ORAL ARGUMENT HAS BEEN SCHEDULED FOR JANUARY 30, 2019

No. 18-1198

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

FEDERAL EDUCATION ASSOCIATION,

Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,

Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

Appearing below in the administrative proceeding before the Federal Labor Relations Authority ("Authority") were the U.S. Department of Defense Educational Activity and the Federal Education Association ("Union"). In this Court proceeding, the Union is the petitioner and the Authority is the respondent.

B. RULING UNDER REVIEW

The Union seeks review of the Authority's decision in *United States Department of Defense, Education Activity and Federal Education Association*, 70 FLRA (No. 132) 654 (June 28, 2018).

C. RELATED CASES

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

/s/ Fred B. Jacob
Fred B. Jacob
Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	United States Department of Defense Education Activity
ALJ	Administrative Law Judge
APA	Provisions of the law allowing for judicial review of Administrative Procedure Act decisions, 5 U.S.C. §§ 701-706 (2018)
Authority	The Federal Labor Relations Authority's three-member adjudicatory body
Br.	Petitioner's opening brief
Decision	The decision of the Authority in this case, dated June 28, 2018
DFAS	Defense Finance and Accounting Service
DoDEA	United States Department of Defense Education Activity
FEA	Petitioner, Federal Education Association
FLRA	Respondent, the Federal Labor Relations Authority
SA	The Federal Labor Relations Authority's Supplemental Appendix
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
UA	The Union's Appendix
ULP	Unfair Labor Practice
Union	Petitioner, Federal Education Association

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case concerns whether the Federal Education Association (the "Union" or "FEA") timely filed an unfair labor practice ("ULP") charge even though it did not do so until five years after receiving express notice of the alleged violation. The Authority determined that the Union's ULP charge against the Department of Defense Education Activity (the "Agency" or "DoDEA") was not timely and dismissed the matter.

The Authority had subject matter jurisdiction over this ULP case pursuant to Section 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) ("the Statute"). 5 U.S.C. § 7105(a)(2)(G). The Authority's decision on review is published at 70 FLRA (No. 132) 654 (June 28, 2018) (the "Decision"). A copy of that decision is included in the Union's Appendix ("UA") at 1-17. The Union's Petition for Review was timely filed within 60 days of the Authority's decision. 5 U.S.C. § 7123(a).

STATEMENT OF ISSUES PRESENTED

1. Whether the Authority reasonably determined that the Union failed to timely file a ULP charge within six months after the Union received notice that the Agency could not fully comply with an arbitrator's decision.

2. Whether there is any basis or precedent for this Court's continued jurisdiction over this matter after it decides the Union's Petition for Review.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE[1]

This matter arose from a dispute between the Agency, a component of the Department of Defense that employs approximately 15,000 workers, and the Union representing approximately 4,000 of those employees, concerning the Agency's payroll practices. (UA 1, 6; SA 120, 132.) In 2003, Arbitrator Daniel F. Brent issued a decision (the "2003 Award") directing the Agency to modify its payroll system so that employees would receive "a clear, fully understandable explanation of what is included" in their pay. (UA 1; SA 51.)

From 2004 to 2010, the arbitrator and parties met at "implementation hearings" to discuss compliance with the 2003 Award. (UA 1; SA 59.) Those hearings culminated in March 2010 when the arbitrator directed the Agency to make specific revisions to its payroll system consistent with the 2003 Award (the "2010 Award"). (UA 1; SA 62-64.)

By letter dated May 3, 2010 (the "May 2010 Letter"), the Agency informed the arbitrator and Union that it could not fully comply with the 2010 Award. (UA 1, 19-

[1] Portions of the record not included in the Union's Appendix are contained in the Supplemental Appendix and are cited as "SA ___."

22; SA 82-85.) The arbitrator met with representatives of the Union and Agency in August 2010 to discuss those matters. (UA 1, 9; SA 111, 136.) During that meeting, the Union's representative demonstrated that the payroll system used by the Agency, which provides services to approximately 800,000 to 1,000,000 Department of Defense civilian employees, did not fully comply with the arbitrator's 2010 Award. (UA 1, 6-7, 9; SA 83, 111, 120, 121, 130-31.)

The arbitrator retained jurisdiction over the matter and continued to meet with the parties approximately once a year for the next five years. (UA 1-2, 9-10; SA 54-55, 96.) Despite the parties' and arbitrator's knowledge that the Agency's payroll system could not fully comply with the 2010 Award, there was no sign that the arbitrator ever intended to relinquish control of the matter.

The Agency on May 13, 2015 petitioned the arbitrator to find that it had substantially complied with the 2010 Award and relinquish jurisdiction over the matter (the "May 2015 Letter"). (UA 1-2; SA 54-55.) In its letter, the Agency informed the arbitrator that his retention of "perpetual jurisdiction" over the matter put the Agency in an "untenable" position, and that if the arbitrator did not release the case, the Agency would ask Congress to intervene. (UA 2; SA 55.)

Impelled to act by the Agency's letter, the arbitrator on August 10, 2015 finally relinquished control over the matter, issuing a decision concluding that the Agency

had not complied with the 2003 and 2010 Awards (the "2015 Award"). (UA 2; SA 56-61.)

The Union filed a ULP charge alleging that the Agency failed to comply with the arbitrator's awards on October 6, 2015. (UA 2; SA 65-66.) The FLRA's General Counsel filed a complaint concerning the matter. (UA 2; SA 67-69.) Following a hearing on the matter, an Administrative Law Judge ("ALJ") determined that the Union's ULP charge was timely and found that the Agency had committed a ULP. (UA 2, 5-17.)

The Agency filed exceptions to the ALJ's decision on the ground, *inter alia*, that the Union's ULP charge was untimely. (UA 2.) The Authority (Chairman Kiko and Member Abbott, and Member DuBester dissenting) set aside the ALJ's decision on that ground and thus did not reach the issue of whether the Agency had committed a ULP. (UA 2-3.)

STATEMENT OF THE FACTS

A. The 2003 and 2010 Awards

This matter stems from awards Arbitrator Daniel Brent made in a 12-year-long arbitration between the Union and Agency concerning Agency's calculation of its employees' compensation. (UA 1.) The Agency employs approximately 15,000

individuals; the Union represents approximately 4,000 of those employees. (UA 6; SA 120, 132.)

In 2003, the arbitrator issued an initial award in the Union's favor. (UA1; SA 1-46.) The Agency filed exceptions to the 2003 Award, and the Authority denied those exceptions in 2004. *U.S. Dep't of Def. Educ. Activity, Arlington, Va.*, 60 FLRA 24 (June 17, 2004). From 2004 through 2010, the arbitrator, Union, and Agency held periodic "implementation hearings" concerning the 2003 Award. (UA 1; SA 59.)

In March 2010, the arbitrator supplemented the 2003 Award, outlining specific goals for the Agency to meet with respect to its payroll system. (UA 1; SA 62-64.) The Agency consulted with its payroll service provider, the Defense Finance and Accounting Service ("DFAS"), concerning its ability to comply with the 2010 Award. (UA 1, 8; SA 75-80, 83-85, 133-35.) DFAS provides payment services for between 800,000 and 1,000,000 Department of Defense civilian employees across all Department of Defense components. (UA 1, 6-7, 20; SA 83, 120, 130-31.) DFAS also provides payroll services for other government agencies such as the Department of Health and Human Services and Department of Veterans Affairs. (UA 1, 6-7, 20; SA 130-31.)

On April 30, 2010, DFAS provided the Agency with a summary of portions of the arbitrator's award with which it could comply, as well as those elements with

which it could not comply. (UA 1, 8; SA 75-80.) The Agency forwarded relevant portions of DFAS's response to the arbitrator and Union on May 3, 2010. (UA 1, 8 & n.9, 19-22; SA 78-80, 82-85.) The May 2010 Letter specifically stated that the Agency could not:

1) Provide monthly rates of employee Living Quarters Allowances, although it was possible that the information could be provided on a bi-weekly basis, subject to significant changes in the DFAS system. (UA 1, 20; SA 83.)

2) Create a link in the system to show Post Allowances paid to employees unless extra funding was found. (UA 1, 20-21; SA 83.)

3) Create a link indicating whether an employee is entitled to a Temporary Quarters Subsistence Allowance, and if so, in what location and the currency exchange rate for the location. (UA 1, 21; SA 84.) DFAS indicated that it did not possess information concerning the location where the employees were stationed or the exchange rates of those locations; instead, the system was designed to use the daily reimbursement rates that were provided by the Agency. (*Id.*) Moreover, DFAS objected that it would not serve a useful purpose to create a link that would tell all of the approximately one million employees served by DFAS whether they are entitled to Temporary Quarters Subsistence Allowances, given that the issue was relevant only to the Union's 4,000 employees. (*Id.*)

4) Provide a link that would give individual employees access to granular information concerning debt collection or repayment, because debt information was maintained in a separate debt database, and individual employees were not allowed to access that database. (SA 84.)

5) Create a link that would provide employees with the annual cost of their Federal Employee Health Benefits and Federal Employee Life Insurance, because the computer systems of the Office of Personnel Management and DFAS maintained only bi-weekly pay deduction information. (UA 1, 21, 22; SA 84-85.)

6) Include a statement visible to individual employees indicating whether they were making Thrift Savings Plan contributions, because those contributions can only be made at an employee's request, and thus the employees would already know that they were making the contributions. (UA 1, 22; SA 85.)

7) Provide information indicating the bases for an employee's pay rate, i.e., information concerning the employee's educational background, years of service, and how that information affects the pay the employee received. (UA 1, 22; SA 85.) DFAS explained that it did not maintain literal descriptions of the bases for each employee's pay, but that it did provide information concerning an individual employee's grade and step. (*Id.*) DFAS further pointed out that an employee's years of service do not always correlate to the employee's step, so that provision of the information the arbitrator ordered could confuse employees. (*Id.*)

In August 2010, the arbitrator and representatives of the Union, Agency, and DFAS met concerning the May 2010 Letter. (UA 1, 9; SA 111, 136.) The Union "demonstrated to everyone that the [payroll] system did not satisfy the [a]ward." (UA 9; *see* SA 121.) The DFAS representative "told the attendees at the presentation that the [payroll system] could do anything they wanted, but it would come at a price and it needed to be approved." (UA 9; *see* SA 136.) Nevertheless, the arbitrator met approximately once a year with the parties from August 2010 through May 2015, even though the Agency made little – if any – progress toward compliance. (UA 9-10; SA 87-90, 92-97, 102-08, 110-13, 115-18, 126, 137, 138-43, 144-47, 148-54.)

On May 13, 2015, the Agency delivered to the arbitrator and Union a letter concerning the 2010 Award. In that letter, the Agency: 1) described its attempts to comply with the 2010 Award, 2) reminded the arbitrator that it had informed him in

the May 2010 Letter that it could not fully comply with the 2010 Award, and 3) asked the arbitrator to rule that it had complied with the "spirit and intent of the award." (UA 1-2; SA 54-55.) The Agency then expressed its extreme frustration with the arbitrator's continuing retention of jurisdiction in the matter:

> I am respectfully requesting that you immediately deem that [the] Agency has complied with the spirit and intent of your order . . . . If not, as a taxpayer and Government official, I am going to request [C]ongressional oversight to determine how and why an arbitrator['s] order that constructively would mean the overhauling the Department of Defense pay process affecting the largest Governmental entity and numerous bargaining unit employees that [the Agency] does not have a bargaining relationship with is a sound, reasonable, and economical expenditure of tax[payer] money. This[,] coupled with the notion of perpetual jurisdiction, which means perpetual Implementation Hearings, resulting in perpetual attorney fees for [the Union] and arbitrator fees, puts the Agency in an untenable position.

(SA 55; *see also* UA 2.)

Spurred by the Agency's May 2015 Letter, the arbitrator on August 10, 2015, issued a final decision finding that the Agency failed to comply with the 2003 and 2010 Awards. (UA 2; SA 56-61.) The arbitrator wrote that, "it has now become apparent that [the Agency] is either unable or unwilling to implement the changes I have ordered . . . . [and that the Agency] has been in non-compliance with the arbitrator's [2003 Award] and subsequent orders since ninety days after" the Authority's 2004 decision. (UA 10 (quoting SA 59-60).)

B. Twelve Years After the 2003 Award, and Five Years After the 2010 Award, the Union Filed a ULP Charge Alleging the Agency Did Not Comply with those Awards

On October 6, 2015, twelve years after the 2003 Award, eleven years after the Authority's 2004 decision, and five years after the Agency told the Union it could not fully comply with the 2010 Award, the Union filed a ULP charge claiming that the Agency failed to comply with the arbitrator's awards. (UA 2; SA 65-66.) On February 11, 2016, the FLRA's General Counsel filed a complaint concerning the matter. (UA 2; SA 67-69.)

Following a hearing, an ALJ on November 30, 2016 issued an order finding, *inter alia*, that the Union timely filed a ULP charge. (UA 2, 5-17.) In assessing the timeliness of the charge, the ALJ determined that the Union could reasonably have believed that the Agency's post-August 2010 compliance efforts indicated that the Agency would comply with the 2010 Award. (UA 2, 3, 11-13.) He therefore determined that the statute of limitations did not run until after the May 13, 2015 letter or until September 10, 2015, 30 days after the Arbitrator issued a final decision. (UA 12-13.) He concluded that the ULP charge was timely regardless which date was used. (UA 13.)

C. The Authority's Decision

The Authority set aside the ALJ's determination, finding that the Union's ULP charge was untimely. (UA 2-3.) The Authority rejected the Union's argument that it did not know until May 2015 that the Agency would not fully comply with the 2010 Award. (*Id.*) The Authority determined that the Agency's May 2010 Letter expressly informed the Union of its inability to comply with portions of the 2010 Award. (UA 2.) The Authority examined that letter and its attachment in detail, identifying the many areas in which the Agency and DFAS stated that the Agency could not be able to comply with the 2010 Award. (UA 1-2 & nn.4-9, 19.) The Authority further found that the Union expressly acknowledged that the Agency could not comply with the 2010 Award when, in the August 2010 meeting, the Union "demonstrated to everyone that the [payroll] system did not satisfy" the 2010 Award. (UA 1, 2, 9; SA 111, 121.) Given the evidence of the Agency's 2010 expressed inability to fully comply with the arbitrator's awards, and the arbitrator's retention of "perpetual jurisdiction" over the matter until the Agency complained about its "untenable position," the Authority determined that the Union's 2015 ULP charge was untimely.

SUMMARY OF ARGUMENT

The Union's failure to file a ULP charge within six months of the Agency's stated inability to comply with the arbitrator's 2010 Award renders the ULP charge

untimely. 5 U.S.C. § 7118(a)(4)(A). The statute of limitations for filing a ULP charge related to non-compliance with an arbitration award begins to run from the date that a party knew, or should have known, that the adverse party would not comply with the award.

The Agency's May 2010 Letter provided the Union with express notice of the Agency's inability to comply with certain portions of the arbitrator's 2010 Award. Indeed, the Union's counsel "demonstrated to everyone that the system did not satisfy the [a]ward" during an August 2010 meeting with the arbitrator and representatives of the Agency and DFAS. The Union's 2010 knowledge of the Agency's inability to comply given its current payroll system started the six-month statute of limitations to file a ULP charge.

The Union, however, did not file a ULP charge, but waited five years. During that time, the arbitrator continued to retain jurisdiction over the matter – even though little changed. Only after the Agency complained to the arbitrator in May 2015 that his exercise of "perpetual jurisdiction" placed the Agency in an "untenable position" and that the Agency intended to seek Congressional oversight, did the arbitrator relinquish control over the matter. (*See* UA 2; SA 54-55, 56-61.) The Union's decision to then file a ULP charge – five years after the Agency told it that it could not fully comply with the 2010 Award – was five years too late.

The Union's argument that it waited to file a ULP charge based on the hope that the Agency would eventually comply with all of the requirements of the 2010 Award is unavailing. First, the Union could not reasonably have believed that the Agency's compelled appearance at ongoing "implementation" meetings for five years fundamentally changed its ability to comply with certain aspects of the Award. Indeed, even if it had not been originally apparent that the Agency would fail to comply with the Award, the Agency's noncompliance with the Award for not one, but five years, should have alerted the Union to the fact that the Agency would not comply, despite the arbitrator's continuing retention of jurisdiction.

Second, the Union could not have reasonably believed that the Agency would comply based on a DFAS representative's statement during the August 2010 meeting that the payroll system "could do anything they wanted, but it would come at a price and it needed to be approved." (Br. 22.) The Union knew that the Agency's payroll system, which served 800,000 to 1,000,000 employees, could not comply with the 2010 Award. (UA 9; SA 111, 121, 136.) It should have known that the caveats of "price" and "approval" were substantial, given that the proposed changes would have benefited only its 4,000 Union members. (*See* UA 9; SA 83, 120, 132.) The Union could thus not have reasonably relied upon that statement as a sign that the Agency would fully comply with the 2010 Award, particularly as months turned to years.

Finally, there is no basis in law, or otherwise, for the Union's request that this Court retain continuing jurisdiction over this matter. Neither the Statute, the law allowing for judicial review of Administrative Procedure Act decisions, 5 U.S.C. §§ 701-706 (2018) ("APA"), nor any other source of law, provides a ground for continuing jurisdiction by this Court of an Authority ULP case. Even if there were a legal basis for such continuing jurisdiction, the Union has provided no evidence showing that such an extraordinary remedy is justified in this case. The only point the Union establishes in its brief is that it disagrees with the Decision.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering the Statute. *See Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 644–45 (1990) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). When judicial review is permitted under § 7123(a) of the Statute, this Court reviews Authority decisions "in accordance with section 10(e) of the [APA]" and will uphold an Authority decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) (quoting *Am. Fed'n of Gov't Emps., Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998)); *see also* 5 U.S.C. § 7123(c) (incorporating by reference APA standards of review).

The Authority's fact findings, such as its finding concerning the date of the Union's receipt of express notice of the Agency's noncompliance with the arbitrator's award, are "'conclusive' if 'supported by substantial evidence on the record considered as a whole.'" *Sec. Exch. Comm'n v. FLRA*, 568 F.3d 990, 995 (D.C. Cir. 2009) (quoting 5 U.S.C. § 7123(c)); *Cf. Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 899 (6th Cir. 1996) (explaining that, under the six-month limitations period for filing ULP charges under the NLRA, "the date upon which the alleged violation of the [National Labor Relations Act] occurred represents a factual finding and, as such, is conclusive 'if supported by substantial evidence on the record considered as a whole'") (quoting *Vemco, Inc. v. NLRB*, 79 F.3d 526, 528 (6th Cir. 1996)). The Supreme Court has:

> defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966) (internal quotations and alterations omitted); *see also Am. Fed'n of State, Cty. & Mun. Emps. Capital Area Council 26 v. FLRA*, 395 F.3d 443, 447 (D.C. Cir. 2005) ("Under [the substantial evidence standard], the Authority's judgments need not be right in our eyes, but they must come with 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'") (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229

(1938)). Moreover, that two different decision makers might "draw[] two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."' *Sec. Exch. Comm'n*, 568 F.3d at 995 (quoting *Consolo*, 383 U.S. at 620).[2]

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE AUTHORITY'S FINDING THAT THE UNION'S ULP CHARGE WAS UNTIMELY

The Court should defer to the Authority's reasonable determination that the Union should have filed, long before October 2015, a ULP charge based on the Agency's non-compliance with the 2003 and 2010 Awards. Substantial evidence supports the Authority's finding that the Agency expressly informed the Union in May 2010 that it could not comply with many aspects of the 2010 Award and that the Union failed to file a ULP charge within six months of receiving that notice. The record similarly supports the Authority's conclusion that the Union's failure to act was not excused by events that occurred between 2010 and 2015. The Union's Petition for Review should therefore be denied.

[2] The Union's citation to *Adamson v. Unum Life Insurance Company of America*, 455 F.3d 1209, 1212 (10th Cir. 2006) (Br. 14), is inapposite because that case involves a review of denial of insurance benefits, not review of an administrative agency's decision.

A. FLRA Standards Concerning the Adjudication of ULPs

Under the Statute, a party's failure to comply with an arbitrator's award constitutes a ULP. *See* 5 U.S.C. § 7116(a)(8); *Nat'l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 500 (D.C. Cir. 2004). The Statute specifies that parties alleging a ULP must file a charge with the Authority within six months of the purported violation. 5 U.S.C. § 7118(a)(4). The statute of limitations for filing ULP charges alleging non-compliance with arbitration awards runs from the date that a party receives express notice that the adverse party will not comply with the award, or when it becomes clear from the facts and circumstances that the adverse party will not comply. *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 61 FLRA 146, 150 (2005), *on remand from Nat'l Treasury Emps.*, 392 F.3d 498. The date of notice of non-compliance is a finding of fact that should be upheld if supported by substantial evidence. *See Dep't of the Treasury*, 61 FLRA at 150 ("A determination under § 7118(a)(4)(A) as to when a party has failed to comply with an arbitration award will involve a case-by-case determination based on what the award requires and what the party's actions are following the award."). This Court then reviews the Authority's factual findings concerning timeliness to determine if substantial evidence supports those findings. 5 U.S.C. § 7123(c) (on review "[t]he findings of the *Authority* with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.").

B. The Union Filed Its ULP Charge Five Years Too Late

Substantial evidence supports the Authority's conclusion that the Union's ULP charge was untimely.

As the Authority found, the Agency's May 2010 Letter expressly notified the Union that it could not comply with significant portions of the 2010 Award. (UA 1 & nn.4-9, 2 & n.19.) The Agency's letter explained that substantial elements of the information the 2010 Award required it to provide was "not available," "not allowed" to be given to employees, "not maintained" by DFAS, "would not serve a useful purpose," could not be "accurately computed," and/or would require additional funding to create. (UA 1 & nn.4-9, 2 & n.19, 19-22; SA 82-85; *see also* pp. 6-7 above.) That the Union chose not to heed the Agency's express statements of its inability to comply – which the Union acknowledged in the August 2010 meeting – does not toll the deadline for filing a ULP charge.

This Court's decision in *American Federation of Government Employees, AFL-CIO, Local 2303 v. FLRA*, 815 F.2d 718, 719 (D.C. Cir. 1987), is instructive. In that case, the union proposed that the parties negotiate concerning travel expenses. *Id.* at 719. The agency refused to do so, but the union did not appeal the issue to the Authority. *Id.* When the union later appealed a substantially similar proposal, the Authority determined that the appeal was time barred, because the time to appeal the first

proposal had passed. *Id.* This Court found the Authority's "judgment was reasonable under all the circumstances," given the "Agency's unqualified" refusal to negotiate the first proposal and affirmed the decision. *Id.* at 721-22. This Court should reach the same conclusion here, where the Agency expressly informed the Union it could not comply with the 2010 Award and the Union did not act for five years. *Cf. Nat'l Treasury Emps. Union v. FLRA*, 798 F.2d 113, 115 (5th Cir. 1986) (upholding Authority decision that ULP charge was untimely where union did not file a ULP charge within six months of its constructive notice of the purportedly unlawful practice).

The Agency's participation in "implementation hearings" and other actions between 2010 and 2015 should not alter that judgment. The Authority reasonably concluded, by viewing the evidence as a whole, that the Agency's post-2010 actions were not a repudiation of the May 2010 Letter. Instead, they were the result of the Agency's inability to extract itself from the arbitration.

The Agency had no choice but to continue to attend "implementation hearings" in the 12-year-long arbitration because of the arbitrator's exercise of "perpetual jurisdiction" over the matter. (UA 2; SA 55.) Indeed, if the Agency *had not* participated in the ongoing arbitration, it would have been subject to a ULP charge for "refusing to arbitrate [an] unresolved grievance[]," which the Authority has "repeatedly held" violates Section 7116(a)(1) and (8) of the Statute. *U.S. Dep't of*

Homeland Sec. U.S. Immigration & Customs Enf't Wash., D.C., 69 FLRA 72, 74 (Nov. 13, 2015). The Agency was only able to force the arbitrator to release the case by explaining, in writing, that the arbitrator had placed the Agency in an "untenable position" and by threatening to raise the matter with Congress. (SA 54-55, 56-61.) The Agency's required participation in the hearings cuts against the Union's argument (Br. 23) that it reasonably believed the Agency's attendance was evidence that the Agency would fully comply with the 2010 Award.[3]

Moreover, the Union could not have reasonably believed that the Agency would comply based on a DFAS statement during the August 2010 meeting that the payroll system "could do anything they wanted, but it would come at a price and it needed to be approved." (Br. 22.) The Union's knowledge that the Agency's current payroll system could not comply with the arbitrator's award (UA 1, 9; SA 111, 121, 136), and the significant caveats of "price" and "approval" should have warned the Union that Agency compliance was unlikely. That is particularly true given that the

[3] The arbitrator's continuing jurisdiction (Br. 23-24) was thus not probative. As the Authority highlighted, "his 'perpetual jurisdiction' had placed the Agency in an 'untenable position.'" (UA 2.) Indeed, the Authority noted that the Union's alleged reliance on the arbitrator's continuing jurisdiction led to *the Union's* unreasonable decision "to pursue enforcement of [a] twelve-year-old arbitration award. . . . five years too late." (UA 3-4.)

changes benefiting only 4,000 employees would have had to be made to a payroll system that served 800,000 to 1,000,000 employees. (*See* SA 83, 120, 132.)

Notwithstanding the Union's arguments to the contrary (Br. 21), the Authority's conclusions concerning the May 2010 Letter are strengthened by evidence of Agency and DFAS disagreements about DFAS's responsibility for complying with the 2010 Award. As the Union notes in another area of its brief, the Agency did "not [have] the practical ability to modify the payroll system itself without assistance from DFAS." (Br. 20 (quoting SA 57).)[4] Without the practical ability to modify the payroll system, the Agency could not comply with the 2003 and 2010 Awards, which is exactly what the Agency indicated in the May 2010 Letter.[5]

Thus, the Agency's post-2010 actions did not erase the clear message it sent and the Union received in 2010: that it could not fully comply with the arbitrator's awards. Significantly, the Authority, like the ALJ, found that the 2015 Award did not impose new requirements on the Agency, but merely "conclude[d] that the Agency

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[4] Indeed, an Agency representative testified that the Agency could not, for example, implement the Living Quarters Allowance change required by the 2010 Award because only DFAS had access to the data necessary to implement the change. (SA 155-57.)

[5] The arbitrator's statement in the 2015 Award that "[the Agency] is obligated to comply with my Award, whether by enlisting other Department of Defense agencies or by undertaking to provide the requisite information independently by issuing a supplemental document" (Br. 20; SA 60) does not change the Agency's express 2010 notice that it could not comply with the 2010 Award.

had failed to comply with his earlier awards." (UA 2, 10.) That fact leads to the logical conclusion that, in the 2015 Award, the arbitrator was finally acknowledging what the Agency expressly told him and the Union in 2010.

Given this evidence, and evidence in the record overall, the Union abnegates responsibility for its own actions when it complains that it is being blamed "for its willingness to trust" the Agency (Br. 23). The Union received the May 2010 Letter. It then "demonstrated to everyone that [the Agency payroll] system did not satisfy" the 2010 Award in August of that year. (UA 2, 9; SA 111, 121.) It knew that the arbitration had been ongoing for the better part of a decade with little results. While the Union may have made a calculated decision to wait in the hope that the Agency would comply with some portions of the 2003 and 2010 Awards, it knew or should have known, when it received the Agency's May 2010 Letter that the Agency could not fully comply with those awards. Thus, the Union did not simply "trust" the Agency – it gambled on the Agency's compliance for five years with ever increasing odds of failure. Even if the Union in 2010 believed that the Agency would fully comply with the 2010 Award, it cannot have reasonably believed that was the case as

the years passed following the issuance of the award.[6] Ultimately, the Union must bear responsibility for failing to preserve its rights with respect to the 2010 Award.[7]

While that conclusion may appear harsh, courts have routinely upheld Authority dismissals of actions when parties failed to comply with necessary procedural requirements. *Nat'l Treasury Emps. Union v. FLRA*, 798 F.2d 113, 115 (5th Cir. 1986) (holding ULP charge was untimely where union had constructive notice of the practice it complained of, but failed to file a charge within six months of receiving notice); *see Tinker Air Force Base, Okla. City Logistics Ctr., Okla. City, Okla. v. FLRA*, 321

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[6] Although the Union catalogues a handful of moments between August 2010 and the spring of 2013 that might have given the Union hope that the Agency might fully comply with the 2010 Award (Br. 22-23), absent from the entire time-line is evidence that the Agency made any substantial progress toward compliance.

[7] While the ALJ formed an alternate view of the case, his decision is not controlling, however much the Union might wish that were the case (Br. 20-24). The Authority conducted an independent, thorough review of the evidence in the case. It simply came to different conclusions concerning the significance of that evidence. *See U.S. Dep't of Veterans Affairs, William Jennings Bryan Dorn Veterans Affairs Med. Ctr., Columbia, S.C.*, 69 FLRA 644, 646 (2016) (setting aside ALJ factual determination). It is the Authority's factual findings, not the ALJ's, that this Court reviews for substantial evidence. 5 U.S.C. § 7123(c) ("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.") (emphasis added). Moreover, statements the arbitrator made in awards he issued over the course of 12 years (Br. 17-20) are irrelevant. The only question addressed by the Authority, and thus the only issue the Court need consider, is whether the Union timely filed a ULP charge. 5 U.S.C. § 7123(a)(1). The substance of the arbitrator's awards is irrelevant except to the extent that they address that timing issue.

F.3d 1242, 1249 (10th Cir. 2002) (affirming Authority's refusal to consider agency exceptions that had not been timely filed); *Am. Fed'n of Gov't Emps., AFL CIO Local 1592 v. FLRA*, 288 F.3d 1238, 1241 (10th Cir. 2002) (dismissing negotiability appeal for failure to properly serve adverse party was not arbitrary and capricious); *cf. U.S. Dep't of Labor*, 20 FLRA 296, 297–98 (1985) (finding ULP charge untimely where union failed to file charge until eight months after learning of the ULP), *rev'd on other grounds, Am. Fed'n of Gov't Emps. v. FLRA*, 834 F.2d 174 (D.C. Cir. 1987).[8]

As one of the Union's own cases states, "'[d]eference is due where the agency has examined the relevant data and provided an explanation of its decision that includes 'a rational connection between the facts found and the choice made.'" *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Such deference is appropriate in this case where the Authority considered all evidence

[8] Many of the cases the Union relies upon to support its arguments are distinguishable. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439 (4th Cir. 1997) (two ALJ errors of law resulted in failure to properly weigh relevant facts); *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1405 (D.C. Cir. 1995) (remanding because of agency failure to explain decision); *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986) (agency failed to consider a factor it was required by law to consider); *Gordon v. Schweiker*, 725 F.2d 231, 235 (4th Cir. 1984) (remanding case because the court could not determine whether the agency had relied upon evidence the court had previously instructed it to disregard).

relevant to the issue of the timeliness of the Union's ULP charge. The Union's Petition for Review should be denied.

II. THERE IS NO LEGAL OR OTHER BASIS FOR THIS COURT'S CONTINUED JURISDICTION OVER THIS MATTER

Nowhere in the 25 pages that the Union devotes to its request that this Court retain jurisdiction over this matter does the Union cite *any* authority supporting the proposition that this Court has the power to do so. Nor does the Union cite *any* authority for the proposition that bias may be presumed based on the political affiliation of agency decision makers or disagreements over how they interpret the law.

The Union does not cite such authority because it cannot. Continuing appellate jurisdiction is not permitted by the Statute, by the APA, or any other source of law. Even if such a remedy were available, it would be inappropriate here because the Union offers no evidence that an improper motive tainted the Authority's Decision, much less the strong showing necessary to overcome the presumption that the Authority rendered the Decision in good faith.

In any event, the Court need only reach the Union's extraordinary request that it maintain continuing jurisdiction over this matter if it finds that the Authority's Decision is not supported by substantial evidence. If this Court comes to that conclusion, it should remand this case for further consideration in light of the Court's

decision. *Cf. Nat'l Treasury Emps. Union v. FLRA*, 392 F.3d 498, 500-01 (D.C. Cir. 2004) (remanding case for further proceedings where Authority test for the timeliness of ULP charges was contrary to the Statute).

A. This Court Lacks the Power to Assert Continuing Jurisdiction Over this Matter

Apparently believing that this Court will take the role that the arbitrator was forced to relinquish, the Union asks the Court to assume what amounts to perpetual jurisdiction over this matter until an unspecified time in the future. (Br. 50-52.) The Court should reject that request.

It is axiomatic that, "[f]ederal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 257 (2013) (internal quotation marks and citation omitted). To establish jurisdiction in a court of appeals, "'[t]he Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it.'" *Micei Int'l v. Dep't of Commerce*, 613 F.3d 1147, 1151 (D.C. Cir. 2010) (quoting *Mayor v. Cooper*, 73 U.S. 247, 252 (1868)). In this case, the Statute and sections of the APA provide this Court with jurisdiction to hear the Union's Petition for Review. Those sources do not permit this Court to retain continuing jurisdiction over this matter.

Congress outlined the limits of this Court's ability to review Authority decisions in Section 7123 of the Statute. That section permits the courts of appeals to only:

"grant any temporary relief . . . 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." 5 U.S.C. § 7123(c). The Statute does not authorize the courts of appeals to retain perpetual jurisdiction over specific Authority cases. Indeed, the retention of such jurisdiction by this Court would eviscerate the power of the Authority to adjudicate the federal labor-management cases that "were committed to the [Authority's] care by" Congress. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984); *see* 5 U.S.C. § 7105(a)(1), (2)(G) ("[t]he Authority shall provide leadership in establishing policies and guidance related to matters under [the Statute and shall] . . . . resolve complaints of unfair labor practices").

Nor does Section 706 of the APA, which Congress incorporated by reference into the Statute (*see* 5 U.S.C. § 7123(c) ("[r]eview of the Authority's order shall be on the record in accordance with section 706 of this title[]")), provide a basis for continuing jurisdiction by this Court. That provision permits courts of appeals only to compel agencies to act in accordance with law and set aside unlawful agency decisions. 5 U.S.C. § 706(1), (2). Moreover, the power of a reviewing court to compel agency actions is limited to "discrete agency action[s] that [the agency] is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). It does not

give reviewing courts the authority to "specify what the action[s] must be," which this Court's continued monitoring of a case would entail. *Id.* at 65.

The Union's request that this Court exercise continuing jurisdiction over this matter should therefore be denied.

B. The Union's Allegations of Bias and Violations of Due Process are Frivolous

This Court should reject the Union's baseless accusations that the Decision is premised on anything other than a review of record evidence and application of the Statute that the Authority is charged with implementing. The Union provides no probative evidence to back up its wild claims. Nor does it provide case law supporting its assertions. It does not do so because even a cursory review of that law demonstrates that the Union's accusations are frivolous.

"Courts have long recognized 'a presumption of honesty and integrity in those serving as adjudicators.'" *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 573 (D.C. Cir. 1982) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)) ("*PATCO*"). "Absent a strong showing to the contrary, an agency adjudicator is presumed to act in good faith and to be capable of ignoring considerations not on the record." *PATCO*, 685 F.2d at 573 (citations omitted). A party claiming that it has been denied due process because of bias bears the burden of showing "a risk of actual bias or prejudgment." *Withro*w, 421 U.S. at 47. To meet that burden, the Union must do

more than accuse Authority Members of holding "'an underlying philosophy with respect to an issue in dispute.'" *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) (quoting *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1208 (D.C. Cir. 1980)). Rather, the Union must prove that Authority Members have "'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" *Nuclear Info.*, 509 F.3d at 571 (quoting *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970)).

The Union utterly fails to make such a showing. Other than disagreeing with the Decision, the only "evidence" the Union provides of alleged bias is a bare tally of alleged "wins" and "losses" divorced from any of the facts or law that produced those results. (Br. Add. A1-A13.) The Supreme Court, however, has made it plain that, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. U.S.*, 510 U.S. 540, 555 (1994). This Court has, in turn, applied that standard to administrative proceedings. *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 944 (D.C. Cir. 1999) ("Although the ALJ could have been more restrained in his language . . . there was nothing to suggest the kind of bias or partiality that requires judicial disqualification.") (citing *Liteky*, 510 U.S. at 555–56).

The Union has provided no evidence that the Authority Members were motivated by anything other than the law. In fact, the evidence that it has presented

suggests just the opposite. The Member biographies that the Union lists on pages 28-32 of its brief demonstrate that the Authority's Members collectively have over a century of civil-service experience in the field of labor law, with approximately 50 of those years devoted exclusively to federal-sector labor law. (*See* Br. 28-32.) Given the Union's inability to produce *any* evidence that Authority Members have "demonstrably made up [their] mind[s] about important and specific factual questions and [are] impervious to contrary evidence," this Court should presume that the Authority's Decision is based on the Members' deep understanding of the law, not bias. *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998) (internal alterations and quotations omitted).[9]

Finally, the FEA claims that unions only win cases before the Authority when agencies are unable to overcome "insurmountable procedural grounds" such as

[9] A review of the portions of the FLRA's Arbitration Guide (available at: https://go.usa.gov/xPu2V) the Union quotes (Br. 36-49), demonstrates that the Union would be unsuccessful in disqualifying an arbitrator based on the alleged evidence of "bias" that it has provided to this Court. The Arbitration Guide's provisions for determining arbitrator bias are based on law applied by federal courts. (*See* Br. 41 & n.320 (citing *Am. Fed'n of Gov't Emps., Local 3979, Council of Prisons Locals*, 61 FLRA 810, 813 (2006).) According to the Arbitration Guide, "[t]o establish that an award is deficient because the arbitrator was biased, a party must show that an award was procured by improper means, that the arbitrator was partial or corrupt, or that the arbitrator engaged in misconduct that prejudiced the parties' rights." (Br. 41 & n.318 (citing *Nat'l Treasury Emps. Union, Chapter 299*, 68 FLRA 835 (2015).) The Union has provided *no* proof of such conduct.

"missed filing deadlines." (Br. 33.) Missing a deadline is precisely the ground on which the Authority dismissed the Union's complaint.

The Union's frivolous claims of bias should thus be rejected.

CONCLUSION

For the foregoing reasons, the Authority respectfully requests that this Court deny the Union's Petition for Review.

Respectfully submitted,

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December 6, 2018

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

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i), I hereby certify that this brief is double-spaced (except for extended quotations, headings, and footnotes) and is proportionally spaced, using Garamond font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 13,000 words. It contains 7,381 words excluding exempt material.

/s/ Rebecca J. Osborne
Rebecca J. Osborne
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on counsel of record and that service will be accomplished by the CM/ECF system.

/s/ Rebecca J. Osborne
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ADDENDUM 1

STATUTORY PROVISIONS

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. § 7105(a). 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. § 7116(a). 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. § 7118(a). Prevention of unfair labor practices

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

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

(A) of the charge;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability

of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.