ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 09-1093

NATIONAL TREASURY EMPLOYEES UNION,
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

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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 National Treasury Employees Union (union) and the Internal Revenue Service (agency). The union is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's decision in *National Treasury Employees Union,* Case No. 0-AR-4089, decision issued on January 21, 2009, reported at 63 F.L.R.A. 70.

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).

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GLOSSARY

Authority or FLRA	Federal Labor Relations Authority
Br.	Brief
Chapter 168	*Nat'l Treasury Employees Union, Chapter 168*, 55 F.L.R.A. 237 (1999)
CBA	Collective Bargaining Agreement
Commerce	*United States Dep't of Commerce v. FLRA*, 7 F.3d 243 (D.C. Cir. 1993)
EEOC	*Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986)
IRS or agency	Department of the Treasury, Internal Revenue Service
Howard University	*Howard Univ. v. Metro. Campus Police*, 512 F.3d 716, 720 (D.C. Cir. 2008)
JA	Joint Appendix
Local 2924	*Am. Fed'n of Gov't Employees, Local 2924 v. FLRA*, 470 F.3d 375, 377 (D.C. Cir. 2006)
NTEU or union	National Treasury Employees Union
NTEU	*Nat'l Treasury Employees Union* v. FLRA, 452 F.3d 793 (D.C. Cir. 2006)
Postal Wkrs.	*United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686 (D.C. Cir. 2009)
SA	Supplemental Appendix

GLOSSARY
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Scott AFB	*Dep't of the Air Force, 375th Mission Support Squadron, Scott AFB, Ill.*, 51 F.L.R.A. 858 (1996)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	Unfair Labor Practice
Verizon	*Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am., Local 2336*, No. 08-7092 (D.C. Cir. July10, 2009)
Wissman	*Wissmanv. Soc. Sec. Admin.*, 848 F.2d 17, (Fed. Cir. 1988)

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority ("Authority" or "FLRA") issued the decision under review in this case on January 21, 2009. The decision is published at 63 F.L.R.A. 70 and is included in the Joint Appendix (JA) at JA 5-11. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135

(2006) (Statute).[1] Although this Court has jurisdiction to review the Authority's decisions resolving exceptions to arbitrator's awards where, as here, such awards involve an Unfair Labor Practice (ULP), 5 U.S.C. § 7123(a)(1), this Court does not have jurisdiction over the instant petition because the petitioner's contentions were not urged before the Authority. 5 U.S.C. § 7123(c); *Equal Employment Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) (*EEOC*) (exhaustion requirement of § 7123(c) is jurisdictional).

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction over the instant petition because petitioner's contentions were not urged before the Authority as required by § 7123(c) of the Statute.

2. Assuming this Court has jurisdiction over the petition for review, whether the Authority reasonably denied the union's exception to an arbitrator's award that found that the employer agency had not repudiated the parties' collective bargaining agreement.

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

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement (CBA) between the National Treasury Employees Union ("NTEU" or "union") and the United States Department of the Treasury, Internal Revenue Service, Washington, D.C. ("IRS" or "agency"). The union filed a grievance claiming that the IRS violated the CBA, statutes, and regulations by using crediting plans in merit promotion actions. After an arbitrator held that the IRS violated neither the CBA nor applicable statutes and regulations, NTEU filed exceptions to the award with the Authority pursuant to § 7122 of the Statute. The Authority denied NTEU's exceptions in their entirety.

NTEU now seeks review of the Authority's decision.

STATEMENT OF THE FACTS

A. Background and the Arbitrator's Award

This dispute arose over the agency's use of "crediting plans" in its merit promotion actions.[2] Although the grievance that is the source of this case was not filed until 2004, evidence submitted to the arbitrator showed that the agency had been using crediting plans since at least 1986. JA 20. Article 13 of the CBA in

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[2] A "crediting plan" is a measuring device consisting of a set of evaluation criteria keyed to the specific knowledge, skills and abilities deemed necessary for the performance of a particular position. JA 15.

effect at the time the grievance was filed, entitled "Promotions/ Other Competitive Actions," contained no explicit mention of crediting plans. JA 27-36. The union contended that the use of crediting plans violated the CBA as well as various government-wide regulations issued by the Office of Personnel Management. JA 17. In addition, the union claimed that the agency committed ULPs by failing to give notice and an opportunity to bargain over the use of crediting plans and, as specifically relevant here, by repudiating the terms of the parties' CBA. JA 17.

The arbitrator first found that nothing in Article 13 of the CBA expressly allows or prohibits the use of crediting plans. However, noting the agency's long-standing use of crediting plans both before and after the negotiation of the current Article 13, and that the use of crediting plans was not discussed in negotiations, the arbitrator determined the relevant sections of Article 13 were not intended to prohibit the agency's continued use of crediting plans. JA 19-20. Accordingly, the arbitrator held that the agency did not violate the CBA by using crediting plans. *Id.* at 20.

The arbitrator also held that the use of crediting plans did not violate applicable laws and regulations. JA 20-21. Regarding the union's contention that the agency repudiated the CBA, the arbitrator stated that, because there was no violation of the CBA, there could not be a "clear and patent breach" of the

agreement.[3] *Id.* at 20. Accordingly, the arbitrator denied the union's grievance. *Id.* at 21.

B. The Authority's Decision

Pursuant to § 7122 of the Statute, NTEU filed exceptions to the arbitrator's award with the Authority. As relevant here, the union contended that, contrary to the conclusion of the arbitrator, the agency's use of crediting plans constituted a "clear and patent breach" of the CBA.[4] JA 6. In that regard, the union argued that the arbitrator's award failed to draw its essence from the parties' agreement because Article 13, properly construed, prohibited the use of crediting plans. *Id.* at 7. The union also contended that the arbitrator erred by examining the bargaining history of Article 13. *Id.*

Applying well-established standards governing the review of arbitrator's awards, the Authority held that the union had not demonstrated that the arbitrator's

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[3] A "clear and patent breach" of a contract provision that "go[es] to the heart of the parties' agreement" constitutes an unlawful repudiation of the agreement in violation of § 7116(a)(1) and (5) of the Statute. *Am. Fed'n of Gov't Employees, Local 2924 v. FLRA*, 470 F.3d 375, 377 (D.C. Cir. 2006) (*Local 2924*), quoting *Dep't of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 F.L.R.A. 858, 861-62 (1996) (*Scott AFB*).

[4] The union also filed exceptions regarding other aspects of the award, all of which were denied by the Authority. JA 8-11. Only the issue of the alleged "clear and patent breach" is before the Court.

award, based on his interpretation of the CBA, was unfounded, implausible, irrational, or in manifest disregard of the agreement.[5] JA 10. Regarding the union's contention that the arbitrator improperly relied on bargaining history, the Authority stated that that issue was not properly before it because NTEU could have, but did not, raise the issue before the arbitrator. Accordingly, the Authority did not consider the matter.[6] JA 10.

With regard to NTEU's contention that the use of crediting plans constituted an unlawful repudiation of the CBA, the Authority noted that a necessary element of repudiation is a clear and patent breach of the agreement. Accordingly, Authority stated that the arbitrator's finding that there was no breach of the

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[5] Under Authority precedent, to demonstrate that an award fails to draw its essence from a collective bargaining agreement, a party must show that the award: (1) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; or (2) does not represent a plausible interpretation of the agreement; or (3) cannot in any rational way be derived from the agreement; or (4) evidences a manifest disregard of the agreement. *See United States Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

[6] Section 2429.5 of the Authority's regulations, 5 C.F.R. § 2429.5, provides, in relevant part, that:

> The Authority will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the . . . arbitrator.

agreement compels a conclusion that there was no repudiation. JA 9. The Authority, therefore, denied the union's exception. *Id.*

STANDARD OF REVIEW

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

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *Nat'l Fed'n of Fed. Employees, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

SUMMARY OF ARGUMENT

1. NTEU's contentions that the Authority erred by not conducting a *de novo* analysis of the relevant contract terms are not properly before this Court. Absent extraordinary circumstances, § 7123(c) of the Statute deprives a reviewing court of jurisdiction to consider objections not urged before the Authority. Further, even if the Authority raises an issue *sua sponte*, a party seeking judicial review of that issue must first file a request for reconsideration before the Authority. *See, e.g., United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993).

Before the Authority, instead of arguing for *de novo* consideration of the arbitrator's construction of the CBA, the union contended that the arbitrator's award did not "draw its essence from the agreement." Thus, the union's arguments on exceptions assumed that the proper standard of review of the arbitrator's construction was the highly deferential "essence of the agreement" standard, not *de novo* analysis. NTEU nowhere suggested that the Authority should review the text of the agreement *de novo*.

Because the union failed to contend before the Authority that a *de novo* analysis of the contract is required, either on exceptions or in a request for reconsideration, the issue is not properly before this Court and the Court should dismiss the petition for review.

2. Even assuming that NTEU's contentions are properly before this Court, they are without merit. The Authority properly deferred to the arbitrator's construction of the CBA and denied the union's exceptions to the arbitrator's award.

This case was before the Authority on exceptions to an arbitrator's award pursuant to § 7122 of the Statute. It is well established that under § 7122, the Authority reviews an arbitrator's construction of contract terms under the highly deferential "essence of the agreement" standard, as would a federal court in a private sector arbitration matter. Under that standard, "[a]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 693 (D.C. Cir. 2009). It is also well settled that under § 7122 of the Statute, where a party excepts to an arbitrator's award on the basis that it is inconsistent with law, the Authority reviews an arbitrator's application of law *de novo*, but reviews the underlying interpretation of the agreement and factual determinations under the applicable deferential standards. Accordingly, although the arbitrator's ultimate conclusion in this case, *i.e.*, that the IRS had not violated § 7116(a)(1) and (5) of the Statute, involved the application of law, the Authority properly deferred to the arbitrator's underlying interpretation of the contract.

Contrary to NTEU's contention, this Court's decision in *American Federation of Government Employees, Local 2924 v. FLRA*, 470 F.3d 375 (D.C. Cir. 2006), upon which NTEU principally relies, does not support the proposition that the Authority should have conducted its own *de novo* analysis of the CBA. That case arose under the statutory ULP procedures, where, if necessary, the Authority interprets the terms of a collective bargaining agreement in the first instance. In contrast, this case was pursued through the grievance/arbitration process, where the Authority's role is to review an arbitrator's determination on exceptions. As discussed above, that review with respect to the construction of contract terms is extremely limited.

Here, by submitting the dispute to arbitration, NTEU agreed to be bound by the arbitrator's interpretation of the CBA and his findings of fact, subject only to the limited review provisions of § 7122 of the Statute. The union cannot now escape the consequences of its forum selection.

For the reasons stated above, NTEU's petition for review should be dismissed for lack of jurisdiction. Further, even if this Court has jurisdiction, the petition should be denied on its merits.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THE INSTANT PETITION BECAUSE PETITIONER'S CONTENTIONS WERE NOT URGED BEFORE THE AUTHORITY AS REQUIRED BY § 7123(c) OF THE STATUTE

A. Section 7123 Bars a Court from Considering Contentions Raised For the First Time in a Petition for Review

Section 7123 of the Statute provides that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court." 5 U.S.C. § 7123(c). The Supreme Court has explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *EEOC,* 476 U.S. at 23. Accordingly, absent extraordinary circumstances, contentions not urged before the Authority, but instead raised for the first time in a petition for review of the Authority's decision, are not within the Court's jurisdiction to consider. *See, e.g., United States Dep't of Commerce v. FLRA*, 7 F.3d 243, 244-45 (D.C. Cir. 1993) (*Commerce*). Even if the Authority raises an issue *sua sponte*, a party seeking judicial review of that issue must first file a request for reconsideration before the Authority. *Id. at* 245.

B. NTEU's Contentions in Its Petition for Review Were Not Raised in Proceedings Before the Authority

The union is raising for the first time in its petition for review the contention that the Authority should have conducted a *de novo* analysis of the relevant contact terms. It is important to note at the outset that NTEU is not contending before this Court that the Authority misapplied the highly deferential "essence of the agreement" standard, *i.e.*, that even under the deferential standard, the arbitrator's award should be vacated.[7] Rather, the union is now arguing that the Authority should have conducted a *de novo* review of the relevant contract terms, rather than applying the "essence of the agreement" standard.

In its exceptions, the union argued that "[t]he arbitrator's ruling that the IRS' use of crediting plans in promotion actions did not violate the parties' agreement fails to draw its essence from that agreement." Supplemental Appendix (SA) at 18-25.[8] Essentially conceding that "the essence of the agreement" is the proper

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[7] Nor could it reasonably do so. As the arbitrator was "arguably construing . . . the contract," review is not authorized on the ground that the arbitrator misinterpreted the agreement. *See below*, pp. 15-16; *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 693 (D.C. Cir. 2009) (*Postal Wkrs.*).

[8] Concurrent with the filing of this brief, the Authority has filed a motion to submit a Supplemental Appendix, consisting of the union's exceptions to the arbitrator's award and the memorandum in support thereof.

standard, the union nowhere suggests that the Authority should review the text of the agreement *de novo*. *Id.* The union did not file a request for reconsideration.

Because the union failed to contend before the Authority that a *de novo* analysis of the contract is required, either on exceptions or in a request for reconsideration, and no extraordinary circumstances being apparent, the issue is not properly before this Court. The Court should, therefore, dismiss the union's petition for review.[9]

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[9] Further, the union's more specific argument (Br. 10) that the arbitrator erred by relying on bargaining history is also not properly before the Court. The Authority held that that argument was barred under § 2429.5 of its regulations, 5 C.F.R. § 2429.5, because the union did not raise the argument before the arbitrator. Accordingly, the Authority did not address the union's contention. Because the union's arguments were not raised in accordance with the Authority's procedures and the Authority did not address them in the first instance, the union may not raise them before the Court. *See Retail Clerks Int'l Ass'n, Local 880, AFL-CIO v. NLRB*, 366 F.2d 642, 647 (D.C. Cir 1966) (matter raised to the National Labor Relations Board in a manner inconsistent with the Board's regulations could not be raised before the court of appeals).

It is also too late in the proceedings for the union to contend that the Authority misapplied § 2429.5 of its regulations. The issue too could have been raised in a motion to the Authority for reconsideration. *Commerce*, 7 F.3d at 245.

II. ASSUMING THIS COURT HAS JURISDICTION OVER THE PETITION FOR REVIEW, THE AUTHORITY REASONABLY DENIED THE UNION'S EXCEPTION TO AN ARBITRATOR'S AWARD THAT FOUND THAT THE EMPLOYER AGENCY HAD NOT REPUDIATED THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

Applying the standards provided in § 7122(a) of the Statute, the Authority reasonably denied NTEU's exception to an arbitrator's award that found that the IRS did not repudiate the CBA. In so doing, the Authority properly deferred to the arbitrator's interpretation of the CBA.

A. Review of Arbitrators' Awards Under § 7122 of the Statute

Congress has provided that "the [Authority is] to review arbitrators' decisions on grounds similar to those applied by Federal courts in private sector labor management relations.'" *Griffith v. FLRA*, 842 F.2d 487, 491 (D.C. Circuit 1988 (quoting 5 U.S.C. § 7122(a)). The conference report on the Civil Service Reform Act[10] confirms this view, stating that, "[t]he 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." H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. at 153 (1978).

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[10] The Statute was enacted as Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

In reviewing an arbitrator's interpretation of the parties' collective bargaining agreement, the Authority and the courts will vacate an award "only if it does not draw its essence from the terms of the collective bargaining agreement." *Verizon Washington, D.C. Inc. v. Commc'ns Workers of Am., Local 2336*, No. 08-7092, 2009 U.S. App. LEXIS 15323, at *14-*15 (D.C. Cir. July10, 2009) (internal quotation omitted) (*Verizon*); *United Steelworkers of Am. v. Enter. Wheel and Car Corp.*, 363 U.S. 593, 597 (1960); *United States Dep't of Def., Def. Contract Audit Agency, Cent. Region, Irving, Tex.*, 60 F.L.R.A. 28, 30 (2004) (*Def. Audit Agency*). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United States Postal Serv. v. Am. Postal Workers Union*, 553 F.3d 686, 693 (D.C. Cir. 2009) (*Postal Wkrs.*) (quoting *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 ((1987); *United States Dep't of the Navy, Naval Mine Warfare Eng'g Activity, Yorktown, Va.*, 39 F.L.R.A. 1207, 1211 (1991). Further, an arbitrator need not be "confined to the express provisions of the contract when issuing his award, but may also consider the structure of the contract as a whole." *Verizon*, 2009 U.S. App. LEXIS 15323, at *15. (internal quotation omitted); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

Since the parties have "authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract." *Verizon*, 2009 U.S. App. LEXIS 15323, at *16 (quoting *Misco*, 484 U.S. at 38); *Howard Univ. v. Metro. Campus Police*, 512 F.3d 716, 720 (D.C. Cir. 2008) (*Howard University*) (parties to arbitration "have agreed to be bound by the arbitrator's interpretation without regard to whether a judge would reach the same result"); *Def. Audit Agency*, 60 FLRA at 30 ("The Authority and the courts defer to arbitrators [regarding the interpretation of the agreement] because it is the arbitrator's construction of the agreement for which the parties have bargained.").

The Authority also may find arbitrators' awards deficient if they are contrary to any law, rule, or regulation. 5 U.S.C. § 7122(a)(1). In making such determinations, the Authority reviews the legal question *de novo*. *United States Dep't of the Treasury, United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994). However, in making such assessments, the Authority defers to the arbitrator's underlying factual determinations and, if relevant, his construction of the contract. *Nat'l Treasury Employees Union, Chapter 168*, 55 F.L.R.A. 237, 241 (1999) (*Chapter 168*); *Nat'l Treasury Employees Union v. FLRA*, 452 F.3d 793, 797 (D.C. Cir. 2006) (*NTEU*) (Although Authority defers to an arbitrator's

interpretation of the contract, it properly reviews *de novo* the arbitrator's application of legal doctrine.). The Authority's deference to an arbitrator's underlying determinations in such cases is grounded in the well-established principle that the parties have agreed that the construction of the contact and the facts are to be found by the arbitrator. *See United States Dep't of Labor*, 62 F.L.R.A. 153, 156 (2007).

Thus, whether the Authority is considering exceptions to an arbitrator's award that specifically challenge an arbitrator's contract interpretation or exceptions that raise legal issues involving such an interpretation, in either case the Authority properly accords appropriate deference to an arbitrator's construction of the pertinent contract language.

B. The Authority Properly Deferred to the Arbitrator's Interpretation of the CBA and Concluded that the IRS Did Not Repudiate the Agreement

1. The Elements of Repudiation

An agency violates its duty to bargain in good faith under § 7116(a)(5) when it repudiates a collective bargaining agreement. *Scott AFB*, 51 F.L.R.A. at 861. A repudiation occurs when: 1) there is a "clear and patent" breach of the agreement; and 2) the provision breached "goes to the heart" of the parties' agreement. *Id.* Obviously, a necessary (but not sufficient) element of any repudiation is that there

be a breach of the agreement. *Nat'l Ass'n of Gov't Employees, Local R3-32*, 61 F.L.R.A. 127, 131 (2005) ("Under Authority precedent, repudiation requires the breach of an obligation imposed by the parties' agreement.").

As will be discussed below, the Authority properly deferred to the arbitrator's construction of the CBA. Because the arbitrator found that the CBA did not prohibit the use of crediting plans, it followed logically that there was no breach of the agreement and, thus, no repudiation. The union's challenge to the Authority's denial of the union's repudiation exception should, therefore, be denied.

2. The Authority Properly Deferred to the Arbitrator's Interpretation of the CBA

Contrary to the union's contentions (Union's Brief (Br.) 8-11), the Authority was not required to conduct a *de novo* review of the CBA provisions. Rather, consistent with well-established administrative and judicial precedent, the Authority applied the highly deferential "essence of the agreement" standard to the arbitrator's interpretation of the agreement.[11]

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[11] Should the Court find the Authority should have conducted a *de novo* review of the contract terms, the Court must remand the case to the Authority to conduct such an analysis. Further, because the arbitrator found no breach, neither he, nor the Authority on review, considered the remaining elements of repudiation, namely whether the alleged breach was "clear and patent" and whether the alleged breach

(footnote continued on next page)

It is well settled that under § 7122 of the Statute, where a party excepts to an arbitrator's award on the basis that it is inconsistent with law, the Authority reviews an arbitrator's application of law *de novo*, but reviews the underlying interpretation of the agreement and factual determinations under the applicable deferential standards. *NTEU*, 452 F.3d at 797 (Although Authority reviews *de novo* the arbitrator's application of legal doctrine, it defers to an arbitrator's interpretation of the contract); *Chapter 168*, 55 F.L.R.A. at 241 (same). Accordingly, although the arbitrator's ultimate conclusion, *i.e.*, that the IRS had not violated § 7116(a)(1) and (5) of the Statute, involved the application of law, the Authority properly deferred to the arbitrator's underlying interpretation of the contract.

The fact that, in this case, the interpretation of the contract was dispositive of the ultimate legal question does not turn the question of contract interpretation into an issue subject to *de novo* review by the Authority. The arbitrator concluded that there was no repudiation of the agreement because there was no breach of the agreement. JA 19-20. The lynchpin of the arbitrator's determination was his construction of Article 13 of the CBA. It was undisputed that the IRS was using

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"goes to the heart of the agreement." The case would have to be remanded for consideration of these factors as well.

crediting plans; therefore, the crucial question was whether Article 13 prohibited the use of crediting plans, *a pure question of contract interpretation*. If the CBA prohibits the use of crediting plans, the agency has breached the agreement. If Article 13 does not prohibit the use of crediting plans, there was no breach and, *a fortiori*, there was no repudiation. Performing the arbitral function of interpreting the parties' contract, the arbitrator found that Article 13 did not prohibit the use of crediting plans. Only after that determination, did he reach the ultimate legal conclusion that there was no repudiation of the CBA.

Finally, NTEU's reliance (Br. 11) on this Court's decision in *Local 2924* to support its contention that the Authority should have conducted its own *de novo* analysis of the CBA is misplaced. That case did not involve the review of an arbitrator's award under § 7122 of the Statute. *Local 2924* arose as a ULP case processed under § 7118 of the Statute. *Local 2924*, 470 F.3d at 379. Where the interpretation of a collective bargaining agreement is necessary to dispose of a ULP case filed under statutory ULP procedures, the Authority interprets the contract in the first instance, *Scott AFB*, 51 F.L.R.A. at 861-62 and n.4, and that determination is subject to judicial review under the standards of § 7123 of the Statute and § 706 of the Administrative Procedures Act, 5 U.S.C. § 706. *See Local 2924*, 470 F.3d at 377 (holding that Authority's determination regarding the

parties' agreement was "arbitrary and capricious and unsupported by substantial evidence"). That is why the Authority conducted its own analysis of the collective bargaining agreement in *Local 2924* and other cases arising under § 7118 of the Statute.

The instant case arises in a different posture. Exercising its choice of forum rights under § 7116(d) of the Statute, NTEU pursued this case through the parties' grievance/arbitration procedure.[12] By choosing the arbitration process, the union submitted the resolution of the case, including the interpretation of the CBA, to the arbitrator in the first instance, and in turn to the Authority's exceptions procedures under § 7122. Consistent with the union's choice of arbitration, on exceptions, the Authority correctly reviewed the arbitrator's contract interpretation under the deferential standards of § 7122, rather than conduct its own analysis as it would have done had the union brought the case under § 7118 of the Statute.

The union cannot now escape the consequences of its forum selection. As the Authority has stated, under a choice of forum provision, aggrieved parties elect the forum as it is constituted under the provisions of the Statute. *Ass'n of Civilian Technicians, New York State Council*, 61 F.L.R.A. 664 (2006), *petition for review*

[12] Section 7116(d) provides that certain issues may be raised under the negotiated grievance procedure or under the statutory ULP procedures found at § 7118 of the Statute, but not both.

denied, 507 F.3d 697 (D.C. Cir. 2007), *cert. denied* __ U.S. __, 129 S. Ct. 344 (2008); *see also Wissman v. Soc. Sec. Admin.*, 848 F.2d 176, 177-78 (Fed. Cir. 1988) (*Wissman*) (Applying a similar choice of forum provision in § 7121(d) of the Statute, the court held that party is bound by the procedures and practices of the forum chosen.).

In this case, by submitting the case to arbitration, NTEU agreed to be bound by the arbitrator's interpretation of the CBA and his findings of fact, subject only to the limited review provisions of § 7122 of the Statute. *See Howard University*, 512 F.3d at 720 (parties to arbitration "have agreed to be bound by the arbitrator's interpretation without regard to whether a judge would reach the same result"). As the court in *Wissman* stated, with a forum's advantages, also come some disadvantages. *Wissman*, 848 F.2d at 178. One of the disadvantages of arbitration is the limited review available under § 7122 of the Statute to the party receiving an unfavorable decision from the arbitrator.

CONCLUSION

The union's petition for review should be dismissed for lack of jurisdiction. Assuming the Court has jurisdiction, the petition for review should be denied on its merits.

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

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

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color,

creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

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

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, 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.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e) and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b)(1) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(2)(A) The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the arbitrator to order—

(i) a stay of any personnel action in a manner similar to the manner described in section 1221(c) with respect to the Merit Systems Protection Board; and

(ii) the taking, by an agency, of any disciplinary action identified under section 1215(a)(3) that is otherwise within the authority of such agency to take.

(B) Any employee who is the subject of any disciplinary action ordered under subparagraph (A)(ii) may appeal such action to the same extent and in the same manner as if the agency had taken the disciplinary action absent arbitration.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate

procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

(g)(1) This subsection applies with respect to a prohibited personnel practice other than a prohibited personnel practice to which subsection (d) applies.

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

(3) The remedies described in this paragraph are as follows:

(A) An appeal to the Merit Systems Protection Board under section 7701.

(B) A negotiated grievance procedure under this section.

(C) Procedures for seeking corrective action under subchapters II and III of chapter 12.

(4) For the purpose of this subsection, a person shall be considered to have elected—

(A) the remedy described in paragraph (3)(A) if such person has timely filed a notice of appeal under the applicable appellate procedures;

(B) the remedy described in paragraph (3)(B) if such person has timely filed a grievance in writing, in accordance with the provisions of the parties' negotiated procedure; or

(C) the remedy described in paragraph (3)(C) if such person has sought corrective action from the Office of Special Counsel by making an allegation under section 1214(a)(1).

(h) Settlements and awards under this chapter shall be subject to the limitations in section 5596(b)(4) of this title.

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

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

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its

designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.