**ORAL ARGUMENT NOT YET SCHEDULED**
**No. 19-1163**

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

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NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

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ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

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# BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (the "Authority") were the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (the "Agency") and the National Weather Service Employees Organization (the "Union"). In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

### B. Ruling Under Review

The Union seeks review of the Authority's decision in *National Weather Service Employees Organization and the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service*, 71 FLRA (No. 47) 275 (August 8, 2019) (Member DuBester dissenting); *as amended*, 71 FLRA (No. 72) 380 (November 4, 2019) (Member DuBester dissenting).

### C. Related Cases

This case was not previously before this Court or any other court. There are no related cases currently pending before this Court or any court of which counsel for the Authority is aware.

/s/ Noah Peters
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## GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| **Agency** | National Oceanic and Atmospheric Administration, National Weather Service, a component of the U.S. Department of Commerce |
| **Arbitrator** | Laurence M. Evans |
| **Authority** | Respondent, the Federal Labor Relations Authority |
| **Br.** | Petitioner's opening brief |
| **CBA** | Collective Bargaining Agreement |
| **Decision** | The decision of the Authority in this case (as amended), dated November 4, 2019 |
| **FMCS** | Federal Mediation and Conciliation Service |
| **FSIP** | Federal Service Impasses Panel |
| **JA** | The Joint Appendix |
| **MOU** | Memorandum of Understanding |
| **NLRA** | The National Labor Relations Act, 29 U.S.C. §§ 151–169 (2018) |
| **NLRB** | National Labor Relations Board |
| **The Statute** | The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) |
| **ULP** | Unfair Labor Practice |
| **Union** | Petitioner, National Weather Service Employees Organization |

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Authority had subject matter jurisdiction over this case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute"). The Authority's initial decision, issued on August 8, 2019, is published at 71 FLRA (No. 47) 275 (2019) and is included in the Joint Appendix ("JA") at 209-214. The Authority issued an Amended Decision (the "Decision") on November 4, 2019, which is published at 71 FLRA (No. 72) 380. (*See* JA 215-221.) The Union's Petition for Review was timely filed on August 12, 2019. 5 U.S.C. § 7123(a). However, as stated below, this Court lacks jurisdiction over the second issue presented in the Union's Statement of Issues to Be Raised: whether the Authority erred in its review of the Arbitrator's contractual holding.

## STATEMENT OF THE ISSUE PRESENTED

Was the Authority correct in finding that the Agency's good-faith invocation of a contractual termination provision was not an unfair labor practice ("ULP")?

Does this Court have jurisdiction to review the Authority's non-ULP contractual holding, given 5 U.S.C. § 7123(a)'s limitation of judicial review of Authority arbitration decisions to cases involving a ULP?

## RELEVANT STATUTORY PROVISIONS

All relevant statutory and regulatory provisions are contained in the attached Statutory Addendum. (Add. 1.)

## STATEMENT OF THE CASE

This case arises from a disagreement over the meaning of a provision of the Collective Bargaining Agreement ("CBA") entered into between the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service (the "Agency") and the National Weather Service Employees Organization (the "Union").

Article 29, § 3 of the CBA allows either the Agency or the Union, upon written notification to the other, to "terminate any or all sections" of the CBA if no agreement is reached after "90 calendar days from the start of formal renegotiation or amendment of" the CBA, and "the services of neither [the Federal Mediation and Conciliation Service ("FMCS")] nor [the Federal Service Impasses Panel ("FSIP")] have been invoked." (JA 86.)

The Agency and the Union began formal negotiations over a new collective bargaining agreement on April 4, 2017. (JA 31, 67, 92, 160.) Over 90 days later, after no agreement was reached, the Agency informed the Union that, "in accordance with Article 29, § 3 of the [CBA]," it was "terminating that agreement effective immediately." (JA 162.) The Agency's email continued, "CBA terms continue as past practices and remain in effect until there is a new agreement." (*Id.*) "Until that occurs, [the Agency] will maintain the status quo, operating under the procedures and policies established under the 2001 CBA." (*Id.*) In an email to Agency employees, the

Agency explained that it would continue to negotiate with the Union to develop a CBA that better aligned with the needs of the Agency and employees. (JA 158.)

In response, the Union filed a grievance pursuant to Article 10, § 9 of the CBA, challenging the Agency's interpretation of Article 29, § 3. (JA 87-90.) The Union contended that it had indeed "invoked" the services of FMCS within the meaning of the CBA by filing an intake form with FMCS in February 2017 and speaking with an FMCS mediator in July 2017, over 90 days after formal negotiations began. (JA 87-88.) The Union also argued that the Agency's termination of the CBA constituted a "unilateral termination and repudiation of the CBA," and thus a ULP. (JA 87.)

On August 22, 2017, the Agency denied the grievance. (JA 91-94.) The Agency informed the Union that, if it disagreed, it could arbitrate its grievance pursuant to Article 11 of the CBA. (JA 94.) Both parties then participated in a grievance arbitration before the Arbitrator. (JA 26.)

In a written decision, the Arbitrator held that the Agency violated Article 29, § 3 of the CBA in terminating the agreement because the parties' previous negotiations over ground rules, which occurred between 2015 and 2016, counted as "formal renegotiation of their CBA." (JA 34-35 (internal quotation marks omitted).) In the alternative, the Arbitrator held that "formal renegotiation" began in January 2017, "when the Agency submitted its first round of substantive bargaining proposals to the Union," and that the Union successfully "blocked" the CBA's termination in

February 2017 by filing initial paperwork with FMCS and speaking to an FMCS mediator. (JA 35-36.)

The Arbitrator held, nonetheless, that the Agency did not commit a ULP because "the record contains no evidence that the Agency repudiated the CBA or any provision therein." (JA 37.) "While the Agency 'terminated' the [CBA] pursuant to its interpretation of Article [29], § 3, all provisions of the CBA remain in effect to date and there is no evidence to the contrary." (*Id.*) Further, "[t]he fact that the Union grieved the Agency's termination of the CBA, culminating in arbitration, undermines the Union's claim that the Agency repudiated the CBA in violation of the Statute." (*Id.*)

The Union and the Agency both filed exceptions to the Arbitrator's award with the Authority. (JA 11-16, 43-52.) The Authority carefully considered the record and the law and set aside the Arbitrator's contractual ruling on the ground that it failed to draw its "essence" from the CBA—that is, the award disregarded the "wording and purposes" of the CBA. (JA 210.) The Authority found that Article 29, § 3 of the CBA—which FSIP imposed in 1986—was intended to provide an "incentive for both parties to complete negotiations in an expeditious manner." (JA 211.) The Authority determined that provision would be undercut if either party could "block" termination of the CBA "by requesting FMCS or FSIP assistance . . . before that party submits one proposal or counterproposal." (*Id.*) Having found that the Agency acted

in accordance with the Article 29, § 3, the Authority found that the Agency had not committed a ULP. (*Id.*)

In an Amended Decision issued on November 4, 2019, the Authority further determined that the Agency did not commit a ULP "for the same reasons articulated by the Arbitrator." (JA 217.) That is, the Agency acted in accordance with a reasonable interpretation of Article 29, § 3 in terminating the CBA, and did not repudiate the contract, but told the Union that the CBA's terms would continue "until there [was] a new agreement." (JA 217-218.)

The Union now seeks review of the Authority's Decision, arguing that: 1) the Agency committed a ULP by "repudiat[ing]" the CBA, and 2) the Authority applied an incorrect standard of review in overturning the Arbitrator's contractual holding. (Statement of Issues, *Nat'l Weather Serv. Emps. Org. v. FLRA*, No. 19-1163, Doc. 1802460 (Aug. 16, 2019) ("Statement of Issues").)

This Court should deny the Petition for Review because: 1) the Authority correctly found that the Agency did not commit a ULP by terminating the CBA pursuant to a reasonable interpretation of Article 29, § 3; and 2) under the plain language of 5 U.S.C. § 7123(a) and long-settled precedent, this Court lacks jurisdiction to consider non-ULP grounds for reviewing Authority decisions involving arbitration awards.

## STATEMENT OF THE FACTS

Article 29 of the parties' CBA, titled "Duration and Terms of Agreement," provides as follows:

> **Section 1.** This Agreement shall be in full force and effect for a period of three (3) years from its effective date. It shall be renewed from year to year thereafter unless written notice of a desire to terminate, renegotiate or amend the Agreement or any part thereof is served by either party upon the other between the 60th day and 105th day prior to the expiration date.
>
> **Section 2.** A Memorandum of Understanding shall be executed by the parties that will specify the ground rules to be used in the renegotiation of this Agreement.
>
> **Section 3.** This Agreement will remain in effect for 90 calendar days from the start of formal renegotiation or amendment of said Agreement, exclusive of any time necessary for FMCS or FSIP proceedings. If at the end of the 90-calendar day period an agreement has not been reached and the services of neither FMCS nor FSIP have been invoked, either party may, upon written notification to the other, terminate any or all sections of the Agreement.

(JA 86.)

FSIP imposed the language of Article 29, § 3 in its 1986 decision, *Department of Commerce, National Weather Service, Wash., D.C.*, 86 FSIP 30 (1986) ("*Commerce*"); that language was incorporated verbatim into the parties' subsequent negotiated CBA. In *Commerce*, FSIP considered the Agency's proposal "that the contract remain in effect for 90 days from the start of formal renegotiations. If no agreement is reached by the end of that time and the services of [FSIP] have not been invoked, either party may terminate any or all sections of the contract." (JA 100.) The reason for the Agency's

proposal was that, "[a]lthough negotiations ha[d] been taking place since 1982, the parties ha[d] been unable to conclude bargaining over a master collective-bargaining agreement." (*Id.*) The Agency believed that "[a] time frame for negotiations would shorten the bargaining period for a successor agreement and avoid delays and excessive costs." (*Id.*) The Agency designed the proposal to "strike[] a balance between the 'Union's belief in unlimited and *ad infinitum* negotiations' and the Employer's desire for a procedure that will promote an effective and efficient government." (*Id.*)

The Union urged FSIP not to adopt the proposal, arguing that "there is no need for contract wording on this issue" and "the parties should follow the 'normal operation of law.'" (*Id.*) While the Union did "not object to" language that merely "require[d] the parties to seek mediation or invoke impasse procedures after 90 days of bargaining," it would not "consent to a provision which would allow the [Agency] to terminate or change terms and conditions of employment during negotiations." (*Id.*)

FSIP sided with the Agency, adopting its proposed language with only a slight modification. (*Id.*) FSIP held that "a specific time limitation for the negotiation of a successor agreement should serve as an incentive for both parties to complete negotiations in an expeditious matter, thereby avoiding the excessive costs and delays which the parties experienced during negotiations over their first collective-bargaining agreement." (JA 100-01.) FSIP added, however, "[s]ince the parties may not be at an

impasse at the conclusion of 90 days of bargaining . . . we would add to the [Agency's] proposal that a request by either party for assistance from [FMCS] *before the end of the 90-day bargaining period* would also serve to prevent the agreement from expiring." (JA 101 (emphasis added).)

On July 16, 2015, the Agency informed the Union that it wished to renegotiate the CBA. (JA 95.) The Agency stated, "[f]or purposes of this notice[,] the expiration of the [CBA] shall take place on October 28, 2015 or on a date 90 days after the start of formal renegotiation of the agreement as set forth in Section 3 of Article 29[,] whichever comes first." (JA 97.) Over the next 16 months, the parties negotiated the ground rules that would govern their CBA negotiations. On October 26, 2017, they executed a Memorandum of Understanding ("MOU") regarding those ground rules. (JA 59-65, 124-154.)

The MOU "establish[ed] and set forth the procedures for bargaining a new term collective bargaining agreement." (JA 125.) It stated that "[a]ll negotiations will be held at a Silver Spring, MD area or Tampa Bay/Sarasota Area NOAA facility, unless another area is mutually agreed upon." (*Id.*) "All negotiations will normally commence at 9:00 AM and be completed at 5:00 PM." (*Id.*) "Negotiations are scheduled for three days per week (Tue, Wed, Thu) in each of two consecutive week sessions followed by two weeks in between, unless mutually agreed to otherwise." (JA 126.) "Formal negotiations which initiate the Union Official Time and Travel and Per Diem provided in section 5A2 of this agreement will begin within sixty (60) calendar

days after the completion of [interest-based bargaining ("IBB")] training, if IBB is the selected method for bargaining." (*Id.*)

The Agency sent its first round of substantive proposals to the Union in January 2017. (JA 66-67.) On February 27 2017, before "the actual negotiation" began, the Union's chief negotiator filed an F-7 Notice of Bargaining form with FMCS, but did not notify the Agency or take any other action to obtain FMCS's services. (JA 67, 155.) In March 2017, the Union submitted its first set of substantive proposals to the Agency. (JA 67.)

On April 4, 2017, the parties began what the Union's chief negotiator described as "the actual negotiation"—that is, substantive, face-to-face negotiations at the Agency's Silver Spring, MD facility. (JA 31, 67, 92, 160.) The parties were not able to reach agreement on a new CBA within 90 days of their first formal negotiating session. (JA 67.) On July 10, 2017, more than 90 days after the April 4 start of negotiations, the Union's chief negotiator sent an email to a FMCS mediator inviting him to "come by and sit in on" one of the parties' bargaining sessions, "if for no other reason than to get to know the two teams." (JA 176.) However, the Agency's chief negotiator objected to the presence of the FMCS mediator. (JA 174-75.) The mediator advised the Union negotiator that FMCS could not get involved in the negotiations because "FMCS must receive a joint request from the parties before we can assist the parties with collective bargaining mediation." (JA 177-78.)

On July 21, 2017, the Agency informed the Union that, "in accordance with Article 29, Section 3 of the [CBA]," it was "terminating that agreement effective immediately." (JA 162.) The Agency's email continued, "CBA terms continue as past practices and remain in effect until there is a new agreement." (*Id.*) "Until that occurs, [the Agency] will maintain the status quo, operating under the procedures and policies established under the 2001 CBA." (*Id.*) In an email to Agency employees, the Agency explained that the termination was "part of the normal process for renegotiating its collective bargaining agreement," and that it "allows the agency and the union to negotiate a superior agreement that aligns with modern needs and operations of our operations of our agency and employees." (JA 158.)

In response, the Union filed a grievance challenging the Agency's interpretation of CBA Article 29, § 3. The Union contended that it had "invoked" FMCS services within the meaning of the CBA by filing an FMCS intake form in February 2017 and by communicating with an FMCS mediator in July 2017. (JA 87-88.) The Union also argued that the Agency's termination of the CBA constituted a "unilateral termination and repudiation of the CBA," and thus amounted to a ULP. (JA 87.)

On August 22, 2017, the Agency denied the Union's grievance and informed it of its arbitration rights under CBA Article 11. (JA 91-94.) Both parties then proceeded to arbitration. The Arbitrator held an evidentiary hearing on December 8, 2017. (JA 53-85.) At the hearing, the Agency's Deputy Director Mary Ericson, testified as follows:

> Q: Since terminating the CBA in July, have you terminated any specific agreements or practices?
>
> A: No.
>
> Q: Do you have any specific plans to terminate any agreements or practices?
>
> A: No.
>
> Q: Why not?
>
> A: As I said, we understand and we have the current collective bargaining agreement. What we're looking for is an updat[ed] agreement that's more flexible and easy to work with. Obviously, we would continue to honor all of our negotiating practices that we need to do, but we're hoping to have one that's more streamlined and aligned to the needs of the services right now.

(JA 82.) The Union has never presented any evidence to the contrary.

In a written decision, the Arbitrator held that the Agency violated CBA Article 29, § 3 when it terminated the agreement. (JA 20-39.) He reasoned that the parties' previous 2015 and 2016 ground rules negotiations, constituted a "formal renegotiation of their CBA." (JA 34-35.) In the alternative, the Arbitrator held that "formal renegotiation" began in January 2017, "when the Agency submitted its first round of bargaining proposals" and that the Union successfully "blocked" the Agency's termination of the CBA by filing initial paperwork with FMCS in February 2017 and communicating with an FMCS mediator. (JA 35-36.)

The Arbitrator held, nonetheless, that the Agency did not commit a ULP because "the record contains no evidence that the Agency repudiated the CBA or any

provision therein." (JA 37.) He found that "[w]hile the Agency 'terminated' the CBA . . . all provisions of the CBA remain in effect to date." (*Id.*) The Arbitrator further determined, "[t]he fact that the Union grieved the Agency's termination of the CBA, culminating in arbitration, undermines the Union's claim that the Agency repudiated the CBA in violation of the Statute." (*Id.*)

The Union and the Agency both filed exceptions to the Arbitrator's award. (JA 11-16, 43-52.) After examining the record and law, the Authority set aside the Arbitrator's contractual ruling on the ground that the ruling failed to draw its "essence" from the CBA. (JA 211.) In other words, the Authority found that the arbitrator's analysis of the contract was not reasonably related to "the wording and purposes of the CBA." (JA 210.) Observing that CBA Article 29, § 3 was intended to provide parties with an incentive to expeditiously complete negotiations, the Authority determined that incentive would be lost if a party could block CBA termination by seeking FMCS assistance before "that party submits one proposal or counterproposal." (JA 211.) The Authority therefore concluded the Agency had not committed a ULP.

In an Amended Decision issued on November 4, 2019, the Authority further determined that the Agency did not commit a ULP "for the same reasons articulated by the Arbitrator." (JA 217.) That is, the Agency acted in accordance with a reasonable interpretation of Article 29, § 3 and thus did not "repudiate" the CBA. (JA 217-18.) It noted that the Agency's actions and statements demonstrated that it

continued to comply with the terms of the CBA after invoking the contractual termination provision. (*Id.*) The Authority also observed that its:

> precedent holds that "[i]n those situations where the meaning of a particular agreement term is unclear, acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the agreement," and thus does not amount to a "repudiation" of the agreement for ULP purposes.

(JA 218 (quoting *Dep't of Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 FLRA 858, 862-63 (1996) ("*Scott AFB*")).)

On August 12, 2019, the Union filed with this Court its Petition for Review of the Authority's Decision. The Union contends that: 1) the Agency committed a ULP by "repudiating" the CBA; and 2) the Authority applied an incorrect standard of review in overturning the Arbitrator's contractual holding. (Statement of Issues.)

## SUMMARY OF THE ARGUMENT

The Agency did not commit a ULP when it terminated the CBA pursuant to its reasonable interpretation of Article 29, § 3 of the agreement. Not only did the Agency act in accordance with a reasonable (indeed, clearly correct) reading of Article 29, § 3, the Agency further took steps to preserve the status quo under the CBA and to preserve its bargaining relationship with the Union. Thus, contrary to the Union's assertions, the Agency did not "repudiate" the CBA—it merely terminated it according to the CBA's own terms.

CBA Article 29, § 3 provided that either party could terminate the agreement within 90 days of the start of formal negotiations, so long as neither party had invoked the mediation services of FMCS or FSIP. As the Union's Chief negotiator testified, the parties commenced "the actual negotiation" on April 4, 2017. (JA 67.) Neither party invoked the mediation services of FMCS or FSIP by July 3, 2017, which was 90 days after the start of formal negotiations. The Agency therefore reasonably believed that it could terminate the CBA by providing written notification to the Union on or after July 4, 2017.

In its Opening Brief, the Union does not argue that the Agency's interpretation of the CBA was unreasonable, nor could it. Although nominally relying upon Section 7116(a)(1) & (5) of the Statute, the Union fails to explain how the Agency's action "interfere[d] with, restrain[ed], or coerce[d] any employee in the exercise by the employee of any right under this chapter," or amounted to a "refus[al] to consult or negotiate in good faith with a labor organization as required by this chapter," the two rights protected by those provisions.

Instead, the Union asserts, without evidence, that the Agency "repudiated" the CBA by invoking the termination provision of Article 29, § 3 of that document. (*See, e.g.*, Br. 44.) The Agency's contemporaneous actions and statements, however, demonstrate that the Agency intended to comply with the spirit and letter of the CBA—not repudiate it.

When it "terminated" the CBA, the Agency explained—both to the Union and its employees—that the Agency would continue to abide by the CBA and maintain its bargaining relationship with the Union. (JA 162.) The Agency did just that. As the Arbitrator correctly observed, "all provisions of the CBA remain[ed] in effect" as of the date of his decision. (JA 37.) That conclusion was supported by undisputed record evidence and from the arbitration hearing itself. (JA 82.) Indeed, "[t]he fact that the Union grieved the Agency's termination of the CBA, culminating in arbitration, undermines the Union's claim that the Agency repudiated the CBA in violation of the Statute." (JA 37.) Thus, although the Agency terminated the CBA, it did not repudiate it. *See* BLACK'S LAW DICTIONARY 1418 (9th Ed. 2009) (defining "repudiate" as "[t]o reject or renounce (a duty or obligation); esp. an indication not to perform (a contract)"); *Cf. Gulf Coast Rebar, Inc.,* 365 NLRB No. 128, slip. op. at 2 (Sept. 18, 2017) ("By invoking arbitration under the very contract it claimed to have repudiated months earlier, the Respondent at the very least sent the Union a 'conflicting signal' concerning its position on the Agreement's continuing validity.").

The Authority's Decision is consistent with 40 years of Authority precedent that a party does not "repudiate" a contract if it acts in accordance with a reasonable interpretation of an ambiguous contract term. That is true even if the party's interpretation is not the only reasonable interpretation. *Scott AFB*, 51 FLRA at 862-63; *accord Soc. Sec. Admin.*, 15 FLRA 614, 622 (1984) ("It is well settled that alleged [ULPs,] which essentially involve differing and arguable interpretations of a negotiated

agreement," do not violate the Statute.); *Div. of Military & Naval Affairs, State of N.Y., Albany, N.Y.*, 8 FLRA 307, 323 (1982) ("The arguable interpretation relied upon by the Respondent negates bad faith on the part of the Respondent, and raises issues of contract interpretation" thus "the aggrieved party's remedy in this case lies within the arbitration procedure of the negotiated agreement, rather than the [ULP] procedure."). The Authority's Decision is also consistent with National Labor Relations Board ("NLRB") precedent. *See, e.g.*, *Atwood & Morrill Co.*, 289 NLRB 794, 795 (1988) (where "the dispute is solely one of contract interpretation, and there is no evidence of . . . an intent to undermine the Union, [the NLRB] will not seek to determine which of two equally plausible contract interpretations is correct.").

Once the Court concludes that the Agency did not commit a ULP, its review is at an end. That is because the Court lacks jurisdiction to review Authority decisions stemming from arbitration awards unless they "involve[] an unfair labor practice." 5 U.S.C. § 7123(a); *see also Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988) (Congress explicitly excluded arbitration awards from judicial review); *accord U.S. Dep't of Justice v. FLRA,* 792 F.2d 25, 28 (2d Cir. 1986) ("Congress intended to limit severely judicial review of arbitral decisions under the Statute.").

Congress limited judicial review of arbitration awards to provide parties with some assurance that arbitration would promptly resolve disputes. *Ass'n of Civilian Technicians, N.Y. State Council v.* FLRA, 507 F.3d 697, 699 (D.C. Cir. 2007) ("*ACT 2007*"). It created the narrow exception for ULP cases to ensure that the law

concerning ULPs developed in a uniform manner. *Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006) ("*AFGE 2006*"). Cases that do not require the application of ULP caselaw are outside this exception. *ACT 2007,* 507 F.3d at 700 (judicial review under Section 7123(a) appropriate only if an Authority order has some "bearing upon the law of unfair labor practices").

The second issue presented by the Union's Petition for Review relates entirely to the Authority's own standards and practices regarding review of arbitration awards. It has no "bearing upon the law of" ULPs. *AFGE 2006*, 453 F.3d at 505. The second issue in the Union's Petition for Review should thus be dismissed for lack of jurisdiction. 5 U.S.C. § 7123(a)(1).

In the alternative, this Court should deny review of the Union's second issue because the Authority's "essence" determination was reasonable and supported by substantial evidence in the record. The Authority correctly found that the Agency's termination of the CBA was consistent with Article 29, § 3. A careful examination of the CBA's terms and the record demonstrates that formal negotiations did not commence until April 4, 2017, and neither party used the services of FMSC or FSIP during the following 90 days. The Arbitrator's award therefore failed to adhere to the "wording and purposes" of the CBA. (JA 210.) Review of the Authority's Decision concerning that issue should be denied.

## STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). This Court defers to the Authority's construction of the Statute, which Congress entrusted to the FLRA's administration. *U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991). The Authority is entitled to "considerable deference" when it exercises its "special function of applying the general provisions of the [Statute] to the complexities of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 97 (internal quotation marks omitted).

In particular, the Court "accord[s] considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *FDIC v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotation marks omitted). This Court will uphold the Authority's decisions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*"); *see also Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998); 5 U.S.C. § 7123(c) (incorporating Administrative Procedure Act standards of review). The scope of such review is narrow. *See, e.g.*, *Am. Fed. of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718,

721 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)). The Authority's factual findings are "conclusive" if they are "supported by substantial evidence on the record considered as a whole." 5 U.S.C. § 7123(c).

Moreover, under § 7123(c) of the Statute, this Court may not consider any "objection that has not been urged before the Authority, or its designee . . . unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c); *see also Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986); *accord NTEU 2014*, 754 F.3d at 1040 ("[w]e have enforced [S]ection 7123(c) strictly"); *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 59 n. 5 (D.C. Cir. 2005).

## ARGUMENT

In its Petition for Review, the Union argues that: 1) the Agency "repudiated" the CBA by terminating it pursuant to its interpretation of Article 29, § 3, and thereby committed a ULP, and 2) the Authority applied an incorrect standard of review when it overturned the Arbitrator's contractual holding. (Statement of Issues.)

The Union's arguments are unavailing. First, a party does not commit a ULP when it acts in accordance with a reasonable interpretation of a CBA provision—much less, as in this case, a plainly correct one. The Authority rightly held that the Agency terminated the CBA pursuant to its reasonable interpretation of Article 29, § 3. Denial of the Union's petition for review of this issue is therefore appropriate,

particularly given the Union's failure to claim that the Agency acted pursuant to an unreasonable interpretation of the contract or otherwise in bad faith.

Second, under the plain language of 5 U.S.C. § 7123(a) and long-settled precedent, this Court lacks jurisdiction to consider non-ULP grounds for reviewing Authority decisions involving arbitration awards. Even if this Court had jurisdiction to review the Authority's review of the Arbitrator's interpretation of the CBA, however, it should deny the Union's petition as it relates to that issue because the Authority's conclusions are reasonable and supported by substantial evidence.

## I. The Authority correctly found that the Agency did not commit a ULP

Section 7116(a) of the Statute provides that it is a ULP for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter" or "to refuse to consult or negotiate in good faith with a labor organization as required by this chapter." *See* 5 U.S.C. §§ 7116(a)(1), (5). Those ULPs are based on ULPs found in the Statute's private-sector analogue, the National Labor Relations Act ("NLRA"). Section 8(a)(1) of the NLRA makes it a ULP for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] rights [to "self-organiz[e], to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining]." *See* 29 U.S.C. § 158(a)(1). Similarly, an entity commits a ULP under Section 8(a)(5) when it

"refuse[s] to bargain collectively with the representatives of [its] employees." *See* 29 U.S.C. § 158(a)(5).

Longstanding precedent of both the Authority and the NLRB provides that good-faith disagreements over the meaning of ambiguous CBA provisions, such as the dispute in this case, do not constitute ULPs. The Authority and NLRB have sensibly determined that neither a union nor an employer commits a ULP if they act in accordance with their reasonable interpretation of contractual terms. *See Timken Roller Bearing Co. v. NLRB*, 161 F.2d 949, 956 (6th Cir. 1947).

The Authority has held that "where the meaning of a particular agreement term is unclear, acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of the terms of the agreement," and thus does not amount to "repudiation" for ULP purposes. *Scott AFB*, 51 FLRA at 862-63; *accord Soc. Sec. Admin.*, 15 FLRA at 622 ("alleged unfair labor practices which essentially involve differing and arguable interpretations of a negotiated agreement, as distinguished from alleged actions which constitute clear and patent breaches of a negotiated agreement, are not deemed to be violative of the Statute"); *Div. of Military & Naval Affairs, State of N.Y., Albany, N.Y.*, 8 FLRA at 323 ("The arguable interpretation relied upon by the Respondent negates bad faith . . . and raises issues of contract interpretation" so that the case should be addressed through arbitration, "rather than the unfair labor practice procedure.").

The Authority's precedent accords with that of the NLRB stretching back nearly 70 years. "Where, as here, the dispute is solely one of contract interpretation, and there is no evidence of animus, bad faith, or an intent to undermine the Union, [the NLRB] will not seek to determine which of two equally plausible contract interpretations is correct." *Atwood & Morrill Co.*, 289 NLRB at 795.[1]

In this case, the Union does not argue that the Agency's interpretation of Article 29, § 3 of the CBA was unreasonable or otherwise bad-faith. By failing to raise this argument in its Opening Brief, the Union has waived it. *See Fox v. Gov't of Dist. of Columbia*, 794 F.3d 25, 29 (D.C. Cir. 2015) (arguments not raised in opening brief are waived); *United States v. $6,976,934.65, Plus Interest*, 554 F.3d 123, 133 n. 4 (D.C. Cir. 2009) (same); *City of Waukesha v. EPA*, 320 F.3d 228, 250 n. 22 (D.C. Cir. 2003) (per curiam) (argument inadequately raised in an opening brief is waived). The Union presumably did not raise this argument because it could not. Article 29, § 3 of the CBA allows either the Agency or the Union, upon written notification to the other, to "terminate any or all sections" of the CBA if no agreement is reached after "90

[1] *Accord NCR Corp.,* 271 NLRB 1212, 1213 (1984); *Vickers, Inc.,* 153 NLRB 561, 570 (1965); *Nat'l Dairy Prod. Corp.*, 126 NLRB 434, 439 (1960) ("As the [NLRB] has held for many years, with the approval of the courts, it will not effectuate the statutory policy for the [NLRB] to assume the role of policing collective-bargaining contracts between employer and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act."); *Morton Salt Co.*, 119 NLRB 1402, 1403 (1958) (same); *Consol. Aircraft Corp. (San Diego, Cal.),* 47 NLRB 694, 706 (1943) (same), *enf'd*, 141 F. 2d 785 (9th Cir. 1944).

calendar days from the start of formal renegotiation or amendment of" the CBA, and "the services of neither FMCS nor FSIP have been invoked." (JA 86.) The record supports the Authority's conclusion that the Agency reasonably acted in accordance with that provision.

*First*, the Agency reasonably marked the beginning of "formal renegotiation" of the CBA as April 4, 2017, the date of the parties' first substantive, face-to-face bargaining session. (JA 31, 67, 92, 160.) Indeed, the Union's chief negotiator himself referred to this session as the beginning of "the actual negotiation" in his testimony before the Arbitrator. (JA 67.)

The parties' ground rules agreement and CBA language both support the Agency's reasonable determination that the formal negotiations began on April 4, 2017. The ground rules agreement repeatedly refer to "negotiations" and "formal negotiations" over the CBA as being coextensive with face-to-face bargaining sessions—not more informal contacts via telephone or email.[2] Moreover, the juxtaposition between CBA Article 29, § 2, which addresses "the ground rules to be

[2] (*See* JA 125-126 (stating that "[a]ll negotiations will be held at a Silver Spring, MD area or Tampa Bay/Sarasota Area NOAA facility, unless another area is mutually agreed upon;" "[a]ll negotiations will normally commence at 9:00 AM and be completed at 5:00 PM.;" "[n]egotiations are scheduled for three days per week (Tue, Wed, Thu) in each of two consecutive week sessions followed by two weeks in between, unless mutually agreed to otherwise;" and "[f]ormal negotiations which initiate the Union Official Time and Travel and Per Diem provided in section 5A2 of this agreement will begin within sixty (60) calendar days after the completion of IBB training, if IBB is the selected method for bargaining.").)

used in the renegotiation of this Agreement," and CBA Article 29, § 3, which refers to "formal renegotiation," makes clear that ground rules negotiations did not constitute "formal renegotiation" of the agreement. (JA 86.)

*Second*, the record supports the conclusion that the Agency reasonably interpreted CBA Article 29, § 3 as permitting it to terminate the agreement because neither party had sought the services of FMCS or FSIP in the 90 days after April 4, 2017. The Union's February 27, 2017 filing of a Notice of Bargaining form with FMCS did not serve to "block" termination of the CBA because it occurred *before* "the actual negotiation" began. (JA 67, 155.) Nor could the Union have believed that filing would serve to "block" termination of the CBA because it did not notify the Agency of the filing or take any other action to obtain FMCS's services. (JA 67, 155.)

The Union's July 10, 2017 communications with FMCS also did not block the Agency's termination of the CBA. First, the communications occurred on July 10, 2017, *after* the 90-day window had passed. Second, the Union's email did not formally invoke FMCS assistance to resolve a dispute, but rather invited an FMCS to "come by and sit in on" one of the parties' bargaining sessions, "if for no other reason than to get to know the two teams." (JA 176.) The Agency objected to the presence of the FMCS mediator. (JA 177-178.) The mediator thereafter advised the Union that FMCS involvement was inappropriate because "FMCS must receive a joint request from the parties before we can assist the parties with collective bargaining mediation." (JA 177-178.)

Thus, "at the end of the 90-calendar day period" beginning on April 4, 2017, "an agreement ha[d] not been reached and the services of neither FMCS nor FSIP ha[d] been invoked." (JA 86.) The Agency was therefore entitled, under CBA Article 29, § 3, to "terminate any or all sections of the Agreement" upon written notification to the Union. (*Id.*) The Agency's interpretation of the CBA thus represents a reasonable one, and the Union has failed to advance any argument to the contrary.

The Union asserts, repeatedly and without evidence, that the Agency "repudiated" the CBA by invoking Article 29, § 3 of that document. But the Union's assertion flies in the face of the evidence, the case law, and the ordinary meaning of the word "repudiate." Legal dictionaries define "repudiate" as "[t]o reject or renounce (a duty or obligation); esp. an indication not to perform (a contract)." BLACK'S LAW DICTIONARY 1418 (9th Ed. 2009). Here, the Agency did precisely the opposite: it stated that it was not rejecting any "duties or obligations" under the contract, but rather would continue to comply with those duties. Indeed, the Agency's email terminating the CBA pursuant to Article 29, § 3 stated: "CBA terms continue as past practices and remain in effect until there is a new agreement." (JA 162.) "Until that occurs, [the Agency] will maintain the status quo, operating under the procedures and policies established under the 2001 CBA." (JA 162.) In an email to its employees, the Agency explained that the termination was "part of the normal process for renegotiating its collective bargaining agreement," and that it "allows the

agency and the union to negotiate a superior agreement that aligns with modern needs and operations of agency and employees." (JA 158.)

Thus, as both the Arbitrator and the Authority determined, "[w]hile the Agency 'terminated' the CBA pursuant to its interpretation of Article [29], § 3, all provisions of the CBA remain in effect to date and there is no evidence to the contrary." (JA 37, 218.) That conclusion is supported by undisputed record evidence from the arbitration hearing. (JA 82.) That evidence included Agency Deputy Director, Mary Ericson's testimony that:

> [W]e understand and we have the current collective bargaining agreement. What we're looking for is an updating agreement that's more flexible and easy to work with. Obviously, we would continue to honor all of our negotiating practices that we need to do, but we're hoping to have one that's more streamlined and aligned to the needs of the services right now.

(JA 82.)

Consistent with its promises to continue to abide by the CBA's terms until a new contract was negotiated, the Agency proceeded to arbitrate its disagreement over the CBA's meaning with the Union under the CBA's own grievance procedures. *See Gulf Coast Rebar, Inc.,* 365 NLRB No. 128, slip. op. at 2 (Sept. 18, 2017) ("By invoking arbitration under the very contract it claimed to have repudiated months earlier, the Respondent at the very least sent the Union a 'conflicting signal' concerning its position on the Agreement's continuing validity."). Thus, "[t]he fact that the Union grieved the Agency's termination of the CBA, culminating in arbitration, undermines

the Union's claim that the Agency repudiated the CBA in violation of the Statute." (JA 37, 218.) Instead, the Agency's termination was plainly intended to spur bargaining with the Union over a new collective bargaining agreement—not to repudiate its bargaining relationship with the Union or its previously-negotiated CBA.

Thus, this case is a far cry from *A & L Underground,* where the employer "sent a letter that severed the bargaining relationship in one stroke." 302 NLRB 467, 469 (1991). In that letter, the employer announced that it was "cancel[ing], abrogat[ing], terminat[ing], and repudiat[ing] any and all" union contracts "effective immediately." *Id.* at 477. Here, in sharp contrast, the Agency announced that it would *abide* by the CBA's terms, would *negotiate* a new agreement with the Union, and would arbitrate its contractual dispute with the Union *pursuant to the CBA's own grievance procedures*.

Similarly unavailing is the Union' reliance on *Dep't of Justice, Bureau of Prisons*, 68 FLRA 786 (2015) ("*BOP 2015*"). (Br. 49.) That case specifically holds that "[t]he Authority will not find a repudiation where a party acts in accordance with a reasonable interpretation of an unclear contractual term." *BOP 2015*, 68 FLRA at 788. Unlike the case at bar, in that case the Authority expressly found that "the Agency did *not* rely on a reasonable interpretation of the master agreement when it refused to engage in further bargaining." *Id.* at 790 (emphasis added). In this case, by contrast, the Union does not, and cannot, contend that the Agency's interpretation of Article 29, § 3 was unreasonable.

Finally, the Union suggests that the Authority lacked the power to issue an Amended Decision. (Br. 23-24, 45-46.) That argument is without merit. This Court has "many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time." *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977); *accord Belville Mining Co. v. United States,* 999 F.2d 989, 997 (6th Cir. 1993) ("Even where there is no express reconsideration authority for an agency, however, the general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision."); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991) ("It is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review"); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[I]t is the general rule that '[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.'") (quoting 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 18.09 (1958)).

Here, the Union does not argue that the Authority's reconsideration prejudiced it, or interfered with this Court's orderly review. Nor does it contend that the Authority's reconsideration Decision, which occurred less than three months after its original decision, was not issued "within a reasonable period of time." *Mazaleski*, 562 F.2d at 720.

Instead, the Union asserts that "[t]he amended decision and additional rationale should not be considered by the Court because the FLRA no longer had jurisdiction over the case." (Br. 45.) That is simply not so. Section 7123(c) of the Statute provides that, after a petition for review is filed, this Court's jurisdiction only becomes "exclusive" "[u]pon the filing of the record with the court." 5 U.S.C. § 7123(c). Prior to the filing of the record, the Authority and this Court have concurrent jurisdiction, and the Authority has the same "inherent power to reconsider and change" its decision enjoyed by any other administrative tribunal. *Cf. Mazaleski*, 562 F.2d at 720 (involving the U.S. Public Health Service). Holding that the Authority lacks the power to conduct further proceedings in the absence of a remand would eviscerate § 7123(c)'s clear mandate that the Authority and this Court enjoy concurrent jurisdiction between the filing of a petition for review and the filing of the administrative record.[3] In this case, the Authority issued its Amended Decision before it filed the Certified Index to the Record, and is included in both that document and in the Joint Appendix. (Certified Index to the Record, *Nat'l Weather Serv. Emps. Org. v. FLRA*, No. 19-1163, Doc. 1814238 (Nov. 4, 2019); JA 215-21.)

[3] Thus, the *obiter dicta* from *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 283 (D.C. Cir. 1971) cited by the Union is not on point. That case involved a different statute (28 U.S.C. § 2347(c)) one which, unlike 5 U.S.C. § 7123(c), did not expressly provide that the FCC retained concurrent jurisdiction during the pendency of a petition for review in the court of appeals.

The Union notes that this Court, on October 28, 2019, denied the Authority's motion for a full remand of the case. But it fails to note that this Court denied a full remand because of the "the delay and prejudice to [the Union] that would attend it." (Order, *Nat'l Weather Serv. Emps. Org. v. FLRA*, No. 19-1163, Doc. 1812868 (Oct. 28, 2019).) The Authority's Amended Decision was issued within a week of that Order, and the Union does not, and cannot, argue that the Authority's issuance of the Amended Decision caused it any prejudice, contributed to any delay, or interfered with this Court's prompt and orderly consideration of its Petition for Review. Instead, the Authority's action streamlines this Court's review, potentially obviating the need a time-consuming remand.

In the absence of a showing of prejudice or delay, "it is an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by [parties] challenging federal action." *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004) ("*Pellissippi Parkway*"). Indeed, there is a strong preference for "allow[ing] agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Denying the Authority power to supplement its decisions would do nothing except create additional delay, "wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Id.* That, in turn, would transform judicial review "into a game in which an agency is

'punished' for procedural omissions by being forced to defend them well after the agency has decided to reconsider." *Pellissippi Parkway*, 375 F.3d at 416.

Even in a case where an agency reversed itself entirely (as opposed to here, where the Authority merely added an additional rationale for its decision), and issued a new decision over a year after its initial decision (as opposed to here, where the Authority issued its amended Decision within 3 months of its initial decision), this Court "d[id] not disturb" the agency's action due to the failure of the adverse party to demonstrate prejudice. *Anchor Line Ltd. v. Fed. Mar. Comm'n*, 299 F.2d 124, 125 (D.C. Cir. 1962). This Court should reach the same result here, where the Union has failed to allege any delay or prejudice resulting from the Authority's Amended Decision.

As the Agency did not commit a ULP, this Court should deny the first issue presented by the Union's Petition for Review.

## II. This Court should dismiss or deny the second issue presented in the Union's Petition for Review.

Because the Agency did not commit a ULP, this Court should dismiss the remainder of the Petition for Review for lack of jurisdiction. That is because the second issue presented by the Union's Petition for Review—whether the Authority applied an incorrect standard of review in overturning the Arbitrator's contractual holding— "does not 'involve[] an unfair labor practice under section 711[6]'" of the Statute. *Ass'n of Civilian Technicians, N.Y. State Council v. FLRA*, 507 F.3d 697, 698 (D.C. Cir. 2007) ("*ACT 2007*") (quoting 5 U.S.C. § 7123(a)(1)). Instead, the second

issue "involves rules applicable to arbitration" that have no direct bearing on the law of ULPs. *Id.* Even if this Court did have jurisdiction over the second issue, the Court should deny the Union's Petition as it relates to that issue because the Union has not demonstrated that the Authority's Decision was arbitrary and capricious. Consequently, the second issue presented by the Union's Petition for Review should be dismissed or denied.

### A. Dismissal of Petitioner's second issue for review for lack of jurisdiction is appropriate

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (internal citations omitted).

The Statute "contains a two-track for resolving labor disputes." *ACT 2007*, 507 F.3d at 699 (internal quotation marks omitted). "A party aggrieved by an unfair labor practice may go down either track, but not both." *Id.* (citing 5 U.S.C. § 7116(d)). "Under the first track, not pursued by the Union in this case, a party may file an unfair labor practice charge with the Authority's General Counsel, who will investigate and issue a complaint, if warranted." *Id.* "The matter is then adjudicated by the Authority, and the Authority's decision is subject to judicial review." *Id.* (citing 5 U.S.C. §§ 7116, 7123).

"Under the second track, which was followed here, a party may file a grievance in accordance with its collective bargaining agreement that alleges an unfair labor practice, a violation of the collective bargaining agreement, or both." *Id.* "The grievance is subject to binding arbitration, § 7121(b)(1)(C)(iii), and the arbitral award is subject to review by the Authority, § 7122(a)." *Id.*

When a party, such as the Petitioner, elects to take the second track, "[t]he Authority's order is not subject to judicial review 'unless the order involves an unfair labor practice under section 711[6]" of the Statute.'" *ACT 2007*, 507 F.3d at 699. (quoting 5 U.S.C. § 7123(a)(1)). "The second track is the track for those who prefer to benefit from the relatively expeditious and (presumably) final result that arbitration promises." *Id.* (internal formatting omitted).

Congress's intent to preclude judicial review of arbitration awards is apparent from the text and legislative history of Section 7123(a)(1). *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988); *accord U.S. Dep't of Justice,* 792 F.2d at 28 ("It is clear that Congress intended to limit severely judicial review of arbitral decisions under the Statute."). The legislative history reveals Congress's intent to ban:

> **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.**

*Griffith*, 842 F.2d at 492 (quoting H.R. REP. NO. 1717, 95th Cong., 2d Sess. 153 (1978), 1978 U.S.C.C.A.N. 2887). "By offering its one level of review at the administrative level, [5 U.S.C. § 7123(a)] protects Congress's interest in providing "arbitration results substantial finality." *ACT 2007,* 507 F.3d at 699.

Section 7123(a)(1)'s "limited exception that allows a second level of review—judicial review—furthers Congress's other stated interest of ensuring 'a single, uniform body of case law concerning unfair labor practices.'" *Id.* This "limited exception" for awards that "involve an unfair labor practice" is intended to "to insure uniformity in the case law concerning unfair labor practices." *Am. Fed'n of Gov't Emps., Local 2510 v. FLRA*, 453 F.3d 500, 505 (D.C. Cir. 2006) ("*AFGE 2006*"). It is further intended to guard against the "risk the Authority will leave the path of the law of unfair labor practices and yet escape the review that would bring it back to the straight and narrow." *Id.* "**Where there is no such risk, neither is there any reason for the Congress to have departed from its established policy favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality, which policy underlies the general rule in § 7123 barring judicial review of arbitral awards.**" *Id.* (emphasis added; internal quotation marks omitted). Thus, this Circuit has clarified that an Authority order "must have some 'bearing upon the law of unfair labor practices' in order to qualify as an order that 'involve[s] an unfair labor practice.'" *ACT 2007,* 507 F.3d at 700 (quoting *AFGE 2006*, 453 F.3d at 505).

The Union urges that the Court should bypass Section 7123(a)'s clear statutory bar on review of arbitration awards, and engage in a form of "indirect review" by scrutinizing the Authority's application of its standard of review governing arbitration decisions. But this Circuit's precedent forecloses that sort of back-door review. "Indirect review of an arbitral award . . . runs counter to public policy," as it "would result in excessive delay and more expense, results clearly contrary to the general policy underlying arbitration awards." *Dep't of Justice*, 792 F.2d at 29. Allowing circuit courts review of FLRA decisions involving arbitration awards "would tend to redundancy and would imperil the features of the arbitral process that we believe Congress had in mind when it set up the scheme: finality, speed and economy." *Griffith*, 842 F.2d at 491. "Reading the exception [for orders involving an unfair labor practice] broadly, then, would be contrary to the proarbitration policy Congress articulated in passing the Act." *ACT 2007,* 507 F.3d at 699 (internal quotation omitted).

Given the clarity of Congress's intent and the weight of precedent, it is hardly surprising that "all circuit courts addressing the matter have concluded that § 7123 bars circuit court review of arbitral decisions not involving unfair labor practices." *Griffith*, 842 F.2d at 491 (collecting cases). "We see no plausible rationale for the alternative rule implicitly advanced by the Union, namely, that our review extends to any order in a case in which an unfair labor practice was involved—regardless

whether the unfair labor practice is involved in the particular order of which review is sought." *AFGE 2006*, 453 F.3d at 505.

For example, in *ACT 2007*, this Court held that it lacked jurisdiction to review an Authority order "involv[ing] rules applicable to arbitration which, when applied in this dispute, resulted in the unfair labor practice claim's exclusion from review." 507 F.3d at 698–99. The Court determined that a "secondary effect on the unfair labor practice claim is not sufficient to qualify the order as one that involves an unfair labor practice for purposes of 5 U.S.C. § 7123(a)(1)." *ACT 2007*, 507 F.3d at 699 (internal quotation marks omitted).

So too in this case, the Court should deny the Union's invitation to broadly consider issues relating to the Authority's standard for reviewing arbitration awards, using its ULP argument as a wedge for the Court to consider arbitration matters that are beyond its jurisdiction. The second issue presented by the Union's Petition for Review relates entirely to the Authority's standards and practices regarding review of arbitration awards, and thus "has no bearing upon the law of unfair labor practices." *AFGE 2006*, 453 F.3d at 505. As it does not "involve[] an unfair labor practice," it is beyond this Court's jurisdiction to consider. 5 U.S.C. § 7123(a)(1).

The Union offers no reason for departing from this precedent. While the Union cites the Supreme Court's *Steelworkers Trilogy*, those opinions "deal with federal court review of employment arbitration decisions, not federal court review of FLRA decisions," and thus "do not provide guidance on this court's jurisdiction over FLRA

decisions." *Am. Fed'n of Gov't Emps., Local 1617 v. FLRA*, 103 F. App'x 802, 807 (5th Cir. 2004). "Instead, this court must rely on the statutory language that specifically explains when review is appropriate." *Id.* And "[t]he language of § 7123 is clear—judicial review of the FLRA's decision regarding an arbitrator's award is precluded unless it involves an unfair labor practice." *Nat'l Treasury Emps. Union v. FLRA*, 112 F.3d 402, 405 (9th Cir. 1997). Congress made a considered decision in 5 U.S.C. § 7123(a) to delegate "interpretive authority" regarding arbitration awards to the Authority, without allowing for judicial review. *Id.* In doing so, "Congress intended just what it said—that the judicial branch stay out of the business of reviewing FLRA decisions involving an arbitration award." *Id.*

Because Congress clearly barred judicial review of Authority decisions involving arbitration awards, parties seeking to obtain judicial review of such decisions must meet the exacting standard set forth in *Leedom v. Kyne*, 358 U.S. 184, 188 (1958). In *Leedom*, the Supreme Court held that a narrow exception to statutory judicial bars exists where an agency acts "in excess of its delegated powers and contrary to a specific prohibition in" its governing statute that is "clear and mandatory." 358 U.S. at 188. This Court has characterized a claim under *Leedom* as "essentially a Hail Mary pass" that "rarely succeeds." *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009). "The *Leedom v. Kyne* exception is intended to be of extremely limited scope," *Griffith*, 842 F.2d at 493, and the burden for establishing *Leedom*

jurisdiction is "nearly insurmountable," *U.S. Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993).

If no ULP occurred in this case, the only way that the Union could bring a claim would be by invoking *Leedom* jurisdiction. The Union, however, does not point to the sort of patent disregard of a "clear and mandatory" statutory provision sufficient to confer *Leedom* jurisdiction. Instead, it contends that the Authority failed to give the Arbitrator what the Union deems a sufficient level of deference in reviewing his construction of the parties' CBA. The Union's disagreement with the Authority's application of its own standard of review for arbitration awards does not amount to the disregard of "a specific and unambiguous statutory directive." *Nat'l Air Traffic Controllers Ass'n AFL-CIO v. FSIP*, 437 F.3d 1256, 1264 (D.C. Cir. 2006).

Pursuant to 5 U.S.C. § 7122(a), the Authority has the power to review arbitration awards on "grounds similar to those applied by Federal courts in private sector labor-management relations." The Authority's regulations state that it may vacate an arbitration award if it "[f]ails to draw its essence from the parties' collective bargaining agreement." 5 C.F.R. § 2425.6. Here, the Authority reviewed the Arbitrator's award under this "essence" ground, to determine whether it was "so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA so as to manifest an infidelity to the obligation of the arbitrator." (JA 216.) Federal courts routinely overturn private-sector arbitration awards that fail to draw their "essence" from the parties' agreement. *See, e.g.*, *Monongahela Valley Hosp. Inc. v.*

*United Steel Paper & Forestry Rubber Mfg. Allied Indus. & Serv. Workers Int'l Union, AFL-CIO*, No. 19-2182, 2019 WL 7286693 (3d Cir. Dec. 30. 2019); *Spero Elec. Corp. v. Int'l Bhd. of Elec. Workers*, 439 F.3d 324, 327-28 (6th Cir. 2006); *Citgo Asphalt Refining Co. v. Paper, Allied-Indus., Chem. and Energy Workers Int'l Union Local No. 2-991*, 385 F.3d 809, 816-17 (3d Cir. 2004); *Pa. Power Co. v. Local Union No. 272, Int'l. Bhd. Of Elec. Workers, AFL-CIO*, 276 F.3d 174, 178-80 (3d Cir. 2001); *Int'l Union, UAW v. Marrowbone Dev. Co.*, 232 F.3d 383, 389 (4th Cir. 2000); *Young Radiator Co. v. Int'l Union, UAW*, 734 F.2d 321, 325 (7th Cir. 1984). In applying this standard, courts have emphasized that "[a]lthough our review of an arbitration award is highly deferential, we do not simply rubber stamp arbitrators' interpretations and decisions." *Citgo*, 385 F.3d at 816 (internal formatting omitted).

The Union contends that the Authority applied the "essence" standard to the facts of this case in a less deferential manner than would have been applied by a federal court. (Br. 22-39.) But the Statute says nothing about the level of deference that the Authority must give to an arbitrator, and this is precisely the sort of highly subjective judgment call that is beyond the proper bounds of *Leedom* jurisdiction. *Nat'l Air Traffic Controllers Ass'n*, 437 F.3d at 1264; *see also U.S. Dep't of Justice*, 981 F.2d at 1343–44; *Griffith*, 842 F.2d at 494 (no *Leedom* jurisdiction where the Authority's "legal error, if any, is at most one of failing to capture some marginal nuance of the Back Pay Act."). In *American Federation of Government Employees, Local 1617*, 103 F. App'x 802, the Fifth Circuit considered this exact question and held that there was no

*Leedom* jurisdiction for a court to review the Authority's application of its standard of review for arbitration awards. This Court should rule similarly here.

### B. In the alternative, denial of Petitioner's second issue for review is appropriate

Even if this Court had jurisdiction, this Court would review the Authority's contractual holding to determine whether "it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91, 94 (D.C. Cir. 2011). The Authority's determination that the Arbitrator's award failed to draw its essence from the parties' agreement is neither arbitrary nor capricious. Instead, the Authority reasonably construed both the Arbitrator's award and CBA Article 29, § 3.

Article 29, § 3 of the CBA allows either the Agency or the Union, upon written notification to the other, to "terminate any or all sections" of the CBA if no agreement is reached after "90 calendar days from the start of formal renegotiation or amendment of" the CBA, and "the services of neither FMCS nor FSIP have been invoked." (JA 86.) There can be little doubt that "formal renegotiation" of the CBA began on April 4, 2017, the date of the parties' first substantive, face-to-face bargaining session. (JA 31, 67, 92, 160.) Indeed, the Union's chief negotiator himself referred to this session as the beginning of "the actual negotiation" in his testimony before the Arbitrator. (JA67.) The parties' ground rules agreement repeatedly referred to "negotiations" and "formal negotiations" over the CBA as being

coextensive with face-to-face bargaining sessions—not more informal contacts via telephone or email. (*See* JA 125-126.) Furthermore, the juxtaposition between Article 29, § 2 of the CBA, which deals specifically with "the ground rules to be used in the renegotiation of this Agreement," and Article 29, § 3, which refers to "formal renegotiation" of the CBA, makes clear that ground rules negotiations are not considered "formal renegotiation" under the agreement. (JA 86.)

Moreover, there is no evidence that either the Agency or the Union invoked the services of FMCS or FSIP within 90 days of April 4, 2017. Instead, the record shows that on February 27, *before* "the actual negotiation" began, the Union's chief negotiator filed a Notice of Bargaining form with FMCS, but did not notify the Agency or take any other action to obtain FMCS's services. (JA 67, 155.)

Only on July 10, 2017, *after* the 90-day window had passed, did the Union's chief negotiator send an email to an FMCS mediator inviting him to "come by and sit in on" one of the parties' bargaining sessions, "if for no other reason than to get to know the two teams." (JA 176.) Thus, "at the end of the 90-calendar day period" beginning on April 4, 2017, "an agreement ha[d] not been reached and the services of neither FMCS nor FSIP ha[d] been invoked." (JA 86.) Therefore, the Agency, "upon written notification to" the Union, was privileged under Article 29, § 3 to "terminate any or all sections of the Agreement." (*Id.*)

As the Authority correctly noted, Article 29, § 3 of the CBA was intended to provide both parties an "incentive to complete negotiations in an expeditious

manner." (JA 217.) It is plain that provision would not serve as an incentive if either party could "block" termination of the CBA through *pro forma* contacts with FMCS or FSIP that have no purpose other than to prevent the other party from terminating the CBA. (*Id.*) Article 29, § 3 would represent a meaningless formality—not a spur to "reaching a quick settlement whenever [the parties] attempted to renegotiate a successor agreement"—if an *ex parte* email to an FMCS mediator was sufficient to satisfy its strictures. (*Id.*) As the Authority's review of the Arbitrator's interpretation and application of the CBA was neither arbitrary nor capricious, the Union's Petition for Review should be denied.

## CONCLUSION

For the foregoing reasons, the Authority respectfully requests that the Court deny the Petition for Review.

Respectfully submitted,

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January 21, 2020

## FED. R. APP. P. RULE 32(a) CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14-point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 10,827 words excluding exempt material.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

## CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Noah Peters
Noah Peters
Solicitor
Federal Labor Relations Authority

# ADDENDUM

## Relevant Statues and Regulations

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**AUTHORITY** **PAGE**

**5 U.S.C. § 7116(a) and (d)**

**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.

* * * * *

(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.

**5 U.S.C. § 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).

**5 U.S.C. § 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.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair

labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

**28 U.S.C. § 2347(c)**

**Petitions to review; proceedings**

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that--

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

**29 U.S.C. § 158(a)**

**Unfair labor practices**

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**5 C.F.R. § 2425.6**

**Grounds for review; potential dismissal or denial for failure to raise or support grounds.**

(a) The Authority will review an arbitrator's award to which an exception has been filed to determine whether 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.

(b) If a party argues that an award is deficient on private-sector grounds under paragraph (a)(2) of this section, then the excepting party must explain how, under standards set forth in the decisional law of the Authority or Federal courts:

(1) The arbitrator:

(i) Exceeded his or her authority; or

(ii) Was biased; or

(iii) Denied the excepting party a fair hearing; or

(2) The award:

(i) Fails to draw its essence from the parties' collective bargaining agreement; or

(ii) Is based on a nonfact; or

(iii) Is incomplete, ambiguous, or contradictory as to make implementation of the award impossible; or

(iv) Is contrary to public policy; or

(v) Is deficient on the basis of a private-sector ground not listed in paragraphs (b)(1)(i) through (b)(2)(iv) of this section.

(c) If a party argues that the award is deficient on a private-sector ground raised under paragraph (b)(2)(v) of this section, the party must provide sufficient citation to legal authority that establishes the grounds upon which the party filed its exceptions.

(d) The Authority does not have jurisdiction over an award relating to:

(1) An action based on unacceptable performance covered under 5 U.S.C. 4303;

(2) A removal, suspension for more than fourteen (14) days, reduction in grade, reduction in pay, or furlough of thirty (30) days or less covered under 5 U.S.C. 7512; or

(3) Matters similar to those covered under 5 U.S.C. 4303 and 5 U.S.C. 7512 which arise under other personnel systems.

(e) An exception may be subject to dismissal or denial if:

(1) The excepting party fails to raise and support a ground as required in paragraphs (a) through (c) of this section, or otherwise fails to demonstrate a legally recognized basis for setting aside the award; or

(2) The exception concerns an award described in paragraph (d) of this section.