

ORAL ARGUMENT NOT YET SCHEDULED

No. 05-1241

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

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2924,
Petitioner**

v.

**FEDERAL LABOR RELATIONS AUTHORITY,
Respondent**

**ON PETITION FOR REVIEW OF A DECISION AND ORDER
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 American Federation of Government Employees, Local 2924 (Union) and United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona (Agency). American Federation of Government Employees, Local 2924 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 and Order in *United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona and American Federation of Government Employees, Local 2924*, Case No. DE-CA-02-0172, decision issued on May 12, 2005, reported at 60 F.L.R.A. (No. 166) 895.

C. Related Cases

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

TABLE OF CONTENTS

	Page No.
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
A. Background.....	3
1. The Agency’s mission.....	3
2. Governing legal requirements	3
3. The parties’ negotiated agreements.....	5
4. Termination of employees.....	7
B. ULP Proceedings Before the Authority	12
STANDARD OF REVIEW.....	16
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	22
THE AUTHORITY REASONABLY HELD THAT THE AGENCY EMPLOYER DID NOT COMMIT UNFAIR LABOR PRACTICES UNDER § 7116(a)(1) AND (5) OF THE STATUTE BY REPUDIATING DRUG TESTING PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS WHEN IT TERMINATED THREE EMPLOYEES IN SENSITIVE POSITIONS FOR ILLEGAL DRUG USE, BECAUSE THE AGENCY EMPLOYER’S INTERPRETATION OF THE AGREEMENT PROVISIONS WAS REASONABLE	22
A. Governing Legal Principles	22

TABLE OF CONTENTS
(Continued)

	Page No.
B. The Authority Properly Concluded That The Agency Did Not Repudiate Either § 9(a) Or § 12 Of The Local Drug Agreement, Or Article 27 Of The CBA	25
1. The First Sentence of § 9(a)	25
2. Article 27 of the CBA.....	29
3. Section 12 of the Local Drug Agreement.....	31
C. The Union’s Arguments For Reversal Of The Authority’s Decision Are Without Merit	32
CONCLUSION.....	39

ADDENDA

Page

**Relevant portions of the Federal Service Labor-Management
Relations Statute, 5 U.S.C. ' ' 7101-7135 (2000)..... A-1**

**Department of the Air Force's Notice of Employee Requirement,
Employee Assigned To Testing Designated Position B-1**

TABLE OF AUTHORITIES

CASES

	Page No.
<i>Ass'n of Civilian Technicians v. FLRA</i> , 269 F.3d 1112 (D.C. Cir. 2001)	17
<i>Bureau of Alcohol, Tobacco and Firearms v. FLRA</i> , 464 U.S. 89 (1983)	16
<i>Cornelius v. Nutt</i> , 472 U.S. 648 (1985)	23
<i>Dep't of the Air Force v. FLRA</i> , 956 F.2d 1223 (D.C. Cir. 1992)	38
<i>Fed. Deposit Ins. Co. v. FLRA</i> , 977 F.2d 1493 (D.C. Cir. 1992)	16
<i>Florida Steel Corp. v. NLRB</i> , 601 F.2d 125 (4 th Cir. 1979)	37
<i>Internal Revenue Serv. v. FLRA</i> , 963 F.2d 429 (D.C. Cir. 1992)	25
<i>Johnson v. Peterson</i> , 996 F.2d 397 (D.C. Cir. 1993)	23
<i>Nat'l Treas. Employees Union v. FLRA</i> , 399 F.3d 334 (D.C. Cir. 2005)	17
<i>Pension Benefit Guaranty Corp. v. FLRA</i> , 967 F.2d 658 (D.C. Cir. 1992) .	16, 17

DECISIONS OF THE FEDERAL LABOR RELATIONS

* <i>Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.</i> , 51 F.L.R.A. 858 (1996)	13, 14, 23-25, 29, 34
<i>Department of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga.</i> , 52 F.L.R.A. 225 (1996)	34, 35
<i>Social Security Admin., Baltimore, Md.</i> , 55 F.L.R.A. 1122 (1999)	29
<i>Social Security Admin., Region VII, Kansas City, Mo.</i> , 55 F.L.R.A. 536 (1999)	25
<i>Social Security Administration, New York, New York and American Federation of Government Employees, Local 3369</i> , 60 F.L.R.A. 301 (2004)	35

TABLE OF AUTHORITIES
(Continued)

	Page No.
<i>Social Security Administration, New York, New York and American Federation of Government Employees, Local 3369, 60 F.L.R.A. 301 (2004)</i>	35
<i>U.S. Dep't of Labor, Washington, D.C. and American Fed'n of Gov't Employees, Local 12, 59 F.L.R.A. 112 (2003)</i>	23
<i>U.S. Dep't of the Air Force, Seymour Johnson Air Force Base, 57 F.L.R.A. 772 (2002)</i>	29
<i>U.S. Penitentiary, Florence, Col., 54 F.L.R.A. 30 (1998)</i>	29

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

<i>Crest Litho, Inc., 308 N.L.R.B. 108 (1992)</i>	23
<i>Rapid Fur Dressing, Inc., 278 N.L.R.B. 905 (1986)</i>	23

STATUTES

Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)	1, 2
5 U.S.C. § 7105(a)(2)(G)	1
5 U.S.C. § 7116(a)	17
* 5 U.S.C. § 7116(a)(1)	2, 12, 22, 23, 35
* 5 U.S.C. § 7116(a)(5)	2, 12, 22, 23, 35
5 U.S.C. § 7118	2
5 U.S.C. § 7121(a)	23
5 U.S.C. § 7123(a)	2
5 U.S.C. § 7123(c)	17

TABLE OF AUTHORITIES
(Continued)

	Page No.
5 U.S.C. § 7701	10
5 U.S.C. § 557(b)	37
* Executive Order 12,564 (1986)	3, 4, 26
§ 5(b)	4
§ 5(c)	4

MISCELLANEOUS

Elkouri & Elkouri, How Arbitration Works, Fifth Ed., 1999 Supp., at 63	36
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*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

Agency	United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona
Add.	Addendum
ALJ	Administrative Law Judge
Br.	Union's Brief
CBA	Collective Bargaining Agreement
Executive Order	Executive Order 12,564, entitled "Drug-Free Workplace"
JA	Joint Appendix
MSPB	Merit System Protection Board
<i>Scott AFB</i>	<i>Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill., 51 F.L.R.A. 858 (1996)</i>
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2000)
TDP	Testing-designated position
ULP	Unfair Labor Practice
Union	American Federation of Government Employees, Local 2924

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STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (Authority) issued the decision and order under review in this case on May 12, 2005. The Authority's decision is published at 60 F.L.R.A. 895. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)

(Statute).¹ This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority reasonably held that the agency employer did not commit unfair labor practices under § 7116(a)(1) and (5) of the Statute by repudiating drug testing provisions of collective bargaining agreements when it terminated three employees in sensitive positions for illegal drug use, because the agency employer's interpretation of the agreement provisions was reasonable.

STATEMENT OF THE CASE

This case arose from an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The case involves an Authority adjudication of a ULP complaint based on a charge filed by the American Federation of Government Employees, Local 2924 (Union). The complaint alleged that the United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona (Agency) violated § 7116(a)(1) and (5) of the Statute by repudiating certain provisions of collective bargaining agreements dealing

¹ Pertinent statutory provisions are set forth in Addendum (Add.) A to this brief.

with drug testing of bargaining unit employees. The Authority dismissed the complaint, and the Union has appealed that dismissal to this Court.

STATEMENT OF THE FACTS

A. Background

1. The Agency's mission - The Agency's mission is to provide for the storage, reclamation, and withdrawal of aircraft for the United States Air Force and other Armed Forces components. (Joint Appendix (JA) at 491.) The value of the aircraft for which the Agency is responsible at any given time can approximate \$27 billion. (JA at 492.) It is a tenant Air Force activity at Davis-Monthan Air Force Base, Tucson, Arizona. (JA at 501.) The Agency is funded solely by fees that it charges to components of the Air Force, Navy, and Army for the services it provides. (JA at 498.)

Bargaining unit employees at the Agency are involved in activities such as removing equipment from and moving aircraft, preparing aircraft for either manned or unmanned flight, and inspecting and modifying aircraft. (JA at 492-93.) Another task employees perform is called "spray lat" work, which entails spraying a latex material on the surfaces of aircraft to protect them from the elements while they are in storage. (JA at 399, 496.)

2. Governing legal requirements - In 1986, President Reagan issued Executive Order 12,564, entitled "Drug-Free Federal Workplace" (Executive

Order). (JA at 163.) The Executive Order provides in relevant part that persons who use illegal drugs are “not suitable for Federal employment.” (JA at 164.) Accordingly, the Executive Order directed federal agencies to develop plans to achieve drug-free workplaces. These plans were to include drug testing, and providing rehabilitation opportunities for employees using illegal drugs. (*Id.*)

The Executive Order distinguished between employees who volunteered their need for drug treatment, and those who did not but were determined to be illegal drug users by way of testing. Section 5(b) of the Executive Order requires an agency to initiate disciplinary action against an employee found to use illegal drugs, unless the employee has self-identified as a drug user, obtains counseling from an agency-sponsored program, and thereafter refrains from using illegal drugs. (JA at 166.) Further, under § 5(c), an agency is prohibited from retaining in a “sensitive” position an employee found to use illegal drugs, prior to the employee’s completion of a rehabilitation program, unless agency management in its sole discretion decides to allow such an employee to return to that position. (*Id.*)

The Air Force issued its drug-testing plan for civilian employees, as called for in the Executive Order, in 1990 (Air Force Plan). (JA at 169.) Among other things, this plan required that employees found to be using

illegal drugs be sent to a rehabilitation program. (JA at 188.) If the employee occupies a “testing-designated position” (TDP), *i.e.*, a “sensitive” position, he/she is subject to random testing. (*Id.*) An employee in a TDP who tests positive for illegal drug use must not be allowed to remain in that position unless, as part of a rehabilitation program, agency management decides otherwise. (*Id.*)

Further, each employee in a TDP must sign a notice stating in part that, upon a positive drug test, he/she will be removed from federal employment unless he/she agrees to enter into a rehabilitation program. However, even if the employee enters into rehabilitation, he/she may still be subject to “disciplinary or adverse action,” and will be placed in a non-TDP, unless agency management in its discretion decides to return the employee to the TDP. (Resp. Exh. 2 at 2, Add. B to this brief.)

3. The parties’ negotiated agreements - The Union represents a bargaining unit of employees at the Agency. (JA at 102.) In 1991, the Union and the Agency negotiated a collective bargaining agreement dealing with drug testing of unit employees (Local Drug Agreement). (JA at 150.) Among other things, this agreement provided for notice to employees of the Agency’s right, in the event of a positive drug test, to take any personnel

action against an employee “consistent with management rights.” (JA at 152.)

Section 9 of the Local Drug Agreement provides that employees testing positive for drug use must report for counseling or rehabilitation, and will be informed of the consequences if they refuse to enter such programs.

(JA at 154.) Section 9(a) of the Local Drug Agreement, entitled “Counseling and Rehabilitation,” provides as follows:

The Employer will retain employees in a duty or approved leave status while undergoing rehabilitation. If placed in a non-duty status, the employee will normally be returned to duty after successful completion of rehabilitation. At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee, if the employee’s return would not endanger public health, safety or national security.

(Id.)

Section 12 of the Local Drug Agreement, entitled “Reasonable Accommodations,” provides that if an employee does not contest a positive test result, the Agency would make “reasonable accommodations” for the employee’s drug problem by providing the employee with access to counseling and rehabilitation programs. (JA at 155.) Section 13 of this agreement establishes procedures for an employee who wishes to contest a positive result. *(Id.)*

In 1998, the Union and the Agency negotiated a comprehensive collective bargaining agreement (CBA) addressing a variety of conditions of employment, including employee drug testing. (JA at 99.) Article 27, the drug-testing article, incorporated the parties' 1991 Local Drug Agreement. (JA at 134.) It also stated that the "ultimate objective of the drug and alcohol abuse program will be to rehabilitate the employee" through counseling and rehabilitation, and that referral for diagnosis and acceptance of treatment "should in no way jeopardize an employee's job security or promotional opportunities." (*Id.*)

4. Termination of employees – This case centers on the termination from employment of three TDP bargaining unit employees of the Agency, based on positive drug test results. The employees will be referred to herein by the first initial of their last names.

a. Employee C was a motor vehicle operator at the Agency for 5 years prior to his termination. (JA at 398.) In October 2001, he was found to have tested positive for illegal drug use. (JA at 263.) He was immediately transferred to "spray lat" work, which is not a TDP. (JA at 496.) He was also directed to an Agency Medical Review Officer for drug counseling. (JA at 406.) Shortly after being notified of his positive result, Employee C contacted his personal physician and enrolled himself in a drug

rehabilitation program. (JA at 400.) He advised his supervisors of this fact. (*Id.*)

After receiving a notice of proposed removal and giving a reply thereto, Employee C was notified in December 2001 that he was removed from employment with the Agency, effective immediately. (JA at 267.) Among other things, the removal notice stated that it was based on concerns about Employee C's ability to safely operate tractor/trailers and forklifts; the resulting loss of his TDP position; and the lack of vacant non-TDP positions to which he could be transferred.² (*Id.*) Employee C had not completed his privately obtained drug rehabilitation at the time of his removal. (JA at 403.)

After receiving his removal notice, Employee C filed a grievance under the parties' negotiated grievance procedure, contesting his removal under Article 27 of the CBA and various sections of the Local Drug Agreement. (JA at 269.) The grievance proceeded to arbitration. (JA at 280.) The record does not reflect the outcome of the arbitration.

² Employee C's temporary transfer to "spray lat" work was only for the purpose of removing him from TDP work while the administrative process for addressing his positive test result was completed. It was not a permanent option for the Agency because the Agency was engaging in a reduction-in-force action at the time. (JA at 497.)

b. Employee N was an aircraft worker for about 3 years prior to his termination. (JA at 361.) He received notice of a positive drug test result in October 2001, and was directed to an Agency Medical Review Officer for drug counseling. (JA at 364, 381.) Employee N immediately contacted his supervisor, to inform him of the positive test result, and met with a union representative. (JA at 365-66.) He also enrolled himself in a drug rehabilitation program a few days after he was notified of the positive test result, and advised his supervisor of that fact. (JA at 251, 367-68.)

Employee N was transferred to “spray lat” work shortly after his positive result. (JA at 371.) In February 2002, after receiving notice of his proposed removal and replying thereto, the Agency notified Employee N that he was removed from his employment with the Air Force, effective 2 days after his termination notice. (JA at 254.) Although the deciding official referenced Employee N’s enrollment in a substance abuse program, the official cited concerns about Employee N’s ability to perform his duties safely as the ground for the removal decision. (*Id.*) Employee N had completed his rehabilitation program at the time of his removal. (JA at 383.)

After receiving his removal notice, Employee N filed an appeal with the Merit Systems Protection Board (MSPB),³ arguing, among other things, that the Agency did not follow its own rules in removing him. (JA at 256, 262.) The record does not reflect the outcome of this MSPB proceeding.

c. Employee H was a forklift operator for the Agency for about 7 years prior to his removal. (JA at 343.) Agency personnel informed him that he tested positive for illegal drug use in January 2002. (JA at 346.) Employee H was directed in this notice to contact an Agency employee, Sgt. Ewish, who was the Drug and Alcohol Abuse Counselor at the Agency. (JA at 560-62.) Also, promptly after receiving the positive test notice, and consistent with a directive accompanying the notice, Employee H met with a member of the Agency's medical staff, Dr. Flowers. (*Id.*)

A few days after the meeting with Flowers, Employee H had himself tested for drug use by an independent testing company. (JA at 347.) This test was negative. (*Id.*) He provided these results to a Union representative, and hypothesized to the representative that the reason for the positive test was that he used hemp products to deal with a skin condition. (JA at 348.)

In March 2002, after receiving a notice of proposed removal and replying thereto, Employee H received his notice of termination of

³ The MSPB is an administrative agency that resolves employee appeals of federal agency adverse personnel actions. 5 U.S.C. § 7701.

employment with the Agency, based on his positive test result. (JA at 227.) Among other things, the removal notice stated that it was based on concerns about Employee H's ability to safely operate tractor/trailers and forklifts; the resulting loss of his TDP position; and the lack of vacant non-TDP positions to which he could be transferred. (JA at 227.) The termination notice was effective 2 days after its issuance. (*Id.*)

Employee H filed an appeal of his termination with the MSPB. (JA at 229.) The appeal was eventually settled and dismissed by an MSPB Administrative Judge in May 2002. (JA at 240-42.)

d. On November 29, 2001, several Union representatives met with Colonel Hendricks, who was the Commander of the Support Group at Davis-Monthan Air Base. (JA at 320.) The Air Base Commander tasked Col. Hendricks with overall responsibility for personnel matters at the Agency. (JA at 417.) However, he had no input into the decisions to remove Employees C, N, and H. (JA at 577.)

During this meeting, the Union representatives expressed their concern over the proposed removals of unit employees who had tested positive for illegal drug use. The Union representatives told Col. Hendricks that they thought these proposed terminations were contrary to Article 27 of the CBA. (JA at 322-23.) Col. Hendricks replied that he had "zero

tolerance” for illegal drug use. (JA at 323.) In response to the Union representatives’ reference to the requirements of the CBA, he said, “I don’t care about your contract.” (*Id.*)

B. ULP Proceedings Before the Authority

Based on a ULP charge filed by the Union, the Authority’s General Counsel issued a complaint against the Agency, alleging ULPs under § 7116(a)(1) and (5) of the Statute. (JA at 81.) More specifically, the complaint alleged that the Agency repudiated portions of Article 27 of the CBA and § 9 of the Local Drug Agreement by terminating the employment of Employees C, N, and H. (JA at 84-85.)

After a hearing, an Authority Administrative Law Judge (ALJ) concluded that the Agency had repudiated portions of the CBA and the Local Drug Agreement. (JA at 65-72.) However, the ALJ further concluded that the ULP complaint did not seek individual relief on behalf of the employees, nor was any such relief available from the Authority as a matter of law. (JA at 43-47.) Accordingly, he recommended that the Authority issue a remedial order requiring the Agency to comply with the CBA and Local Drug Agreement. (JA at 72-73.)

On exceptions to the ALJ's recommended decision filed by the Agency, the Authority dismissed the complaint.⁴ (JA at 30.) The Authority held that, on the record taken as a whole, the Agency acted under a reasonable interpretation of Article 27 of the CBA and § 9 of the Local Drug Agreement, and as a result, it did not repudiate those agreements. (JA at 24.)

The Authority began by setting out its analytical framework for resolving cases alleging a ULP for repudiation of a negotiated agreement. (JA at 22-23.) Its lead case in this area is *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 F.L.R.A. 858 (1996) (*Scott AFB*). In that case, the Authority identified two elements to be considered in such cases: 1) the nature of the breach alleged, *i.e.*, whether or not it is clear and patent; and 2) the nature of the agreement provision allegedly breached, *i.e.*, whether or not it "go[es] to the heart of the parties' agreement."

The Authority observed that under this analysis, it may be necessary to inquire into the meaning of the agreement provision allegedly breached. (JA at 22.) However, it is not always necessary to determine the precise

⁴ The General Counsel filed cross-exceptions to the ALJ's refusal to award individual relief to the terminated employees. However, given the Authority's dismissal of the complaint, it did not address the General Counsel's claim. (JA at 30 n.9.)

meaning of the provision, because the key consideration is whether the agency employer has acted under a reasonable interpretation of the agreement, even if it is not the only reasonable interpretation. (JA at 23.)

Turning to the present case, the Authority first noted that § 9(a) of the Local Drug Agreement was subject to more than one reasonable interpretation. (JA at 24.) One such interpretation was that offered by the ALJ, *i.e.*, that § 9(a) requires the Agency not to remove an employee from his position while undergoing drug counseling. (JA at 25.)

However, the Authority stated that the Agency's interpretation of § 9(a) was also reasonable, *i.e.*, that the section says nothing about the Agency's right to discipline, but rather concerns only the leave status of employees attending drug rehabilitation during duty hours. (JA at 25.) Prior to § 9(a), Agency supervisors were not required to grant leave to employees undergoing drug rehabilitation during duty time. (JA at 26.)

In this connection, the Authority referred to the record testimony of Agency representatives who had negotiated § 9(a), affirming this intent of the provision. (JA at 26-27.) These Agency representatives further testified that it was not the parties' understanding that the Agency in § 9(a) was in any way giving up its pre-existing right to discipline employees undergoing drug rehabilitation, including removal. (*Id.*) This Agency testimony, the

Authority noted (JA at 27, n.8), was unrebutted by any other witnesses who had actually been involved in negotiating § 9(a).

Similarly, as to Article 27 of the CBA, the Authority referenced unrebutted record testimony of an Agency representative, that the discussions at the bargaining table between the parties centered on this article ensuring that employees undergoing drug rehabilitation during duty time be able to do so on approved leave. (JA at 28.) As with § 9(a), this witness testified that there was no discussion of Article 27 causing management to forego any aspect of its right to discipline employees, including removal, at any time. (*Id.*) Accordingly, the Authority found this interpretation of Article 27 of the CBA to be reasonable. (JA at 29.)

Based on its conclusions that the Agency's interpretations of § 9(a) and Article 27 were reasonable, the Authority held that the Agency did not commit a clear and patent breach of those agreement provisions. Therefore, the Agency did not repudiate those provisions. (JA at 29.)

The Authority went on to find, despite the absence of an Agency exception on the point, that the ALJ erred in finding that the Agency repudiated § 12 of the Local Drug Agreement, concerning employee access to drug rehabilitation services. In this regard, the Authority found that there

was no record evidence that the Agency ever denied such services to the employees. (JA at 29-30.)

STANDARD OF REVIEW

Authority decisions are reviewed “in accordance with the Administrative Procedure Act,” and may be set aside only if found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983); *see also Pension Benefit Guaranty Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

This Court has noted that “[w]e accord 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.” *Fed. Deposit Ins. Co. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, “[o]ur scope of review is limited.” *Pension Benefit Guaranty Corp.*, 967 F.2d at 665. So long as the Authority “provide[s] a rational explanation for its decision,” it will be sustained on appeal. *Fed. Deposit Ins. Co.*, 977 F.2d at 1496.

Where, as here, the Authority interprets its own enabling statute, “we are mindful that we owe great deference to the expertise of the Authority as it exercises its special function of applying the general provisions of the Act

to the complexities of federal labor relations.” *Ass’n of Civilian Technicians v. FLRA*, 269 F.3d 1112, 1115 (D.C. Cir. 2001) (internal quotations omitted). Similarly, “we defer to the Authority's interpretation of its own precedent.” *Nat’l Treas. Employees Union v. FLRA*, 399 F.3d 334, 339 (D.C. Cir. 2005).

Review of the Authority's factual determinations is narrow. “We are to affirm the FLRA's findings of fact ‘if supported by substantial evidence on the record considered as a whole.’” *Pension Benefit Guaranty Corp.*, 967 F.2d at 665 (internal citations omitted); *see also* 5 U.S.C. § 7123(c) (“[t]he 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”).

SUMMARY OF ARGUMENT

1. A breach of a collective bargaining agreement provision that is based on a reasonable interpretation of the provision is not in itself an unfair labor practice (ULP). However, if an agency employer unilaterally changes working conditions in such a way as to manifest a patent disregard for its obligations under an agreement provision, the Authority will find a ULP under § 7116(a) of the Statute based on a repudiation of the agreement.

In its lead case on repudiation, the Authority held, as relevant here, that it would not find repudiation of an agreement provision if the provision is unclear, and the party acted in accordance with a reasonable interpretation of that term, even if other reasonable interpretations are possible. In other words, the breach of the agreement term must be “clear and patent” to constitute a ULP. *Scott AFB*, 51 F.L.R.A. at 862.

In the instant case, the Authority properly held that the Agency did not repudiate parts of two negotiated agreements by terminating three employees working in sensitive positions for illegal drug use. The Authority based its holding on the fact that the Agency acted in accordance with a reasonable interpretation of those agreements.

2. The first sentence of § 9(a) of the 1991 Local Drug Agreement (JA at 154) provides that the Agency “will retain employees in a duty or approved leave status while undergoing rehabilitation.” The Authority acknowledged that it was reasonable for the Union to interpret this provision as requiring the Agency not to terminate employees who tested positive for illegal drug use while undergoing rehabilitation.

However, the Authority noted that the Agency’s interpretation was also reasonable. This interpretation was that an employee attending rehabilitation must be placed in a paid leave or duty status, as opposed to an

unpaid status, as was possible before the agreement. However, nothing in this provision affected in any way management's right to take disciplinary action, including removal, against an employee when, in management's discretion, the particular circumstances of a case warranted taking such an action.

The Authority based its conclusion as to the reasonableness of the Agency's interpretation on the unrebutted testimony of an Agency bargaining team member who drafted management's proposals for the Local Drug Agreement. This witness testified that the Agency's understanding of the provision was based in large part on other provisions of the Local Drug Agreement, as well as the legal context in which the agreement was negotiated. This legal context included, among other things, an Executive Order on drug abuse in the federal workplace and an Air Force regulation. These legal authorities established that, although rehabilitation of drug users was an important part of the federal government's drug-free workplace plan, management retains the discretion to discipline employees in appropriate situations. In short, this witness established, management did not understand § 9(a) to be a "safe harbor" from discipline for drug users while undergoing rehabilitation.

3. The Authority also properly concluded that the Agency did not repudiate Article 27 of the 1998 negotiated agreement, which also dealt with drug abuse. This provision required that it be read in a manner consistent with the 1991 drug agreement. Further, Article 27 states in part (JA at 134) that “referral for diagnosis and acceptance of treatment should in no way jeopardize an employee’s job security or promotional opportunities.”

The Authority again relied on the un rebutted testimony of an Agency representative who drafted management’s proposals for this article, in concluding that the Agency’s interpretation of the Article was reasonable. This witness testified that the main point of discussion on Article 27 was whether employees undergoing rehabilitation would be able to do so in a paid, as opposed to unpaid, status. At no point did the parties discuss management foregoing any of its disciplinary prerogatives, including removal of an employee in an appropriate case. Again, although the Authority recognized the reasonableness of the Union’s interpretation of Article 27, the Authority found the Agency’s interpretation to be reasonable as well.

Finally, the Authority found no repudiation of § 12 of the Local Drug Agreement. This provision requires that the Agency make rehabilitation and

counseling opportunities available to employees found to be illegal drug users. The Authority found that the Agency met this requirement.

4. The Union's arguments are without merit. First, as discussed above, the Union's claim that the agreement provisions at issue allow for only one reasonable interpretation is incorrect. None of the provisions expressly prohibit the Agency from terminating the employment of an employee found to have used illegal drugs.

Moreover, the Union unpersuasively asserts that it is nonsensical to mandate rehabilitation for an employee, and yet allow the Agency to remove the employee from his/her job. However, this result is no more vulnerable to criticism than requiring the Agency to allow an employee to complete rehabilitation, as the Union urges, only to permit the Agency to then remove him/her, a result the Union seems to accept; or to retain an established drug user in a sensitive position. In short, there is no contradiction in establishing rehabilitation as a favored option for employees as a general matter, but allowing the Agency to remove employees in particular cases as circumstances dictate.

The incorrectness of the Union's argument is further apparent when the present case is compared to other cases in which repudiation was found.

These other cases involved agreement provisions that clearly left no room for the interpretation adopted by the agency employer.

Finally, the fact that the Agency did not except to the ALJ's holding that finding a repudiation of § 12 of the Local Drug Agreement does not bar the Authority from holding to the contrary. The Authority, not the ALJ, is responsible for resolving ULPs under the Statute. Moreover, the Authority was clearly correct in its holding.

Accordingly, the Union's petition for review should be denied.

ARGUMENT

THE AUTHORITY REASONABLY HELD THAT THE AGENCY EMPLOYER DID NOT COMMIT UNFAIR LABOR PRACTICES UNDER § 7116(a)(1) AND (5) OF THE STATUTE BY REPUDIATING DRUG TESTING PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS WHEN IT TERMINATED THREE EMPLOYEES IN SENSITIVE POSITIONS FOR ILLEGAL DRUG USE, BECAUSE THE AGENCY EMPLOYER'S INTERPRETATION OF THE AGREEMENT PROVISIONS WAS REASONABLE.

A. Governing Legal Principles

The Authority has long recognized that not every breach of a collective bargaining agreement provision is a ULP. To do so would mean that the ULP procedures of the Statute would compete with grievance arbitration as the means for resolving disputes about the meaning of a negotiated agreement provision. This is a result that Congress manifestly

did not want in enacting the Statute. *See* 5 U.S.C. § 7121(a) (with exceptions not here relevant, grievance arbitration procedures are to be “the exclusive administrative procedures for resolving grievances which fall within its coverage,” including disputes about the meaning of an agreement provision); *Johnson v. Peterson*, 996 F.2d 397, 398 (D.C. Cir. 1993).

On the other hand, the Authority has recognized that a party to a collective bargaining agreement can unilaterally change working conditions of employees in such a way as to manifest a patent disregard for its obligations under a negotiated agreement. Such disregard will be viewed as a repudiation of a negotiated agreement, and will constitute a ULP under § 7116(a)(1) and (5) of the Statute. *U.S. Dep’t of Labor, Washington, D.C. and American Fed’n of Gov’t Employees, Local 12*, 59 F.L.R.A. 112, 116 (2003) (discussing the difference between an allegation of contract breach and repudiation).⁵

The Authority’s lead case on repudiation is *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 F.L.R.A. 858 (1996) (*Scott AFB*). As the Authority noted in the instant

⁵ The Authority’s repudiation doctrine has roots in private sector labor law. *See, e.g., Crest Litho, Inc.*, 308 N.L.R.B. 108, 110 (1992); *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. 905, 906 (1986). The Supreme Court has recognized the Authority’s use of the doctrine. *Cornelius v. Nutt*, 472 U.S. 648, 664 (1985).

case (JA at 22), *Scott AFB* identified two elements necessary to establish a ULP violation based on repudiation: 1) the nature and scope of the breach, *i.e.*, whether the breach was “clear and patent”; and 2) the nature of the agreement provision allegedly breached, *i.e.*, did the breach go to the “heart of the parties’ agreement.” *Scott AFB*, 51 F.L.R.A. at 862.

As to the first element, at issue in this case, the Authority noted in *Scott AFB* that in those situations where the meaning of an 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.

Scott AFB, 51 F.L.R.A. at 862-63.⁶

Because the focus of “clear and patent breach” analysis is simply whether a party acted on a “reasonable interpretation” of an agreement provision, as opposed to the most accurate interpretation, the Authority noted in *Scott AFB* that it would not always ascertain the “precise meaning” of an agreement provision in repudiation cases. *Scott AFB*, 51 F.L.R.A. at

⁶ Because the Authority decided the instant case under the first element of the repudiation doctrine, it did not need to reach the second element, concerning whether the agreement provision repudiated went to the heart of the parties’ agreement. The second element will therefore not be discussed further in this brief.

862 n.4.⁷ The Authority proceeded in that case to find that an agency did not repudiate an agreement provision dealing with workplace smoking practices because it acted on a reasonable interpretation of the provision. *Scott AFB*, 51 F.L.R.A. at 862-63.

B. The Authority Properly Concluded That The Agency Did Not Repudiate Either § 9(a) Or § 12 Of The Local Drug Agreement, Or Article 27 Of The CBA

1. The First Sentence of § 9(a) -- The Authority began its analysis by recognizing that the Union’s interpretation of the first sentence of § 9(a) of the Local Drug Agreement was reasonable. (JA at 24-25.) That is, the first sentence of § 9(a), stating that the Agency “will retain employees in a duty or approved leave status while undergoing rehabilitation,” could be read to mean that the Agency must not terminate an employee from his/her job while the employee is participating in a drug rehabilitation program.

However, based on the un rebutted testimony of Agency management representatives involved in negotiating the 1991 Local Drug Agreement and

⁷ This agreement interpretation function of the Authority in repudiation cases is thus in contrast to cases in which a party claims, for example, that an action alleged to be a ULP was in fact permitted by an agreement provision, or that a matter proposed for bargaining is “covered by” an existing agreement. In these latter types of cases, the Authority applies the same rules of contract interpretation as would an arbitrator in resolving a grievance. *See, e.g., Internal Revenue Serv. v. FLRA*, 963 F.2d 429, 439 (D.C. Cir. 1992); *Social Security Admin., Region VII, Kansas City, Mo.*, 55 F.L.R.A. 536, 538 (1999) (discussing connection between contract defense and “covered by” doctrines).

the 1998 CBA, and as the Authority noted, the Union's interpretation is not the only reasonable interpretation of that section. (JA at 25-26.) Warren Kossman, a management personnel official responsible for drafting the Agency's proposals for the Local Drug Agreement, testified (JA at 447) that the agreement was the product of Exec. Order 12,564, which in part mandated the removal from a TDP of any employee testing positive for drug use (JA at 166); and the Air Force Civilian Drug Testing Plan, which contained the same requirement (JA at 188).

Kossman also testified that the first sentence of §9(a) was meant to implement ¶ 11 of the Department of the Air Force Drug Testing Plan (JA at 179). This paragraph guaranteed that an employee in drug rehabilitation would be able to be in a leave status while attending counseling sessions. Prior to the Air Force Plan, no such guarantee was available for employees, thus inhibiting the effectiveness of the rehabilitation. (JA at 448.)

Kossman stressed that the first sentence of § 9(a) was not intended to provide a "safe harbor" from discipline for employees that tested positive for drug use and chose to enter into rehabilitation. (JA at 448-50.) Indeed, Kossman testified, Agency management understood itself as a result of the negotiations to be in full possession of all management rights to discipline employees, including removal while an employee was undergoing

rehabilitation. The only “safe harbor” created in the Local Drug Agreement, Kossman said (JA at 450), was § 15 of the Local Drug Agreement (JA at 156). This provision assured employees self-identifying themselves as drug users prior to testing that there would be no “reprisal” for their admission.

He also pointed to (JA at 449) § 6(d) of the Local Drug Agreement (JA at 152), which stated that a positive drug test could result in a variety of management actions, including “any . . . actions consistent with management rights.” He also referred to a notice (Add. B to this brief) that TDP employees were required to sign, stating, among other things, that employees entering into drug rehabilitation may nonetheless be subject to “disciplinary or adverse action.” Kossman said this notice was consistent with the provisions of the Local Drug Agreement. (JA at 469-70.)

Other supportive testimony that the Authority relied on included the testimony of Karen Young, a management personnel official who was involved in the negotiation of the 1998 CBA. (JA at 26.) Young confirmed that in the 1998 CBA negotiations, management understood its prerogatives under the 1991 Local Drug Agreement not to be affected by an employee’s

participation in a drug rehabilitation program after a positive test result.⁸
(JA at 539-41.)

This un rebutted bargaining history testimony⁹ supports the Authority's conclusion that the Agency relied on a reasonable construction of the first sentence of § 9(a) in terminating the three employees. As the Authority held (JA at 27), the Agency reasonably viewed the first sentence of § 9(a) as saying nothing about discipline of employees receiving positive drug test results. Moreover, this witness testimony established the substantial legal background the parties were operating in during the 1991 negotiations, including the Air Force Drug Plan. This legal background consistently affirmed the Agency's management right to take any appropriate action, including removal during rehabilitation, against an employee testing positive for illegal drug use.

In short, the Authority properly held that the Agency could reasonably have read the first sentence of § 9(a) to mean effectively that an employee

⁸ Article 27, § 5 of the CBA requires that that Article be implemented in a manner consistent with the Local Drug Agreement. (JA at 134.)

⁹ As the Authority noted (JA at 27 n.8), there was testimony from a Union representative that disagreed with the testimony of Kossman and Young as to the meaning of § 9(a). However, this Union representative was not involved in any of the negotiations at issue here. Thus, the Authority properly accorded little weight to the Union representative's testimony. In fact, as the Authority noted (JA at 27 n.8), if anything, the Union representative's testimony provides some support for the Agency's case.

will be kept in a duty or approved leave status while undergoing rehabilitation, *unless the Agency chose, due to the particular circumstances of a case, to exercise its preexisting rights to discipline the employee during that time.* Nothing in the wording of the first sentence of § 9(a) prohibits this reading.

This is not, of course, to say that this interpretation would necessarily prevail before an arbitrator on a grievance alleging a mere breach, as opposed to a repudiation, of § 9(a). However, as the Authority made clear in *Scott AFB*, among other cases,¹⁰ determining that a party has violated an agreement provision does not establish that it has repudiated the provision. The important point here is that the Authority properly concluded that the Agency acted under a reasonable, if not the only, interpretation of the first sentence of § 9(a). Therefore, the Authority's determination that no repudiation of the section occurred should be upheld.

2. Article 27 of the CBA – The Authority again relied on un rebutted bargaining history testimony in holding that the Agency did not repudiate this agreement provision. (JA at 27-28.) In this connection, Karen Young was part of the Agency's management negotiating team for the 1998

¹⁰ See also *U.S. Dep't of the Air Force, Seymour Johnson Air Force Base*, 57 F.L.R.A. 772, 774 (2002); *Social Security Admin., Baltimore, Md.*, 55 F.L.R.A. 1122, 1126 (1999); *U.S. Penitentiary, Florence, Col.*, 54 F.L.R.A. 30, 31-32 (1998).

CBA, and drafted bargaining proposals for management. (JA at 536-37.) She testified that the parties at the bargaining table discussed the meaning of Article 27. (JA at 539.) Young said that the primary point discussed with the Union concerning this article was whether employees undergoing rehabilitation would be ensured of being able to do so while on paid leave or excused absence, instead of leave without pay. (*Id.*)

Young went on to say that there was no discussion between the parties to the effect that Article 27 was intended to require the Agency to refrain from taking any disciplinary action against an employee it may deem appropriate, including removal during rehabilitation. (JA at 540-41.) Further, she stated that the notice required to be signed by TDP employees (Add. B to this brief), which specified the possibility of a personnel action such as removal being taken against an employee notwithstanding his/her enrollment in rehabilitation, was known to the Union when the CBA was being negotiated and was not objected to. (JA at 535.)

Based on this testimony, the Authority properly held, as with § 9(a) of the Local Drug Agreement, that the Agency reasonably believed that Article 27 of the CBA did not bar it from terminating the employees. (JA at 28.) In this regard, and as the Authority determined, it was reasonable for the Agency to conclude that Article 27 is silent with regard to the Agency's

exercise of its preexisting right, in appropriate circumstances, to discipline an employee based on a positive drug test. Rather, the provision concerns only the leave status of employees attending rehabilitation. Thus, as the Authority held, the Agency did not commit a clear and patent breach of Article 27, and therefore did not repudiate that provision. (*Id.*) Again, the Authority did not dispute the reasonableness of the Union's interpretation of Article 27 as prohibiting removal of employees enrolled in drug rehabilitation. (JA at 29.) The Authority simply concluded that the Agency's interpretation was reasonable as well. (*Id.*)

3. Section 12 of the Local Drug Agreement – In addition, the Authority correctly held that no record evidence supports the ALJ's recommended holding that the Agency also repudiated § 12 of the Local Drug Agreement. (JA at 29.) That provision requires that the Agency make drug rehabilitation opportunities available to employees testing positive for illegal drug use. (JA at 155.) All three terminated employees were directed to drug counseling staff at the Agency after their positive test results, for the purpose of being enrolled in a drug rehabilitation program. (JA at 562-67.) If anything, this evidence demonstrates the Agency's full compliance with § 12 of the Local Drug Agreement, not its repudiation.

C. The Union's Arguments For Reversal Of The Authority's Decision Are Without Merit

1. The Union's primary argument supporting reversal is that the meaning of § 9 of the Local Drug Agreement and Article 27 of the CBA is so plain as to allow for only one reading: an employee enrolled in drug rehabilitation cannot be removed from his employment with the Agency under any circumstances. (Union's Brief (Br.) at 17-21.) As a result of this purported clarity, the Union argues that the Authority's recourse to witness testimony about the bargaining history of these agreement provisions is error. (Br. at 17-18.)

Much of what has already said at pp. 25 to 31 above refutes this claim. The Union is incorrect when it argues that the language of the agreement provisions allows for only one reasonable interpretation. The fact of the matter is that none of the agreement provisions the Union relies on explicitly bans the removal actions the Agency undertook in this case. These provisions instead talk about retaining employees in a duty or approved leave status while undergoing drug rehabilitation (§ 9(a)); discuss how "[r]eferral for diagnosis and acceptance of treatment should [not] jeopardize an employee's job security or promotional opportunities" (Article 27, § 3); and generally establish a policy favoring rehabilitation of illegal drug users (§ 12 of the Local Drug Agreement and Article 27, § 2 of the CBA). As

already argued, although these provisions certainly could reasonably be interpreted to ban employee removals while the employee is in rehabilitation, they are not so clear-cut as to foreclose another reasonable interpretation.

The Union's contention that its view of the disputed agreement provisions is the most reasonable interpretation is based on several erroneous points. For example, the Union argues (Br. 20) that agreement provisions surrounding the first sentence of § 9(a) all go to an employee's employment status, not his/her leave status. Thus, the Union claims, the first sentence of § 9(a) should also be so construed. This is by no means an unreasonable argument. But it certainly does not establish the Union's view of the first sentence of § 9(a) as the only possible interpretation under the Authority's "clear and patent breach" test. Indeed, the fact that the first sentence of § 9(a) expressly mentions "approved leave status" lends credence to the Agency's interpretation of this provision.¹¹

¹¹ Mr. Kossman, the Agency representative who was on the bargaining team for management, testified without refutation that it was not unusual for the parties to combine different topics under one heading in the Local Drug Agreement. (JA at 477.) Moreover, the Union's reference (Br. 20) to § 14 of the Local Drug Agreement (JA at 155-56) does nothing to help its case. That provision only addresses leave for employees to provide urine specimens, meet with the Medical Review Officer, etc. It does not address attendance at ongoing rehabilitation sessions.

The Union also claims (Br. 19-20) that it is nonsensical to read the agreement provisions at issue as requiring the Agency to make rehabilitation available to employees, and yet allow the Agency to terminate them while that rehabilitation is ongoing. The Authority, however, has never found a clear and patent breach of an ambiguous agreement provision based on the purported lack of wisdom of the provision. Repudiation must be established on the basis of the agreement language itself. *E.g., Scott AFB*, 51 F.L.R.A. at 862 (clear and patent breach must be of the “terms of the agreement”).

In any event, it is by no means clear that the result discounted by the Union is any more vulnerable to criticism than: 1) requiring the Agency to retain illegal drug users in TDPs, as the Union urges here, since no non-TDP positions were open; or 2) requiring the Agency to allow the employees to finish rehabilitation, and then terminate them, a result the Union appears to believe would not have repudiated the disputed agreement provisions. (Br. at 18; agreement provisions must be read to require that the Agency “could not remove employees for a positive drug test *while they were undergoing rehabilitation*” (emphasis supplied).)

The infirmity of the Union’s claim is shown further by comparing the present case with other Authority cases in which a repudiation based on clear and patent breach was found. For example, in *Department of the Air*

Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga., 52 F.L.R.A. 225 (1996), the Authority found a repudiation of a negotiated agreement provision. That provision explicitly called for, among other things, agency management to maintain indoor smoking areas for employees until negotiations on a new agreement for outdoor smoking areas were completed. Despite this unequivocal language, the agency banned indoor smoking areas prior to completion of the negotiations on outdoor smoking areas.

Similarly, in *Social Security Administration, New York, N.Y. and American Federation of Government Employees, Local 3369*, 60 F.L.R.A. 301 (2004), the Authority affirmed an arbitrator's holding that an agency committed ULPs under § 7116(a)(1) and (5) of the Statute by repudiating a negotiated agreement provision. The agreement provision allowed agency management to change by mid-term bargaining only those working conditions set by past practice that were "not specifically covered" by the agreement. The agreement did "specifically cover[]" the payment of travel and per diem expenses to employee union representatives performing representational duties on official time. Nonetheless, the agency unilaterally terminated the payment practice and demanded mid-term negotiations on the matter. The Authority found both the "not specifically covered" language,

and the fact that the payment practice was specifically covered in the agreement, to be clear and unambiguous.

In both these cases, the agreement provisions at issue left no room for alternative reasonable interpretations. In the present case, by contrast, there is the possibility for such an alternative reasonable reading. The Authority therefore properly reached a different result.

Given the correctness of the Authority's holding that the Local Drug Agreement and the CBA are not unambiguous, it was appropriate for the Authority to rely on bargaining history testimony to decide the reasonableness of the Agency's understanding of those agreements. Elkouri & Elkouri, *How Arbitration Works*, Fifth Ed., 1999 Supp., at 63 (“[p]recontract negotiations frequently provide a valuable aid in the interpretation of ambiguous [contract] provisions”).¹²

In sum, the Union fails to establish that the Authority erred in holding that the Agency did not commit a clear and patent breach of § 9(a) of the Local Drug Agreement or Article 27 of the CBA. These arguments should therefore be rejected.

¹² It is important to bear in mind that, as discussed at p. 25, n.7, above, the Authority does not construe an agreement provision in a repudiation case as would an arbitrator resolving a grievance alleging a breach of a provision. Thus, the Authority here used bargaining history to assess the reasonableness of the Agency's interpretation of the agreements, not the best reading of the agreements, as would a grievance arbitrator in a breach case.

2. The Union makes a separate argument concerning the Authority's holding that the ALJ erred in finding a clear and patent breach of § 12 of the Local Drug Agreement. (Br. at 22-23.) This claim also lacks merit and should be rejected.

First, the Union is in error when it argues (Br. at 23 n.4) that it was "improper" for the Authority to overturn the ALJ on this issue in the absence of an Agency exception. Under the Administrative Procedure Act, 5 U.S.C. § 557(b), which applies to Authority ULP proceedings, an agency reviewing an ALJ recommended decision shall have "all the powers which it would have in making the initial decision." It is the Authority's, not the ALJ's, responsibility to decide whether a ULP was committed. *Cf. Florida Steel Corp. v. NLRB*, 601 F.2d 125, 129 (4th Cir. 1979) (ULP determination where credibility not at issue is "primarily the responsibility of the [National Labor Relations] Board, not the administrative law judge"). Thus, once an ALJ recommended decision is before the Authority on exceptions, the Authority acts within its powers if it chooses not to be bound by an ALJ conclusion it views as erroneous.

Second, the Union is wrong on the merits. Section 12 of the Local Drug Agreement (JA at 155) simply calls on the Agency to make drug rehabilitation available to employees. As the Authority correctly noted (JA

at 29), there is nothing in the record to show that the Agency failed provide such services to any of the employees. In fact, the record reflects that all three employees at issue were referred to drug counseling. (*E.g.*, JA at 562.) Further, as with the other agreement provisions at issue in this case, there is nothing in § 12 of the Local Drug Agreement that expressly bars the Agency from exercising its preexisting rights to discipline employees for good cause shown, even if those employees are undergoing drug rehabilitation.

The Union's reference (Br. at 22) to Col. Hendricks' comments (see pp. 11-12, above) adds nothing to its claim that the ALJ was correct in concluding that § 12 was repudiated. Whatever Col. Hendricks' views about the negotiated agreements may have been, he played no role in deciding to terminate the three employees at issue in this case. (JA at 577.) Accordingly, his comments cannot be imputed to the Agency management officials who decided on the terminations, which were the only acts alleged to repudiate the agreements.¹³

¹³ The Union also argues (Br. 23-25) that individualized relief, i.e., reinstatement and back pay for the three employees, should be awarded. However, because the Authority found no ULP violation, it did not address this issue. (JA at 22, 30.) Accordingly, if the Court should reverse the Authority on the finding of no violation, it should remand to the Authority, to address this remedy issue, as well as any other points raised on exceptions that were not addressed by the Authority. *E.g.*, *Dep't of the Air Force v. FLRA*, 956 F.2d 1223, 1225 (D.C. Cir. 1992) (Court remands to the

CONCLUSION

The Union's petition for review should be denied.

Respectfully submitted,

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Authority for balancing of competing interests in the first instance in data disclosure case).

CERTIFICATION PURSUANT TO FRAP RULE 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is proportionately spaced, utilizes 14-point serif type, and contains 8,394 words.

William E. Persina

June 1, 2006

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

AMERICAN FEDERATION OF GOVERNMENT)
EMPLOYEES, LOCAL 2924,)
)
 Petitioner)
)
 v.) No. 05-1241
)
 FEDERAL LABOR RELATIONS AUTHORITY,)
)
 Respondent)

CERTIFICATE OF SERVICE

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

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