ORAL ARGUMENT NOT YET SCHEDULED

No. 12-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

ROSA M. KOPPEL
Solicitor

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7907

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority") were the National Treasury Employees Union ("NTEU" or "Union") and the United States Department of the Treasury, Internal Revenue Service, Washington, D.C. ("IRS" or "Agency"). NTEU 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 *National Treasury Employees Union and United States Department of the Treasury, Internal Revenue Service, Washington, D.C.* , Case No. 0-NG-3158, decision issued on October 31, 2012, reported at 67 FLRA (No. 7) 24.

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 Circuit Rule 28(a)(1)(C). However, the issue presented in this case, whether proposals to bring within a collective bargaining agreement's grievance procedures disputes concerning the termination of probationary employees are negotiable, already has been addressed by the U.S. Court of Appeals for the District of Columbia Circuit in *United States Department*

of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), and *National Treasury Employees Union v. Federal Labor Relations Authority*, 848 F.2d 1273 (D.C. Cir. 1988). In both decisions, the D.C. Circuit held that such proposals are not within the duty to bargain because they are inconsistent with Federal law or government-wide rules or regulations. Thus far, the D.C. Circuit is the only United States Court of Appeals to directly address this issue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No. (s)

CASES

***** Authorities upon which we chiefly rely are marked with an asterisk.

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES

REGULATIONS

GLOSSARY

Agency or IRS	Department of the Treasury, Internal Revenue Service, Washington, D.C.
Authority or FLRA	Federal Labor Relations Authority
CBA	Collective Bargaining Agreement
CSRA	Civil Service Reform Act of 1978, as amended, 5 U.S.C. §§ 1101-9101 (2006)
EEOC	Equal Employment Opportunity Commission
INS	*U.S. Dep't of Justice, Immigration and Naturalization Serv. V. FLRA*, 709 F.2d 724 (D.C. Cir. 1983)
JA	Joint Appendix
MSPB	Merit Systems Protection Board
NTEU or Union	National Treasury Employees Union
NTEU I	*NTEU*, 25 FLRA 1067 (1987)
NTEU II	*NTEU v. FLRA*, 848 F.2d 1273 (D.C. Cir. 1988)
OPM	Office of Personnel Management
PB	Petitioner's Brief
SOP	Statement of Position
Statute	Federal Service Labor Management Relations Statute
ULP	Unfair labor practice

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-2574

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on October 31, 2012. The Authority's decision is published at 67 FLRA (No. 7) 24. A copy of the decision is included in the Joint Appendix (JA) 125-133. The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) ("FSLMRS" or

"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 correctly held that an agency is not obligated to bargain over a proposal to give negotiated grievance rights to probationers who allege that they were unlawfully terminated.

STATEMENT OF THE CASE

This case arises out of a negotiability proceeding under § 7117 of the Statute. The National Treasury Employees (the "Union" or "NTEU") submitted a proposal to amend the parties' collective bargaining agreement (CBA) to permit probationary employees, or probationers,[2] to grieve separations, including terminations, if the grievance is "confined to enforcing the procedures or rights contained in a statute." JA 6-7. The U.S. Department of the Treasury, Internal Revenue Service (the "Agency" or "IRS") asserted in writing that the proposal was non-negotiable as contrary to law. JA 11. In response, the Union filed a negotiability appeal under § 7105(a)(2)(E) of the Statute. JA 5. The Agency filed a statement of position (SOP), JA 36, the Union filed a response, JA 55, and the

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

[2] As relevant here, "probationers" are competitive service employees who have neither completed their one-year probationary periods nor completed "one year of current continuous service under other than a temporary appointment limited to 1 year or less." *See* 5 U.S.C. § 3321, 5 C.F.R. §§ 315.802(a) and 315.803(b).

Agency filed a reply. JA 114. The Union now seeks review of the Authority's decision that the proposal is outside the duty to bargain.

STATEMENT OF THE FACTS

A. Background

The existing CBA between the Union and the Agency excludes disputes concerning the termination of probationers from the scope of the grievance procedures. JA 7. The Union proposed to amend the CBA to permit grievances concerning the termination of probationers. *Id*. Its specific proposal is:

> The grievance procedures . . . shall not apply to the following . . . [(8)] the separation of a probationary employee unless the grievance is confined to enforcing the procedures or rights contained in a statute, and any subsequent arbitration decision is controlled solely by the requirements of law and government-wide regulation such that the arbitrator is merely substituting for the federal authority that would hear the employee's challenge.

JA 6-7 (second omission in original); JA 34 (changing subsection number from "(11)" to "(8)"). The parties agree that the proposal would permit the Union to grieve and arbitrate a dispute concerning a probationary employee's termination if the grievance were limited to enforcing rights under any statute. JA 35. The Agency alleged that the proposal was non-negotiable. JA at 11.

B. The Authority's decision

The Authority began its analysis by citing the nearly 30 years of its precedent holding that proposals are inconsistent with 5 U.S.C. § 3321 and

5 C.F.R. part 315, subpart H to the extent they grant probationers: (1) separation-related procedures beyond those provided for by statute or Office of Personnel Management (OPM) regulations; or (2) the ability to grieve separation disputes. JA 128-29. The Authority noted that these holdings accord with decisions of the U.S. Court of Appeals for the D.C. Circuit, the only U.S. Court of Appeals to directly address this issue until now. JA 129. Both the Authority and the D.C. Circuit holdings recognize that it is up to OPM to decide what procedural protections probationers should get, and it was Congress' intent that parties not be able to supplement those OPM-provided protections on their own via collective bargaining. JA 129.

The Authority found unpersuasive all four of the Union's reasons why the Authority should abandon its unbroken line of precedent and find the proposal negotiable. First, the Authority rejected the Union's argument that the Authority and D.C. Circuit precedents are wrong because they "ignore" the Statute. The Authority explained that these precedents applied rather than ignored the Statute, finding proposals like the one at issue to be inconsistent with government-wide regulations and, thus, under section 7117(a)(1) of the Statute, non-negotiable. JA 129.

Next, the Authority found incorrect the Union's assertion that the decisions of the Authority and the D.C. Circuit reflect a belief that management has the right

to summarily terminate probationers without any procedural protections whatsoever. Instead, the Authority explained, these decisions reflect that probationer receive limited due process in connection with their terminations and that only OPM has the authority to expand the protections available to them. JA 129. That Congress provided alternative means for pursuing separation-related claims of probationers does not mean that these claims also may be pursued via means that Congress did not provide, including a negotiated grievance procedure. The Union's assertion to the contrary, the Authority explained, runs counter to Congressional intent. JA 129.

Further, the Authority found unpersuasive the Union's argument that public policy in favor of arbitrating disputes, as reflected in two cases that the Supreme Court decided under the Federal Arbitration Act, warrants the Authority's abandonment of its own precedent under the Statute. JA 127, 130. Acknowledging that public policy generally favors arbitration, the Authority observed, nonetheless, that it does not require arbitration that is inconsistent with a statute or governing regulation. JA 130. As the Authority explained, in both decisions relied upon by the Union, the Supreme Court determined that arbitration of the dispute was consistent with applicable federal law. JA 130.

Next, the Authority rejected the Union's argument that because other proposals that afford benefits to employees exceeding those required by law are

negotiable, the Authority should find that the Union's proposal, which gives probationers a remedy that OPM regulations do not, is negotiable as well. JA 130. But, as the Authority explained, proposals that grant benefits beyond what regulations require are non-negotiable under § 7117(a)(1) of the Statute if they conflict with those regulations. JA 130.

Finally, the Authority addressed what the Union contended were arguments supporting negotiability that the Authority had not considered before. JA 130-31. Among those arguments were that the proposal adds no hurdles for employers to undergo before terminating probationers, and that an arbitrator deciding a grievance under the proposal would serve the same function as an administrative or judicial decision-maker that a terminated probationer could otherwise go before. JA 131. The Authority found the additional arguments unpersuasive and, instead, held that the proposal is inconsistent with Congress' intent and OPM regulations carrying out that intent. JA 131.[3]

The Union filed a petition seeking review of the Authority's determination of non-negotiability.

[3] Having held that the proposal is inconsistent with OPM regulations, the Authority found it unnecessary to address whether it also is inconsistent with 5 U.S.C. §3321. Nor did the Authority find it necessary to address the Union's contention that the proposal does not interfere with a management right and that, even if it does, it is negotiable nonetheless. JA 130 n. 7, and 131 n.9.

SUMMARY OF ARGUMENT

The Union's proposal, which grants probationers the right to grieve allegedly unlawful terminations, conflicts with OPM regulations that deny that avenue of redress. Therefore, the proposal is non-negotiable under § 7117(a)(1) of the Statute. For nearly the past 30 years, and consistent with decisions of the U.S. Court of Appeals for the District of Columbia Circuit, the Authority has held that such proposals are non-negotiable and that grievances brought by probationers over their terminations are not arbitrable.

Yet, the Union asks this Court to order the Authority to change course now because the conflict between its proposal and OPM regulations is "illusory." According to the Union, because Congress has provided probationers with other means of challenging allegedly illegal terminations, such as EEO and unfair labor practice complaints, they should also have access to a remedy that Congress and OPM did not provide - - the negotiated grievance procedure.

The Court should reject the Union's claim. To do otherwise would permit bargaining parties to usurp the role that Congress assigned to OPM in deciding which procedural protections probationers need. Instead, this role belongs to OPM, and any proposal attempting to undermine that Congressionally-assigned role is non-negotiable.

ARGUMENT

THE AUTHORITY CORRECTLY HELD THAT AN AGENCY IS NOT OBLIGATED TO BARGAIN OVER A PROPOSAL TO GIVE NEGOTIATED GRIEVANCE RIGHTS TO PROBATIONERS WHO ALLEGE THAT THEY WERE UNLAWFULLY TERMINATED.

A. 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 & Firearms v. FLRA*, 464 U.S. 89, 97 n.7 (1983) (quotation marks omitted); *see also NRC v. FLRA*, 895 F.2d 152, 154 (4th Cir. 1990) ("*NRC*"). With regard to a negotiability decision, "[d]ue deference is paid to an FLRA determination of negotiability." *NRC*, 895 F.2d at 154.

This case involves the Authority's interpretation of its own organic Statute as it relates to other federal laws, specifically, 5 C.F.R. part 315, subpart H. When the Authority interprets other laws, although it is not entitled to deference, *Dep't of the Navy, Military Sealift Command v. FLRA*, 836 F.2d 1409, 1410 (3rd Cir. 1988), the Authority's interpretation should be followed to the extent the reasoning is "sound." *Ass'n of Civilian Technicians, Tex. Lone Star Chapter v. FLRA*, 250 F.3d 778, 782 (D.C. Cir. 2001) (quoting *Dep't of the Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C. Cir. 1988)).

B. The Union's proposal is non-negotiable.

1. The Authority correctly held that the Union's proposal is inconsistent with 5 C.F.R. part 315, subpart H.

Probationers who are terminated during their probationary periods are not without recourse. They have limited rights of appeal to the Merit Systems Protection Board (MSPB). *See* 5 C.F.R. § 315.806(b) and (c). Also, they may file complaints of discrimination with the Equal Employment Opportunity Commission (EEOC). *See* 42 U.S.C. § 2000e-16. As complainants, they would be entitled to procedural protections including an impartial investigation (29 C.F.R. § 1614.108), a hearing before an Administrative Law Judge (29 C.F.R. § 1614.109), a final decision (29 C.F.R. § 1614.110), an appeal to the EEOC (29 C.F.R. § 1614.401), and the right to file suit in federal district court (29 C.F.R. §1614.407). Alternatively, probationers may file unfair labor practice (ULP) complaints with the Authority's General Counsel if they believe that their terminations violated § 7116(a) of the Statute. *See* 5 U.S.C. § 7118, 5 C.F.R. part 2423; *Indian Health Serv. Crow Hospital, Crow Agency, Mont.*, 57 FLRA 109 (2001).

But, as the Authority held, a probationer may not grieve his termination under the agency's negotiated grievance procedure because neither Congress nor OPM gave that right to probationers. JA 129. The Union's proposal, however, would grant that very right to probationers. Thus, the proposal conflicts with OPM

regulations governing the probationary period and, therefore, is non-negotiable under § 7117(a)(1) of the Statute. JA 129-31.

As the Authority explained, although Congress extended certain procedural protections to probationers, it also determined that "'a single additional forum available to other federal employees – a negotiated grievance procedure – would remain unavailable to probationers.'" JA 129 (quoting *NTEU v. FLRA*, 848 F.2d 1273, 1277 (D.C. Cir. 1988) ("*NTEU II*"), *denying pet. for review of NTEU*, 25 FLRA 1067 (1987) ("*NTEU I*")). The Authority's decision, which honors Congress's intent, should be upheld.

2. The Authority's decision is supported by nearly 30 years of Authority precedent concerning terminated probationers.

Since 1985, the Authority has consistently held that proposals like the one at issue here are non-negotiable under § 7117(a)(1) of the Statute because they are inconsistent with 5 C.F.R. part 315, subpart H. *See, e.g.*, *NTEU*, 46 FLRA 696, 763-65 (1992) (provision requiring agency to allow probationers an opportunity to respond to supervisory recommendations concerning their termination was inconsistent with 5 C.F.R. part 315, subpart H and, thus, non-negotiable); *NTEU*, 40 FLRA 849, 863-64 (1991) (proposals requiring agency, before terminating a probationer, to give advance notice, hold a meeting, and consider the employee's oral or written statements were non-negotiable); *NTEU*, 38 FLRA 1366, 1370-72

(1991) (same); *Bremerton Metal Trades Council*, 32 FLRA 643, 661 (1988) (provision that would include removal of probationers under the parties' negotiated grievance procedure is precluded by 5 C.F.R. part 315, subpart H); *NFFE, Local 29*, 20 FLRA 788, 790-91 (1985), *abrogated on other grounds by Fed. Emps. Metal Trade Council*, 38 FLRA 1410, 1428-30 & n.2 (1991), *as recognized in AFGE, AFL-CIO, Council of Marine Corps Locals, Council 240*, 39 FLRA 839, 846-47 (1991) (same, regarding a proposal).

In addition, as the Authority explained, JA 129, it has consistently held that grievances concerning a probationer's termination are not arbitrable. *See NTEU*, 66 FLRA 416, 418 (2011); *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282, 284 (2011); *AFGE, Local 2006*, 58 FLRA 297, 298 (2003); *Dep't of Health & Human Servs.*, 14 FLRA 164, 164-65 (1984).

This unbroken line of rulings is a perfectly valid justification for the Authority not to change course now. "[U]psetting the stability and predictability of the law is not something that should be taken lightly." *Santos v. United States*, 461 F.3d 886, 894 (7th Cir. 2006); *see also United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007) ("Overturning a long-standing precedent is never to be done lightly, and particularly not in the area of statutory construction, where Congress is free to change interpretation of its legislation."). This is no less true for administrative agencies like the Authority. *See City of Lawrence, Mass. v. CAB*, 343 F.2d 583,

589 (1st Cir. 1965) (Aldrich, C.J., dissenting) ("The principles that an administrative agency must have standards, must not depart from them in an individual case, and should not make a general change lightly . . . seem to me as important as the basic proposition that its findings and reasoning must be set forth sufficiently to permit intelligent review.").

Therefore, the Authority appropriately rejected the Union's suggestion that the Authority abandon nearly 30 years of its precedent by ordering the Agency to bargain over a proposal that is inconsistent with OPM regulations. As the Authority explained (JA 129-31) and as explained below, this precedent accords with decisions of the U.S. Court of Appeals for the District of Columbia Circuit, which is the only Circuit thus far to directly address the issue before this Court.

3. The Authority's decision is consistent with decisions of the D.C. Circuit and other courts.

In *U.S. Dep't of Justice, Immigration and Naturalization Serv.*, 709 F.2d 724 (D.C. Cir. 1983 ("*INS*"), the D.C. Circuit reviewed a decision in which the Authority ordered the agency to bargain over a proposal that would have made grievable virtually any termination of a probationer. The D.C. Circuit reversed the Authority, holding that the proposal was "flatly inconsistent with" 5 C.F.R. part 315, subpart H and "would provide [probationers] precisely what Congress would not." *INS*, 709 F.2d at 728.

The Union no longer argues that *INS* was incorrectly decided. *Compare* JA 64 (Union's statement that *INS* court's analysis "strains credibility") and PB at 7, 12-14. Instead, it now argues that the Authority erred in relying upon *NTEU II* which, it claims, "was an unreasonable extrapolation of [the D.C. Circuit's] rationale in *INS*." *Id*. at 14. The Union is wrong.

As the *NTEU II* court explained, the only difference between the proposal before it and the *INS* proposal was that the *NTEU II* proposal would have provided the negotiated grievance procedure only to those terminated probationers who alleged (but had yet to establish) unlawful discrimination. *NTEU II* at 1275. As to why the Authority's application of *INS* to the *NTEU II* proposal was correct, the D.C. Circuit explained in *NTEU II* that "[t]o allow the mere allegation of discrimination to give a discharged probationary employee access to the grievance procedure, with the concomitant power of the arbitrator to order reinstatement, would substantially thwart Congress's intention to allow summary termination of probationary employees." *Id*. To allow such an exception would "eviscerate Congress' intention that collective bargaining not supplement probationers' existing procedural protections." *Id*. at 1276. The *NTEU II* court's reasoning is entirely consistent with, and flows from, *INS*'s holding that proposals are non-negotiable if they "usurp[] the authority Congress conferred on OPM" by

providing "precisely what Congress would not." *INS*, 709 F.2d at 729, 730. Therefore, *NTEU II* correctly applied the *INS* analysis.

Although no other federal appellate court has directly addressed the issue decided in *INS* and *NTEU II*, the Seventh Circuit adopted the D.C. Circuit's approach in both decisions when, in reversing the Authority in an analogous case, it held that a proposal that would subject to binding arbitration all adverse employment actions taken against non-preference excepted service employees was not negotiable. *U.S. Dep't of Health and Human Services v. FLRA*, 858 F.2d 1278 (7th Cir. 1988). To hold otherwise, according to the court, would be to treat the Civil Service Reform Act (CSRA) as "a statutory minimum which might be supplemented through the collective bargaining process authorized in the [Statute]." *Id*. at 1283. Such an approach to the CSRA would upset "the delicate balancing between the needs of efficient agency administration and employment protection" that Congress sought to achieve. *Id*. at 1284 (citing *United States v. Fausto*, 484 U.S. 439,445 (1988)). The same holds true for providing probationers additional protections via collective bargaining that the CSRA and OPM regulations do not provide. In both cases, requiring the agency to bargain over the proposal would allow the proposal to do "precisely what Congress would not." *Id*. at 1285. Indeed, in this regard, the Seventh Circuit found no meaningful distinctions between the non-preference excepted service employees involved in its

decision and the probationers involved in *INS* and *NTEU II*. *See also Dep't of Health and Human Servs. v. FLRA*, 894 F.2d 333 (9th Cir. 1990) (concluding that the 7th Circuit was correct in the foregoing decision); *Dep't of the Treasury, Office of Chief Counsel v. FLRA*, 873 F.2d 1467, 1469 (D.C. Cir. 1989) (same).

For the foregoing reasons, this Court should reject the Union's attempt to set aside the clear choices made by Congress and OPM in the exercise of their authority to decide which procedural protections terminated probationers should have.

C. None of the Union's arguments overcome the conflict between the proposal and OPM regulations.

1. The plain language of the Statute does not provide probationers the right to grieve their terminations.

The Union contends that Authority's decision is contrary to the Statute, which defines the terms "grievance" and "employee" broadly enough to include complaints by terminated probationers and does not identify them as an exclusion from matters covered by grievance procedures in § 7121(c). PB at 6, 10-11. That is incorrect. The Authority's decision, in which it held that the proposal is non-negotiable under § 7117(a)(1) of the Statute because it conflicts with 5 C.F.R. part 315, subpart H, comports with the Statute. *See* JA 129. The Union's contention that nothing in the Statute denies terminated probationers access to the negotiated grievance procedure, PB at 11, ignores the statutory scheme under which Congress

delegated to OPM the authority to decide which procedural rights to make available to probationers. As the D.C. Circuit reminded the Union when it rejected the same argument, Congress instructed OPM, not the Authority, to provide procedural protections for probationers. *INS*, 709 F.2d at 729. Therefore, as did the D.C. Circuit in both *INS* and *NTEU II*, this Court should reject the Union's argument.

2. The availability of alternative means of redress does not provide probationers the right to grieve their terminations.

The Union contends that the conflict between its proposal and 5 C.F.R. part 315, subpart H is "illusory." PB at 17. According to the Union, because Congress has provided probationers with some avenues of redress from allegedly illegal terminations, probationers should also be able to resort to an additional form of redress that Congress did not provide them - - the negotiated grievance procedure. *Id*. at 16-17; 20-23. Stated somewhat differently, the Union contends that its proposal does not conflict with OPM regulations because it "is not designed to provide any substantive legal protections to probationary employees that do not already exist." *Id*. at 19. Instead, the Union claims that all the proposal does is to "permit probationers, like all other employees, to resort to the negotiated grievance procedure." *Id*. But, that is precisely why the proposal is inconsistent with Government-wide regulations and, thus, non-negotiable under § 7117(a)(1).

Thus, for the Union to argue, as it did 25 years ago before the D.C. Circuit, that a probationer's right to file an employment discrimination complaint (or pursue any other available avenue of redress) somehow implies the availability of a negotiated grievance procedure contravenes Congressional intent that different categories of employees be given different levels of procedural protection and usurps OPM's authority over the probationary period. *See NTEU II*, 848 F.2d at 1276.

3. General public policy in favor of arbitration does not provide probationers the right to grieve their terminations.

The Union also contends that the Authority's decision "flies in the face of" public policy favoring arbitration of employment disputes. PB at 23. However, as the Authority explained, JA 130, neither of the Supreme Court decisions that the Union relies upon holds that the public policy applies when, as here, permitting arbitration of a dispute would be inconsistent with a Government-wide regulation. Instead, in both cases, decided under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, not the Statute, the Supreme Court upheld the enforcement of contract clauses requiring that Age Discrimination in Employment Act (ADEA) claims be arbitrated because it found that to be consistent with the ADEA. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 274 (2009) (federal law required the enforcement of a CBA provision that subjected all union members' age discrimination claims to arbitration); *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 28-29 (1991)

(allowing arbitration of an ADEA claim would not undermine the EEOC's role in enforcing the ADEA). Thus, as the Authority found, JA 130, neither decision undercuts longstanding Authority precedent that proposals, like the Union's proposal, which are inconsistent with OPM regulations governing the probationary period, are non-negotiable.

CONCLUSION

The Union's petition for review should be denied.

Respectfully submitted,

/S/ Rosa M. Koppel
Rosa M. Koppel
Solicitor
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300

Fed. R. App. Rule 32(a) Certification

Pursuant to Fed. R. App. P. Rule 32(a)(7)(C)**,** I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 3821 words excluding exempt material.

/s/ Rosa M. Koppel
Rosa M. Koppel
Counsel for the Respondent

Certificate of Service

I hereby certify that on this 8th day of April 2013, in accordance with Local Rule 31(d), I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Union by way of the Court's ECF notification system, and also provided a courtesy copy by U.S. Mail to:

Gregory O'Duden, General Counsel
Larry J. Adkins, Deputy General Counsel
Peyton H. N. Lawrimore, Assistant Counsel
National Treasury Employees Union
1750 H Street, N.W,
Washington, D.C. 20006

/s/ Rosa M. Koppel
Rosa M. Koppel
Counsel for the Respondent

ADDENDUM

Relevant Statutes and Regulations

5 U.S.C.

§ 3321. Competitive service; probationary period

(a) The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—
(1)before an appointment in the competitive service becomes final; and
(2)before initial appointment as a supervisor or manager becomes final.

(b) An individual—
(1)who has been transferred, assigned, or promoted from a position to a supervisory or managerial position, and
(2)who does not satisfactorily complete the probationary period under subsection (a)(2) of this section,
shall be returned to a position of no lower grade and pay than the position from which the individual was transferred, assigned, or promoted. Nothing in this section prohibits an agency from taking an action against an individual serving a probationary period under subsection (a)(2) of this section for cause unrelated to supervisory or managerial performance.

(c) Subsections (a) and (b) of this section shall not apply with respect to appointments in the Senior Executive Service or the Federal Bureau of Investigation and Drug Enforcement Administration Senior Executive Service.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor

organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

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

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by

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

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the

agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or

recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 7118. Prevention of unfair labor practices

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

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

(A) of the charge;

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

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

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

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

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

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

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

the General Counsel may issue a complaint based on the charge if the charge was

filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

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

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

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

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

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

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

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

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

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

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

§ 7121. Grievance procedures

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

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

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

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

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

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

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

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

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described

in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

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

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

(B) A negotiated grievance procedure under this section.

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

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

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

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

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

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

§ 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.

42 U.S.C. § 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

The Equal Employment Opportunity Commission shall—
(1)be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;
(2)be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and
(3)consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.
The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—
(1)provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and
(2)a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.
With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant
Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such

department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e–5(f) through (k) of this title applicable to civil actions
The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties..
1

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity
Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e–5(e)(3) of this title applicable to compensation discrimination
Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

5 C.F.R. part 315, subpart H

5 C.F.R. § 315.801. Probationary period; when required

(a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period when the employee:

(1) Was appointed from a competitive list of eligibles established under subpart C of this part;
(2) Was reinstated under subpart D of this part unless during any period of service which affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require a probationary period.

(b) A person who is:
(1) Transferred under § 315.501; or
(2) Promoted, demoted, or reassigned; before he completed probation is required to complete the probationary period in the new position.

(c) A person who is reinstated from the Reemployment Priority List to a position in the same agency and the same commuting area does not have to serve a new probationary period, but, if separated during probation, is required to complete the probationary period in the new position.

(d) Upon noncompetitive appointment to the competitive service under the Postal Reorganization Act (39 U.S.C. 101*et seq.*), an employee of the Postal Career Service (including substitute and part-time flexible) who has not completed 1 year of Postal service, must serve the remainder of a 1-year probationary period in the new agency.

(e) A person who is appointed to the competitive service either by special appointing authority or by conversion under subparts F or G of this part serves a 1-year probationary period unless specifically exempt from probation by the authority itself.

5 C.F.R. § 315.802. Length of probationary period; crediting service

(a) The probationary period required by § 315.801 is 1 year and may not be extended.

(b) Prior Federal civilian service (including nonappropriated fund service) counts toward completion of probation when the prior service:
(1) Is in the same agency, e.g., Department of the Army;
(2) Is in the same line of work (determined by the employee's actual duties and responsibilities); and
(3) Contains or is followed by no more than a single break in service that does not exceed 30 calendar days.

(c) Periods of absence while in a pay status count toward completion of probation. Absence in nonpay status
while on the rolls (other than for compensable injury or military duty) is creditable up to a total of 22 workdays. Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration to Federal service. Nonpay time in excess of 22 workdays extends the probationary period by an equal amount. An employee serving probation who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Service serves the remainder of the probationary period upon reinstatement provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

(d) The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, *i.e.*, those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as 1 day of credit toward the 260 days in a pay status required for completion of probation. (However, the probationary period cannot be completed in less than 1 year of calendar time.)

5 C.F.R. § 315.803. Agency action during probationary period (general)

(a) The agency shall utilize the probationary period as fully as possible to

determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

(b) Termination of an individual serving a probationary period must be taken in accordance with subpart D of part 752 of this chapter if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart.

5 C.F.R. § 315.804. Termination of probationers for unsatisfactory performance or conduct

(a) Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

(b) Probation ends when the employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee's appointment. For example, when the last workday is a Friday and the anniversary date is the following Monday, the probationer must be separated before the end of the tour of duty on Friday since Friday would be the last day the employee actually has to demonstrate fitness for further employment.

5 C.F.R. § 315.805. Termination of probationers for conditions arising before appointment

Subject to § 315.803(b), when an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) Notice of proposed adverse action. The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.
(b) Employee's answer. The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.
(c) Notice of adverse decision. The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the Merit Systems Protection Board (MSPB), and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

5 C.F.R. § 315.806. Appeal rights to the Merit Systems Protection Board

(a) Right of appeal. An employee may appeal to the Merit Systems Protection Board in writing an agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Merit Systems Protection Board review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) On discrimination. An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(c) On improper procedure. A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of race, color, religion, sex, or national origin; or age (provided that at the time of the alleged discriminatory action the employee was at least 40 years of age); or handicapping condition if the individual meets the definition of "handicapped person" as set

forth in regulations of the Equal Employment Opportunity Commission at 29 CFR 1613.702(a). An appeal alleging a discriminatory termination may be filed under this subsection only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.

29 C.F.R. § 1614.108. Investigation of complaints

(a) The investigation of complaints shall be conducted by the agency against which the complaint has been filed.

(b) In accordance with instructions contained in Commission Management Directives, the agency shall develop a complete and impartial factual record upon which to make findings on the matters raised by the written complaint. Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences or any other fact-finding methods that efficiently and thoroughly address the matters at issue. Agencies are encouraged to incorporate alternative dispute resolution techniques into their investigative efforts in order to promote early resolution of complaints.

(c) The procedures in paragraphs (c) (1) through (3) of this section apply to the investigation of complaints:

(1) The complainant, the agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the investigator deems necessary.

(2) Investigators are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.

(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to requests for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the investigator may note in the investigative record that the decisionmaker should, or the Commission on appeal may, in appropriate circumstances:

(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;

(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;

(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;

(iv) Issue a decision fully or partially in favor of the opposing party; or

(v) Take such other actions as it deems appropriate.

(d) Any investigation will be conducted by investigators with appropriate security clearances. The Commission will, upon request, supply the agency with the name of an investigator with appropriate security clearances.

(e) The agency shall complete its investigation within 180 days of the date of filing of an individual complaint or within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal pursuant to 1614.107. By written agreement within those time periods, the complainant and the respondent agency may voluntarily extend the time period for not more than an additional 90 days. The agency may unilaterally extend the time period or any period of extension for not more than 30 days where it must sanitize a complaint file that may contain information classified pursuant to Exec. Order No. 12356, or successor orders, as secret in the interest of national defense or foreign policy, provided the investigating agency notifies the parties of the extension.

(f) Within 180 days from the filing of the complaint, within the time period contained in an order from the Office of Federal Operations on an appeal from a dismissal, or within any period of extension provided for in paragraph (e) of this section, the agency shall notify the complainant that the investigation has been completed, shall provide the complainant with a copy of the investigative file, and shall notify the complainant that, within 30 days of receipt of the investigative file, the complainant has the right to request a hearing before an administrative judge or may receive an immediate final decision pursuant to 1614.110 from the agency with which the complaint was filed. In the absence of the required notice, the complainant may request a hearing at any time after 180 days has elapsed from the filing of the complaint.

29 C.F.R. § 1614.109. Hearings

(a) When a complainant requests a hearing, the Commission shall appoint an administrative judge to conduct a hearing in accordance with this section. Upon appointment, the administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record. Any hearing will be conducted by an administrative judge or hearing examiner with appropriate security clearances.

(b) Dismissals. Administrative judges may dismiss complaints pursuant to § 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.

(c) Offer of resolution.(1) Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney.
(2) Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not.
(3) The offer of resolution shall be in writing and shall include a notice explaining the possible consequences of failing to accept the offer. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief. With regard to monetary relief, an agency may make a lump sum offer covering all forms of monetary liability, or it may itemize the amounts and types of monetary relief being offered. The complainant shall have 30 days from receipt of the offer of resolution to accept it. If the complainant fails to accept an offer of resolution and the relief awarded in the administrative judge's decision, the agency's final decision, or the Commission decision on appeal is not more favorable than the offer, then, except where the interest of justice would not be served, the complainant shall not receive payment from the agency of attorney's fees or costs incurred after the expiration of the 30-day acceptance period. An acceptance of an offer must be in writing and will be timely if postmarked or

received within the 30-day period. Where a complainant fails to accept an offer of resolution, an agency may make other offers of resolution and either party may seek to negotiate a settlement of the complaint at any time.

(d) Discovery. The administrative judge shall notify the parties of the right to seek discovery prior to the hearing and may issue such discovery orders as are appropriate. Unless the parties agree in writing concerning the methods and scope of discovery, the party seeking discovery shall request authorization from the administrative judge prior to commencing discovery. Both parties are entitled to reasonable development of evidence on matters relevant to the issues raised in the complaint, but the administrative judge may limit the quantity and timing of discovery. Evidence may be developed through interrogatories, depositions, and requests for admissions, stipulations or production of documents. It shall be grounds for objection to producing evidence that the information sought by either party is irrelevant, overburdensome, repetitious, or privileged.

(e) Conduct of hearing. Agencies shall provide for the attendance at a hearing of all employees approved as witnesses by an administrative judge. Attendance at hearings will be limited to persons determined by the administrative judge to have direct knowledge relating to the complaint. Hearings are part of the investigative process and are thus closed to the public. The administrative judge shall have the power to regulate the conduct of a hearing, limit the number of witnesses where testimony would be repetitious, and exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. The administrative judge shall receive into evidence information or documents relevant to the complaint. Rules of evidence shall not be applied strictly, but the administrative judge shall exclude irrelevant or repetitious evidence. The administrative judge or the Commission may refer to the Disciplinary Committee of the appropriate Bar Association any attorney or, upon reasonable notice and an opportunity to be heard, suspend or disqualify from representing complainants or agencies in EEOC hearings any representative who refuses to follow the orders of an administrative judge, or who otherwise engages in improper conduct.

(**f) Procedures.(1)** The complainant, an agency, and any employee of a Federal agency shall produce such documentary and testimonial evidence as the administrative judge deems necessary. The administrative judge shall serve all orders to produce evidence on both parties.

(2) Administrative judges are authorized to administer oaths. Statements of witnesses shall be made under oath or affirmation or, alternatively, by written statement under penalty of perjury.
(3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:
(i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
(ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
(iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
(iv) Issue a decision fully or partially in favor of the opposing party; or
(v) Take such other actions as appropriate.

(g) Decisions without hearing.(1) If a party believes that some or all material facts are not in genuine dispute and there is no genuine issue as to credibility, the party may, at least 15 days prior to the date of the hearing or at such earlier time as required by the administrative judge, file a statement with the administrative judge prior to the hearing setting forth the fact or facts and referring to the parts of the record relied on to support the statement. The statement must demonstrate that there is no genuine issue as to any such material fact. The party shall serve the statement on the opposing party.
(2) The opposing party may file an opposition within 15 days of receipt of the statement in paragraph (d)(1) of this section. The opposition may refer to the record in the case to rebut the statement that a fact is not in dispute or may file an affidavit stating that the party cannot, for reasons stated, present facts to oppose the request. After considering the submissions, the administrative judge may order that discovery be permitted on the fact or facts involved, limit the hearing to the issues remaining in dispute, issue a decision without a hearing or make such other ruling as is appropriate.
(3) If the administrative judge determines upon his or her own initiative that some or all facts are not in genuine dispute, he or she may, after giving notice to the

parties and providing them an opportunity to respond in writing within 15 calendar days, issue an order limiting the scope of the hearing or issue a decision without holding a hearing.

(h) Record of hearing. The hearing shall be recorded and the agency shall arrange and pay for verbatim transcripts. All documents submitted to, and accepted by, the administrative judge at the hearing shall be made part of the record of the hearing. If the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the administrative judge shall make the document available to the agency representative for reproduction.

(i) Decisions by administrative judges. Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency. The administrative judge shall send copies of the hearing record, including the transcript, and the decision to the parties. If an agency does not issue a final order within 40 days of receipt of the administrative judge's decision in accordance with 1614.110, then the decision of the administrative judge shall become the final action of the agency.

29 C.F.R. § 1614.110. Final action by agencies

(a) *Final action by an agency following a decision by an administrative judge*.

When an administrative judge has issued a decision under § 1614.109(b), (g) or (i), the agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the

administrative judge, then the agency shall simultaneously file an appeal in accordance with § 1614.403 and append a copy of the appeal to the final order. A copy of EEOC Form 573 shall be attached to the final order.

(b) *Final action by an agency in all other circumstances.*

When an agency dismisses an entire complaint under § 1614.107, receives a request for an immediate final decision or does not receive a reply to the notice issued under § 1614.108(f), the agency shall take final action by issuing a final decision. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, or, as appropriate, the rationale for dismissing any claims in the complaint and, when discrimination is found, appropriate remedies and relief in accordance with subpart E of this part. The agency shall issue the final decision within 60 days of receiving notification that a complainant has requested an immediate decision from the agency, or within 60 days of the end of the 30-day period for the complainant to request a hearing or an immediate final decision where the complainant has not requested either a hearing or a decision. The final action shall contain notice of the right to appeal the final action to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. A copy of EEOC Form 573 shall be attached to the final action.

42 C.F.R. § 1614.401. Appeals to the Commission

(a) A complainant may appeal an agency's final action or dismissal of a complaint.

(b) An agency may appeal as provided in § 1614.110(a).

(c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to § 1614.204(g)(4).

(d) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of

employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB or if 5 U.S.C. 7121(d) is inapplicable to the involved agency.

(e) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with § 1614.504.

42 C.F.R. § 1614.407. Civil action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;
(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;
(c) Within 90 days of receipt of the Commission's final decision on an appeal; or
(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.