistent with the Statute and case law of this Court. Accordingly, the Authority's holding that the second sentence of § A.2. of the MA is not an arrangement under § 7106(b)(3), and therefore cannot support the arbitrator's incursion into PTO's management prerogatives regarding employee retention, is correct and should be affirmed.[27]

CONCLUSION

The Union's petition for review should be dismissed for lack of subject matter jurisdiction. In the alternative, it should be denied on the merits.

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[27] Given the Authority's holding that the second sentence of § A.2. of the MA is not an "arrangement," the Authority did not proceed to consider whether the provision is an "appropriate" arrangement, i.e., one that does not excessively interfere with the exercise of a management right.

Respectfully submitted.

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William R. Tobey
Acting Solicitor

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William E. Persina
Attorney

Federal Labor Relations Authority
1400 K St., NW, Suite 300
Washington, D.C. 20424-0001
(202) 218-7999

JANUARY 2006

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

PATENT OFFICE PROFESSIONAL ASSOCIATION, Petitioner	)	
v.	)	No. 05-1173
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

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

Richard J. Hirn
5335 Wisconsin Ave., NW
Suite 440
Washington, D.C. 20015

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Thelma Brown
Paralegal Specialist

January 4, 2005