ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

No. 19-1065

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

INDEPENDENT UNION OF PENSION EMPLOYEES FOR DEMOCRACY AND JUSTICE,

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 (the "Authority") were the Pension Benefit Guaranty Corporation and the Independent Union of Pension Employees for Democracy and Justice (the "Union"). In this Court proceeding, the Union is the Petitioner and the Authority is the Respondent.

B. Ruling Under Review

The Union seeks review of the Authority's final order in *Independent Union of Pension Employees for Democracy & Justice*, 70 FLRA 820 (No. 164) (Sept. 24, 2018) (Member DuBester concurring), *reconsideration denied*, 71 FLRA (No. 14) 60 (Mar. 7, 2019) (Member DuBester concurring).

C. Related Cases

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

/s/ Rebecca J. Osborne
Rebecca J. Osborne
Deputy Solicitor
Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Add.2	Addendum 2, Supplemental Documents (Bound Separately)
Agency	Pension Benefit Guaranty Corporation
ALJ	Administrative Law Judge
Authority	Respondent, the Federal Labor Relations Authority
Br.	Petitioner's Principal Brief in Support of Petition for Review
CBA	A Collective Bargaining Agreement
FLRA	Respondent, the Federal Labor Relations Authority
IUPEDJ	Petitioner, Independent Union of Pension Employees for Democracy & Justice
JA	Joint Appendix
MOA	Memorandum of Agreement between the Agency and its Exclusive Representative, dated September 20, 2011
NLRA	The National Labor Relations Act
NLRB	National Labor Relations Board
Petitioner	Petitioner, Independent Union of Pension Employees for Democracy & Justice
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
Union	Petitioner, Independent Union of Pension Employees for Democracy & Justice
UPE	Union of Pension Employees, the exclusive-representative predecessor of Petitioner, IUPEDJ

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION[1]

This case concerns whether the Federal Labor Relations Authority ("FLRA," or "Authority") reasonably concluded that the Independent Union of Pension Employees for Democracy & Justice ("IUPEDJ," the "Union," or the "Petitioner") committed unfair labor practices ("ULPs") by violating its obligations under a 2011 collective bargaining agreement ("CBA") and memorandum of agreement ("MOA") agreed to by the Pension Benefit Guaranty Corporation (the "Agency") and its employees' exclusive representative. In relevant part, the CBA and MOA provided that a panel of five pre-identified arbitrators would hear all party grievances.

IUPEDJ, which became the Agency's employees' exclusive representative after the CBA and MOA were executed, was unwilling to be bound by those agreements. It began a systematic campaign to dismantle the arbitrator panel by engaging in behavior that the Administrative Law Judge ("ALJ") who adjudicated the ULP

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[1] References to the Union's Opening brief are cited as "Br. ___"; references to the Joint Appendix are cited as "JA ___" and references to the supplemental documents in Addendum 2, which is separately bound, are cited as "Add.2 Ex. at ___."

The Authority decision that is the subject of this Petition for Review *Independent Union of Pension Employees for Democracy & Justice*, 70 FLRA 820 (2018) (Member DuBester concurring), is cited as "Decision" or "*Dec.*" and is located at Add.2 Ex. 17. The Authority's decision on the Union's motion for reconsideration, *Independent Union of Pension Employees for Democracy & Justic*e, 71 FLRA 60 (2019) (Member DuBester concurring), is cited as "*Recons. Dec.*" and is located at Add.2 Ex. 18.

complaints, found to be "reprehensible"[2]—including harassing arbitrators, falsely accusing them of ethical violations, and resisting participation in arbitrations. When one of those arbitrators, Arbitrator James Conway, refused to be intimidated by the Union's tactics, IUPEDJ refused to pay him—forcing him to bring an action in small claims court to recover his fees. Based on ample evidence and applicable statutory precedent, the Authority reasonably decided that IUPEDJ's threats and coercion constituted a ULP under § 7116(b)(1) and (5) of the Federal Service Labor Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018) (the "Statute"). Its remedy for the ULPs focused on ending IUPEDJ's illegal behavior and placing the parties in the position they would have been in but for the ULPs. The Authority therefore ordered IUPEDJ to comply with the CBA and MOA, to offer Arbitrator Conway and another arbitrator the opportunity to rejoin the arbitrator panel, and electronically distribute a notice concerning the order.

The Authority had subject matter jurisdiction over this ULP case pursuant to §§ 7116 and 7118(a) of the Statute. The Authority's final order is published at 70 FLRA 820, 825 (No. 164) (2018) (Member DuBester concurring), *reconsideration denied*,

[2] The ALJ's decision is located at *Indep. Union of Pension Emps. for Democracy & Justice*, 70 FLRA 820, 831-49 (2018) of Add.2 Ex. 17 and is cited as "*ALJ*." The ALJ's analysis of the ULP complaints begins, "While the Union maintains that its reprehensible behavior in these cases did not violate the Statute, its arguments are unconvincing." *ALJ*, 70 FLRA at 845.

71 FLRA 60 (No. 14) (2019) (Member DuBester concurring). The Union's Petition for Review was timely filed within 60 days of the Authority's final order denying reconsideration. 5 U.S.C. § 7123(a).

STATEMENT OF ISSUES PRESENTED

1. Whether the Authority reasonably determined that the Union committed ULP under § 7116(b)(1) and (5) of the Statute by denying bargaining unit employees and the Agency access to the grievance procedures provided for in the CBA and MOA to which the Agency and IUPEDJ were subject.

2. Whether the Authority reasonably determined that the Union's attempts to induce Arbitrators Feigenbaum and Conway to resign from the arbitrator panel were threatening or coercive under 5 U.S.C. § 7116(e).

3. Whether the Authority reasonably determined that the Union failed to establish that its speech was a matter of public concern under the First Amendment to the Constitution and whether the Union has waived its right to assert any new arguments that: a) its speech involved a matter of public concern, and b) its interest in that speech outweighed the government's interest in preventing ULPs.

4. Whether the Authority reasonably determined that the nontraditional remedy of inviting Arbitrators Feigenbaum and Conway to return to the arbitrator panel "would be effective to recreate the conditions and relationships with which the

[ULPs] interfered as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct."

5. Whether the Union failed to establish: a) reasonable grounds for not timely informing the Authority of Arbitrator Conway's move, and b) that evidence of Arbitrator Conway's move is material to the Authority's Decision, given that the CBA and MOA do not refer to arbitrators' residential locations.

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

This matter concerns two ULP complaints filed by the FLRA's Office of General Counsel against IUPEDJ for violations of §§ 7116(b)(1) and (5) of the Statute. The dispute arises from a CBA and MOA that the Agency and the Union of Pension Employees ("UPE"), IUPEDJ's predecessor union, executed in 2011. The agreements provided that a rotating panel of five pre-selected, permanent arbitrators would resolve all grievances. Later that year, IUPEDJ replaced UPE as the exclusive representative of bargaining unit employees at the Agency.

Under the Statute, a party to a CBA commits a ULP when it refuses to abide by mandatory provisions of that agreement. 5 U.S.C. § 7116(b)(5). It is well established

that the terms of a CBA remain in force until the parties negotiate a new contract. *Indep. Union of Pension Emps. for Democracy & Justice*, 68 FLRA 999, 1004 (2015) ("*IUPEDJ 2015*") (citing *Dep't of the Air Force, 35th Combat Support Group (TAC), George Air Force Base, Cal.*, 4 FLRA 22, 23 (1980) ("*George AF Base*")), *reconsideration denied*, *Indep. Union of Pension Emps. for Democracy & Justice*, 69 FLRA 158, 159-61 (2016) ("*Recons. IUPEDJ 2015*").[3] Moreover, the benefits and obligations of an existing CBA inure to successor parties. *IUPEDJ 2015*, 68 FLRA at 1004 (citing *U.S. Nuclear Regulatory Comm'n*, 6 FLRA 18, 19-20 (1981)).

Similarly, depriving employees of their access to grievance procedures in a CBA is a ULP under § 7116(b)(1) because it interferes with employees' rights under the Statute. *Cf. George AF Base*, 4 FLRA at 22-23, 29 (agency violated 5 U.S.C. § 7116(a)(1) by refusing to process an employee's grievance and by telling employee that she had no rights under the grievance procedure because an agreement had expired).

In this case, IUPEDJ repeatedly denied that it was bound by the CBA and MOA arbitration provisions, resisted complying with those provisions, and actively sought the resignation of the arbitrators to whom the Agency and predecessor union

[3] *IUPEDJ 2015*, 68 FLRA 999 (2015) is located at Add.2 Ex. 10. *Recons. IUPEDJ 2015*, 69 FLRA 158 (2016) is located at Add.2 Ex. 11.

had agreed in the MOA. IUPEDJ demanded *ex parte* interviews with the arbitrators, sent them letters asking them to resign and accusing them of unethical conduct, and refused to pay them for their services. It continued to resist compliance with the CBA and MOA even after the Authority issued decisions in 2015 and 2016 that addressed, at length, the Union's obligation to comply with those agreements. *See IUPEDJ 2015*, 68 FLRA at 1004, 1006.

The FLRA's General Counsel issued ULP complaints in 2014 and 2016 alleging, *inter alia*, that IUPEDJ committed ULPs under § 7116(b)(1) and (5) by failing to comply with the CBA and MOA grievance procedures, particularly with respect to the selection of arbitrators. *ALJ*, 70 FLRA at 831; (Add.2 Exs. 13, 15.) The ALJ consolidated those cases. *ALJ*, 70 FLRA at 831; (Add.2 Ex. 16.) The General Counsel moved for summary judgment, which the ALJ granted in part. *ALJ,* 70 FLRA at 848. The ALJ ordered IUPEDJ to comply with the CBA and MOA, to invite Arbitrator Feigenbaum back onto the arbitrator panel, and to post and electronically distribute a notice concerning his order. *Id.*

The Authority (Chairman Kiko and Member Abbott, Member DuBester concurring) adopted the ALJ's decision and order, modifying it only to require the Union to also invite Arbitrator Conway to return to the arbitrator panel. *Dec.*, 70 FLRA at 820, 827. The Union moved for reconsideration, which the Authority

denied. *Recons. Dec.*, 71 FLRA at 60, 62. Four days after the Authority issued its Decision denying the Union's motion for reconsideration, the Union attempted to supplement the record with information that Arbitrator Conway had moved to Minnesota. (Add.2 Ex. 19.) As the Authority had closed the record when it denied IUPEDJ's motion for reconsideration, the Authority did not consider IUPEDJ's submission and it is not a part of the record of this case.

IUPEDJ filed with this Court a Petition for Review on March 13, 2019, and a motion to stay the Authority's order on March 29, 2019. This Court denied the stay motion on June 4, 2019.

STATEMENT OF THE FACTS

I. The Agency and its prior exclusive representative agree to create an arbitrator panel

On May 3, 2011, the Agency and the UPE, Petitioner's predecessor union, entered into a CBA. (JA at 4.) Article 2, Section 3(B)(1) of the CBA provided that, for purposes of resolving disputes, the Agency and its employees' exclusive representative (then UPE) would mutually select a panel of five arbitrators to serve on a rotating basis. (JA at 7.) Pursuant to Article 2, Section 3(B)(1), the Agency and UPE agreed upon a panel of five arbitrators, and on September 20, 2011, the Agency and UPE signed a Memorandum of Agreement ("MOA") identifying the following

individuals as members of the panel: James Conway, Charles Feigenbaum, Allen Foster, Joshua Javits, and Seymour Strongin. (JA at 8.)

II. IUPEDJ attempts to dismantle the arbitrator panel by harassing, threatening, and stonewalling the arbitrators

Later that year, IUPEDJ replaced UPE as the exclusive representative of bargaining unit employees at the Agency. *ALJ*, 70 FLRA at 834; (Add.2 Ex. 1.) On January 18, 2013, the Agency informed Arbitrators Conway and Feigenbaum in separate emails that they had been selected to hear grievances. *ALJ*, 70 FLRA at 834-35; (Add.2 Ex. 2 at 5, Ex. 3 at 14.)

In an email dated January 23, 2013, IUPEDJ told Arbitrator Feigenbaum that it wanted to interview him before agreeing to permit him to arbitrate disputes with the Agency. *ALJ*, 70 FLRA at 835; (Add.2 Ex. 2 at 4.) He declined, stating that he did not believe an *ex parte* interview was appropriate. *ALJ*, 70 FLRA at 835; (Add.2 Ex. 2 at 6.) IUPEDJ responded by asking Feigenbaum to resign, which he did on February 5, 2013. *ALJ*, 70 FLRA at 835-36; (Add.2 Ex. 2 at 7, 12.)

On February 14, 2013, the Agency notified Arbitrator Foster that he had been selected to hear a grievance, because the arbitrator previously selected—Arbitrator Feigenbaum—had withdrawn from the panel, and Arbitrator Foster's name was next on the alphabetical list. *ALJ*, 70 FLRA at 838; (Add.2 Ex. 4 at 37.) IUPEDJ informed Arbitrator Foster that it did not agree to him arbitrating disputes. *ALJ*, 70

FLRA at 838; (Add.2 Ex. 4 at 36.) Arbitrator Foster effectively resigned from the arbitrator panel, informing the parties that he was not "prepared to be your arbitrator unless both sides have consented or do consent." *ALJ*, 70 FLRA at 838; (Add.2 Ex. 4 at 36.)

On December 3, 2013, Arbitrator Strongin informed the Agency that he would not participate in further cases involving the Agency, citing difficulties he had collecting his fees from IUPEDJ in an earlier case. *ALJ*, 70 FLRA at 838; (Add.2 Ex. 5.)

On May 23, 2014, the Agency informed Arbitrator Javits that he had been selected from the panel in alphabetical order to hear an institutional grievance. *ALJ*, 70 FLRA at 838-39; (Add.2 Ex. 6 at 43-44.) When Arbitrator Javits offered to schedule a hearing, IUPEDJ responded: "We are a new Union[.] We never selected you[.]" *ALJ*, 70 FLRA at 839; (Add.2 Ex. 6 at 42.) In late 2014, the Agency again attempted to proceed with the arbitration, and Arbitrator Javits informed the parties that he was available for a conference call. *ALJ*, 70 FLRA at 839; (Add.2 Ex. 8 at 75-76.) In an email dated December 1, 2014, IUPEDJ threatened Arbitrator Javits by suggesting that by refusing to resign, he had violated the Federal Mediation and Conciliation Service Code of Professional Responsibility for Arbitrators of Labor Disputes (the "arbitrator ethics code"). *ALJ*, 70 FLRA at 839; (Add.2 Ex. 8 at 73-74.)

IUPEDJ attached a copy of Arbitrator Feigenbaum's resignation letter. *ALJ*, 70 FLRA at 839; (Add.2 Ex. 8 at 074.)

IUPEDJ's conduct with respect to Arbitrator Conway was similar, but more sustained, because he resisted the Union's efforts to force his resignation. As it had done with Arbitrator Feigenbaum, IUPEDJ asked Arbitrator Conway to submit to an interview, and subsequently asked him to resign. *ALJ*, 70 FLRA at 835; (Add.2 Ex. 3 at 13-15.) The Agency, however, informed Arbitrator Conway that it opposed his withdrawal from the arbitrator panel. *ALJ*, 70 FLRA at 836; (Add.2 Ex. 3 at 19.)

After procuring Arbitrator Feigenbaum's resignation, IUPEDJ sent a copy of his resignation to Arbitrator Conway and asked him to read it. *ALJ*, 70 FLRA at 836-38; (Add.2 Ex. 3 at 20-21.) The following week, IUPEDJ again sent Arbitrator Feigenbaum's resignation letter to Arbitrator Conway, and asked if he had considered the letter. *ALJ*, 70 FLRA at 836; (Add.2 Ex. 3 at 22-23.) Arbitrator Conway responded that parties often use requests for recusals to delay arbitrations, find a more favorable forum, or intimidate neutrals. *ALJ*, 70 FLRA at 836; (Add.2 Ex. 3 at 25.) He further wrote that he "did not intend to recuse himself, absent compelling support for the motion." *ALJ*, 70 FLRA at 836; (Add.2 Ex. 3 at 25.) He asked the parties to schedule a pre-hearing conference. *ALJ*, 70 FLRA at 836; (Add.2 Ex. 3 at 25.) IUPEDJ replied:

> The Union has not requested your recusal. . . . The Union has simply asked that you consider voluntarily resigning from an arbitration panel where this Union had absolutely no role. See example of Arbitrator Feigenbaum voluntarily resigning. . . .
>
> There is no need for any call. There is nothing to discuss. Please just let us know if you wish to voluntarily resign, as Arbitrator Feigenbaum did . . . and as other arbitrators have been willing to do.
>
> The Union does not wish to participate in any discussion now about any particular case. The Union is not agreeable to paying any fees or costs that are not [sic] associated with any particular case.
>
> In sum, please simply let us know if you wish to voluntarily resign from the panel.

ALJ, 70 FLRA at 836-37; (Add.2 Ex. 3 at 24-25.) On February 16, 2013, Arbitrator Conway responded that IUPEDJ's request was the equivalent of asking him to recuse himself. *ALJ*, 70 FLRA at 837; (Add.2 Ex. 3 at 24.) He requested that the parties meet with him to discuss the matter. *ALJ*, 70 FLRA at 837; (Add.2 Ex. 3 at 24.)

On February 21, 2013, IPEDJ responded with a letter with the subject line "Request That You Reconsider Your Resignation in Light of Ethics Violations." *ALJ*, 70 FLRA at 837-38; (Add.2 Ex. 3 at 27-029.) IUPEDJ wrote that by refusing to voluntarily resign, Arbitrator Conway was violating the arbitrator ethics code. *ALJ*, 70 FLRA at 837-38; (Add.2 Ex. 3 at 27.) IUPEDJ again referred to Arbitrator Feigenbaum's resignation; asked Arbitrator Conway to "confirm [his] resignation"; accused him of "fabricat[ing]" a recusal motion; and questioned his competency, fairness, and professionalism. *ALJ*, 70 FLRA at 837-38; (Add.2 Ex. 3 at 28-29.)

In the fall of 2013, the Agency filed a grievance alleging that IUPEDJ retaliated against an employee by publishing an article in its newsletter calling her a "traitor" and warning other employees to "beware of" and "avoid" her. *IUPEDJ 2015*, 68 FLRA at 1000. The parties proceeded to arbitration before Arbitrator Conway (the "newsletter arbitration"). *ALJ*, 70 FLRA at 838. In September 2014, Arbitrator Conway issued an award sustaining the Agency's grievance. *ALJ*, 70 FLRA at 839; (Add.2 Ex. 7.)

Arbitrator Conway notified the parties in December 2014 that IUPEDJ had refused to pay its portion of his arbitration fees for the newsletter arbitration. *ALJ*, 70 FLRA at 839; (Add.2 Ex. 9.) Ultimately Arbitrator Conway was forced to file actions in small claims court to recover his fees. IUPEDJ resolved the matter on October 2015, on the condition that Arbitrator Conway resign from the panel—the outcome IUPEDJ had sought for two years. (JA at 16-17.) Arbitrator Conway resigned from the panel on December 1, 2015. (JA at 15.)

In the meantime, IUPEDJ filed numerous exceptions to Arbitrator Conway's award. *IUPEDJ 2015*, 68 FLRA at 999-1000. The Authority dismissed, in part, and denied in part, IUPEDJ's exceptions. *Id.* at 1014. The Authority also determined that IUPEDJ and the Agency were bound by the CBA's arbitration provisions and found that Arbitrator Conway's appointment to the arbitrator panel was valid. *Id.* at 1003-14. The Authority reaffirmed that Decision when IUPEDJ moved for

reconsideration. *Indep. Union of Pension Emps. for Democracy & Justice*, 69 FLRA 158, 159-61 (2016).

The Agency filed ULP charges against IUPEDJ in 2013 and 2015. *ALJ*, 70 FLRA at 831; (Add.2 Exs. 10, 12.) The FLRA's General Counsel issued ULP complaints against the Union in October 2014 and January 2016, alleging, *inter alia*, that IUPEDJ resisted complying with the terms of the CBA and MOA with respect to the selection and payment of arbitrators and arbitration procedures, and thus that IUPEDJ committed a ULP under § 7116(b)(1) and (5) of the Statute. *ALJ*, 70 FLRA at 831; (Add.2 Exs. 11, 13.) The ALJ consolidated the cases. *ALJ*, 70 FLRA at 831; (Add.2 Ex. 14.)

The General Counsel filed a summary judgment motion that the ALJ granted in part. *ALJ*, 70 FLRA at 831-32. The ALJ determined that IUPEDJ was bound by Article 3, Section 3(B) of the CBA. He further found that the IUPEDJ was bound by the MOA, and the arbitration panel selected therein, even though a prior union had negotiated those agreements. *Id.* at 842. He also found that IUPEDJ's refusal to give effect to those grievance and arbitration procedures, and its actions to dismantle the arbitrator panel by soliciting the resignations of Arbitrators Conway, Feigenbaum, and Javits, violated § 7116(b)(1) and (5) of the Statute. *Id.* at 842-44, 847-48.

With respect to relief, the ALJ ordered the nontraditional remedy of requiring IUPEDJ to make a good faith effort to bring Arbitrator Feigenbaum back into the arbitrator panel. *Id.* at 848. He found that this nontraditional remedy was appropriate because it would "recreate the conditions and relationships with which the ULP[s] interfered, and . . . deter[] future violations." *Id.* (citing *Am. Fed'n of Gov't Emps., AFL-CIO*, 21 FLRA 986, 989 (1986)). The ALJ determined that the same remedy was not appropriate with respect to the following arbitrators: 1) Arbitrator Conway, because he resigned after the Agency filed the ULP charges; 2) Arbitrator Foster, because there was insufficient evidence that IUPEDJ's ULPs caused his resignation; and 3) Arbitrator Strongin, because his resignation occurred outside of the time period for the ULP charges. *ALJ*, 70 FLRA at 848.

The Authority adopted the ALJ's decision and agreed that the use of the nontraditional remedy was appropriate on September 24, 2018. *Dec.*, 70 FLRA at 826-27. It found, however, that IUPEDJ should also offer Arbitrator Conway the opportunity to return to the arbitrator panel because IUPEDJ had committed ULPs with respect to him. *Dec.*, 70 FLRA at 827. The Authority noted that it could consider events that occurred after the Agency filed a ULP charge to remedy the harm that comes from pre-charge activities. *Id.* (citing *Dep't of Health & Human Services, Soc. Sec. Admin. Dall. Region, Dall., Tex.*, 32 FLRA 521, 525-26 (1988) ("*SSA*")). It

concluded that, although Arbitrator Conway had resigned after the Agency filed a ULP charge, it was necessary to consider his resignation to remedy the harm caused by the Union's ULPs. *Dec.*, 70 FLRA at 827 (citing *SSA*, 32 FLRA at 525-26).

Following the initial Decision, IUPEDJ moved for reconsideration and a stay. *Recons. Dec.*, 71 FLRA at 60-62. On March 7, 2019, the Authority issued a decision denying those motions. *Id.* The Authority specifically rejected the Union's argument that the Decision conflicted with IUPEDJ's settlement with Arbitrator Conway. *Id.* at 62 n.22. It observed that IUPEDJ did not cite language from the agreement showing how the agreement conflicted with the Authority's remedy or why the agreement would bar the Union from inviting Arbitrator Conway to rejoin the arbitrator panel. *Id.*

On March 11, 2019, four days after the Authority denied IUPEDJ's motion for reconsideration, the Union filed a submission with FLRA attempting to supplement the record. (Add.2 Ex. 19.) In its submission, IUPEDJ claimed that, following the Authority's initial September 2018 Decision, it discovered that Arbitrator Conway had moved to Minnesota. (*Id.*) IUPEDJ claimed that Arbitrator Conway's move meant that including him on the arbitrator panel would impose an unanticipated burden on the parties, and that the Authority should reconsider its Decision on that ground. (*Id.*)

As the Authority had closed the record when it denied IUPEDJ's motion for reconsideration, the Authority did not consider IUPEDJ's tardy submission.

IUPEDJ filed a Petition for Review on March 13, 2019. On March 29, 2019, IUPEDJ filed a Motion for a Stay, and on April 15, 2019, the Authority filed a brief in opposition to the motion. On July 22, 2019, IUPEDJ filed a revised brief in support of its Petition for Review. This Court denied the Union's stay motion on June 4, 2019.

SUMMARY OF ARGUMENT

The Union committed ULPs under § 7116(b)(1) and (5) of the Statute when it refused to give effect to the grievance procedures agreed to by its predecessor union, UPE, and the Agency. Under § 7116(b)(5), it is a ULP for a Union to refuse to abide by the mandatory provisions of a CBA, even where that agreement has expired, and even where a predecessor union negotiated the agreement. By refusing to abide by the grievance procedures set out in the CBA and MOA, the Union denied bargaining-unit employees access to those procedures, in violation of § 7116(b)(1) of the Statute. Contrary to the Petitioner's assertions, the CBA did not require the selection of a new arbitrator panel upon IUPEDJ's succession as the exclusive representative of bargaining unit employees at the Agency.

Similarly unavailing are Petitioner's contentions that its communications with Arbitrators Feigenbaum and Conway fall within the scope of the protection of § 7116(e) of the Statute. Petitioner's communications were not "personal views, arguments or opinions." As both the Authority and ALJ correctly determined, Union officials communicated on behalf of the Union, not themselves as individuals. Moreover, the Petitioner's efforts to browbeat Arbitrators Feigenbaum and Conway were threatening and coercive in nature, and thus were not protected under § 7116(e).

Nor has the Union demonstrated that the Authority exceeded its statutory authority by directing IUPEDJ to invite Arbitrator Conway to rejoin the arbitrator panel. The Petitioner contends that a settlement agreement in which Arbitrator Conway agreed to resign from the arbitrator panel bars this relief. However, the Union has not explained how the Authority's order that the Union invite Arbitrator Conway to rejoin the panel violates the terms of the agreement. The Authority was not a party to the agreement and is not bound by it. Moreover, the agreement does not prohibit the Union from inviting Arbitrator Conway to return, nor does it bar him from accepting such an invitation. To treat the settlement as a bar to the Authority's order would permit the Petitioner to end-run the Statute.

Petitioner's claim that its communications constituted protected speech under the First Amendment also fails. As an initial matter, the Union did not explain below

how its statements involved a matter of public concern, and thus has waived further arguments on this subject. Nor does the Union now explain how its demands for the resignation of Arbitrators Feigenbaum and Conway implicated a matter of public concern. Even if those communications did implicate a matter of public concern, the Government's interest in preventing ULPs outweighs the Union's interest in making baseless, coercive statements to the arbitrators.

Finally, the Union has not shown that its evidence concerning Arbitrator Conway's change in residence was material or that there were reasonable grounds for its failure to submit that evidence during the proceedings before the Authority. Accordingly, the Court should decline to order that evidence to be taken before the Authority pursuant to § 7123(c) of the Statute.

STANDARD OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *Ass'n of Civilian Techs., Mont. Air Chapter No. 29 v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("*Chevron*")). This Court defers to the Authority's construction of the Statute, *U.S. Dep't of Air Force v. FLRA*, 949 F.2d 475, 480 (D.C. Cir. 1991), as "'Congress . . . clearly delegated to the Authority the responsibility in the first instance to construe

the [Statute]." *Nat'l Treasury Emps. Union v. FLRA*, 754 F.3d 1031, 1041 (D.C. Cir. 2014) ("*NTEU 2014*") (quoting *Library of Cong. v. FLRA*, 699 F.2d 1280, 1284 (D.C. Cir. 1983)).

Courts uphold Authority decisions unless they are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *NTEU 2014*, 754 F.3d at 1041 (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 Administrative Procedure Act standards of review). The scope of such review is narrow. *See, e.g.*, *Am. Fed. of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 722 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974)).

This Court reviews the Union's challenges to the Authority's legal determinations under the two-step *Chevron* framework. Where Congress "has directly spoken to the precise question at issue," this Court "give[s] effect to [its] unambiguously expressed intent," but if the statute is silent or ambiguous this Court defers to the Authority's interpretation so long as it is "based on a permissible construction of the statute." *Nat'l Treasury Emps. Union v. FLRA*, 414 F.3d 50, 57 (D.C. Cir. 2005) ("*NTEU 2005*") (quoting *Chevron,* 467 U.S. at 842–43); *see also NTEU 2014,* 754 F.3d at 1041. In contrast, the Court "owes no deference to [an] agency's pronouncement on a constitutional question." *J.J. Cassone v. NLRB*, 554 F.3d 1041,

1044 (D.C. Cir. 2009) (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1173-74 (D.C. Cir. 1980)). Accordingly, the Court reviews constitutional claims de novo. *Id.*

The Authority's findings of fact 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)). 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 decisionmakers might "draw[] two inconsistent conclusions from the evidence does not prevent [the Authority's] finding from being supported by substantial evidence." *Sec. Exch. Comm'n*, 568 F.3d at 995 (quoting *Consolo*, 383 U.S. at 620).

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

ARGUMENT

I. The Authority reasonably determined that the Union violated § 7116(b)(1) and (5) of the Statute

The record and relevant precedent firmly support the Authority's determination that the Union's attempts to dismantle a negotiated panel of arbitrators constituted ULPs.

A union commits a ULP under § 7116(b)(5) when it refuses to abide by mandatory provisions of a CBA. A union's obligation to abide by a CBA continues even if a predecessor union negotiated the agreement. *IUPEDJ 2015*, 68 FLRA at 1004 (citing *U.S. Nuclear Regulatory Comm'n*, 6 FLRA at 19-20). The Authority has determined that such continuation is appropriate because it "enhances the stability of a new bargaining relationship" and helps in resolving disputes "through the

arbitration process with finality, speed, and economy." *IUPEDJ 2015*, 68 FLRA at 1004 (quotations, alteration, and citations omitted).

A union's obligation to comply with a CBA continues even after the agreement has expired, until the parties agree to a new CBA. *See IUPEDJ 2015*, 68 FLRA at 1004; *Am. Fed'n of Gov't Emps., AFL-CIO*, 21 FLRA 986, 987-88 (1986) (by rescinding memorandum of understanding and refusing to abide by its terms, union violated 5 U.S.C. § 7116(b)(5)); *cf. Dep't of Health & Human Servs., Soc. Sec. Admin.*, 44 FLRA 870, 881 (1992) ("*HHS*") (finding ULP where agency changed mandatory subject of bargaining upon expiration of agreement); *Dep't of the Air Force 35th Combat Support Grp. (Tac) George Air Force Base, Cal. Activity*, 4 FLRA 22, 23, 29 (1980) ("*George AF Base*") (adopting ALJ's finding that the rights and privileges accorded to a union by an agreement "continue until a new agreement is reached or impasse results from negotiations").

Similarly, depriving employees of their access to grievance procedures is a ULP under § 7116(b)(1) because it interferes with employees' rights under the Statute. *Cf. AFGE, Local 2782*, 21 FLRA 339, 339, 350-51 (1986) (adopting ALJ's finding that the union violated § 7116(b)(1) when it refused to proceed to arbitration concerning agency grievances); *George AF Base*, 4 FLRA at 22-23, 29 (adopting ALJ's finding that the agency violated § 7116(a)(1) by refusing to process an employee's grievance and by

telling employee that she had no rights under the grievance because an agreement had expired).

Here, the Authority reasonably determined that the Union committed a ULP under both § 7116(b)(1) and (5) by interfering with and restraining the rights of Agency employees to access the grievance and arbitration procedures provided for in the CBA and MOA. *Dec.*, 70 FLRA at 825. The pertinent section of the CBA is Article 2, Section 3(B)(1), which, in relevant part, provides for the mutual selection of a five-member arbitrator panel:

> Within thirty (30) days of implementation of this Agreement, the Parties will exchange lists of the names of ten (10) arbitrators they deem acceptable to serve as arbitrator for disputes under this Agreement. Up to five arbitrators common on both Parties' lists will be informed of their selection to serve as members of a rotating panel. If there are not five (5) names common to both lists, the Parties will repeat the process until five (5) common names have been identified. If a vacancy is created, the Parties will repeat the selection process to fill the vacancy.

(JA at 7.) It is undisputed that the parties to the CBA—at that time, the Agency and UPE—complied with that provision by mutually selecting the five-member arbitration panel listed in the MOA. (JA at 8.)

Contrary to the Petitioner's arguments (Br. 14-15), nothing in this or any other CBA section provides that the MOA becomes void and a new selection process triggered when there is a change in the bargaining unit's exclusive representative. Nor

does the CBA provide that either party may unilaterally *create* vacancies by coercing the members of the arbitrator panel to resign. Rather, by resisting the authority of the members of the panel, and by attempting to dissolve that panel, the Union deprived both the Agency and bargaining unit employees of the grievance procedures provided by the CBA and MOA. The Union thereby committed ULPs under § 7116(b)(1) and (5) of the Statute.[4] This Court should therefore, deny the Union's Petition for Review.

II. The Union's communications with Arbitrators Feigenbaum and Conway were not permissible expressions of personal views, arguments, or opinions within the meaning of 5 U.S.C. § 7116(e)

Contrary to the Union's assertions, its communications with Arbitrators Feigenbaum and Conway were not protected activity under § 7116(e) of the Statute. (Br. 16-17.) Instead they were ULPs.

[4] Similarly without merit is Petitioner's claim that the Authority never explained how IUPEDJ's "actions constituted a refusal to consult or negotiate in good faith with an agency under § 7116(b)(5)." (Br. 13-14.) The Authority specifically addressed that issue, citing *HHS*, 44 FLRA at 881, for the proposition that changing "a mandatory subject of bargaining upon the expiration of a collective-bargaining agreement" violates § 7116(b)(5). *Dec.*, 70 FLRA at 825 n.59; *see also ALJ*, 70 FLRA at 842 (citing *Am. Fed'n of Gov't Emps., AFL-CIO*, 21 FLRA 986, 987-88 (1986) for the proposition that a union may violate §7116(b)(5) by rescinding an agreement and refusing to abide by its terms). In other words, the failure to abide by the terms of an agreement may constitute a refusal "to consult or negotiate in good faith with an agency" under § 7116(b)(5).

Section 7116(e) of the Statute protects the expression of personal views, arguments, or opinions by management, employees, or union representatives, but only so long as "the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." 5 U.S.C. § 7116(e). That provision of law does not protect the Union's threatening and coercive communications with the arbitrators.

When the Union communicated with Arbitrators Feigenbaum and Conway, it did so in its role as exclusive representative of the bargaining union employees and not as an individual expressing personal views or opinions. *Dec.*, 70 FLRA at 826; *ALJ*, 70 FLRA at 846. Consequently, those communications were not protected by § 7116(e). *Cf. Dep't of the Air Force, Air Force Plant Representative Office Detachment 27, Fort Worth, Tex.*, 5 FLRA 492, 499 (1981) (statements posted by management official were not personal views within the meaning of § 7116(e), but could reasonably be interpreted as the agency's official position regarding the matters addressed therein).

Furthermore, § 7116(e) did not protect the Union's communications with Arbitrators Feigenbaum and Conway because the statements included threats of reprisal. Specifically, by making baseless accusations of ethics violations, IUPEDJ implicitly threatened Arbitrators Feigenbaum and Conway for those alleged violations if they did not withdraw from the arbitrator panel. *See IUPEDJ 2015*, 68 FLRA at

1012-13 (threats are not protected under § 7116(e)); *cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-20 (1969) (threats against employees do not receive protection from the counterpart of the National Labor Relations Act ("NLRA") to § 7116(e) of the Statute); *NLRB v. U.S. Postal Serv.*, 526 F.3d 729, 732 (11th Cir. 2008) (ruling that the NLRA's counterpart to § 7116(e) of the Statute incorporates the First Amendment, but a "threat of retaliation against an employee for engaging in protected conduct" does "not enjoy Speech Clause immunity"). This alone removes the communications from protection under § 7116(e).

In addition, the Authority and ALJ correctly found that the communications with Arbitrators Feigenbaum and Conway were "made under coercive conditions." *Dec.*, 70 FLRA at 826. The determination of whether a statement was "made under coercive conditions" within the meaning of § 7116(e) is an objective one, and requires an assessment of the entire factual context. *Army & Air Force Exchange Service (AAFES), Ft. Carson, Colorado*, 9 FLRA 620, 626-27 (1982). The pertinent inquiry is not whether a coercive effect was intended or perceived, but whether the speaker's actions would tend to coerce a reasonable person. *See id.* at 627. Here, it is apparent that the Union's insistent and hostile resignation demands, accompanied by implicit threats to Arbitrators Feigenbaum and Conway to report them for alleged ethical violations, would tend to coerce a reasonable person to resign—as both Arbitrator

Feigenbaum, and ultimately Arbitrator Conway, in fact did. IUPEDJ's repeated demands for the resignations of Arbitrators Feigenbaum and Conway were also coercive in that they deprived the Agency and bargaining unit employees of access to the properly negotiated grievance procedures. The Union's coercive and unlawful attempt to dismantle the properly established arbitrator panel does not constitute protected speech under § 7116(e). *Cf. Int'l Bhd. Of Electrical Workers, Local 1501, A.F. of L. v. NLRB*, 341 U.S. 694, 704 (1951) (the remedial function of the provision of the NLRA that parallels § 7116(e) is to protect noncoercive speech by employers and unions "in furtherance of a lawful object").

The Union's Petition for Review should therefore be denied.

III. The Authority did not exceed its statutory power by requiring the Union to invite Arbitrators Feigenbaum and Conway to return to the arbitrator panel

The Union's arguments that the Authority exceeded its remedial power by ordering IUPEDJ to invite Arbitrators Feigenbaum and Conway to return to the panel are without merit.

With respect to Arbitrator Feigenbaum, the Union merely repeats its claims that its interactions with him did not constitute ULPs. (Br. 19.) As explained more fully above (*see* §§ I-II), those arguments are unavailing. IUPEDJ does not, however, argue that the non-traditional relief of inviting Arbitrator Feigenbaum to return to the panel

is inappropriate if this Court denies review of the Authority's finding of ULPs. Thus, if this Court denies review with respect to the Authority's ULP findings, it should similarly deny review of the Authority's remedy with respect to Arbitrator Feigenbaum.

IUPEDJ's arguments with respect to Arbitrator Conway are similarly unavailing. Nontraditional remedies are appropriate where, "assuming that there exist no legal or public policy objections," the remedy is "reasonably necessary and would be effective to recreate the conditions and relationships with which the [ULPs] interfered, as well as to effectuate the policies of the Statute, including deterrence of future violative conduct." *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (internal citation and quotation omitted). The Authority may consider post-charge events in fashioning remedies for ULPs. *See, e.g.*, *SSA*, 32 FLRA at 525-26 (1988) (ordering "make-whole" remedy for employees adversely affected by improper implementation of accountability plans, including "correction of personnel actions that would or would not have been taken but for the violation of the Statute").

The Authority reasonably determined that offering Arbitrator Conway the opportunity to return to the arbitrator panel was appropriate. *Dec.*, 70 FLRA at 826-27. It came to that conclusion because the Authority believed that it was necessary to consider his resignation in order to remedy the harm caused by IUPEDJ's pre-charge threats and coercion. *Dec.*, 70 FLRA at 821, 827; *see also SSA*, 32 FLRA at 525-26.

The Court should reject IUPEDJ's claims that its settlement agreement with Arbitrator Conway bars the relief that the Authority granted. (Br. 19-21.) As an initial matter, IUPEDJ has never explained why inviting Arbitrator Conway to rejoin the panel would violate the terms of its settlement agreement with him. *See Recons. Dec.*, 71 FLRA at 62 n.22. Nothing in the agreement prohibits the Union from offering Arbitrator Conway a position on the arbitrator panel. (*See* JA at 16.) The agreement also does not prohibit Arbitrator Conway from accepting such an offer. (*Id.*) If the Union had intended to bar Arbitrator Conway from ever being considered for the panel again, it presumably would have included those terms in the agreement. (Br. 20-21.)

Further, even if, as the Union claims, the Decision invalidated the settlement agreement, such an outcome is consistent with a core principle of labor law. Private settlements address only private rights, not the public's interest in discouraging ULPs. *Cf. Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 806 F.2d 269, 272 (D.C. Cir. 1986). As this Court has held in the comparable context of the NLRB, "there is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of" individual parties. *Id.* (quoting *Clear Haven Nursing Home*, 236 NLRB 873, 855 (1978), *overruled on other grounds by Independent Stave Co.*, 287 NLRB 740 (1987)). In keeping with that public interest, the

FLRA, like the NLRB, will only approve the withdrawal of a complaint pursuant to a settlement agreement if the agreement would "effectuate the policies of the . . . Statute." 5 C.F.R. § 2423.25(b), (c); *cf. UPMC*, 365 NLRB No. 153, 2017 WL 6350171, *1 (Dec. 11, 2017) (settlement acceptable because it "effectuates the purposes of the [NLRA]"). In the absence of such a showing and approval, a private settlement has no effect on a ULP proceeding.

In this case, the Union's agreement with Arbitrator Conway may have resolved the private dispute with him—but neither the Agency nor the Authority were parties to that agreement, and neither is bound by it. IUPEDJ did not attempt to secure the FLRA's consent for that post-complaint agreement. *Cf.* 5 C.F.R. § 2423.25(a), (b) (after the General Counsel issues a complaint alleging a ULP, parties to the complaint may resolve it only if the FLRA agrees to the resolution). As a result, the Union's private agreement with Arbitrator Conway concerning resolution of a fee dispute, does not affect the Authority (or Agency's) interest in correcting a ULP.

Ultimately, if IUPEDJ's settlement could serve as a bar to the Authority-ordered relief, it would enable the Union to bypass the Statute. The Authority reasonably concluded that IUPEDJ's attempts to induce Arbitrator Conway to resign were part of the Union's ULPs. *Dec.*, 70 FLRA at 820, 827. Under these circumstances, permitting the settlement to trump the Authority's order would be

tantamount to rewarding IUPEDJ's campaign of harassment. That outcome would not "effectuate the policies of the . . . Statute." 5 C.F.R. § 2423.25(b), (c). This Court should therefore reject IUPEDJ's arguments concerning the remedy of inviting Arbitrator Conway to return to the panel.

IV. The Authority's order did not violate the Union's First Amendment free speech rights

This Court should reject the Union's claims of First Amendment protection for its communications with Arbitrators Feigenbaum and Conway. (Br. 17-19.)

The Supreme Court held in *Connick v. Myers*, 461 U.S. 138 (1983) that the threshold issue in determining whether the Government has violated the free speech rights of a public employee is whether the speech involves a matter of "public concern," i.e., whether the speech "relate[s] to any matter of political social, or other concern to the community." *Id.* at 146-47. "[O]nly if a court finds that the public employee's speech meets this threshold requirement should the court go on to balance the employee's interests in free expression against the Government's interest in curtailing the expression." *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 830 F.2d 294, 300 (D.C. Cir. 1987) (citing *Connick*, 461 U.S. at 149-50). These standards apply to speech by public unions. *See Booth v. Pasco City, Fla.*, 757 F.3d 1198, 1214 (11th Cir. 2014); *IUPEDJ 2015*, 68 FLRA at 1012.

Thus, to support its First Amendment free speech claim, the Union must, at a minimum, show that its communications with the arbitrators involved matters of public concern. The Union waived this argument by failing to raise it in the FLRA proceedings. Even now with new arguments it makes to this Court, IUPEDJ has not established that its communications involved a matter of public concern. Moreover, the Union has never explained why its interest in making baseless accusations to circumvent properly negotiated grievance procedures outweighs the Government's interest in preventing ULPs. Denial of IUPEDJ's Petition for Review with respect to its First Amendment arguments is, therefore, appropriate.

A. The Union waived any argument that its communications with Arbitrators Feigenbaum and Conway constituted a matter of public concern

The Union waived its right to assert that its statements to the arbitrators involved a matter of public concern. Section 7123(c) of the Statute limits judicial review by providing that, when an aggrieved party seeks review of a final order of the Authority, "[n]o objection that has not 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." 5 U.S.C. § 7123(c); *Equal Emp't Opportunity Comm'n v. FLRA*, 476 U.S. 19, 23 (1986) (*per curiam*) ("*EEOC*"); *see also Am. Fed'n of State, City & Mun. Emps. Capital Area Council 26 v. FLRA*, 395 F.3d 443, 447

(D.C. Cir. 2005).[5] In other words, absent extraordinary circumstances, the Court lacks jurisdiction to review issues that IUPEDJ never presented to the Authority. *EEOC*, 476 U.S. at 23. As the Supreme Court has observed, the "plain language [of § 7123(c)] evinces an intent that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues." *EEOC*, 476 U.S. at 23.

In this case, the Union did not identify in its arguments to the Authority (*see Dec.*, 70 FLRA at 826 n.70; Add.2 Ex. 22 at 380-88), or to the ALJ (*see ALJ*, 70 FLRA at 846-47; Add.2 Ex. 21 at 239-43), a public concern involved in the Union's requests that the arbitrators resign. First Amendment rights are implicated only if the speech involves a matter of public concern, and for this reason both the Authority and ALJ found the Union's First Amendment arguments to be without merit. *See Dec.*, 70 FLRA at 826 n.70; *ALJ*, 70 FLRA at 846 (citing *IUPEDJ 2015*, 68 FLRA at 1011).

In its Petition for Review, the Union attempts for the first time to frame its First Amendment arguments in terms of matters of public concern. (Br. 17-19.) The Union, however, waived those arguments by failing to raise them in the FLRA proceedings. 5 U.S.C. § 7123(c). The Union has not identified any extraordinary

[5] In turn, § 2429.5 of the Authority's regulations provides that the Authority "will not consider any evidence, factual assertions, arguments (including affirmative defenses)" that a party has not presented to an ALJ. 5 C.F.R. § 2429.5.

circumstances that would excuse its failure to argue before the Authority that its communications with Arbitrators Feigenbaum and Conway involved matters of public concern. Thus, this Court may not consider IUPEDJ's current arguments. *Id.*

B. Even if it had not waived the arguments, the Union has not, in its Petition for Review, established that its communications with the arbitrators constituted a matter of public concern

Even if it had not waived the argument, IUPEDJ's attempts to establish that its communications with Arbitrators Feigenbaum and Conway involved a matter of public concern fail because it cites, without applying, language from factually distinguishable cases. Thus, for example, the Union cites *Janus v. American Federation of State, County & Municipal Employees, Council 31*, 138 S. Ct. 2448, 2474 (2018) (Br. 18), in which the Supreme Court observed that speech by a public-sector union in the handling of grievances "*may* be of substantial public interest." *Janus* , 138 S. Ct. at 2476 (emphasis added). In making that observation, however, the Supreme Court specifically cited as an example that the respondent union had filed a grievance seeking to compel the State of Illinois to appropriate $75 million to fund a wage increase. *Id.* at 2476-77. Here, in contrast, the Petitioner has not explained, nor is it apparent, how its unjustified demands for the resignations of Arbitrators Feigenbaum and Conway implicated any such "matter of political, social, or other concern to the community." *See Connick*, 461 U.S. at 146.

The Petitioner's citations to *Clue v. Johnson*, 179 F.3d 57, 61 (2d Cir. 1999), and *Boddie v. City of Columbus*, 989 F.2d 745, 750 (5th Cir. 1993), are also inapposite. *Clue* involved an intraunion dispute which, unlike the Union's demands for the resignations of Arbitrators Feigenbaum and Conway, "necessarily entail[ed] a substantial criticism of management." 179 F.3d at 61. In *Boddie*, the Fifth Circuit held that a "public concern" inquiry under *Connick* is unnecessary to support a *freedom of association* claim involving a public union. *Boddie,* 989 F.2d at 750; *see also Hatcher v. Bd. of Pub. Educ. & Orphanage for Bibb County*, 809 F.2d 1546, 1558 (11th Cir. 1987). The Union has cited no authority for the proposition that *free speech* claims by unions are not subject to the "public concern" requirement, and no such authority exists.

C. The Government's interest in enforcing the Statute outweighs IUPEDJ's alleged First Amendment interests

Finally, even if IUPEDJ could show that its communications with Arbitrators Feigenbaum and Conway implicated a matter of public concern, it does not, and has never, demonstrated why its First Amendment interests outweigh the Government's interest in enforcing the Statute. (*See* Br. 17-19; Add.2 Ex. 22 at 380-88; Add.2 Ex. 21 at 239-43.) The Union has never made that argument, because it cannot credibly do so.

In adopting the Statute, Congress explicitly found that protection of the collective-bargaining rights of Federal employees—in this case, the right of the

Agency's bargaining unit employees to avail themselves of negotiated grievance procedures—"safeguards the public interest . . . contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment[.]" 5 U.S.C. § 7101(a)(1). Congress further explained that the purpose of the Statute is "to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." *Id.* § 7101(b). Consistent with those purposes, Congress granted the Authority "jurisdiction to provide systemic remedies to vindicate the public interest in preventing unfair labor practices." *Wildberger v. FLRA*, 132 F.3d 784, 791-92 (D.C. Cir. 1998) (approving Authority's interpretation of 5 U.S.C. § 7116(d)). Thus, even if the Union's waiver of this and other arguments were not fatal to its First Amendment claims, the Court should find that the Government's interest in preventing ULPs outweighs the Union's First Amendment interest.

V. The Petitioner has not provided grounds for the Court to direct the Authority to consider additional evidence

This Court should reject Petitioner's argument that the Court should consider purportedly new evidence that Arbitrator Conway has moved to Minnesota. The Union did not timely present this evidence to the Authority. (Br. 21-22.) Section

7123(c) of the Statute provides that the Court may direct the Authority to consider additional evidence if the party seeking to adduce that evidence "shows to the satisfaction of the [C]ourt 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[.]" 5 U.S.C. § 7123(c). Thus, to demonstrate that it is entitled to this extraordinary relief, the Petitioner must show both: 1) that Arbitrator Conway's move is a material fact that would have affected the Authority's Decision, and 2) that there were reasonable grounds for the Petitioner's failure to timely present that evidence to the Authority. *Id.*; *cf. Prime Serv., Inc. v. NLRB*, 266 F.3d 1233, 1240 (D.C. Cir. 2001) (applying parallel provision of the NLRA). Neither requirement is satisfied here.

First, IUPEDJ has not shown that the change in Arbitrator Conway's residence is a material fact. The Authority ordered IUPEDJ to invite Arbitrator Conway to rejoin the panel as a means of returning the parties to the positions they would have been in but for IUPEDJ's ULPs. There is no evidence that the Arbitrator's move would have affected his ability to participate in the panel under the CBA and MOA. This is particularly true in an era in which parties may easily communicate remotely.

Second, IUPEDJ provides no evidence that there were reasonable grounds for its failure to produce evidence concerning the move before the Authority. IUPEDJ admits that it learned in late 2018 that Arbitrator Conway moved. (Add.2 Ex. 18, ¶ 8.)

However, IUPEDJ did not inform the Authority of that development until after the Authority had denied IUPEDJ's motion for reconsideration in March 2019. As IUPEDJ has not shown that the evidence is material, or that there were reasonable grounds for its failure to introduce it during the proceedings before the Authority, the Court should decline to order that the evidence be taken before the Authority pursuant to § 7123(c) of the Statute.

CONCLUSION

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

Respectfully submitted,

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August 21, 2019

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

Pursuant to Fed. R. App. P. 32(a)(2), (7), 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 8,888 words excluding exempt material.

/s/ Rebecca J. Osborne
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2019, 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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