ORAL ARGUMENT NOT SCHEDULED

No. 10-1065

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

UNITED POWER TRADES ORGANIZATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

ROSA M. KOPPEL
Solicitor

JOYCE G. FRIEDMAN
Attorney

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

ORAL ARGUMENT NOT SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The United Power Trades Organization ("UPTO" or "union") and the U.S. Department of the Army, Army Corps of Engineers, Northwestern Division ("agency"), appeared below in the administrative proceeding before the Federal Labor Relations Authority ("FLRA" or "Authority"). In this court proceeding, UPTO is the petitioner, and the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision in *United Power Trades Organization and United States Department of the Army, Army Corps of Engineers, Northwestern Division*, Case No. 0-AR-4490, issued on January 28, 2010, reported at 64 F.L.R.A. (No. 69) 440.

C. Related Cases

This matter was previously before this Court under D.C. Circuit Docket No. 09-1212. However, on motion of the FLRA for remand to reconsider the issues set forth by the union's exceptions to the arbitrator's award, the Court ordered that the motion be granted and remanded the matter to the FLRA for further proceedings. The said further proceedings resulted in the Authority's decision that is now before this Court. Counsel for the Authority is unaware of any other cases

pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page No.

ADDENDUM

Page No.

TABLE OF AUTHORITIES

CASES

Page (s)

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES

CODE OF FEDERAL REGULATIONS

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

GLOSSARY

AD	Authority Decision
Agency	United States Department of the Army, U.S. Army Corps of Engineers, Northwestern Division
Authority or FLRA	Federal Labor Relations Authority
BATF	*Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89 (1983)
CBA	collective bargaining agreement
DVP	District Vice President
JA	Joint Appendix
PB	Petitioner's Brief
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
Tr.	Transcript
union	United Power Trades Organization
UPTO	United Power Trades Organization

ORAL ARGUMENT NOT SCHEDULED

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

No. 10-1065

UNITED POWER TRADES ORGANIZATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

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

BRIEF FOR RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision under review in this case was issued by the Federal Labor Relations Authority ("FLRA" or "Authority") on January 28, 2010. The Authority's decision is published at 64 F.L.R.A. (No. 69) 440. A copy of the decision is included in the Joint Appendix ("JA") at ____. The Authority

exercised jurisdiction over the case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 ("Statute").[1] This Court has jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

STATEMENT OF THE ISSUES

Whether the appeal of the arbitrator's award solely concerning the United States Department of the Army, U.S. Army Corps of Engineers' ("agency's") refusal to award Robert Reams, the District Vice President ("DVP") for the United Power Trades Organization ("UPTO" or "union") official time implicated §§ 7102 and 7114 of the Stature relating to the union's right to designate a representative of its own choosing.

Whether the Authority properly upheld the award of the arbitrator who determined that the agency violated neither the Statute nor the Collective Bargaining Agreement ("CBA") by denying the DVP official time to perform representational services because the CBA did not provide official time for the DVP when a Project Representative and/or Alternate was available to perform these services.

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

STATEMENT OF THE CASE

Course of Proceedings Below

The union filed a grievance on behalf of the DVP (formerly a union Project Representative at the Bonneville Dam facility near Portland, Oregon) when the agency denied him official time in September and October 2007, for representational services he had performed. JA __ (Award at 1). The grievance was taken to arbitration. After the submission of evidence, briefs, and a hearing, the arbitrator issued an award finding, in pertinent part,[2] that the CBA did not provide official time for the DVP regarding representational duties absent the unavailability of both the union's chosen Project Representative and an Alternate. JA ___ (Award at 14). So finding, the arbitrator concluded that the agency did not violate the CBA or the Statute and denied the grievance. JA ___ (Award at 15).

UPTO filed exceptions to the arbitrator's award with the Authority pursuant to § 7122 of the Statute and 5 C.F.R. § 2425.3. JA ____ (UPTO's Exceptions dated Feb. 19, 2009). The agency filed an opposition to the union's exceptions. JA ___ (Agency's Opposition dated March 25, 2009). In a decision dated June 3, 2009, the Authority summarily denied the exceptions and upheld the arbitrator's

[2] The arbitrator's finding that the grievance was arbitrable within the meaning of the CBA was not appealed, and is not an issue before the Court.

award. JA ___ (FLRA decision at 63 F.L.R.A. (No. 126) 422). UPTO appealed the decision of June 3, 2009, to this Court.

On September 16, 2009, counsel for the Authority requested that the Court remand the case for a more thorough review and analysis of the union's exceptions. JA ___ (FLRA Motion for Remand). On September 28, 2009, the Court granted the Authority's motion. JA ___ (Order dated Sept. 28, 2009).

On January 28, 2010, the Authority issued its decision fully discussing and analyzing the union's exceptions, and still denying its exceptions. UPTO now seeks review of the Authority's January 28, 2010 decision and order pursuant to § 7123(a) of the Statute.

STATEMENT OF THE FACTS

The Arbitrator's Award

When the agency and union were unable to resolve a grievance filed by the union on behalf of DVP Reams, the matter was submitted to arbitration. JA ___ ("Authority Decision" ["AD"] at 1). The parties agreed to have the arbitrator frame the issues to be resolved. For purposes of this appeal, the issue set forth by the arbitrator was "whether the [agency] violate[d] the [CBA] and/or relevant law when it refused to grant [the DVP] official time when he requested it." JA ___ (Award at 2).

After a hearing, and the submissions of evidence and argument, the arbitrator issued his award on January 16, 2009, denying the union's grievance. JA ___ (Award at 1-15). Although acknowledging the union's argument that the law and Articles 22.1 and 22.2 of the CBA provide that the union has the right to choose its own representatives, the arbitrator found that this was not the issue before him. Rather, he found that the crux of the case concerned the meaning of the parties' negotiated provision in Article 25.3 of the CBA and "who may initiate a request for official time and … under what circumstances." JA ___ (Award at 12). Article 25.3 states in pertinent part: "If there is no Project Representative or Alternate at a project, at any given time, the District Vice President, or someone designated by the District Vice President, may serve in the capacity of the Project Representative." JA ___ (CBA, Article 25.3).

The arbitrator first found that Article 16.5 of the CBA supported his determination that the parties intended that different chosen union representatives were responsible for handling specific types of grievances. Specifically, he found that the Project Representative or Alternate were the union's chosen representatives that the parties had negotiated to represent the union in most matters involving the project itself. *Id*.

The arbitrator explained that while Article 22 was negotiated to ensure that the agency would not interfere with employees' choice of their representative,

Article 25.3 must "mean something." JA ___ (Award at 12). The arbitrator found that Article 25.3 was negotiated to allow for the demarcation of responsibilities between various union officials and to facilitate workload management. JA ___ (Award at 13-14). The arbitrator concluded that under Article 25.3, "absent the resignation of both the Project Representative and an alternate, the Vice President was not the party to request for official time and to grieve about it." JA ___ (Award at 14). The arbitrator accordingly found that the agency did not violate either the CBA or the Statue when it rejected the DVP's request for official time and he denied the grievance. JA ___ (Award at 15).

The Authority's Decision

Pursuant to § 7122 of the Statute, UPTO filed exceptions to the arbitrator's award with the Authority. JA ___ (UPTO's Exceptions). The union basically argued that the arbitrator's award was contrary to law and failed to draw its essence from the CBA. JA ___ (AD at 3). The agency filed an opposition to UPTO's exceptions. JA ___ (Agency's Opposition).

Consistent with its well-established precedent, the Authority reviewed the question of law raised by the agency *de novo*. JA ___ (AD at 3). In applying a standard of *de novo* review, the Authority deferred to the arbitrator's underlying factual findings. JA ___ (AD at 4).

The Authority rejected the union's argument that the award implicated and negated the union's statutory right, under 5 U.S.C. §§ 7102 and 7114, to choose its own representatives, because the award only concerned the issue of contractual rights to obtain official time for representational services. JA ___ (AD at 4-5). The Authority explained that the statutory provision that is pertinent to the union's rights in this regard is § 7131 of the Statute, and not §§ 7102 and 7114. JA ___ (AD at 4).

Specifically, because the DVP's request for official time did not involve his representation in the negotiation of a CBA or his participation in Authority proceedings and did not pertain to internal union matters, the Authority determined that the DVP's entitlement to official time must derive from § 7131(d). *Id*. The Authority noted that § 7131(d) states that entitlement to official time is a matter for negotiation if the parties agree that it is reasonable, necessary, and in the public interest. The Authority thus found that entitlement to official time covered by that provision is a contractual, and not a statutory, entitlement. *Id*. The Authority noted that it had previously rejected arguments under § 7114 that an exclusive representative to perform representational activities of any type is entitled to § 7131(d) official time or that a contract that limits the number of representatives entitled to official time constrains a union's statutory right to choose its own

representatives. Thus, the Authority found no basis for finding that the award was contrary to law. JA ___ (AD at 4-5)

The Authority also rejected the union's exception that the award failed to draw its essence from the CBA. JA ___ (AD at 5). The Authority found that the arbitrator's construction of the contract is entitled to deference. Moreover, the Authority found that the union failed to establish that the arbitrator's findings could not in any rational way be derived from the CBA or were unfounded in reason and fact or unconnected with the wording of the CBA. The Authority also found that the union failed to show that the arbitrator's construction of the CBA was not a plausible interpretation, or evidenced a manifest disregard, of the CBA. JA ___ (AD at 5-6). Accordingly, the Authority denied the union's exceptions and upheld the arbitrator's award. An appeal to this Court followed.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Overseas Educ. Ass'n, Inc. v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have

sanctioned, the Authority's construction should be upheld. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845. As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *NFFE, Local 1309* v. *Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *NTEU v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. *See AFGE, Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988); *see also LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997).

Here, the Authority's decision resolving the issue of entitlement to official time required the Authority's expertise in interpreting the provision of its enabling statute concerning official time, *i.e.*, 5 U.S.C. § 7131; the Authority's interpretation of this provision is entitled to considerable deference unless its construction is unreasonable. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S.

89, 97 (1983) ("BATF"). The Authority's decision was consistent with the plain words of 5 U.S.C. § 7131, and with FLRA precedent.

And the issue of the DVP's right to official time does not implicate the statutory provisions regarding the union's right to freely choose its representatives as argued by UPTO. The CBA indicates that the union freely chose its representatives for specific purposes, and the question regarding who may request official time is an entirely different issue.

The Authority's decision upholding the arbitrator's award is thus not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the Authority's decision should be affirmed and the union's petition should be denied under the applicable standard of review.

SUMMARY OF ARGUMENT

This appeal concerns an award of an arbitrator who upheld the agency's denial of a union official's request for official time to perform representational services. The arbitrator based the award on his interpretation of the parties' CBA as not providing official time to that official to perform representational services when other specified officials were available to perform those services. The union contends that the Authority's denial of its exceptions to the award must be set aside as arbitrary and capricious, and also as contrary to the CBA.

The union's first contention is based on a fundamental misunderstanding of what the agency actually did. The agency did not interfere with the union's statutory right to designate the official as a representative. Instead, it denied the official's request for official time because, under the particular circumstances of the request, when other representatives were available to perform representational services, the official had no contractual right to official time.

As for the union's second contention, the Authority properly deferred to the arbitrator's interpretation of the CBA which, as this Court has recognized, is entitled to a high degree of deference. Here, the arbitrator's interpretation drew its essence from the CBA read as a whole. By contrast, the union's preferred interpretation, in effect, writes out of the CBA the very provision that the arbitrator found to be most relevant to the issues before him.

Because the Authority reasonably held that the award was not contrary to law and drew its essence from the CBA, the union's petition for review should be denied.

ARGUMENT

I. The Union Mistakenly Conflates or Confuses the Union's Statutory Right to Choose Its Representatives With the Only Issue in the Case, *i.e.*, the Statutory and Contractual Rights of an Employee Performing Representational Union Duties To Be Granted Official Time in Accordance with the CBA.

The petitioner contends that the Authority and the arbitrator erred in failing to recognize the DVP as a designated representative by refusing to grant him official time for representational services and that this error interferes with its right to choose its representatives under §§ 7102 and 7114. *See, e.g.*, Petitioner's Brief ("PB") at 8, 9. The petitioner is mistaken. As the Authority stated in its decision, "the Arbitrator's interpretation of the parties' agreement to find that the Agency properly denied the DVP's request for official time does not implicate the Union's right to choose its own representatives under the Statute [at §§ 7102 and 7114]." JA ___ (AD at 5).

Indeed, there is nothing in the record indicating that the agency precluded the union from freely choosing its Project Representatives, Alternates or DVPs; or that the agency did not recognize the DVP as a union official or representative when a Project Representative and Alternate was unavailable. It is the union that decided with the agency in negotiating the CBA, however, which representative

would be entitled to official time and under what circumstances; a different matter, entirely.

FLRA and Supreme Court precedent firmly establishes that union representatives need not be treated as if they are "'on the job' for all purposes." *See BATF*, 464 U.S. at 104. In this regard, a union's statutory right under § 7114 to choose representatives to perform representational activities is not so intertwined with official time entitlements guided by § 7131(d) that every chosen union representative is entitled to official time. For example, the fact that a CBA has a provision that limits the amount of official time to a certain type of representative or for a certain time has no bearing on the union's statutory freedom to select its representative. And "[t]he determination [of the type of representative] who may engage in representational activity on official time in no way dictates the identity of the union's representatives." *See, U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 F.L.R.A. 1111, 1119, 120 (1994) (a limitation in the parties' agreement on the number of representatives entitled to official time "in no way constrains the Union in its statutory right to designate its representatives."); *U.S. Dep't of the Navy, Naval Mine Warfare Eng'g Activity, Yorktown, VA.* [*"Naval Mine Warfare Eng'g Activity"*], 39 F.L.R.A. 1207, 1213-14 (1991) (an official time provision in a CBA does not encroach on the Union's duty to choose representatives to represent unit employees). Here, the CBA reflects that UPTO

freely chose its representatives for different purposes (*e.g.* Project Representative to represent unit employees working on a project), and there is nothing in the record indicating that UPTO was constrained in exercising its statutory right.

In promulgating § 7131(d) of the Statute, Congress assigned the determination of the entitlement to official time to the union and the agency together, and not to either party alone. *See Naval Mine Warfare Eng'g Activity*, 39 F.L.R.A. at 1214. Thus, as observed by the Authority, "any entitlement to official time to engage in activities covered by § 7131(d) is a contractual, not statutory, entitlement." JA ___ (AD at 4). Accordingly, because the union's statutory right to choose its representative is not the issue in this case, and the right to official time (*i.e.*, a contractual right under the guidance of § 7131(d) for representational services that is at issue in this case) is, UPTO's argument regarding waiver is irrelevant. *See* PB at 11-12. Moreover, the union's argument in this regard underscores its confusion between its statutory rights to choose its representatives and the contractual rights instigated by § 7131(d) of the Statute.

Because this case concerns a grievance over the denial of official time for representational services, it is clear that § 7131(d) of the Statute is applicable. That section provides that the rights and restrictions associated with official time for such services are subject to negotiation and will be "in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the

public interest" 5 U.S.C. § 7131(d). Moreover, as the Authority correctly found, "the parties may negotiate all matters concerning use of official time under § 7131(d), including, as relevant here, which union officials may use official time." JA ___ (AD at 4, *relying on Naval Mine Warfare Eng'g Activity*, 39 FLRA at 1213-14). For these reasons, the arbitrator properly based his decision to deny the DVP official time on his interpretation of § 7131(d) and the CBA, rather than §§ 7102 and 7114.

II. The Authority's Decision Properly Deferred to the Arbitrator's Interpretation of the CBA that Was Otherwise in Accordance with Law and Precedent Concerning Statutory and Contractual Rights Applicable to Official Time.

The federal courts give extreme deference to an arbitrator's interpretation of a collective bargaining agreement or contract so long as the arbitrator's award draws its essence from the agreement. *See Brotherhoood of Maintenance of Way Employees v. I.C.C.*, 920 F.2d 40, 45 (D.C. Cir. 1990).[3] The Authority uses this very standard of deference in reviewing an arbitrator's award that involves the interpretation of a collective bargaining agreement. *See* 5 U.S.C. § 7122(a)(2);

[3] This extremely deferential standard of review is derived from the Supreme Court's "Steelworkers Trilogy," establishing very limited judicial review of arbitration awards in the collective bargaining context. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

AFGE, Council 220, 54 F.L.R.A. 156, 159 (1998). The Authority will abide by this high standard of deference (because "it is the arbitrator's construction of the agreement for which the parties have bargained,") and uphold the arbitrator's award unless the appealing party establishes that it fails to draw its essence from the CBA. *See U.S. Dep't of Labor (OSHA)*, 34 F.L.R.A. 573, 576 (1990). The appealing party must accordingly show that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement ; or (4) evidences a manifest disregard of the agreement. *Id*. at 575. The union has not met this burden, and the Authority's decision upholding the arbitrator's award must be affirmed.

UPTO contends that the arbitrator's award interpreting the CBA failed to draw its essence from the CBA. *See* PB at 13-17. UPTO states that Article 25.3 of the CBA did not preclude the DVP from representing the Union and obtaining official time on project-specific representational issues. *See* PB at 14. In this regard, UPTO appears to argue that the arbitrator erred in reconciling Articles 22.1 and 25.1 of the CBA with the terms of Article 25.3.[4] *Id*. However, in order to

[4] Article 22.1 states in pertinent part: "The Union has the right to organize the bargaining unit and to designate representatives of their choosing for the purpose

interpret a CBA, an arbitrator must read all the provisions to put the subject matter in context. The union's argument would have the effect of ignoring or writing out the language of Article 25.3 which clearly pertains to who of the union's chosen representatives may act in a representational capacity for project unit employees and ask for official time.

The arbitrator's interpretation was consistent with the CBA and the Statute. The arbitrator acknowledged that the union has rights under the statute and in Articles 22.1 and 22.2 to choose its own representatives. But he also stated:

> [t]he parties to this collective bargaining agreement were not content to simply utilize Article 22. They negotiated as well Article 25.3 which is at the heart of this matter. It seems to me that the Union, as the Employer contends, would like me to simply ignore the contractual language contained in this Article …. But it does mean something. It does mean that the parties thought that there was some kind of demarcation line in union representation for various kinds of union officials. The assumption appears to be that the Project Representative or Alternate is the party that is to represent the union in most matters involving the project itself. Indeed, Article 16.5 explicitly references the role which different

---

of … the prosecution of grievances … without fear of restraint, interference, coercion or discrimination."

Article 25.1 states in pertinent part:

> Union Officers and Project Representatives shall be designated by the Union and shall be recognized as employee representatives. An up-to-date list of Project Representatives and Officers will be supplied to the Employer and posted to bulletin boards at the various projects. Unless included on this up-to-date listing, employees will not be entitled to Official Time under the provisions of this agreement.

> union representatives are to have in processing grievances in different circumstances. … Again, why would [the] language [of Article 25.3 be negotiated [if] in the union's view … only Article 22 is controlling? Its position provides no answer to this important question.

JA ___ (Award 12, 14). Thus, the arbitrator gave full effect to all the language of the CBA and his award cannot be said to be irrational, unfounded, implausible or in manifest disregard of the parties' agreement. *See* JA (AD at 6). Under the extreme deferential standard, the Authority upheld the arbitrator's decision, and, respectfully, this Court should affirm the Authority's decision as consistent with law.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Solicitor

/s/ Joyce G. Friedman
JOYCE G. FRIEDMAN
Attorney

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7906

January 10, 2011

D.C.Circuit Rule 32(a) Certification

Pursuant to Fed. R. App. P. 32(a)(7) and D.C. Circuit Rule 32(a), I hereby certify that this brief is double spaced (except for extended quotations, headings, and footnotes) and is proportionately spaced, using Times New Roman font, 14 point type. Based on a word count of my word processing system, this brief contains fewer than 14,000 words. It contains 3,623 words excluding exempt material.

/s/ Joyce G. Friedman
Joyce G. Friedman
Counsel for the Respondent

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

No. 10-1065

UNITED POWER TRADES ORGANIZATION,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent.

CERTIFICATE OF SERVICE

I certify that copies of the Brief for the Federal Labor Relations Authority, have been filed with the Court and served this day, by way of the ECF filing system, and by mail, upon the following:

Thomas F. Muther, Jr., Esq.
Minahan & Muther, P.C.
5132 W. 26th Street
Denver, Colorado 80212

/s/ Joyce G. Friedman
Joyce G. Friedman
Attorney for the Respondent

January 10, 2010

Relevant Portions of the Federal Service Labor-Management Relations Statute
5 U.S.C. §§ 7101-7135

TABLE OF CONTENTS

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

§ 7116. Unfair labor practices

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

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

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

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter. Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions 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.

(e) The expression of any personal view, argument, opinion or the making of any statement which—

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat or reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

§ 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).

§ 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.

§ 7131. Official time

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.