ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1199

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

DAVID M. SHEWCHUK
Deputy Solicitor

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

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," "Respondent," or "Authority") were the National Treasury Employees Union ("NTEU," "Petitioner," or "Union") and the United States Department of the Treasury, Internal Revenue Service ("IRS" or "Agency"). NTEU is the petitioner in this Court proceeding; the Authority is the respondent. The Agency has indicated, through filing an unopposed motion for an extension of time to file an amicus brief, that it may participate as amicus curiae.

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*, Case No. 0-AR-4765, decision issued on February 22, 2012, reported at 66 F.L.R.A. (No. 94) 506.

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 that are related to this case within the meaning of Circuit Rule 28(a)(1)(C).

TABLE OF CONTENTS

ADDENDUM

TABLE OF AUTHORITIES

CASES

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES

REGULATIONS

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

GLOSSARY

Bennett	*Bennett v. Spear*, 520 U.S. 154 (1997)
DLA	*Def. Logistics Agency, Def. Depot Tracy, Tracy, Cal.*, 39 F.L.R.A. 999 (1991)
DOJ	*U.S. Dep't of Justice v. FLRA*, 266 F.3d 1228 (D.C. Cir. 2001)
EEO	Equal Employment Opportunity
"FLRA," "Respondent," or "Authority"	Federal Labor Relations Authority
HQ, NASA	*Headquarters, Nat'l Aeronautics and Space Admin., Wash., D.C.*, 50 F.L.R.A. 601 (1995)
"IRS" or "Agency"	Internal Revenue Service
OIG	Office of the Inspector General
JA	Joint Appendix
NASA	*NASA v. FLRA*, 527 U.S. 229, 237 (1999)
"NTEU," "Petitioner," or "Union"	National Treasury Employees Union
OPM	Office of Personnel Management
PB	Petitioner's Brief
PBGC	*Pension Benefit Guar. Corp., Wash., D.C.*, 62 F.L.R.A. 219, 222-23 (2007)
SSA	*Soc. Security Admin., Office of Hearings and Appeals, Boston Reg'l Office, Boston, Mass.*, 59 F.L.R.A. 875 (2004)

Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101-7135 (2006)
ULP	unfair labor practice

ORAL ARGUMENT NOT YET SCHEDULED

No. 12-1199

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

NATIONAL TREASURY EMPLOYEES UNION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of the Federal Labor Relations Authority ("FLRA," "Respondent," or "Authority") under Section 7123(a) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2006) ("Statute").[1,2]

---

[1] The Authority's decision in this case is published at 66 F.L.R.A. (No. 94) 506, and a copy of the decision is included in the Joint Appendix (JA) at 5-16. The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(H) of the Statute.

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

On October 17, 2012, this Court directed the parties to "address in their briefs whether the court has jurisdiction over this petition for review" under 5 U.S.C. § 7123(a), which provides for judicial review of certain "final order[s] of the Authority." Here, the portion of the Authority's order on review appears to constitute a "final order" under § 7123(a); however, the issue contested by the Union was never raised to the Authority, and so § 7123(c) compels the Court to dismiss the Union's petition in its entirety for lack of jurisdiction.

A. Background

The National Treasury Employees Union ("NTEU," "Union," or "Petitioner") brought a grievance against the Internal Revenue Service ("IRS" or "Agency"), alleging that the IRS had committed an unfair labor practice (ULP) in violation of 5 U.S.C. § 7116(a) and also violated the parties' collective bargaining agreements by, among other things, not allowing union representatives to attend and participate in background interviews of NTEU employees conducted by investigators from the Office of Personnel Management (OPM). JA 7. To determine whether or not the Agency had committed the alleged violations, the Arbitrator was required to resolve a matter of first impression: whether investigators from one Federal agency (here, OPM) can be "representatives" of another agency (the IRS) for purposes of 5 U.S.C. § 7114(a)(2)(B). JA 11.

That section of the Statute codifies "*Weingarten*" rights for federal bargaining unit employees, giving bargaining unit employees who are subjected to an investigatory interview the right to request union participation in the interview, *provided*, first, that the employee has a reasonable expectation that the interview may lead to disciplinary action and, second, that the interview is being conducted by "a representative of the agency." JA 11; 5 U.S.C. §7114(a)(2)(B); *see also NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Here, the Arbitrator determined that OPM's investigators are not representatives of the IRS, and therefore that the Union has no statutory or contractual rights in the interviews and, as a result, that the IRS had not violated law or the parties' contract in denying Union participation in the interviews. JA 7-8; JA 199-200.

NTEU filed exceptions to the Arbitrator's award with the Authority, arguing that OPM's investigators are, in every investigatory interview, representatives of the IRS and that the Arbitrator's holding was therefore contrary to § 7114(a)(2)(B). JA 8-9. The Union also argued, in the alternative, that "even if OPM's investigators are not representatives of the Agency in all instances, [they] are representatives of the Agency when interviewing *excepted* [as opposed to *covered*] employees." JA 8 (emphasis added).[3]

[3] Federal employees are either "covered" by or "excepted" from OPM's statutory mandate to conduct suitability investigations and make determinations about individuals' suitability for employment in the federal service. "Covered"

In its decision, the Authority granted the Union's exceptions in part and denied them in part. Rejecting the Union's claim that OPM is a representative of the Agency in every investigatory interview, the Authority first held, as to *covered* employees, that the Arbitrator had not erred in holding that "OPM's investigators were performing an OPM function, and acting under OPM's control, when interviewing covered employees. Accordingly, [they] … were not representatives of the Agency under § 7114(a)(2)(B) … when interviewing those employees, and we deny the Union's exceptions concerning those employees." JA 12. With respect to the *excepted* employees, however, the Authority granted the Union's exceptions, finding that "OPM's investigators were performing an [IRS] function, and acting under the ultimate control of the [IRS], when they interviewed excepted employees. … [Therefore,] the Agency violated § 7116(a)(1) and (8) of the Statute, and Articles 5.4.I.1 and 9.2.C.7 of the CBA, as alleged. Further … we remand the award to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy." JA 13.

---

employees hold positions that are subject to OPM's authority to conduct suitability investigations and to remove employees found not suitable for federal service. 5 C.F.R § 731.101(b). "Excepted" employees do not hold positions subject to OPM's suitability investigations or determinations, but agencies may (as the IRS did) nonetheless request that OPM also investigate those employees and report its findings to the Agency for the Agency to then make retention or removal decisions. JA 6 at n.2, 4.

The net result of the Authority's decision was, in effect, two distinct holdings. With respect to covered employees, the Authority fully and finally resolved all pending claims, ruling that NTEU and its employees have no representation rights in OPM's investigatory interviews of those employees, and foreclosing any further arbitral action in this case with respect to covered employees. With respect to excepted employees, the Authority fully and finally resolved the legal claims, but left to the parties (or, failing that, the Arbitrator) the determination of what remedy is appropriate for the Agency's ULPs and contractual violations.

B. The Authority's decision is a final order for purposes of § 7123(a)

There does not appear to be any basis for dismissing the Union's petition for review for lack of a final order. Judicial review of Authority decisions is provided for by 5 U.S.C. § 7123, under which,

> [a]ny person aggrieved by any final order of the Authority … 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.

5 U.S.C. § 7123(a). In this case, the portion of the Authority's decision for which the Union seeks review meets the finality criteria of *Bennett v. Spear*, 520 U.S. 154 (1997) (*Bennett*) – i.e., it is the consummation of the Authority's decisionmaking

on covered employees, and determined the legal rights of the Union and its bargaining unit employees.

1. Review of Authority decisions is conducted under the Administrative Procedure Act, which permits review of "the whole or part" of an Authority decision

The case before this Court appears to concern only a portion of the Authority's decision below: the Authority's ruling that OPM's investigators are not representatives of the IRS under §7114(a)(2)(B) when those investigators are conducting suitability interviews of covered employees.

Review of a portion, rather than the entirety, of an Authority decision is permitted by the Statute's judicial review scheme. Under 5 U.S.C. § 7123(c), the courts of appeals review Authority decisions "on the record in accordance with section 706 of this title." 5 U.S.C. § 7123(c). Section 706 – part of the Administrative Procedure Act – speaks to the review of agency "actions," 5 U.S.C. § 706(2), which are defined in turn as "the whole *or a part* of an agency rule, order … or the equivalent." 5 U.S.C. § 551(13) (emphasis added); *see also* 5 U.S.C. § 701(b)(2) (providing that the definition of "agency action" in 5 U.S.C. § 551 applies to the use of term in 5 U.S.C. Chapter 7).

The Authority acknowledges the general rule that remanded cases are not final for purposes of review. *E.g.*, *Verizon v. Commc'n Workers of Am.*, 571 F.3d 1296, 1301 (D.C. Cir. 2009) (reciting principle that, "[p]rovided that the matter left

for determination is not merely ministerial ... an order that does not determine the entire substantive relief to which the plaintiff is entitled is not a final decision") (internal quotation marks and citations omitted). Here, though, that concern seems to be inapposite: NTEU is permitted to seek review of less than the entirety of the Authority's decision, and the appealed portion of the Authority's decision *does* determine the entire substantive relief vis-à-vis covered employees and *does not* include a remand.

2. The portion of the Authority's decision at issue here meets the APA test for finality

The portion of the Authority's decision that the Union seeks review of – i.e., the holding that OPM investigators are not representatives of the IRS when interviewing covered employees – both consummated the Authority's decisionmaking on that question and determined the rights of covered employees and of the Union with respect to those interviews. The appealed Authority action, therefore, meets the Supreme Court's test for finality.

In *Bennett*, the Supreme Court explained that

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow[.]"

Id. at 177-178 (citations omitted); *see also Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 13 (D.C. Cir. 2005) (reciting two-part *Bennett* analysis).

With respect to the first condition, the Authority's holding on covered employees consummated its decisionmaking on that issue: the holding that OPM investigators are not agency representatives when they interview covered employees was not "tentative, open to further consideration, or conditional on future agency action." *City of Dania Beach v. FAA*, 485 F.3d 1181, 1188 (D.C. Cir. 2007).

Likewise, the holding on covered employees determined a party's rights or obligations. In this case, the Authority determined that covered bargaining unit employees had no right to Union participation at their suitability investigation interviews, and that the Union had neither the right to participate nor the right to official time for its participation. In so holding, the Authority's decision had a "direct and immediate effect on the day-to-day business of the parties challenging the action[.]" *John Doe, Inc. v. DEA*, 484 F.3d 561, 566 (D.C. Cir. 2007) (internal quotations and citations omitted).

C. The Court lacks jurisdiction under § 7123(c) to consider the Union's petition, which seeks review of an issue not contested before the Authority.

The Court's required jurisdictional inquiry does not end, however, with determining that the portion of the Authority's decision under review is a final

order. Under § 7123(c), the Court still must consider whether it has jurisdiction over the particular issue advanced by the Union. "No objection that has not been urged before the Authority … shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. § 7123(c). Here, because the Union never raised to the Authority the issue on which it now seeks judicial review – whether OPM's investigators are representatives of the IRS when interviewing covered employees *in their first year of service* – the Court is without jurisdiction to entertain NTEU's petition.

1. Section 7123(c) prohibits the courts from considering issues not first presented to the Authority

The courts' "jurisdiction to review the Authority's decisions does not extend to an objection that has not been urged before the Authority." *Am. Fed'n of State, Cnty. & Mun. Employees Capital Area Council 26 v. FLRA*, 395 F.3d 443, 451-52 (D.C. Cir. 2005) (internal quotation marks omitted). As the Supreme Court held, "Section 7123(c) speaks to courts, not parties, and its plain language evinces an intent that the FLRA shall pass upon issues arising under the Act, thereby bringing its expertise to bear on the resolution of those issues." *EEOC v. FLRA*, 476 U.S. 19, 23 (1986); *accord NLRB v. FLRA*, 2 F.3d 1190, 1195 (D.C. Cir. 1993).

This Court has repeatedly rebuffed litigants' attempts to obtain judicial review of arguments not first presented to the Authority. In doing so, this Court has observed that if parties were permitted to raise new issues in a petition for

review, "the initial adjudicatory role Congress gave to the Authority would be transferred in large measure to this court, in plain departure from the statutory plan." *Dep't of the Treasury v. FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983). Moreover, § 7123(c) requires precision in parties' pleadings: as little as a new "twist" in a party's argument deprives the court of jurisdiction over that "twist." *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 820 (D.C. Cir. 1987).[4]

2. The issue set forth in Petitioner's brief was never raised to the Authority

In its brief, the Union asks the Court to determine

> Whether the [FLRA] erred in concluding that [OPM] investigators are not acting as "representatives" of the [IRS], within the meaning of 5 U.S.C. § 7114, when they conduct suitability investigation interviews of "covered" employees *in their first year of employment*.

Petitioner's Brief (PB) at 10 (emphasis added). The final phrase, "in their first year of employment," introduces a new concept not previously argued to the Authority: that there is something special about covered employees in their first year of employment that warrants a different outcome than would otherwise apply

[4] Exceptions to the bright-line rule of § 7123(c) may be made only in "extraordinary circumstances." 5 U.S.C. § 7123(c). The Union does not claim the presence of any extraordinary circumstance justifying its failures in this case, nor is any such circumstance apparent from the record. "Our precedents demonstrate that 'extraordinary circumstances' truly are extraordinary. With certain inapplicable exceptions, we have only found they exist when the newly raised arguments implicate constitutional issues like separation of powers, or sovereign immunity[.]" *U.S. Dep't of the Air Force v. FLRA*, 680 F.3d 826, 830 (D.C. Cir. 2012) (internal quotation marks and citations omitted).

to other covered employees. This is much more than a new "twist" in the Union's argument; this is a new argument altogether.

Before the Authority, the Union argued that OPM investigators are representatives of the IRS when they conduct interviews of any employee, covered or excepted, or, in the alternative, at least when they conduct interviews of excepted employees. JA 144-45; JA 168-78, 178-81; JA 167 ("[E]ven if OPM investigators do not act as IRS' representatives in the investigation of *competitive service* employees, they certainly do so in conducting investigations of *excepted service* employees.").

Because those were the issues that the Union presented to the Authority, the Authority's decision addressed only those issues. *E.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Complex, Victorville, Cal.*, 65 F.L.R.A. 539, 539 at n.1 (2011) (declining to address "issues … not raised in the exceptions"); *Nat'l Ass'n of Gov't Emps., Local R5-66*, 65 F.L.R.A. 452, 453 (2011) (addressing only the excepted-to portions of arbitrator's decision); *U.S. Dep't of Veterans Affairs Medical Ctr., Detroit. Mich.*, 64 F.L.R.A. 794, 796 (2010) (addressing only the issues raised by the excepting party). And so the Authority first considered (and rejected) the Union's argument that OPM's investigators are representatives of the IRS for all interviews of all employees, holding that the investigators are not IRS representatives when interviewing covered employees. JA 11-12. The

Authority then considered (and agreed with) the Union's alternative argument, that the investigators are representatives of the IRS when they interview excepted employees. JA 12-13. However, nowhere does the Authority's decision analyze particular rules applicable to "covered employees in their first year of employment," *because the Union did not except to the Arbitrator's ruling on that basis*.

This is a markedly recent change in the Union's approach to the case. The Union's initial Statement of the Issue to this Court mirrored the issues that the Union raised to the Authority, stating the issue as:

> Whether the FLRA erred in concluding that [OPM] investigators are not acting as "representatives" of the [IRS], within the meaning of 5 U.S.C. §7114, when they conduct suitability investigations of employees with positions in the competitive service and in the excepted service where the incumbent can be noncompetitively converted to the competitive service [i.e., all "covered" employees].

Petitioner's Statement of the Issue (May 22, 2012) at 1. But now, in an effort to better position its case for appeal, the Union advocates the drawing of a new line: not between covered and excepted employees, as it argued before the Authority, and as it originally stated the issue to this Court, but between covered employees *in their first year of employment* and all other employees. In its brief, the Union asks the Court to resolve this new issue without ever having posed the question to the Authority.

This is precisely what the Supreme Court held that § 7123(c) was designed to avoid: issues of federal labor law being considered for the first time by the courts, without the Authority first having had the opportunity to "pass upon the issue." The Court may not consider the Union's newly raised issue, and must instead dismiss the petition for review.

D. Even if the Court does have jurisdiction over the Union's issue, § 7123(c) bars the Union's first argument, alleging factual inaccuracies

Similarly, the first argument that the Union raises in support of its new issue – that the Authority's decision is premised upon factual inaccuracies – was never raised to the Authority. The Union claims, PB 22-25, that the Authority did not appreciate the factual distinction between suitability investigations and suitability determinations, or the full extent of the IRS's delegated authority, and that the FLRA's "mistaken belief," PB 22, or "lack of awareness," PB 24, led it to a faulty legal conclusion, PB 25.

If the Union disagreed with the Arbitrator's factual findings, or the Authority's reliance upon them, it had every opportunity to raise those disagreements to the Authority. The Union could have – but did not – make a non-fact argument to the Authority. JA 12. The Union also could have – but did not – move for reconsideration of the Authority's decision. *See* 5 C.F.R. § 2429.17; *U.S. Dep't of Homeland Sec., U.S. Customs and Border Prot.*, 66 F.L.R.A. 1042, 1043 (2012) (permitting reconsideration to correct factual errors). As a result, the

Union's argument was never put to the Authority; instead, the Union chose to raise its factual argument for the first time on appeal, and so the Court is without jurisdiction to consider it.

STATEMENT OF THE ISSUE

Under Authority precedent, non-employees of an agency may nonetheless be "representatives" of that agency for purposes of 5 U.S.C. § 7114(a)(2) when performing an agency function and operating under agency control. Was the Authority reasonable when it held that OPM's investigators are not always representatives of the IRS because, when investigating covered employees, the investigators do not perform an IRS function or operate under IRS control?

STATEMENT OF THE CASE

NTEU brought a grievance against the IRS, alleging that the Agency had committed a ULP and violated the parties' collective bargaining agreements when OPM did not allow union representatives to attend and participate in interviews of NTEU employees conducted by OPM investigators, and the IRS did not grant NTEU representatives official time to attend the interviews. JA 7. To determine whether or not the Agency had committed ULPs and/or contractual violations, the Arbitrator was required to resolve a matter of first impression: whether investigators from one Federal agency (here, OPM) can be "representatives" of another agency (the IRS) for purposes of 5 U.S.C. § 7114(a)(2)(B). JA 11.

The Arbitrator determined that OPM's investigators are not representatives of the IRS, and therefore that the Union has no statutory or contractual rights in the interviews and, as a result, that the IRS had not violated law or the parties' agreements in denying Union participation in the interviews. JA 7-8; JA 199-200. Pursuant to 5 U.S.C. § 7122(a), NTEU filed exceptions to the Arbitrator's award with the Authority, arguing that OPM's investigators are representatives of the IRS when they interview *any* IRS employee or, in the alternative, that "even if OPM investigators do not act as IRS' representatives in the investigation of *competitive service* employees, they certainly do so in conducting investigations of *excepted service* employees." JA 167; JA 8 (emphasis added), 9.

In its decision, the Authority granted the Union's exceptions in part and denied them in part. Following the Union's distinction between covered (competitive service) employees and excepted employees, the Authority first held, as to *covered* employees, that the Arbitrator had not erred in holding that OPM's investigators were not "representatives of the Agency under § 7114(a)(2)(B) … when interviewing those employees, and we deny the Union's exceptions concerning those employees." JA 12. With respect to the *excepted* employees, however, the Authority granted the Union's exceptions, and remanded the award to the parties for resubmission to the Arbitrator, absent settlement, to determine an appropriate remedy. JA 13.

The Union now petitions for review of an altogether different issue, namely, whether OPM's investigators are representatives of the IRS under § 7114(a)(2) when they interview *covered employees in their first year of service*.

STATEMENT OF THE FACTS

A. Background

Government-wide regulations require most federal employees – those in the "competitive service" or in positions eligible for conversion to the competitive service – to undergo a background investigation early in their careers to allow OPM to determine whether they are "suitable" for federal employment. Suitability for federal employment is based on "determinations … [of] a person's character or conduct that may have an impact on the integrity or efficiency of the service." 5 C.F.R. § 731.101(a); *see also* 5 C.F.R. § 731.202 (criteria for making suitability determinations). An individual who is found to be unsuitable for federal service is subject to cancellation of his job offer, removal from his position, and/or debarment from future employment. 5 C.F.R. § 731.203.

The regulatory scheme providing for these background investigations and suitability determinations is set forth at 5 C.F.R. Part 731. Read together, 5 U.S.C. § 3301, 5 C.F.R. § 5.2(a), and 5 C.F.R. Part 731 establish that OPM is the ultimate "gatekeeper" for the competitive service, and charge OPM with "[i]nvestigating the qualifications and suitability of applicants for positions in the competitive

service." 5 C.F.R. § 5.2(a). As § 5.2 indicates, only employees in the competitive service (and those in the excepted service whose positions may be converted to the competitive service) are subject to suitability actions. Other employees – "excepted" employees – may undergo background investigations if, for instance, they hold a position of "public trust" under 5 C.F.R. § 731.106, but those investigations are not for the purpose of determining "suitability." *See generally* 5 C.F.R. § 731.101, § 731.104(a), § 731.105(a).

OPM may delegate a portion of its authority relative to investigations and determinations to the agencies that actually employ the competitive service employees. For example, OPM may delegate investigation duties. 5 C.F.R. § 731.104(a). OPM has also promulgated a standing regulatory delegation which, on its surface, allows agencies to "mak[e] suitability determinations and tak[e] suitability actions … in cases involving *applicants* for and *appointees* to covered positions in the agency," 5 C.F.R. § 731.103(a).[5]

However, these delegations are less momentous than they might appear at first glance. For example, OPM requires annual re-approval of the delegation to conduct investigations. JA 192. Similarly, the right to make suitability

[5] OPM defines "applicant" as "a person who is being considered or has been considered for employment," "appointee" as "a person who has entered on duty and is in the first year of a subject-to-investigation appointment," and "employee" as "a person who has completed the first year of a subject-to-investigation appointment." 5 C.F.R. § 731.101(b).

determinations for applicants and appointees is subject to OPM revocation, 5 C.F.R. § 731.103(f), and to OPM's retention of exclusive jurisdiction over certain types of cases, 5 C.F.R. § 731.103(g).

In contrast to these two narrow delegations, OPM retains the vast majority of suitability-related authority: the right to investigate employee suitability, or to delegate those investigations to employing agencies, 5 C.F.R. § 731.104(a); the right to "set forth policies, procedures, criteria, standards … and supplementary guidance for the implementation of this part," 5 C.F.R. § 731.102(c); the right to approve government-wide debarments made under delegated authority, 5 C.F.R. § 731.103(b); the right to require agencies exercising delegated authority to "adhere to OPM requirements," 5 C.F.R. § 731.103(c); the right to revoke any delegation to an agency that does not conform to OPM guidance, 5 C.F.R. § 731.103(f); the right to "make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment … [or] involving a refusal to furnish testimony[,]" 5 C.F.R. § 731.103(g); the right to take suitability actions against applicants and appointees, 5 C.F.R. § 731.105(b); the exclusive right to take suitability actions against employees, 5 C.F.R. § 731.105(d), (e); and the right, *notwithstanding any delegation to an agency*, to "exercise its jurisdiction under this part in any case it deems necessary," 5 C.F.R. § 731.103(g).

Until June 2008, the IRS had limited delegated authority from OPM, permitting the Agency to perform its own suitability investigations. JA 192. When the IRS was conducting investigations, it allowed the Union to participate in those investigations on official time. Since June 2008, however, OPM has not renewed its delegation to the IRS; instead, OPM is investigating covered IRS employees under its own authority and using its own investigators, and the Union has not been allowed to attend the interviews. JA 192-93.

The Union filed grievances, alleging that the Agency had committed ULPs and violated the parties' agreements because OPM was not allowing Union representatives to attend investigatory interviews "of excepted .. and competitive [service] employees," JA 7, and because the Agency was denying Union representatives official time to attend the investigations conducted by OPM, *id.*

B. The Arbitrator's Award

The Arbitrator denied the Union's grievances, holding that "[t]he claim that OPM investigators are 'representatives' of [the] IRS under the Statute, CBA[,] and various memoranda is not persuasive and is unsupported by legal authority." JA 200.

The Arbitrator was unconvinced by NTEU's view of several key factual issues. He rejected, for instance, NTEU's attempt to describe OPM investigators as equivalent to an agency's own Office of the Inspector General (OIG) or Equal

Employment Opportunity (EEO) investigators, finding that OPM's investigators are "legally independent," while OIG agents are employees of the agency itself, and EEO investigators are "brought in by the agency to perform agency tasks and functions." JA 199. In this regard, the Arbitrator observed that to the extent that the IRS has *any* suitability-related authority, it does so only at OPM's pleasure. JA 200 ("In this context, not to be underestimated is the authority and power of OPM to delegate to agencies the very background investigative function at issue here.").

The Arbitrator also rejected the notion that OPM's investigators are simply proxies for IRS management. Rather, he found, OPM's investigators are performing their work for the benefit of OPM itself, consistent with OPM's role as the "executive agency of the [f]ederal [g]overnment whose legal mission, among other things, is to perform background investigations of federal employees." JA 199. Nor did the Arbitrator find that the IRS exerts any actual control over OPM's investigators: "I see no basis or authority for IRS to tell OPM how its investigators should go about conducting their investigatory interviews. As a matter of policy, OPM has determined not to permit union representatives to participate in its background investigations. There is nothing IRS … can do about it." JA 200.

C. The Authority's Decision

NTEU filed exceptions to the Arbitrator's award with the Authority, claiming that the Arbitrator's determination that OPM's investigators are not

always representatives of the IRS is contrary to § 7114(a)(2)(B). JA 8; JA 165, 169. Alternatively, the Union argued that "even if OPM investigators do not act as IRS' representatives in the investigation of *competitive service* employees, they certainly do so in conducting investigations of *excepted service* employees."[6] JA 167, 178-80; JA 8.

The Authority first rejected the Union's argument that OPM's investigators are representatives of the agency in every circumstance. Relying on the Arbitrator's determinations that:

> (1) OPM "has a 'legal mission' to 'perform background investigations[,]'" JA 7 (citing JA 199);
>
> (2) during the relevant times, OPM had not delegated that authority to the IRS, *id.* (citing JA 199);
>
> (3) OPM "acted independently of" the IRS, *id.* (citing JA 200);
>
> (4) "there was nothing the Agency could do about" OPM's decision to exclude NTEU representatives from its interviews, *id.* (citing JA 200); and that
>
> (5) "OPM's investigators are 'legally independent'" of the IRS, *id.* (citing JA 199),

[6] As explained above, though, nowhere in the Union's exceptions did it argue that interviews of covered employees *in their first year of employment* should be treated differently from the interviews of other covered employees.

the Authority held that

> [t]hese findings, which are not challenged as nonfacts (or on any other ground), support a conclusion that OPM's investigators did not act under the Agency's control when interviewing covered employees. … OPM's investigators were performing an OPM function, and acting under OPM's control, when interviewing covered employees.

JA 12. As such, the Authority concluded that "OPM's investigators were not representatives of [the IRS] under § 7114(a)(2)(B) of the Statute when interviewing those employees, and we deny the Union's exceptions concerning those employees." *Id.*

The Authority agreed with the Union's alternative argument, though, and held that OPM's investigators are representatives of the IRS when they interview excepted employees. In contrast to interviews of covered employees, which are OPM's statutory prerogative and uncontrollable by employing agencies, "there is no indication that OPM's investigators were carrying out an OPM function [when interviewing excepted employees]. In this regard, OPM's suitability regulations are specifically limited in scope to covered employees." JA 12 (quotations and citation omitted). "In sum, OPM's investigators were performing an Agency function, and acting under the ultimate control of the Agency, when they interviewed excepted employees," JA 13, and the investigators were therefore representatives of the IRS when conducting such interviews, *id.*

The Union now seeks review by this Court of an entirely different issue from those addressed by the Authority: not whether OPM's investigators are representatives of the IRS in *every* case, or in the case of only *excepted* employees, but whether OPM's investigators are representatives of the IRS when interviewing *covered* employees *in their first year of employment*.

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) (internal quotation marks omitted); *see also Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

"[I]f the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–843 (1984). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See id.* at 844. A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *Nat'l Fed'n of Fed. Emps., Local 1309 v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted). Furthermore, this Court has noted that it "accord[s] considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotation marks and citations omitted). As a result, the Court's "scope of review is limited." *Pension Benefit Guar. Corp. v. FLRA*, 967 F.2d 658, 665 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

By changing the issue of the case at this late date, the Union has stripped this Court of jurisdiction over its petition for review and the Court should dismiss the petition without argument. If the Court should determine that it has jurisdiction to consider the merits of the Union's petition, then the petition should be denied, and the Authority's reasonable decision affirmed.

The issue advanced by the Union's brief – concerning the status of OPM investigators when interviewing covered employees in their first year of federal employment – is materially different from the issues that the Union advanced

before the Authority: whether OPM's investigators are always IRS representatives, no matter whom they interview or, alternatively, whether OPM's investigators are IRS representatives at least when interviewing excepted employees. Under the law of this Circuit, parties seeking review of an Authority decision must have raised every twist of their argument to the Authority in order for 5 U.S.C. § 7123(c)'s jurisdictional mandate to be satisfied. Here, the Union has failed to do so, and so this Court may not consider the Union's newly-raised argument.

On the merits of the case, the Authority's decision is plainly reasonable. The Authority reasonably extended the analytic framework applied to outside contractors – the "function and control" analysis – to cases like this, where the investigators are employees of a different federal agency. The Authority then correctly applied that framework to the facts of this case, in which the Authority, following the Arbitrator's unexcepted-to factual findings, held that OPM's investigators are not representatives of the IRS when they perform suitability interviews of covered employees because the investigators are performing an OPM function (investigating suitability for federal employment, a statutory and regulatory responsibility of OPM itself) and acting under OPM control – indeed, the IRS had absolutely no control over OPM's investigators when they interviewed covered employees.

The Union raises several countervailing arguments, challenging both the Authority's adoption of the "function and control" analysis and the factual findings of the Authority. With respect to the former, the Union errs by misinterpreting and over-extending the Supreme Court's *NASA* decision. With respect to the latter, the Union failed to raise its factual disagreements to the Authority, and so they, too, are outside of the Court's jurisdiction to consider; moreover, the Union's factual quibbles are either inaccurate, misleading, or irrelevant.

In the absence of any properly-raised argument that calls into question the Authority's ruling on the issues that were actually before the Authority, the Authority's decision should stand.

ARGUMENT

THE AUTHORITY REASONABLY HELD THAT OPM'S INVESTIGATORS ARE NOT ALWAYS REPRESENTATIVES OF THE IRS BECAUSE, WHEN INVESTIGATING COVERED EMPLOYEES, THE INVESTIGATORS DO NOT PERFORM AN IRS FUNCTION OR OPERATE UNDER IRS CONTROL.

It is well-settled that the phrase "representative of the agency" is broad enough to include representatives other than those in a direct bargaining relationship with an employee's union. *E.g.*, *NASA v. FLRA*, 527 U.S. 229, 237 (1999) (*NASA*). In that vein, the Authority has held that representatives of an agency's Office of the Inspector General (OIG) are "representatives of the agency," *Headquarters, National Aeronautics and Space Administration,*

Washington, D.C., 50 F.L.R.A. 601, 612-19 (1995) (*HQ, NASA*), as are non-federal employee contractors who perform agency functions and operate under agency control, *e.g., Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts*, 59 F.L.R.A. 875, 879-80 (2004) (*SSA*).

But the bounds of the phrase are not limitless. In the instant case, the Authority reasonably interpreted the Statute and judicial and Authority precedent when it applied the "function and control" analysis to determine that OPM's background investigators are not representatives of the IRS when they interview covered employees, for whom OPM has principal – and, in many respects, exclusive – responsibility for investigating and determining suitability for federal employment.

Moreover, the Union's legal and factual arguments to the contrary are unpersuasive. They are either ill-founded, outside of the Court's jurisdiction for not having been raised to the Authority, or both.

A. The Authority reasonably applied the "function and control" analysis from its line of outside contractor cases

The question of whether an employee of one federal agency may be a representative of another agency for purposes of § 7114(a)(2) was one of first impression, and so the Authority began its analysis of the Union's exceptions by acknowledging that it "has not previously addressed whether an investigator from

one agency can be a representative of another agency." JA 11. As a result, the Authority looked to relevant "representative of the agency" precedent. It considered both the *NASA* line of OIG cases, in which the investigators at issue were employed by the same agency as the interviewed employees, and a line of Authority decisions concerning outside contractors. JA 10-11.

1. The Authority reasonably determined that the "function and control" analysis is the best-suited analog for analyzing investigators employed by a different federal agency

Between cases concerning agency OIGs and those concerning outside contractors, the Authority reasonably found that the Authority decisions involving outside contractors – as cited by the Union in its exceptions, JA 172 – are most relevant in analyzing investigators employed by a different federal agency. JA 11.

As the Authority explained, "this [case] involves [OPM] investigators who are not employed by the Agency[.]" *Id.* This is in sharp contrast to the OIG cases, where the investigators were, in fact, employed by the respondent agencies. In *NASA*, for instance, the Authority found that "NASA, OIG is also a component of NASA … [and] OIG agents … through a chain of command .. report to NASA, OIG headquarters … [which] in turn, reports to the … head of the agency." *HQ, NASA*, 50 F.L.R.A. at 602; *see also NASA*, 527 U.S. at 239, 240 (noting that under law, NASA OIG investigators are employees of that agency; they "report to and [are] under the general supervision of" the NASA Administrator). Here, though,

there is no dispute but that OPM's investigators are employed by OPM, and not by the IRS. This puts them in closer parallel to the outside contractors considered in a separate line of cases that apply the "function and control" test.

Having reasonably analogized OPM's investigators to outside contractors, the Authority correctly summarized the rule created by those cases: whether a non-agency employee is a "representative of the agency" for purposes of § 7114(a)(2) turns on "whether [they] perform[] an Agency function, and whether they act[] under the Agency's control." JA 11. In *Defense Logistics Agency, Defense Depot Tracy, Tracy, California*, 39 F.L.R.A. 999 (1991) (*DLA*) for example, the Authority agreed with its Administrative Law Judge, *id.* at 1013, that Employee Assistance Program contractors were representatives of the agency for purposes of § 7114(a)(2), because the contractors were used "to accomplish the same services … which [the agency] was required to furnish employees," *id.* at 1030, and the agency "maintained sufficient control over these sessions so that it cannot disentangle itself from the actions" of the contractor, *id.* Likewise, in *SSA*, the agency's contracted-for EEO investigators were held to be representatives of the agency based upon the agency's "control and direction of these investigators," and the fact that the agency "had an official obligation to investigate these EEO complaints[.]" *SSA*, 59 F.L.R.A. at 880; *see also Pension Benefit Guar. Corp.*,

Wash., D.C., 62 F.L.R.A. 219, 222-23 (2007) (*PBGC*) (deciding case with identical facts under same rationale as *SSA*).

2. The Union's arguments against using the "function and control" analysis are unconvincing

In its brief, the Union argues that the Authority was wrong to apply the function and control analysis, claiming that this approach "is inconsistent with [*NASA*,] the only Supreme Court case expounding on the meaning of the term 'representative' under Section 7114(a)(2)(B)[.]" PB 29. According to the Union, *NASA* and *United States Department of Justice v. FLRA*, 266 F.3d 1228 (D.C. Cir. 2001) (*DOJ*), "make clear that investigators can be representatives of an agency even when they are operating under their own legal authority and insulated from agency interference or control," as OPM's investigators do here, *id.* at 30, and that the proper test to apply is whether OPM's investigators operate "on behalf of, or for the benefit of" the IRS, JA 29, 31.

The Union seems to understand *NASA* as creating a bright-line test whereby all § 7114(a)(2) "representative of the agency" questions are answered by asking whether the interviewer acts on behalf of or for the benefit of the agency. *See generally* PB at 29-34. The Union is wrong. Neither the Supreme Court in *NASA* nor the D.C. Circuit in *DOJ* (resolving the even narrower issue of whether an agency's own OIG investigators are "representatives of the agency" when performing criminal investigations) announced a bright-line test applicable to each

and every "representative of the agency" determination.[7] To the contrary, both cases are rather narrow rebuttals of agencies' efforts to exclude their own OIG investigators from the Statute's coverage. *E.g.*, *NASA*, 527 U.S. at 237 ("[W]e have no difficulty concluding that § 7114(a)(2)(B) is not limited to agency investigators representing an 'entity' that collectively bargains with the employee's union."); *DOJ*, 266 F.3d at 1231 (rejecting agency's invitation to create a "criminal investigation" exception to *NASA*'s holding that an agency's OIG investigators are representatives of their agency).

The Union's favored language appears in the portion of the Supreme Court's opinion where the Court rejects NASA's argument that an OIG's law enforcement function trumps the fact that an agency OIG is still a part of that agency, and supervised by the agency head. *NASA*, 527 U.S. at 240 ("unlike the jurisdiction of many law enforcement agencies, an OIG's investigative office, as contemplated by the IGA, is performed with regard to, and on behalf of, the particular agency in which it is stationed"). The "with regard to, and on behalf of" language was simply an explanation for why the Court rejected a particular NASA argument, not a universal test.

[7] In its brief, the Union miscites *DOJ* as "*U.S. Dep't of Justice v. Am. Fed'n of Gov't Emps., Local 709 (AFGE Local 709*)." AFGE was an intervenor in the case, and a party before the Authority, but the case citation should read as it does above.

In fact, the Supreme Court in *NASA* seemed to go out of its way to make clear that it was not answering any question other than the one in front of it:

> To resolve the question presented in this case, we need not agree or disagree with the Authority's various rulings regarding the scope of § 7114(a)(2)(B), nor must we consider whether the outer limits of the Authority's interpretation so obstruct the performance of an OIG's statutory responsibilities that the right must be more confined in this context [than in other contexts] …. The process by which the scope of § 7114(a)(2)(B) may properly be determined, and the application of that section to law enforcement officials with a broader charge, present distinct questions not now before us.

NASA, 527 U.S. at 244; 244 at n.8. As this shows, the "with regard to, and on behalf of" language that NTEU attempts to portray in its brief as a determinative test, *e.g.*, PB at 29, and which it faults the Authority for not applying here, PB at 31, is no such thing.

NTEU is incorrect, too, when it states that *NASA* and *DOJ* "make clear that investigators can be representatives of an agency even when they are operating under their own legal authority and insulated from agency interference or control," as OPM's investigators do here, *id.* at 30. The point of *NASA* was that an OIG is *not* free from its agency's control, the Inspector General Act (IGA) notwithstanding. Although the IGA gives OIGs a certain amount of independence, OIGs still report to – and are under the control of – their agency head. *NASA*, 527 U.S. at 240. This is not the case here: OPM's investigators are employed by, and report to, OPM, not the IRS, and so much of *NASA*'s commentary is inapposite.

NTEU further misunderstands *NASA* when it declares that "the FLRA's ruling in this case leads to the very result that the *NASA* Court intended to prevent: an agency being able to outsource investigatory interviews of its employees outside of the agency[.]" PB at 32 (citing *NASA*, 527 U.S. at 234). But *NASA* did not speak at all to the issue of interviews conducted by non-agency interviewers; those were not the facts of the case, and the Court was conscientious in limiting its holding. The passage that NTEU purports to interpret actually reads:

> By its terms, § 7114(a)(2)(B) is not limited to investigations conducted by certain "entities" within the agency in question. It simply refers to representatives of "the agency," which, all agree, means NASA. … Thus, relying on prior rulings, the Authority found no basis in the [Statute] or its legislative history to support the limited reading advocated by NASA and its OIG. The Authority reasoned that adopting their proposal might erode the right by encouraging the use of investigative conduits *outside the employee's bargaining unit*[.]

NASA, 527 U.S. at 234 (citation omitted, emphasis added). This addresses a very narrow policy interest not at issue here: the concern that, under NASA's argument that "representatives of the agency" meant only representatives with whom the employee's union had a bargaining relationship, agencies could simply assign internal investigations across organizational lines; e.g., have a New York City investigator investigate an employee in Philadelphia, and thereby deny the investigated employee *Weingarten* rights. But – again – that gamesmanship is not an issue here, chiefly because the investigations are not IRS's to assign. To the extent that the IRS has any participation in the process, it does so only at the

pleasure of OPM. The balance of interests in this case, therefore, is wholly different from the interests at play in an OIG case, and the Union is wrong to suggest otherwise.

B. The Authority correctly applied the function and control analysis to the facts of the case and denied the Union's exception

The Authority correctly applied the function and control analysis in rejecting NTEU's argument that OPM's investigators are *always* representatives of the IRS; as the Authority held, with respect to covered employees, the investigators do not perform an IRS function or operate under IRS control when conducting suitability interviews. JA 11, 12. The Union's arguments to the contrary are either barred by 5 U.S.C. § 7123(c), unconvincing, or both.

1. The Authority correctly held that OPM's investigators perform an OPM function, and operate under OPM control

With respect to the "function" prong, the OPM investigators in this case were fulfilling an OPM statutory directive, and not simply assisting the IRS with carrying out a function for which the Agency had the actual legal responsibility. As the Arbitrator found, "OPM's investigators were carrying out *OPM's* investigative function," not the IRS's, "in connection with making suitability determinations." JA 11 (emphasis added, quotation marks omitted). Read together, 5 U.S.C. § 3301, 5 C.F.R. § 5.2(a), and 5 C.F.R. Part 731 make clear that it is OPM – not the IRS, or employing agencies as a whole – that has the legal

responsibility to police the competitive service. OPM may allow employing agencies to assist, to some degree, in some of the investigative or determinative functions, but that does not change the bottom line: the legal responsibility and authority for suitability investigations and determinations is OPM's.

This is in stark contrast to the facts of *SSA*, *PBGC*, and *DLA* – cases in which the Authority found contractors to be performing an agency function, unlike here. In *SSA*, for example, "[t]he [agency] had an official obligation to investigate these EEO complaints, and the fact that a contractor, rather than an agency employee, was designated by the agency to conduct these investigations does not diminish the relationship with the respondent." *SSA*, 59 F.L.R.A. at 880; *see also PBGC*, 62 F.L.R.A. at 224 ("in the instant case, the contractor was performing a function that otherwise would have been performed by the [agency]"). Here, the OPM investigators perform an OPM function; in some circumstances, the IRS may be permitted to substitute its investigators, but that does not change that the *function* at issue here – of investigating employees' suitability for the competitive service – is OPM's. The Authority reasonably determined, then, that "when OPM's investigators were interviewing and investigating covered employees … they were performing an OPM function, not a function or task of the Agency." JA 11.

Similarly, the facts of the case show that IRS had no control over OPM's investigators when those investigators were dealing with covered employees. JA 12. The Arbitrator's (until now) unchallenged findings that "there was no basis or authority for the Agency to tell OPM how its investigators should go about conducting their investigatory interviews," JA 12, and that "there was nothing the Agency could do to change OPM's policy decision not to permit Union" participation in the covered employees' interviews, *id.* (quotation marks omitted), inexorably led the Authority to conclude that the investigators operated under OPM's – not IRS's – control when interviewing covered employees. *Id.*

Based on the facts of the case, then, the Authority properly applied the function and control analysis and rejected NTEU's argument that OPM's investigators are always IRS representatives, whether interviewing covered or excepted employees.

2. The Union's new argument is both improperly raised under § 7123(c) and unconvincing

As explained above, p. 13, the Union's argument that the Authority erred by basing its decision on a misunderstanding of, first, the relationship between suitability *investigations* and suitability *determinations* and, second, the degree of delegated authority permitted to the IRS, is not properly before this Court. Nothing in the Union's exceptions objected to the Arbitrator's factual findings ("[t]hese findings, which are not challenged as nonfacts (or on any other ground)

…," JA 12), and the Union did not move for reconsideration of the Authority's decision. As such, these objections were not "urged before the Authority," 5 U.S.C. § 7123(c), and "shall [not] be considered by the Court," *id.*

Even if the Court were to consider the Union's argument, it would find it to be misleading, inaccurate, and – perhaps most damningly – irrelevant.

The Union misleads when it cites to record portions other than the Authority's and Arbitrator's findings of fact and represents those record portions as "undisputed," PB 26, or the facts of the case. *E.g.*, PB at 11-17, 21. Citations such as these – to witness testimony, for instance, or even to party stipulations – do not represent the facts of the case unless adopted by the Arbitrator and the Authority. When an arbitrator's factual findings are unchallenged, the Authority defers to those findings. *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Atwater, Cal.*, 66 F.L.R.A. 737, 739 (2012). The Authority's findings, in turn, are conclusive so long as they are "supported by substantial evidence on the record considered as a whole[.]" 5 U.S.C. § 7123(c); *SEC v. FLRA*, 568 F.3d 990, 995 (D.C. Cir. 2009). Here, the Union never denies that substantial evidence supports the Authority's factual findings; instead, the Union simply recites the portions of record evidence which it wishes the Arbitrator had adopted, and treats those portions as having been proven when they have not.

The Union also describes important details inaccurately. According to the Union, for example, "OPM investigators have no power to compel employees' cooperation." PB 27. In this, NTEU forgets 5 C.F.R. § 731.103(g) – a section that it cites several times in its brief – under which OPM retains exclusive jurisdiction over "*all* suitability cases involving a refusal to furnish testimony as required by § 5.4 of this chapter. Agencies must refer these cases to OPM for suitability determinations and suitability actions[.]" *Id.* (emphasis added). There could hardly be clearer proof that OPM's investigators do, in fact, have the power to compel employees' cooperation than that OPM has the unilateral right to fire employees who do not cooperate with its investigators.[8]

Ultimately, though, it isn't clear that any of the Union's factual quibbles actually matter. Even *if* the Authority did fail to appreciate the distinction between investigations and determinations or understand the full extent of the Agency's delegated authority, *and if* the Union's issue about competitive service *appointees* was before the Court – which, again, it is not; the issue is barred in its entirety by § 7123(c) – none of this demonstrates that the Authority's ruling with respect to covered employees was incorrect. And even for the group of covered workers for

[8] This reserved authority also undermines the Union's view that *NASA* is an analytic match to the instant case. In *NASA*, the Supreme Court found that "formal sanctions for refusing to submit to an OIG interview cannot be pursued by the OIG alone[.]" *NASA*, 527 U.S. at 242. As 5 CFR 731.103(g) demonstrates, the exact opposite is true here: OPM has the exclusive right to remove or debar federal employees who do not provide information as required.

whom the IRS has the most delegated authority – covered "appointees," in their first year of service – the suitability process as a whole remains OPM's statutory and regulatory prerogative. OPM may or may not delegate the right to perform investigations, 5 C.F.R. § 731.104(a), but any delegation requires annual renewal, as described above. Similarly, OPM retains broad suitability determination rights even for appointees, including the exclusive right to take actions based on false statements, fraud, or refusal to furnish testimony, or in any other case that "it deems necessary." 5 C.F.R. § 731.103(g).

This is all consistent with the dispositive facts of the case: first, that "when OPM's investigators were interviewing and investigating covered employees – employees subject to OPM suitability determinations – they were performing an OPM function, not a function or task of the Agency," JA 11, and, second, that there was "no basis or authority for [the IRS] to tell OPM how its investigators should go about conducting their investigatory interviews," and "nothing [the IRS] could do to change OPM's policy decision not to permit Union representatives to participate in the interviews[,]" JA 12. As a result, even for this narrow class of employees – a class of employees for which the Union, until its brief, never called for special discussion or analysis – the Arbitrator's and Authority's previously unchallenged factual findings still amply demonstrate that OPM's investigators are performing an OPM function, and operating under OPM control.

CONCLUSION

As explained above, the Union's entire petition for review must be dismissed under 5 U.S.C. § 7123(c) as a result of the Union's failure to raise its new "covered-employees-in-their-first-year-of-service" argument to the Authority. If the Court does entertain the Union's petition, it should be denied, as the Authority reasonably extended the function and control analysis to questions concerning investigators from other federal agencies and correctly determined that under that analysis and the facts of the case, OPM's investigators are not representatives of the IRS when interviewing covered employees; furthermore, the Union's arguments to the contrary are either barred by § 7123(c) or unconvincing, or both.

Respectfully submitted,

/s/ by David M. Shewchuk
Rosa M. Koppel
Solicitor

/s/ David M. Shewchuk
David M. Shewchuk
Deputy Solicitor
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300

D.C. Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7)(C) and D.C. Circuit Rule 32(a), 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 9,214 words excluding exempt material.

/s/ David M. Shewchuk
David M. Shewchuk
Counsel for the Respondent

Certificate of Service

I hereby certify that on this 14th day of January, 2013, 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

Julie M. Wilson
Associate General Counsel

Paras N. Shah
Assistant Counsel
National Treasury Employees Union
1750 H Street, N.W.
Washington, D.C. 20006

/s/ David M. Shewchuk
David M. Shewchuk
Counsel for the Respondent

ADDENDUM A

5 U.S.C. § 551 – Definitions

For the purpose of this subchapter—
…
(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; …
…

*****

5 U.S.C. § 701 – Application; definitions

…

(b) For the purpose of this chapter—
…
(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

*****

5 U.S.C. § 706 – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

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

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

*****

5 U.S.C. § 3301 – Civil service, generally

The President may—
(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

*****

5 U.S.C. § 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) resolves 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.

…

*****

5 U.S.C. § 7114 – Representation rights and duties

(a)

…

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or
(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
(ii) the employee requests representation.

…

*****

5 U.S.C. § 7116 – Unfair labor practices

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

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;
(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;
(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;
(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;
(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;
(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or
(8) to otherwise fail or refuse to comply with any provision of this chapter.

…

*****

5 U.S.C. § 7123 – Judicial review; enforcement

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

(1) section 7122 of this title (involving an award by an Arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or
(2) section 7112 of this title (involving an appropriate unit determination),
may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or

transacts business or in the United States Court of Appeals for the District of Columbia.

…

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

…

*****

5 C.F.R. § 5.2 – Investigations and evaluations

The Director may secure effective implementation of the civil service laws, rules, and regulations, and all Executive orders imposing responsibilities on the Office by:
(a) Investigating the qualifications and suitability of applicants for positions in the competitive service. The Director may require appointments to be made subject to investigation to enable the Director to determine, after appointment, that the requirements of law or the civil service rules and regulations have been met.
(b) Evaluating the effectiveness of: (1) Personnel policies, programs, and operations of Executive and other Federal agencies subject to the jurisdiction of the Office, including their effectiveness with regard to merit selection and employee development; (2) agency compliance with and enforcement of applicable laws, rules, regulations and office directives; and (3) agency personnel management evaluation systems.
(c) Investigating, or directing an agency to investigate and report on, apparent violations of applicable laws, rules, regulations, or directives requiring corrective action, found in the course of an evaluation.

*****

5 C.F.R. Part 731 - Suitability

§ 731.101 - Purpose

(a) The purpose of this part is to establish criteria and procedures for making determinations of suitability and for taking suitability actions regarding employment in covered positions (as defined in paragraph (b) of this section) pursuant to 5 U.S.C. 3301, E.O. 10577 (3 CFR, 1954-1958 Comp., p. 218), as amended, and 5 CFR 1.1, 2.1(a) and 5.2. Section 3301 of title 5, United States Code, directs consideration of “age, health, character, knowledge, and ability for the employment sought.” E.O. 10577 (codified in relevant part at 5 CFR 1.1, 2.1(a) and 5.2) directs OPM to examine “suitability” for competitive Federal employment. This part concerns only determinations of “suitability,” that is, those determinations based on a person's character or conduct that may have an impact on the integrity or efficiency of the service. Determinations made and actions taken under this part are distinct from objections to eligibles or pass overs of preference

eligibles, and OPM's and agencies' decisions on such requests, made under 5 U.S.C. 3318 and 5 CFR 332.406, as well as determinations of eligibility for assignment to, or retention in, sensitive national security positions made under E.O. 10450 (3 CFR, 1949-1953 Comp., p. 936), E.O. 12968, or similar authorities.
(b) Definitions. In this part:
Applicant means a person who is being considered or has been considered for employment.
Appointee means a person who has entered on duty and is in the first year of a subject-to-investigation appointment (as defined in § 731.104).
Core Duty means a continuing responsibility that is of particular importance to the relevant covered position or the achievement of an agency's mission.
Covered position means a position in the competitive service, a position in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and a career appointment to a position in the Senior Executive Service.
Days means calendar days unless otherwise specified in this part.
Employee means a person who has completed the first year of a subject-to-investigation appointment.
Material means, in reference to a statement, one that is capable of influencing, affects, or has a natural tendency to affect, an official decision even if OPM or an agency does not rely upon it.
Suitability action means an outcome described in § 731.203 and may be taken only by OPM or an agency with delegated authority under the procedures in subparts C and D of this part.
Suitability determination means a decision by OPM or an agency with delegated authority that a person is suitable or is not suitable for employment in covered positions in the Federal Government or a specific Federal agency.

§ 731.102 – Implementation

…
(c) OPM may set forth policies, procedures, criteria, standards, quality control procedures, and supplementary guidance for the implementation of this part in OPM issuances.

§ 731.103 – Delegation to agencies

(a) Subject to the limitations and requirements of paragraphs (f) and (g) of this section, OPM delegates to the heads of agencies authority for making suitability determinations and taking suitability actions (including limited, agency-specific

debarments under § 731.205) in cases involving *applicants* for and *appointees* to covered positions in the agency.

(b) When an agency, acting under delegated authority from OPM, determines that a Governmentwide debarment by OPM under § 731.204(a) may be an appropriate action, it must refer the case to OPM for debarment consideration. Agencies must make these referrals prior to any proposed suitability action, but only after sufficient resolution of the suitability issue(s), through subject contact or investigation, to determine if a Governmentwide debarment appears warranted.

(c) Agencies exercising authority under this part by delegation from OPM must adhere to OPM requirements as stated in this part and OPM's issuances described in § 731.102(c). Agencies must also implement policies and maintain records demonstrating that they employ reasonable methods to ensure adherence to these OPM issuances.

(d) Agencies may begin to determine an applicant's suitability at any time during the hiring process. Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicant is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection. However, in certain circumstances, such as filling law enforcement positions, an agency may choose to initiate a preliminary suitability review at the time of application. Whether or not a person is likely to be eligible for selection, OPM must be informed in all cases where there is evidence of material, intentional false statements, or deception or fraud in examination or appointment, and OPM will take a suitability action where warranted.

(e) When an agency, exercising authority under this part by delegation from OPM, makes a suitability determination or changes a tentative favorable placement decision to an unfavorable decision, based on an OPM report of investigation or upon an investigation conducted pursuant to OPM-delegated authority, the agency must:

(1) Ensure that the records used in making the determination are accurate, relevant, timely, and complete to the extent reasonably necessary to ensure fairness to the person in any determination;

(2) Ensure that all applicable administrative procedural requirements provided by law, the regulations in this part, and OPM issuances as described in § 731.102(c) have been observed;

(3) Consider all available information in reaching its final decision on a suitability determination or suitability action, except information furnished by a non-corroborated confidential source, which may be used only for limited purposes, such as information used to develop a lead or in

interrogatories to a subject, if the identity of the source is not compromised in any way; and

(4) Keep any record of the agency suitability determination or action as required by OPM issuances as described in § 731.102(c).

(f) OPM may revoke an agency's delegation to make suitability determinations and take suitability actions under this part if an agency fails to conform to this part or OPM issuances as described in § 731.102(c).

(g) OPM retains jurisdiction to make final determinations and take actions in all suitability cases where there is evidence that there has been a material, intentional false statement, or deception or fraud in examination or appointment. OPM also retains jurisdiction over all suitability cases involving a refusal to furnish testimony as required by § 5.4 of this chapter. Agencies must refer these cases to OPM for suitability determinations and suitability actions under this authority. Although no prior approval is needed, notification to OPM is required if the agency wants to take, or has taken, action under its own authority (5 CFR part 315, 5 CFR part 359, or 5 CFR part 752) in cases involving material, intentional false statement in examination or appointment, or deception or fraud in examination or appointment; or refusal to furnish testimony as required by § 5.4 of this title. In addition, paragraph (a) of this section notwithstanding, OPM may, in its discretion, exercise its jurisdiction under this part in any case it deems necessary.

§ 731.104 – Appointments subject to investigation

(a) To establish a person's suitability for employment, appointments to covered positions identified in § 731.101 require the person to undergo an investigation by OPM or by an agency with delegated authority from OPM to conduct investigations. However, except as provided in paragraph (b)(2), an appointment will not be subject to investigation when the person being appointed has undergone a background investigation and the appointment involves:

(1) Appointment or conversion to an appointment in a covered position if the person has been serving continuously with the agency for at least 1 year in one or more covered positions subject to investigation;

(2) Transfer to a covered position, provided the person has been serving continuously for at least 1 year in a covered position subject to investigation;

(3) Transfer or appointment from an excepted service position that is not a covered position to a covered position, provided the person has been serving continuously for at least 1 year in a position where the person has been determined fit for appointment based on criteria equivalent to the factors provided at 5 CFR 731.202 ;

(4) Appointment to a covered position from a position as an employee working as a Federal Government contract employee, provided the person has been serving continuously for at least 1 year in a job where a Federal agency determined the contract employee was fit to perform work on the contract based on criteria equivalent to the factors provided at 5 CFR 731.202; or

(5) Appointment to a covered position where there has been a break in service of less than 24 months, and the service immediately preceding the break was in a covered position, an excepted service position, or a contract employee position described in paragraphs (a)(1) to (a)(4) of this section.

(b)

(1) Either OPM or an agency with delegated suitability authority may investigate and take a suitability action against an applicant, appointee, or employee in accordance with § 731.105. There is no time limit on the authority of OPM or an agency with delegated suitability authority to conduct the required investigation of an applicant who has been appointed to a position. An employee does not have to serve a new probationary or trial period merely because his or her appointment is subject to investigation under this section. An employee's probationary or trial period is not extended because his or her appointment is subject to investigation under this section.

(2) An appointment to a covered position also will be subject to investigation when:

(i) The covered position requires a higher level of investigation than previously conducted for the person being appointed; or

(ii) An agency obtains new information in connection with the person's appointment that calls into question the person's suitability under § 731.202 ;

(3) Suitability determinations must be made for all appointments that are subject to investigation.

(c) Positions that are intermittent, seasonal, per diem, or temporary, not to exceed an aggregate of 180 days per year in either a single continuous appointment or series of appointments, do not require a background investigation as described in § 731.106(c)(1). The employing agency, however, must conduct such checks as it deems appropriate to ensure the suitability of the person.

(d) Reinvestigation requirements under § 731.106 for public trust positions are not affected by this section.

(e) For purposes of this section, “criteria equivalent to the factors provided at 5 CFR 731.202 ” are criteria that provide adequate assurance that the person to be appointed, converted to an appointment, or transferred is suitable to be employed in a covered position, as determined by OPM, in issuances under this regulation. A

decision by OPM, or by an agency applying guidance from OPM, that a prior fitness determination was not based on criteria equivalent to the factors provided at 5 CFR 731.202, and that a new investigation or adjudication is necessary is not subject to review under section 731.501 of this part.

§ 731.105 – Authority to take suitability actions

(a) Neither OPM nor an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, a position that is not subject to investigation or check under § 731.104.
(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on any of the criteria of § 731.202 ;
(c) Except as limited by § 731.103(g), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202 ;
(d) OPM may take a suitability action under this part against an *employee* based on the criteria of § 731.202(b)(3), (4), or (8).
(e) An agency may not take a suitability action against an *employee*. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

§ 731.106 – Designation of public trust positions and investigative requirements

(a) Risk designation. Agency heads must designate every covered position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service. OPM will provide an example of a risk designation system for agency use in an OPM issuance as described in § 731.102(c).
(b) Public Trust positions. Positions at the high or moderate risk levels would normally be designated as “Public Trust” positions. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain.
(c) Investigative requirements.

(1) Persons receiving an appointment made subject to investigation under this part must undergo a background investigation. OPM is authorized to establish minimum investigative requirements correlating to risk levels. Investigations should be initiated before appointment but no later than 14 calendar days after placement in the position.

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter detail the various sensitivity levels and investigative requirements. Procedures for determining investigative requirements for all positions based upon risk and sensitivity will be published in OPM issuances, as described in §§ 731.102(c) and 732.201(b).

(3) If suitability issues develop prior to the required investigation, OPM or the agency may conduct an investigation sufficient to resolve the issues and support a suitability determination or action, if warranted. If the person is appointed, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) Reinvestigation requirements.

(1) Agencies must ensure that reinvestigations are conducted and a determination made regarding continued employment of persons occupying public trust positions at least once every 5 years. The nature of these reinvestigations and any additional requirements and parameters will be established in supplemental guidance issued by OPM.

(2) If, prior to the next required reinvestigation, a separate investigation is conducted to determine a person's eligibility (or continued eligibility) for access to classified information or to hold a sensitive position, or as a result of a change in risk level as provided in paragraph (e) of this section, and that investigation meets or exceeds the requirements for a public trust reinvestigation, a new public trust reinvestigation is not required. Such a completed investigation restarts the cycle for a public trust reinvestigation for that person.

(3) Agencies must notify all employees covered by this section of the reinvestigation requirements under this paragraph.

(e) Risk level changes. If an employee or appointee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's or appointee's position is changed to a higher level, the employee or appointee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14

calendar days after the promotion, demotion, reassignment or new designation of risk level is final.
(f) Completed investigations. Any suitability investigation (or reinvestigation) completed by an agency under paragraphs (d) and (e) of this section must result in a determination by the employing agency of whether the findings of the investigation would justify an action under this part or under another applicable authority, such as part 315, 359, or 752 of this chapter. Section 731.103 addresses whether an agency may take an action under this part, and whether the matter must be referred to OPM for debarment consideration.

…

§ 731.202 – Criteria for making suitability determinations

(a) General. OPM, or an agency to which OPM has delegated authority, must base its suitability determination on the presence or absence of one or more of the specific factors (charges) in paragraph (b) of this section.
(b) Specific factors. In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action:

(1) Misconduct or negligence in employment;
(2) Criminal or dishonest conduct;
(3) Material, intentional false statement, or deception or fraud in examination or appointment;
(4) Refusal to furnish testimony as required by § 5.4 of this chapter ;
(5) Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others;
(6) Illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation;
(7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and
(8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) Additional considerations. OPM and agencies must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(1) The nature of the position for which the person is applying or in which the person is employed;
(2) The nature and seriousness of the conduct;
(3) The circumstances surrounding the conduct;
(4) The recency of the conduct;
(5) The age of the person involved at the time of the conduct;
(6) Contributing societal conditions; and
(7) The absence or presence of rehabilitation or efforts toward rehabilitation.

(d) Reciprocity. An agency cannot make a new determination under this section for a person who has already been determined suitable or fit based on character or conduct unless a new investigation is required under § 731.104 or § 731.106, or no new investigation is required but the investigative record on file for the person shows conduct that is incompatible with the core duties of the relevant covered position.

§ 731.203 – Suitability actions by OPM and other agencies

(a) For purposes of this part, a suitability action is one or more of the following:
(1) Cancellation of eligibility;
(2) Removal;
(3) Cancellation of reinstatement eligibility; and
(4) Debarment.

(b) A non-selection, or cancellation of eligibility for a specific position based on an objection to an eligible or pass over of a preference eligible under 5 CFR 332.406, is *not* a suitability action even if it is based on reasons set forth in § 731.202.

(c) A suitability action may be taken against an applicant or an appointee when OPM or an agency exercising delegated authority under this part finds that the applicant or appointee is unsuitable for the reasons cited in § 731.202, subject to the agency limitations of § 731.103(g).

(d) OPM may require that an appointee or an employee be removed on the basis of a material, intentional false statement, deception or fraud in examination or appointment; refusal to furnish testimony as required by § 5.4 of this chapter; or a statutory or regulatory bar which prevents the person's lawful employment.

(e) OPM may cancel any reinstatement eligibility obtained as a result of a material, intentional false statement, deception or fraud in examination or appointment.

(f) An action to remove an appointee or employee *for suitability reasons* under this part is not an action under part 315, 359, or 752 of this chapter. Where behavior covered by this part may also form the basis for an action under parts 315, 359, or 752 of this chapter, an agency may take the action under part 315, 359, or 752 of this chapter, as appropriate, instead of under this part. An agency must notify OPM

to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.
(g) Agencies do not need approval from OPM before taking unfavorable suitability actions. However, they are required to report to OPM all unfavorable suitability actions taken under this part within 30 days after they take the action. Also, all actions based on an OPM investigation must be reported to OPM as soon as possible and in no event later than 90 days after receipt of the final report of investigation.

…

*****

5 C.F.R. § 2429.17 – Reconsideration

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.