ORAL ARGUMENT NOT YET SCHEDULED
No. 20-1233

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

NATIONAL LABOR RELATIONS
BOARD PROFESSIONAL ASSOCIATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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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 National Labor Relations Board (the "Agency") and the National Labor Relations Board Professional Association (the "Union"). In this Court proceeding, the Union is the petitioner, the Authority is the respondent, and the Agency is the intervenor.

B. Ruling Under Review

The Union seeks review of the Authority's decision in *National Labor Relations Board Professional Association*, 71 FLRA 737 (2020), upholding an Arbitrator's ruling that the Union's unfair labor practice grievance was not procedurally arbitrable.

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/ Noah Peters
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Federal Labor Relations Authority

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GLOSSARY OF ABBREVIATIONS

Agency	The National Labor Relations Board
ALJ	Administrative Law Judge
Arbitrator	Arbitrator Timothy Buckalew
Authority	Respondent, the Federal Labor Relations Authority
Award	The award of Arbitrator Timothy Buckalew dated December 7, 2018
CBA	Collective Bargaining Agreement
Decision	The Authority's Decision in *National Labor Relations Board Professional Association*, 71 FLRA 737 (May 7, 2020)
JA	The Joint Appendix
The Statute	The Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018)
ULP	Unfair Labor Practice
Union	Petitioner, National Labor Relations Board Professionals' Association

JURISDICTIONAL STATEMENT

In this case, the National Labor Relations Board Professional Association ("Union") seeks review of the Authority's decision in *National Labor Relations Board Professional Association*, 71 FLRA 737 (2020) (the "Decision") (JA 143–46). But its Petition for Review suffers from a fatal jurisdictional flaw. Under the Federal Service Labor-Management Relations Statute (the "Statute"), 5 U.S.C. §§ 7101-7135 (2018), federal courts lack subject-matter jurisdiction to review Authority decisions resolving exceptions to arbitration awards unless the decision "involves an unfair labor practice." 5 U.S.C. § 7123(a)(1); *Broad. Bd. of Governors Office of Cuba Broad. v. FLRA*, 752 F.3d 453, 456 (D.C. Cir. 2014) ("*Cuba Broadcasting*"). In order to "involve" an unfair labor practice ("ULP"), the Authority's order must "include some sort of substantive evaluation of a statutory unfair labor practice." *Ass'n of Civilian Technicians, N.Y. State Council v. FLRA*, 507 F.3d 697, 699 (D.C. Cir. 2007) ("*ACT*") (internal quotation marks omitted). "A passing reference to an unfair labor practice or a mere effect on the reviewability of an unfair labor practice claim is not enough." *Id.* at 700.

The Authority's Decision did not involve a ULP. The Decision merely denied exceptions to an Arbitrator's ruling that the Union's grievance was not procedurally arbitrable because it was filed outside the ten business-day window for filing grievances set forth in the parties' collective bargaining agreement ("CBA"). (JA 143–46.) In denying the Union's exceptions, the Authority did not consider the substance of the Union's ULP claim, but rather whether the Union's grievance was timely filed

under the CBA. (JA 144 ("Put simply, this case – which involves an arbitrator's determination regarding the timeliness of a grievance – concerns only procedural arbitrability.").) So too, the Arbitrator framed the issue before him as solely whether the Union's grievance was arbitrable as a procedural matter. (JA 16 (framing the sole issue as "Is the [Union's] grievance . . . arbitrable?").)

Thus, the Authority's Decision "involve[d] rules applicable to arbitration which, when applied in this dispute, resulted in the unfair labor practice claim's exclusion from review." *ACT*, 507 F.3d at 698–99. *ACT* is clear that such a "secondary effect on the unfair labor practice claim is not sufficient to qualify the order as one that 'involves an unfair labor practice' for purposes of 5 U.S.C. § 7123(a)(1)." *Id.* at 699. As a result, this Court lacks appellate jurisdiction under § 7123(a) of the Statute, and the Union's Petition for Review must be dismissed. *See* 5 U.S.C. § 7123 (a)(1).

STATEMENT OF THE ISSUE PRESENTED

Does this Court have jurisdiction to review the Authority's Decision that "concern[ed] only procedural arbitrability" (JA 144) and did not discuss the merits of the Union's ULP claim?

RELEVANT STATUTORY PROVISIONS

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

STATEMENT OF THE CASE

At issue in this case is whether this Court has jurisdiction to review Authority procedural arbitrability determinations in cases where the Authority neither evaluates nor discusses the substance of a statutory ULP claim. This Court answered this very question over a decade ago in *ACT*, when it held that, in order to "involve" a ULP under § 7123(a)(1) of the Statute (and thus fall within the exception to the general non-reviewability of Authority arbitration decisions), the Authority's order must "include some sort of substantive evaluation of a statutory unfair labor practice." *ACT*, 507 F.3d at 699 (internal quotation marks omitted). "A passing reference to an unfair labor practice or a mere effect on the reviewability of an unfair labor practice claim is not enough." *Id.* at 700. *Cuba Broadcasting* reaffirmed this principle in holding that the Authority "must do more than simply note the existence of an unfair labor practice claim for its order to 'involve' an unfair labor practice—indeed, even explaining why it will not address an unfair labor practice argument is insufficient." 752 F.3d at 457. Instead, the Authority's "order must, as we held in *ACT*, reach and discuss the merits of a statutory unfair labor practice or in some 'other way affect[ ] substantive law regarding' a statutory issue." *Id.* Here, the Authority's Decision neither discussed the merits of a ULP claim nor affected substantive ULP law.

This matter arose from the Union's grievance alleging that the National Labor Relations Board (the "Agency") committed a ULP when it shut down its health unit without first negotiating with the Union. (JA 38–39, 143.) The Union was informed

of the Agency's decision to close the health unit on January 29, 2018 (JA 49) and February 1, 2018 (JA 56), but waited until March 7, 2018 to file its grievance. (JA 20.) After the Agency denied the grievance, the Union invoked arbitration. (JA 142.)

Before the Arbitrator, the Agency challenged the grievance's arbitrability, contending that the grievance was not timely filed under the CBA's grievance procedure. (JA 80–85.) Article 11 of the parties' CBA requires that, "[u]pon the request of either party," questions of arbitrability will be decided before the merits of a grievance. (JA 140.) Over the Union's "vigorous objections," the Arbitrator held a hearing "restricted to the Agency's claim that the grievance was procedurally defective and could not be heard on its merits because the [U]nion did not file the grievance within ten days of knowledge of the facts giving rise to the grievance as required by Article 10." (JA 17.)

On December 7, 2018, the Arbitrator issued an award limited to a single issue: "Is the [Union]'s grievance dated March 7, 2018 arbitrable?" (JA 16.) The Arbitrator held that the Union's grievance was not arbitrable because it was not timely filed under the parties' CBA. (JA 19–20.) The CBA says that any grievance must be filed within ten business days of the aggrieved party or Union representative having knowledge of the facts giving rise to the grievance. (JA 137.) The Arbitrator found that the Union's ULP claim was not procedurally arbitrable because it had been filed too late, over one month after the Agency informed the Union that the health unit would be closed. (JA 19–20.)

The Union filed exceptions to the Award in January 2019, arguing that it was contrary to law, based on a nonfact, and exceeded the Arbitrator's authority. (JA 14.) The Authority denied these exceptions and upheld the Arbitrator's finding that the Union's grievance was not procedurally arbitrable. (JA 146.)

The Union has now filed a Petition for Review of the Authority's Decision, despite the fact neither the Arbitrator nor the Authority considered the merits of the Union's ULP claim. JA 146; *compare* 5 U.S.C. § 7123(a)(1) (limiting judicial review of Authority arbitration decisions to those that "involve[] an unfair labor practice").

STATEMENT OF THE FACTS

I. The Union Repeatedly, and Unsuccessfully, Seeks to Bargain Over the Agency's Decision to Close Its Health Unit

On August 3, 2017, an Agency working group (which included representatives of the Union) recommended that the Agency implement several cuts based on budgetary concerns. (JA 44–47, 34.) One of the cuts it recommended was closing the Agency's on-site health unit at its Washington, D.C. headquarters. (JA 45.) The working group noted that the health unit was a "high ticket item where only a fraction of [Agency employees] utilize services, and a majority of that usage is for flu shots[.]" (JA 45.)

On January 12, 2018, the Union (through its President, Karen Cook) "request[ed] input in the consideration and decision-making process concerning cuts." (JA 48.) However, on January 29, 2018, the Agency's then-Acting Chairman, Marvin

Kaplan, told Cook that Agency leadership had voted to approve several cost-cutting measures, including closing the health unit, and that the cuts would be "implemented this week." (JA 49–50.)

Cook, on behalf of the Union, responded with a long list of questions, including several related to the health unit's closure. (JA 53–54.) On February 1, 2018, the Agency again confirmed that several cost-cutting measures, including closing the health unit, had been approved by the Agency and would be implemented no later than March 1, 2018. (JA 56.) The Agency sent a lengthy memorandum to Cook on February 8, 2018 responding to her questions about the cuts. (JA 65–68.)

On February 7, 2018, February 28, 2018, and March 6, 2018, the Union again demanded bargaining "over all proposed changes" including the health unit closure, but its pleas were ignored. (JA 72–75.) Later, on March 6, the Agency sent an email to all employees announcing that the health unit would close for good effective March 31, 2018. (JA 76.)

The next day (March 7) the Union filed a grievance with the Agency, alleging violations of the parties' CBA and § 7116(a)(1), (5) and (6) of the Statute, over the Agency's decision to close the health unit without first engaging in bargaining. (JA 38–39.) The Union complained that the Agency "has treated not only the closure, but its effects on employees, as a *fait accompli*" and demanded, *inter alia*, that the Agency "rescind[] the March 6 email" announcing the health unit closure, "acknowledg[e] its obligation to bargain over the proposed Health Unit closure," and maintain the

"status quo until bargaining is complete." (JA 39.) After the Agency denied the grievance, the Union invoked arbitration. (JA 142.)

II. The Arbitrator Finds the Union's Grievance to Be Untimely, and Thus Not Arbitrable, Without Reaching the Merits of Its ULP Claim

Before the Arbitrator, the Agency challenged the grievance's arbitrability, contending that the grievance was not timely filed under the CBA. (JA 80–85.) Article 10 of the parties' CBA says that a grievance must be presented to the appropriate Agency manager within ten business days of the aggrieved party or Union representative having knowledge of the facts giving rise to the grievance. (JA 134.) Thus, the CBA required the Union to file its grievance within ten business days of it becoming aware that the Agency would close the health unit.

Article 11 of the parties' CBA requires that, "[u]pon the request of either party," questions of arbitrability will be decided before the merits of a grievance. (JA 140.) Over the Union's "vigorous objections," the Arbitrator held a hearing restricted to the Agency's claim that "the grievance was procedurally defective and could not be heard on its merits" because the Union did not file the grievance within ten days of knowing the facts giving rise to the grievance (that is, the health unit's closure), as required by Article 10 of the CBA. (JA 17.)

On December 7, 2018, the Arbitrator issued an award limited to a single issue: "Is the [Union]'s grievance dated March 7, 2018 arbitrable?" (JA 16.) The Arbitrator held that the Union's grievance was not arbitrable because it was not filed within the

ten business-day window specified in the parties' CBA. (JA 19–20.) The Arbitrator determined that the Agency's February 1, 2018 email was "clear and unambiguous: the decision to eliminate health units . . . had been made" and the Union's "attempt to provide some input . . . had clearly been rejected." (JA 19.) Thus, the Union "knew that its claimed right to participate in the decision making finalizing the cost cutting measures had been rejected as of February 1, 2018." (JA 20.) "More than ten business days lapsed before this grievance was filed on March 7." (JA 20.) Thus, the Arbitrator "conclude[d] that the grievance is procedurally defective and cannot be heard on its merits in this forum." (JA 20.) He made "no finding regarding" the merits of the Union's ULP claim and held simply that "[t]he grievance is not arbitrable." (JA 20.)

III. The Authority Agrees with the Arbitrator That the Union's Grievance Was Untimely and Non-Arbitrable As a Procedural Matter, Without Reaching the Merits of the Union's ULP Claim

The Union filed exceptions to the Award in January 2019, arguing that the Award was contrary to law, based on a nonfact, and in excess of the Arbitrator's authority. (JA 9, 14.) In a unanimous decision, the Authority upheld the Award and denied the Union's exceptions. (JA 143–46.) Like the Arbitrator, the Authority framed the issues before it as related solely to the grievance's arbitrability as a procedural matter: "Put simply, this case – which involves an arbitrator's determination regarding the timeliness of a grievance – concerns only procedural arbitrability." (JA 144.) The Authority found that the Arbitrator had not disregarded

the Union's procedural rights by failing to apply the same standards that an Administrative Law Judge ("ALJ") would have to the Union's ULP claim. (JA 145.) In doing so, the Authority noted that the Arbitrator analyzed only the parties' negotiated grievance procedure and "made no findings regarding the merits of the grievance." (JA 145.)

The Authority rejected the Union's argument that the Arbitrator's award violated its rights under the Fifth Amendment to the U.S. Constitution because the Union never presented this claim to the Arbitrator, and the Authority's regulations prohibit the Authority from considering matters that could have been, but were not, raised before the arbitrator. (JA 145 (citing 5 C.F.R. §§ 2425.4(c), 2429.5).)

Finally, the Authority rejected the Union's contentions that the Arbitrator based his award on a nonfact and exceeded his authority. (JA 145–46.) For these exceptions, the Union argued that the Arbitrator erred in framing the Union's grievance as challenging the Agency's unilateral *decision* to close the health unit, as opposed to its unilateral *implementation* of its decision. But the Authority noted that the parties had not stipulated to the issue before the Arbitrator, and thus the Arbitrator had great leeway as to how to formulate the issue before him. (JA 146.)

The Union then filed this Petition for Review. On July 14, 2020, the Authority moved to dismiss the Petition for Review for lack of jurisdiction. The Authority's motion was referred to the merits panel on October 9, 2020, and the parties were directed to brief the jurisdictional issues.

SUMMARY OF THE ARGUMENT

The Court lacks jurisdiction over the Union's Petition for Review because the Authority's Decision concerns an arbitration award and does not involve a ULP. Under the Statute, appellate courts lack jurisdiction to review Authority orders in arbitration cases unless the Authority's order "involves" a ULP. *See* 5 U.S.C. § 7123(a)(1). To "involve" a ULP, the Authority's order itself must contain a substantive evaluation of a ULP claim. *ACT*, 507 F.3d at 699. This Court lacks jurisdiction where the Authority "describes an unfair labor practice claim solely to '*reject* the notion that an unfair labor practice is any part of the case before it.'" *Cuba Broadcasting*, 752 F.3d at 457 (cleaned up) (quoting *Dep't of the Interior v. FLRA*, 26 F.3d 179, 184 (D.C. Cir. 1994)).

That is, however, precisely what happened in this case: both the Arbitrator and the Authority framed the sole issue before them purely in terms of procedural arbitrability and mentioned the Union's ULP claim solely to reject the notion that the substance of that claim formed any part of the case before them. (JA 144; JA 16.)

Therefore, despite the Union's insistence that the Authority should have considered substantive ULP law in assessing the Award, the Authority had no basis for doing so. The Award solely involved questions of procedural arbitrability under the parties' CBA, as the Arbitrator concluded that the Union's grievance was untimely and thus non-arbitrable under the parties' CBA. (JA 143.) Thus, the only question the Authority had to answer in evaluating the Union's exceptions was whether the

Arbitrator acted reasonably in determining that the Union's grievance was not procedurally arbitrable. (JA 144.) The Authority's Decision, therefore, contains no discussion of ULP law and no evaluation of the substance of the Union's ULP claim. Thus, this Court does not have jurisdiction to review the Authority's Decision under 5 U.S.C. § 7123(a)(1). *ACT*, 507 F.3d at 700; *Cuba Broadcasting*, 752 F.3d at 459.

Even if this Court had jurisdiction to review the merits of the Authority's Decision, and it does not, the Decision must be upheld. "When reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues." *Nat'l Weather Serv. Employees Org. v. FLRA*, 966 F.3d 875, 881 (D.C. Cir. 2020) ("*NWSEO*") (citing 5 U.S.C. § 7122(a)(2)). The "sole inquiry" the Authority may undertake is whether the Arbitrator was "even arguably construing or applying the [CBA] and acting within the scope of his authority[.]" *Id.* (internal quotation marks omitted). Where the parties have agreed to submit arbitrability questions to an arbitrator, "an Arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds." *Nat'l Ass'n of Gov't Emps.*, 71 FLRA 775, 777 (2020) ("*NAGE*"); *see also First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The Authority will generally defer to the underlying factual findings of the arbitrator in reviewing an arbitration award. *Am. Fed'n of Gov't Emps. Local 3740*, 68 FLRA 454, 455 (2015).

Here, using an appropriately deferential standard of review, the Authority denied the Union's contrary-to-law, nonfact and exceeded-authority exceptions. The Authority correctly noted that the Award concerned only the procedural arbitrability of the Union's grievance under the parties' CBA, and that the Arbitrator "made no findings regarding the merits of the grievance." (JA 144.) The Authority properly deferred to the Arbitrator's factual findings underlying his procedural arbitrability determination, including the question of when the Union knew of the facts giving rise to the grievance. (*See* JA 144–45.) The Authority rightly observed that the parties had not stipulated to the issue before the Arbitrator, and thus the Arbitrator had great leeway as to how to formulate the issue before him. (JA 146.) The Authority also found, correctly, that the Arbitrator's findings were "directly responsive to the issue before him—namely whether the grievance was arbitrable." (JA 146.)

In its briefing, the Union accuses the Authority of ignoring substantive legal questions and ULP law underlying the Arbitrator's decision when it denied the Union's contrary-to-law, nonfact, and exceeded-authority exceptions. (Pet'r Br. 24, 33.) But the Union elsewhere concedes that its Petition for Review involves no substantial question of law, because "[a]ll parties agree that the Union was required to file its grievance within 10 business days of discovering the facts giving rise to the grievance." (Pet'r Br. 22.) Instead, as the Union candidly admits, the issues it seeks to raise in this appeal concern "how to substantively evaluate the date on which the Union learned of the operative facts giving rise to its unfair-labor-practice claim."

(Pet'r Br. 22–23.) The Union's arguments thus boil down to disagreement with the Arbitrator's factual findings and his interpretation of the Union's grievance. On these questions, the Authority was required to defer to the Arbitrator's reasonable determination, based on straightforward contractual language, that the Union's grievance was untimely. *NWSEO*, 966 F.3d at 881. The Union's Petition for Review must be dismissed for lack of jurisdiction or (in the alternative) denied outright.

STANDARDS OF REVIEW

The Authority is responsible for interpreting and administering its own Statute. *See, e.g.*, *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)). 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), and upholds the Authority's decisions so long as they are "reasonable and defensible," *Dep't of Treasury, Bureau of Alcohol, Tobacco, & Firearms v. FLRA*, 857 F.2d 819, 821 (D.C. Cir. 1988).

When judicial review is permitted under § 7123(a) of the Statute, this Court 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 Administrative Procedure Act standards of review). The scope of such review is

narrow. *See, e.g.*, *Am. Fed'n of Gov't Emps., Local 2303 v. FLRA*, 815 F.2d 718, 721 (D.C. Cir. 1987) (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285–86 (1974)).

"When reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues." *NWSEO*, 966 F.3d at 881 (citing 5 U.S.C. § 7122(a)(2)). The "sole inquiry" the Authority may undertake is "whether the arbitrator [was] even arguably construing or applying the [CBA] and acting within the scope of his authority[.]" *Id.* (internal quotation marks omitted.) Where the parties have agreed to submit arbitrability questions to an arbitrator, an arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds. *See, e.g.*, *First Options of Chi., Inc.*, 514 U.S. at 943; *NAGE*, 71 FLRA at 777.

ARGUMENT

I. This Court Does Not Have Jurisdiction to Review the Authority's Decision Because It Did Not "Involve" a ULP

Congress may grant or limit federal court jurisdiction as it sees fit. *City of Arlington, Tex. v. Fed. Commc'n Comm'n*, 569 U.S. 290, 297 (2013); *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401, 411–12 (1940). It is presumed that a matter lies outside federal court jurisdiction unless the party asserting jurisdiction demonstrates otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). "In interpreting a provision that precludes judicial review," the Court "must determine whether the

challenged agency action is of the sort shielded from review" and "may not inquire whether a challenged agency decision is arbitrary, capricious, or procedurally defective unless [it is] certain of [its] subject matter jurisdiction." *Knapp Med. Ctr. v. Hargan*, 875 F.3d 1125, 1128 (D.C. Cir. 2017) (internal quotation marks omitted).

Here, the Court lacks jurisdiction over the Union's Petition for Review. The Statute "contains a two-track system for resolving labor disputes." *ACT*, 507 F.3d at 699 (internal quotation marks omitted). "A party aggrieved by an unfair labor practice may go down either track, but not both." *Id.* (citing 5 U.S.C. § 7116(d)). "Under the first track, not pursued by the Union in this case, a party may file an unfair labor practice charge with the Authority's General Counsel, who will investigate and issue a complaint, if warranted." *Id.* "The matter is then adjudicated by the Authority, and the Authority's decision is subject to judicial review." *Id.* (citing 5 U.S.C. §§ 7116, 7123).

"Under the second track, which was followed here, a party may file a grievance in accordance with its collective bargaining agreement that alleges an unfair labor practice, a violation of the collective bargaining agreement, or both." *Id.* "The grievance is subject to binding arbitration, § 7121(b)(1)(C)(iii), and the arbitral award is subject to review by the Authority, § 7122(a)." *Id.* When a party, such as the Union, chooses the second track, "[t]he Authority's order is not subject to judicial review 'unless the order involves an unfair labor practice under section 711[6]' of the Statute." *Id.* (quoting 5 U.S.C. § 7123(a)(1)). "The second track is the track for those

who prefer to benefit from the relatively expeditious and (presumably) final result that arbitration promises." *Id.* (internal formatting omitted).

Section 7123(a) of the Statute expresses an "unusually clear congressional intent . . . to foreclose review"' of Authority decisions resolving exceptions to arbitration awards. *Griffith v. FLRA*, 842 F.2d 487, 490 (D.C. Cir. 1988). It states, in relevant part:

> 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 [7116][1] of this title. . . .
>
> 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. . . .

5 U.S.C. § 7123(a) (emphasis added).

The legislative history of § 7123(a) underscores Congress's intent to restrict appellate scrutiny of Authority decisions involving arbitration awards. The Conference Report explains:

> [T]here will be no judicial review of the Authority's action on those arbitrators[']awards in grievance cases which are appealable to the Authority. The Authority will only be authorized to review the award of the arbitrator on very narrow grounds similar to the scope of judicial review of an arbitrator's award in the private sector. In light of the limited nature of the Authority's review, the conferees determined it would be inappropriate for there to be subsequent review by the court of appeals in such matters.

[1] The text of the Statute refers to § 7118, but this has been recognized as an error. *Am. Fed'n Of Gov't Emps., Local 2510 v. FLRA,* 453 F.3d 500, 502 n.* (D.C. Cir. 2006) ("*AFGE Local 2510*"). Section 7116 is the correct citation. *Id.*

H.R. REP. NO. 95-1717, at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (available at: https://go.usa.gov/xPfNk). Thus, the plain language of § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards, except where the Authority's order "involves an unfair labor practice." *ACT*, 507 F.3d at 699; *see also Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 70–71 (D.C. Cir. 1987) ("*OEA*"). Congress created a narrow exception for cases that "involve[] an unfair labor practice" in order "to insure uniformity in the case law concerning unfair labor practices." *AFGE Local 2510*, 453 F.3d at 505.

In order to "involve" a ULP, the Authority's order must "include some sort of substantive evaluation of a statutory unfair labor practice." *ACT*, 507 F.3d at 699 (internal quotation marks omitted). "[A] mere effect on the reviewability of an unfair labor practice claim is not enough." *Id.* at 700. The Authority "must do more than simply note the existence of an unfair labor practice claim for its order to 'involve' an unfair labor practice—indeed, even explaining why it will not address an unfair labor practice argument is insufficient." *Cuba Broadcasting*, 752 F.3d at 457. Instead, "the Authority's order *itself* must have some bearing upon the law of unfair labor practices." *ACT*, 507 F.3d at 700 (internal quotation marks omitted) (emphasis added); *see also Cuba Broadcasting*, 752 F.3d at 457 ("The [Authority]'s order must, as we

held in *ACT*, reach and discuss the merits of a statutory unfair labor practice or in some other way affect substantive law regarding a statutory issue" to "involve" a ULP.) (internal formatting omitted). Where the Authority's order "deals solely with arbitration procedure, and neither discusses nor in any other way affects substantive law regarding unfair labor practices, it does not 'involve' an unfair labor practice." *ACT*, 507 F.3d at 700.

In this case, the Authority could not have been clearer in framing the issue before it solely in terms of arbitration procedure: "Put simply, this case – which involves an arbitrator's determination regarding the timeliness of a grievance – **concerns only procedural arbitrability**." (JA 144 (emphasis added).) Like the Arbitrator, the Authority did not evaluate the substance of the Union's ULP claim. It did nothing more than apply its own procedural arbitration rules to deny the Union's various exceptions to the Arbitrator's determination that the Union's grievance was not timely filed under the parties' CBA. (JA 144–46.) As in *ACT*, "[t]he Authority did not engage in any substantive discussion of the Union's unfair labor practice claim in its order, but instead explicitly found that the arbitrator was justified in concluding that the substance of the unfair labor practice claim was not part of the dispute." *ACT*, 507 F.3d at 700; *compare* JA 145 (determining that the Arbitrator "made no findings regarding the merits of the grievance"), *and* JA 146 (stating that "the Authority accords substantial deference to" the Arbitrator's formulation of the issue before him and that "the Arbitrator's findings [we]re directly responsive to the issue

before him – namely, whether the grievance was arbitrable").

Thus, while the Union alleged a ULP in its grievance, the Arbitrator never heard the merits of the ULP claim, dismissing the grievance as procedurally defective. (JA 16 (Arbitrator framing the sole issue before him as "Is the [Union's] grievance . . . arbitrable?").) And the Authority affirmed the Arbitrator's disposition solely based on his finding that that the Union's grievance was not procedurally arbitrable. (JA 144.) Whether a matter is procedurally arbitrable is determined by the terms of the parties' contract, not statute. *See Fraternal Order of Police New Jersey Lodge 173*, 58 FLRA 384, 385–86 (2003) ("*Lodge 173*"); *First Options of Chi., Inc.*, 514 U.S. at 943. Since Article 11 of the parties' CBA dictated that the Arbitrator must consider procedural arbitrability questions before he could address the merits of claims, neither the Arbitrator nor the Authority considered the substance of the Union's ULP claims. (JA 144.)

The Authority's Decision does not "involve" a statutory ULP. As this Court specifically held in *ACT*, the determination that a matter is not procedurally arbitrable "does not involve [a ULP] under section 7116" of the Statute. *ACT*, 507 F.3d at 698 (internal quotation and alterations omitted). That conclusion does not change even if the Union asserted ULP claims in its grievance or made ULP arguments in its briefs before the Authority. (Pet'r Br. 13–14.) It is the Authority's "final order—not the arbitrator's award or the initial grievance"—that is the subject of the petition for judicial review and that determines whether this Court has jurisdiction. *Cuba Broadcasting*, 752 F.3d at 457 (citing *AFGE Local 2510*, 453 F.3d at 504). The

Authority's order in this case concerned only the arbitrability of the Union's claim, not its substance, and thus under *ACT* it did not "involve" a ULP.

In addition, this Court's precedent is clear that it lacks appellate jurisdiction where the Authority "describes an unfair labor practice claim solely to '*reject* the notion that an unfair labor practice is any part of the case before it.'" *Id.* (internal alteration omitted) (quoting *Dep't of the Interior v. FLRA*, 26 F.3d 179, 184 (D.C. Cir. 1994)). That is, however, precisely what happened in this case: both the Arbitrator and the Authority framed the issue purely in terms of procedural arbitrability, and mentioned the Union's ULP claim solely to reject the notion that the substance of that claim formed any part of the case before them. (JA 144, 16.)

Just like in *ACT*, the Union "fails in its attempt to characterize this order as involving an unfair labor practice by pointing to its effect on the Union's unfair labor practice allegations." *ACT*, 507 F.3d at 700. That is because,

> [w]hile the Authority ensured that the Union's unfair labor practice claim will not be considered on its merits by affirming the arbitrator's framing of the issues, our caselaw is clear that the Authority's order itself must have some "bearing upon the law of unfair labor practices" in order to qualify as an order that "involve[s] an unfair labor practice."

Id. (quoting *AFGE Local 2510*, 453 F.3d at 505). As in *ACT*, "the Authority's order in this case deals solely with arbitration procedure, and neither discusses nor in any other way affects substantive law regarding unfair labor practices[.]" *Id.* Thus, "it does not 'involve' an unfair labor practice," and this Court lacks jurisdiction to review it. *Id.*

The Union's citation to *OEA* is unavailing. In that case, the Authority made a "detailed assessment of the precise nature" of a statutory ULP charge to determine if the Statute's election of remedies provision, § 7116(d), precluded a subsequent grievance. *OEA*, 824 F.2d at 70–71. Given the depth of the Authority's analysis of the substance of the ULP, the Court determined that its order "involved" a ULP. *Id.* at 71. Here, by contrast, the Authority's decision focused only on whether the Arbitrator plausibly interpreted the parties' *collective bargaining agreement* when he found that Union's grievance was not procedurally arbitrable. (JA 144.) Again, the CBA, not the Statue, governed deadlines for filing a grievance.

NWSEO underscores that the Court lacks jurisdiction over the Union's Petition here. In *NWSEO*, the Court considered an Authority order that addressed *both* the substance of a breach-of-contract claim *and* a ULP claim. *NWSEO*, 966 F.3d at 880. *NWSEO* reiterated the rule of *ACT* that the Authority's order must "include some sort of substantive evaluation of a statutory unfair labor practice to be reviewable under § 7123(a)[.]" *Id.* Because the "Authority Order under review [in *NWSEO*] addressed whether the Employer had committed an unfair labor practice and ruled that it had not[,]" this requirement was satisfied. *Id.* (internal quotation marks omitted). Indeed, in the Authority order at issue in *NWSEO*, "the Authority devoted a section of its opinion, entitled 'The Agency's termination did not constitute a repudiation,' to the issue of whether the Employer 'unlawfully repudiate[d] the CBA in violation of § 7116(a)(1) and (5) of the Statute [the provisions defining ULPs].'" *Id.*

Here, by contrast, both the Authority and Arbitrator took pains to make clear that they were *not* deciding the merits of the Union's ULP claim but only whether it was procedurally arbitrable as a contractual matter. (JA 16, 144.)

NWSEO specifically distinguished *ACT* because in *ACT*, the arbitrator "fram[ed] the issues as arising solely under the collective bargaining agreement." *NWSEO*, 966 F.3d at 880. "Thus, the order that the petitioner asked the court to review [in *ACT*] said nothing about an unfair labor practice, except that the arbitrator properly did not address whether there had been an unfair labor practice." *Id.* *NWSEO* thus makes clear that *ACT*'s holding applies in this case. That is because neither the Authority's Decision nor the Arbitrator's Award contained any substantive discussion of the Union's ULP claim. (JA 16, 144.)

Contrary to the Union's contentions (Pet'r Br. 19–20), case law concerning the statute of limitations governing statutory ULP charges filed with the Authority's General Counsel does not apply in this case. Procedural arbitrability is determined by contract, not statute. *See Lodge 173*, 58 FLRA at 385–86; *First Options of Chi., Inc.*, 514 U.S. at 943. And the Union has provided no support for its argument that standards governing the timeliness of statutory ULP charges should be applied to grievances filed under a CBA. (JA 145.) None of the cases cited by the Union concerning the statute of limitations for filing a statutory ULP charge hold differently. *See Fed. Deposit Ins. Corp. v. FLRA*, 977 F.2d 1493, 1495 (D.C. Cir. 1992) (statutory ULP charge filed with the Authority's General Counsel); *U.S. Dep't of the Interior, U.S. Geological Survey,*

Great Lakes Sci. Ctr., 68 FLRA 734, 736 (2015) (same); *U.S. Dep't of Justice Exec. Office for Immigr. Review New York, N.Y.*, 61 FLRA 460, 467 (2006) (same); *U.S. Dep't of Justice, Immigr. & Naturalization Serv.*, 55 FLRA 93, 96 (1999) (same); *see also Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004) (timeliness of ULP charge involving employer refusal to arbitrate); *Leach Corp. v. NLRB*, 54 F.3d 802, 806 (D.C. Cir. 1995) (statutory ULP charge brought under the National Labor Relations Act). As the Authority's Decision turns entirely on valid contractual grounds, upholding it in no way requires the Court to consider case law relating to the timeliness of ULP charges as a general matter. *See Cuba Broadcasting*, 752 F.3d at 458–59 (finding no appellate jurisdiction where the Authority did not address the merits of ULP bases for a claim and there was a "separate and independent basis" for the arbitrator's award).

This case is thus distinguishable from *U.S. Dep't of Navy v. FLRA*, where "the contract provided no ground for the Authority's decision." 665 F.3d 1339, 1345 (D.C. Cir. 2012). Here, valid contractual grounds amply support the Authority's Decision: the Union filed a grievance that the Arbitrator determined was untimely under the terms of its CBA, and the Authority upheld that determination. As the terms of the parties' CBA govern whether the Union's grievance is procedurally arbitrable, there is no question of interpreting provisions of the Statute that deal with ULPs. (JA 146.) Because the Authority's decision was "based solely on the collective bargaining agreement," this Court should not assert jurisdiction over it. *Navy,* 665 F.3d at 1344.

Perhaps realizing that this Court does not have jurisdiction over this matter, the Union makes an extraordinary alternative argument that the Court should review this case even if it lacks jurisdiction under § 7123(a)(1). (Pet'r Br. 16–18.) The Union argues that the Court should take this step because it believes that the jurisdictional language of § 7123(a) of the Statute and this Court's precedent are "ambiguous." (Pet'r Br. 16.) The Union offers no support for that claim. Nor does it attempt to distinguish this case from many cases (including some cited in the Union's brief), in which this Court has come to a different conclusion by: 1) holding that Congress clearly intended to limit judicial review of arbitration decisions and 2) narrowly construing the statutory exception for ULP claims. *See ACT*, 507 F.3d at 699 (the Statute "limits our review to orders of the Authority which involve unfair labor practices in order to balance a strong Congressional policy favoring arbitration of labor disputes with a Congressional intent for uniformity in the case law concerning unfair labor practices[.]") (internal quotations omitted); *AFGE Local 2510*, 453 F.3d at 505 (rejecting argument that Court "review extends to any order in a case in which an unfair labor practice was involved—regardless whether the unfair labor practice is involved in the particular order of which review is sought"); *Griffith v. FLRA*, 842 F.2d 487, 490–91 (D.C. Cir. 1988).

Further, the Union's assertion that it "had no choice but to file" a grievance rather than an ULP charge (Pet'r Br. 17) is baseless. When it filed a grievance on March 7, 2018, the Union made a choice concerning the remedies it would seek. *See* 5

U.S.C. § 7116(d). Nothing prevented the Union from filing such a claim with the Office of General Counsel, which has continued to process ULP charges even without a General Counsel. The only task that the Office of General Counsel cannot perform is issuing ULP complaints. However, completion of that task is deferred, not denied, because the Office will recommence issuing ULP complaints once a new General Counsel is confirmed. *See Serv. Emps. Int'l Union Local 200 United v. Trump,* 1:19-cv-1073, 2019 WL 6710865, at *9 (W.D.N.Y. Dec. 10, 2019) (rejecting the notion that "the vacancy in the [Authority's] General Counsel position (which presumably will be filled at some point) calls into question the validity of the statutory review scheme."), *aff'd*, 975 F.3d 150 (2d Cir. Sept. 16, 2020). [2]

Given these circumstances, this Court's decision in *ACT* precisely fits the circumstances of this case:

> We note that if the Union wished to protect its right to judicial review of any possible [ULP] claims, it could have utilized [the mechanism for filing ULP claims] provided by the Statute which leads to judicial review. Because it instead decided to proceed through the second track, it is bound by the Statute's ban on judicial review unless the Authority's order "involves" a [ULP].

[2] In addition, the Union filed its grievance on March 7, 2018. (JA 143.) At that time, the Authority's General Counsel position had only been vacant for a few months, as an Acting General Counsel had served until November 16, 2017. Thus, even assuming that a prolonged delay in filling a General Counsel vacancy could ever excuse a party's decision to elect an arbitration remedy, and it cannot, there was no reason for the Union to believe in March 2018 that there would have been any unusual delay in processing a ULP charge.

ACT, 507 F.3d at 700. The Union chose to file an untimely grievance rather than a statutory ULP charge. In doing so, it took the risk that its grievance would be dismissed on procedural grounds. The Union had the right to take that risk, but the fact that the risk failed to pay off does not give the Court jurisdiction over this case.

II. The Authority, Applying the Required Deferential Standard of Review, Properly Denied the Union's Exceptions to the Arbitrator's Award

Even if this Court had jurisdiction over this matter, and it does not, the Union's Petition for Review must still be denied. Using an appropriately deferential standard of review, the Authority correctly denied the Union's contrary-to-law, nonfact, and exceeded-authority exceptions. In doing so, the Authority properly upheld the Arbitrator's reasonable determination that, pursuant to plain terms of Article 10 of the parties' CBA, the Union's grievance was not timely filed. This outcome was compelled by the deferential standard of review that the Authority was required to apply in reviewing the Arbitrator's award, under which the Authority's inquiry was limited to determining whether the Arbitrator was "even arguably construing or applying the contract and acting within the scope of his authority." *NWSEO*, 966 F.3d at 881 (internal quotation marks omitted).

A. The Authority Was Required to Uphold the Arbitrator's Contractual Holding If He Was Even Arguably Construing or Applying the CBA

"Procedural arbitrability involves procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused." *U.S. Small Bus. Admin.*, 70 FLRA 525, 526 (2018) ("*SBA*") (internal quotation omitted). It

is a matter of contract, not statute. *See Lodge 173*, 58 FLRA at 385–86; *First Options of Chi., Inc.*, 514 U.S. at 943. Section 7121(a)(1) of the Statute states that "any collective-bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability… the procedures shall be the exclusive administrative procedures for resolving grievances." In this case, the parties' negotiated grievance procedure comes from Article 10 of the parties' CBA. (JA 19–20.)

"When reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review to that a federal court uses in private-sector labor-management issues." *NWSEO*, 966 F.3d at 881 (citing 5 U.S.C. § 7122(a)(2)). Where the parties have agreed to submit arbitrability questions to an arbitrator, an arbitrator's procedural-arbitrability determination is entitled to deference and is subject to review only on narrow grounds. *See, e.g., First Options of Chi., Inc.*, 514 U.S. at 943; *SBA*, 70 FLRA at 527. In addition, the arbitrator has great discretion in framing the issue before him, and the Authority defers to the arbitrator's choice of how to frame the issue. *See Dep't of the Interior v. FLRA*, 26 F.3d 179, 184 (D.C. Cir. 1994); *Am. Fed'n of Gov't Emps. Local 1101*, 70 FLRA 644, 645 (2018).

In reviewing an arbitrator's contractual interpretation, the "sole inquiry" the Authority may undertake is "whether the Arbitrator [was] even arguably construing or applying the [CBA] and acting within the scope of his authority[.]" *NWSEO*, 966 F.3d at 881(internal quotation marks omitted.) The Authority thus defers to an

arbitrator's interpretation of the parties' negotiated agreement, *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 725 (9th Cir. 1991), and the arbitrator's underlying factual findings, *Am. Fed'n of Gov't Emps. Local 3740*, 68 FLRA 454, 455 (2015). The Authority can only find the arbitrator's procedural arbitrability determination contrary to law if the appealing party establishes that "the ruling conflicts with statutory procedural requirements that apply to the parties' negotiated grievance procedure." *Fraternal Order of Police Lodge No. 168*, 70 FLRA 788, 790 (2018) ("*Police*").

B. The Authority Reasonably Upheld the Arbitrator's Finding that the Union's Grievance Was Untimely Filed Under the Parties' CBA and Therefore Not Procedurally Arbitrable

The Authority correctly affirmed the Arbitrator's determination that the Union's grievance was not procedurally arbitrable because it was not timely filed under Article 10 of the parties' CBA. Article 10 requires a grievant to present a grievance to a responsible manager within 10 business days of the grievant or Union representative knowing the facts giving rise to the grievance. (JA 134.) The Arbitrator made a factual determination that the communication between the Union and Agency on February 1, 2018 was "clear and unambiguous" and the Union had knowledge of the health unit's impending closure as of that date. (JA 19.) Specifically, the correspondence from the Agency on February 1, 2018, where the Agency informed the Union that it would move forward with closing the health unit, should have been enough to alert the Union that the decision to close the health unit

had already been made and the Union's efforts to bargain over that decision had come to naught. (JA 19.) Under the CBA, therefore, the Union should have filed the grievance within 10 business days of February 1, but did not. (JA 19.) Because the Arbitrator was "arguably construing or applying the [CBA] and acting within the scope of his authority," the Authority was required to uphold his procedural arbitrability determination. *NWSEO*, 966 F.3d at 881 (internal quotation marks omitted).

In its briefing, the Union accuses the Authority of ignoring substantive legal questions and ULP law underlying the Arbitrator's decision when it denied the Union's contrary to law, nonfact, and exceeded-authority exceptions. (Pet'r Br. 24, 33.) But the Union elsewhere concedes that its Petition for Review involves no substantial question of law, because "[a]ll parties agree that the Union was required to file its grievance within 10 business days of discovering the facts giving rise to the grievance." (Pet'r Br. 22.) Instead, as the Union candidly admits, the issues it seeks to raise in this appeal concern "how to substantively evaluate the date on which the Union learned of the operative facts giving rise to its unfair-labor-practice claim." (Pet'r Br. 22–23.) The Union's arguments thus boil down to a disagreement with the Arbitrator's factual findings and contract interpretation. On those questions, the Authority was required to defer to the Arbitrator. *NWSEO*, 966 F.3d at 881.

Thus, the legal discussion on pages 25–33 of the Union's brief is totally beside the point: whatever law the Arbitrator may have potentially cited as "framing" or

"underlying" his inquiry on the factual question of when the Union knew the operative facts giving rise to its grievance, at the end of the day that question was still a factual one on which the Authority must defer to the Arbitrator. No matter how much the Union tries to shift the focus of the Authority's review to lengthy discussions of ULP law, it cannot escape the fact that this case is solely about procedural arbitrability. The Arbitrator made a simple and reasonable determination that the Union's grievance was untimely based on straightforward contractual language in Article 10 of the parties' CBA requiring a grievant or Union representative to file within ten business days of having knowledge of the facts giving rise to the grievance. (JA 19–20.) The Authority reasonably upheld that determination by the Arbitrator—and only that determination. (JA 144.)

Even when considered on its merits, the Union's argument that it was obligated to file its grievance within 10 days (pursuant to the CBA), but that the 10 days only began to run upon implementation of the changes (pursuant to the Statute) is unavailing. The cases the Union cites for the proposition that statutory ULP standards may be applied to contractual grievances (Pet'r Br. 31–32) are distinguishable from this case. While it is true that an arbitrator may (but is not required to) rely on statutory standards applicable to ULPs where the provisions of a CBA "mirror, or are intended to be interpreted in the same manner as, the Statute" (Pet'r Br. 31–32 (internal quotation omitted)), the Union has not even attempted to demonstrate that the CBA provisions in this case "mirror" the Statute, and made no

attempt to do so before the Authority either. *Contra Gen. Servs. Admin. E. Distribution Ctr. Burlington, N.J.*, 68 FLRA 70, 70 (2014) (arbitrator applied statutory ULP standards where contract provisions mirrored statutory ULP provisions); *see also Am. Fed'n of Gov't Emps. Local 1164*, 64 FLRA 599, 600 (2010) (same); *U.S. Dep't of the Treasury, Customs Serv., Se. Region*, 43 FLRA 921, 925–26 (1992) (Authority remanded the case to the arbitrator to determine whether the parties' agreement or the Statute governed).[3] In the absence of any evidence or argument that Article 10's provisions governing the filing of grievances mirror the Statute's provisions, there is no basis for the Union's claims that standards governing the timeliness of statutory ULP charges should be applied to grievances filed under its CBA. (JA 145.)

As the Authority reasonably found that the Arbitrator's award was not contrary to law, the Petition for Review should be denied.

C. The Authority Reasonably Denied the Union's Exception that the Award Was Based on a "Nonfact"

The Authority properly rejected the Union's exception that the Arbitrator based his award on a nonfact. (JA 145–46.) To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.

[3] Similarly distinguishable is *U.S. Dep't of Homeland Security U.S. Customs & Border Protection*, 65 FLRA 870, 872 (2011), which did not involve procedural arbitrability and merely stands for the unremarkable proposition that arbitrators resolving grievances involving ULPs "must apply the same standards and burdens that are applied by ALJs" under the Statute including burdens of proof.

Nat'l Fed'n of Fed. Emps., Local 1984, 56 FLRA 38, 41 (2000). "[T]he Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration." *Id.* (citation omitted); *see Am. Fed'n of Gov't Emps. Local 2382*, 66 FLRA 664, 667–68 (2012) ("*AFGE Local 2382*"). Thus, "an arbitrator's interpretation of a collective bargaining agreement does not constitute a matter that can be challenged as a nonfact." *U.S. Dep't of Def. Def. Contract Mgmt. Agency*, 59 FLRA 396, 403 (2003) (citation omitted).

Here, the Union claims the Arbitrator "erred by basing his ruling on a 'nonfact'—when the Agency reached a decision on the health unit—rather than when it implemented a change in working conditions." (Pet'r Br. 22.) But that argument is essentially a claim that the Arbitrator misinterpreted the parties' CBA and incorrectly applied the CBA to the facts of this matter. As noted above, those are not matters that can be challenged on nonfact grounds, but instead disagreements with the Arbitrator's contract interpretation and factual findings. Thus, the Authority correctly denied the Union's nonfact exception. (JA 146.)

Similarly unavailing is the Union's attempt to challenge the Authority's determination that the grievance "neither explicitly alleges nor explains how the Agency [engaged in a ULP] by 'unilaterally implementing'" the closure of the health unit. (Pet'r Br. 33–34; JA 146.) Again, this constitutes nothing more than disagreement with the Arbitrator's determination that the Union's grievance challenged the "decision making process concerning cuts," not the implementation of

the health unit's closure. (JA 19.) As the Arbitrator found, and the Authority agreed, the Union's "attempt to provide some input prior to the Agency decision to adopt the cuts had clearly been rejected" as of February 1, 2018, and thus "[t]he facts giving rise to the grievance asserting the [Union]'s right to participate in the pre-decision bargaining were settled no later than" that date. (JA 19; *see also* JA 145–46.)

Indeed, the Union's grievance discusses many changes that the Agency announced pre-bargaining and the Agency's obligation to engage in bargaining concerning those issues. (JA 38–39.) The grievance does not, however, use the word "implement" or explain that the Agency's implementation of the health unit's closure was a separate violation of the law from its exclusion of the Union from the decision-making process concerning the health unit's closure. (JA 38–39.) Nor was the Union able to demonstrate that the parties had a mutual understanding that the grievance concerned the unilateral implementation of the health unit's closure, as opposed to its exclusion from the decision-making process. (JA 29–30.) It was the Arbitrator's duty to assess these issues in the context of the dispute before him, and the fact that the Union may disagree with his conclusions do not render them clearly erroneous or based on nonfacts. *Nat'l Ass'n of Indep. Labor Local 17*, 68 FLRA 97, 99 (2014).

The Authority has long held that it will not find an award deficient based on factual disagreements by the parties. *AFGE Local 2382*, 66 FLRA at 667. The Authority's Decision properly deferred to the Arbitrator's interpretation of the Union's grievance and his determination, based on the record before him, that it was

untimely. (JA 146.) The Authority's decision to deny the Union's nonfact exception was therefore neither arbitrary nor capricious. *Police*, 70 FLRA at 790 (denying nonfact exception challenging arbitrator's evaluation of the evidence); *NLRB Prof'l Ass'n*, 68 FLRA 552, 555 (2015) (denying nonfact exception where the arbitrator's determination was not clearly erroneous); *cf. United Power Trades Org.*, 67 FLRA 311, 315 (2014).

D. The Authority Reasonably Denied the Union's Exceeded-Authority Exception

The Authority reasonably found that the Arbitrator did not exceed his authority (JA 145), notwithstanding the Union's arguments to the contrary (Pet'r Br. 39–41). Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration or resolve an issue not submitted to arbitration. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Det. Ctr. Guaynabo, P.R.* 68 FLRA 960, 966 (2015). Where the parties fail to stipulate to the issue before the arbitrator, arbitrators may formulate the issue based on the subject matter before them, and substantial deference is given to that formulation. *Nat'l Treasury Emps. Union*, 70 FLRA 57, 60 (2016).

Here, the Union again argues that the Arbitrator and Authority departed from precedent on unilateral change ULPs, repeating its discontent with the Arbitrator's interpretation of its grievance. (Pet'r Br. 40.) But once again, this argument attacks the Arbitrator's factual findings and contract interpretation, and does not raise any error of law. The Arbitrator faithfully applied the parties' negotiated grievance

procedure in Article 10 of the CBA to the facts of the case before him, and determined that the grievance was untimely. (JA 19–20.) The Authority upheld the Arbitrator's decision and noted that the Arbitrator's findings were directly responsive to the issue before him; namely, whether the Union's grievance was timely. (JA 146.) The Arbitrator did not fail to resolve an issue presented before him because once he determined that the grievance was untimely, and thus not arbitrable, there was no need to consider the merits of the Union's ULP claim or ULP law governing the timeliness of ULP charges filed with the Authority's General Counsel.

The Union's argument that the Authority's Decision creates a broad, new standard concerning the filing of ULP charges or grievances involving ULP claims (Pet'r Br. 37–40) is off-base. The holding of the Decision is limited to the facts of this case, which involved an Arbitrator's interpretation of the specific CBA that governed relations between the Union and Agency. The Authority merely found that the Arbitrator reasonably determined that under Section 10 of this particular CBA, the Union's knowledge that the Agency had unilaterally decided to make a change, rather than implementation of that change, triggered the deadline for filing grievances. *Compare* JA 133 (CBA provision requiring grievances to be filed "within ten (10) business days following the date on which the aggrieved party or an Association representative (officer or steward) *had knowledge of the facts* giving rise to the grievance") (emphasis added), *with U.S. Dep't of Def. Educ. Activity Alexandria*, 71 FLRA 765, 765 (2020) (requiring grievances to be filed "within forty-five (45) calendar days *after the*

incident or occurrence giving rise to the grievance") (emphasis added). The Authority's denial of the Union's exceeded-authority exception was thus neither arbitrary nor capricious.

CONCLUSION

The Authority respectfully requests that the Court dismiss the Petition for Review for lack of jurisdiction or (in the alternative) deny it.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 9,369 words excluding exempt material.

/s/ Noah Peters
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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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/ Noah Peters
Noah Peters
Solicitor
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ADDENDUM

Relevant Statues and Regulations

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5 U.S.C. § 7116(a) and (d)

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.

* * * * *

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised

under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

5 U.S.C. § 7121

Grievance Procedures

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

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

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

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

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

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

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

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

(2) An aggrieved employee affected by a prohibited personnel practice described in paragraph (1) may elect not more than one of the remedies described in paragraph (3) with respect thereto. For purposes of the preceding sentence, a determination as to whether a particular remedy has been elected shall be made as set forth under paragraph (4).

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

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

(B) A negotiated grievance procedure under this section.

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

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

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

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

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

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

5 U.S.C. § 7122

Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient--

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

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.

5 C.F.R. § 2425.4(c)

Content and format of exceptions

(c) What is prohibited. Consistent with 5 CFR 2429.5, an exception may not rely on any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented to the arbitrator.

5 C.F.R. § 2429.5

Matters not previously presented; official notice

The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Regional Director, Hearing Officer, Administrative Law Judge, or arbitrator. The Authority may, however, take official notice of such matters as would be proper.