ORAL ARGUMENT NOT YET SCHEDULED
No. 11-1019

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

UNITED STATES DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

PATENT OFFICE PROFESSIONAL ASSOCIATION,

Intervenor.

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

BRIEF FOR RESPONDENT
FEDERAL LABOR RELATIONS AUTHORITY

ROSA M. KOPPEL
Solicitor
Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424
(202) 218-7907

AUGUST 2011

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties to this petition for review are the petitioner, United States Department of Commerce, Patent and Trademark Office, the respondent, the Federal Labor Relations Authority, and the intervenor, Patent Office Professional Association. There are no amici before this Court.

B. Ruling Under Review

The ruling under review is *United States Department of Commerce, Patent and Trademark Office (Agency) and Patent Office Professional Association (Union)*, Case No. 0-AR-4128, issued on November 30, 2010, reported at 65 F.L.R.A. (No. 62) 290.

C. Related Cases

Respondent is not aware of any related cases. However, *United States Department of the Treasury, Bureau of the Public Debt, D.C. v. FLRA*, No. 11-1102 (D.C. Cir.) , which involves a negotiability appeal rather than review of an arbitral award (which is the case here), also presents the question of whether the Authority's current "abrogation" standard, rather than its previous "excessive interference" standard, should apply to determine whether a union proposal (as opposed to a provision in a collective bargaining agreement) is an "appropriate arrangement" intended to ameliorate the adverse effects of the exercise of a

management right. In an order dated June 6, 2011, this Court ordered that the instant case and No. 11-1102 be argued on the same day before the same panel.

In addition, in a prior arbitration between the parties in the instant case concerning the same contractual provision but different arbitral awards and issues, the Patent Office Professional Association filed a petition for review from an Authority decision reversing an arbitral award. The court dismissed the petition for lack of jurisdiction, finding that the award did not involve a statutory unfair labor practice. *See U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839 (2005), *pet. for review dismissed*, 180 Fed. App'x 176 (D.C. Cir. Mar. 21, 2006) (unpublished).

/s/ Rosa M. Koppel
ROSA M. KOPPEL
Attorney for the Respondent

TABLE OF CONTENTS

ADDENDUM

Relevant Statutes, Regulations, and Rules

TABLE OF AUTHORITIES

CASES

Page No.

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

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

STATUTES AND REGULATIONS

MISCELLANEOUS

GLOSSARY

Authority	Federal Labor Relations Authority
First Award	Award of Arbitrator Larry Evans dated October 1, 2004
FLRA	Federal Labor Relations Authority
MA	Millennium Agreement
OPM	Office of Personnel Management
POPA	Patent Office Professional Association
PTO	U.S. Dep't of Commerce, Patent & Trademark Office
PTO I	*U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839 (2005)
Second Award	Award of Arbitrator Salvatore J. Arrigo dated July 25, 2006
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135
ULP	Unfair labor practice

ORAL ARGUMENT NOT YET SCHEDULED

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

No. 11-1019

UNITED STATES DEPARTMENT OF COMMERCE,
PATENT AND TRADEMARK OFFICE,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

PATENT OFFICE PROFESSIONAL ASSOCIATION,
Intervenor.

ON PETITION FOR REVIEW OF A FINAL 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 November 30, 2010. The Authority's decision is published at 65 F.L.R.A. (No. 62) 290. A copy of the

decision is included in the Joint Appendix ("JA") 282. 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]

STATEMENT OF THE ISSUES

1. Whether the Authority properly held that its decision in *U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839 (2005), *pet. for review dismissed*, 180 Fed. App'x 176 (D.C. Cir. Mar. 21, 2006) (unpublished) (*PTO I*), did not preclude it or the arbitrator from determining whether Section A.2 of the parties' collective bargaining agreement is an appropriate arrangement.

2. Whether the Authority reasonably held that Section A.2 is an appropriate arrangement.

3. Whether the Authority reasonably held that the agency repudiated Section A.2 of the collective bargaining agreement.

4. Whether the Authority reasonably held that the arbitrator's award did not violate the Back Pay Act.

STATEMENT OF THE CASE

Petitioner, the United States Department of Commerce, Patent and Trademark Office ("PTO"), seeks review of a decision of the Authority upholding an

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

arbitration award pursuant to § 7122 of the Statute. The arbitrator found that Section A.2 of the collective bargaining agreement entered into between PTO and the union, the Patent Office Professional Association (POPA) was enforceable under § 7106(b)(3) of the Statute and that PTO clearly and patently breached the agreement in violation of § 7116(a)(1) and (5) of the Statute. The arbitrator concluded that PTO was required to fulfill its obligations under the agreement.

STATEMENT OF THE FACTS

Background

In 2000, PTO's patent examiners were paid under the General Schedule (GS). JA 282. Because it was having difficulty recruiting and retaining employees, PTO sought and received Office of Personnel Management (OPM) approval to pay employees special rates that were ten and fifteen percent higher than the GS rates. JA 282, 283. Under OPM regulations, employees paid a special rate receive the same general increases, but not the locality pay, that employees paid GS rates receive. JA 283. As a result, over time, special pay rates erode in value relative to the GS rates.

In conjunction with OPM's approval of the special rates, PTO and POPA entered into a collective bargaining agreement, known as the Millennium Agreement (MA). JA 69. The MA's preamble provides that "[t]his entire agreement shall not be effective unless OPM approves the special pay schedule in

accordance with" the MA. *Id*. Section A.1 of the MA contains the uniform special pay schedule for which PTO was to seek OPM's approval for 2001. Section A.2 of the MA requires PTO to make annual requests to OPM to increase the special pay schedule as follows:

> The [Agency] shall request OPM approval for the next five years to increase the special pay schedule so as to maintain the 10% and 15% salary differentials relative to the updated GS rates, in a manner consistent with OPM regulations. If OPM refuses the request, the Agency shall enter into discussions with [the Union] in order to provide substantially equivalent alternatives.

JA 69.

Section B of the MA provides for the reduction of the paper search files that examiners use when reviewing patent applications in order for PTO to transition to an automated search system. Under the MA's paper search files reduction schedule, at Section B.5.a., some paper files were to have been removed by the date the MA was implemented. JA 71. Under Section B.13, eventually, virtually all paper files would be eliminated. JA 72.

2002 Dispute and First Award

In 2002, federal employees in the Washington area received a 1.17 percent increase in locality pay in addition to the 3.6 percent general increase. JA 283. Consistent with the first sentence in Section A.2, PTO requested that OPM increase the special pay rates for examiners by 1.17 percent. *Id*. OPM refused the

request, stating that PTO no longer had recruitment or retention problems, and recommended that PTO explore "the strategic use of other compensation flexibilities to address targeted recruitment and retention problems." *Id*.

Pursuant to the second sentence in Section A.2, after OPM refused PTO's request, the parties discussed ways in which a substantially equivalent alternative could be paid to employees. When the discussions failed to produce an agreement, POPA filed a grievance that was ultimately submitted to arbitration. JA 283.

Before Arbitrator Larry Evans, the parties stipulated the sole issue as follows: "Did management violate Section A.2 of the [MA]? If so, what should the remedy be?" *PTO I*, 60 FLRA at 840. Arbitrator Evans interpreted the second sentence of Section A.2 as intended to address the adverse effect of special rate erosion that would occur over time as non-special rate employees received locality pay increases. *Id*. He determined that PTO violated the second sentence of Section A.2, which required PTO to engage in discussions with POPA in order to compensate for a way to overcome the lost locality pay. *Id*. Arbitrator Evans ordered PTO to engage in such discussions with POPA. *Id*.

In exceptions to the award (hereinafter, the First Award) it filed with the Authority, PTO argued that the award was contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute. *Id*. at 841. PTO also contended that Section A.2 of the MA does not constitute an appropriate arrangement under

§ 7106(b)(3) of the Statute. *Id*. The Authority agreed that Section A.2, as interpreted and enforced by Arbitrator Evans, is not an appropriate arrangement. *Id*. at 842. The Authority explained that the adverse effect that the arbitrator found Section A.2 was intended to address resulted not from the exercise of a management right but, instead, by operation of law. *Id*.

Then, the Authority rejected POPA's argument that Section A.2 is an arrangement for employees who are adversely affected by management's decision to eliminate paper files for patent searches and to include a customer-service element in employees' performance plans. *Id*. at 843. The Authority noted that Arbitrator Evans did not interpret Section A.2 as intended to ameliorate these adverse effects and that POPA presented no evidence of such an intent. *Id*. Accordingly, the Authority set aside the First Award.

POPA filed a petition for review, which this Court dismissed. The Court held that it lacked jurisdiction under 5 U.S.C. § 7123(a) to review the Authority's decision because the underlying award did not involve an unfair labor practice (ULP). *See Patent Office Professional Association v. FLRA*, 180 Fed. App'x 176, 1777-178 (D.C. Cir. Mar. 21, 2006)(unpublished).

The Second Award

In 2003, the locality pay rate for the Washington, D.C. area was again increased by 1.17 percent. However, PTO notified POPA that it would not ask

OPM to increase it. JA 284. POPA filed a grievance, which was submitted to arbitration before Arbitrator Salvatore J. Arrigo.

Arbitrator Arrigo adopted POPA's statement of issues, being:

1. Whether PTO violated Section A.2 of the MA when it refused to request OPM approval to increase the special pay schedule;
2. Whether PTO violated Section A.2 when it refused to engage in discussions to provide a substantially equivalent alternative;
3. Whether Section A.2 is an appropriate arrangement for employees who were adversely affected by management's decision to eliminate paper patent files and add a customer service element to unit employees' performance plans;
4. Whether PTO's refusal to request OPM approval or engage in discussions to provide a substantially equivalent alternative constituted a clear and patent breach of a provision that goes to the heart of the MA, thereby constituting contract repudiation and a ULP in violation of 5 U.S.C. § 7116(a)(1) and (5);
5. Whether PTO's refusal to request OPM approval or to engage in discussions to provide a substantially equivalent alternative constituted a violation of the duty to negotiate in good faith as defined by § 7114(b)(5), thereby constituting a ULP in violation of 5 U.S.C.

§ 7116(a)(1) and (5); and

6. If a violation is found, what the appropriate remedy would be.

JA 55-56.

In his award (the Second Award), Arbitrator Arrigo interpreted the first sentence of Section A.2 as requiring PTO to make yearly requests to OPM for an increase in the special pay rate. JA 60. He made a factual finding that the requirement in the first sentence of Section A.2, that PTO certify that the request is necessary to ensure adequate staffing, does not prevent PTO from honestly certifying that the request is based on long-term needs. *Id*. As the arbitrator explained, if OPM finds PTO's reasons for the raise to be inadequate, and rejects the request, PTO would nevertheless have fulfilled its obligations under the first sentence of Section A.2. *Id*. While recognizing that there was no OPM refusal because PTO made no request to OPM, still, the arbitrator concluded that under "the most reasonable and sensible interpretation of [Section A.2]," PTO was obligated to enter into discussions with POPA. JA 61.

Next, the arbitrator found that Section A.2 affects management's right to retain employees but that it was intended to be an appropriate arrangement. JA 62-64. The arbitrator found that the entirety of Section A "was negotiated as a *quid pro quo* for the elimination of paper patents and the addition of customer service duties for employees." JA 62. He found that the linkage between a special pay

schedule and the paper file and customer service issues was established "in every document concerning the discussions between the parties and in the submission to OPM." JA 63. The arbitrator determined that Section A's provisions were a "balm" to ameliorate the adverse effects on employees from the elimination of paper files and the introduction of the customer service element. *Id*. As such, the arbitrator found that Section A's provisions were enforceable as appropriate arrangements. JA 63-64.

The arbitrator agreed with POPA's claim that PTO committed a ULP because it repudiated the MA. Assessing whether PTO clearly and patently breached Section A.2, the arbitrator found the section to be "clear and unambiguous" in its requirements. JA 64. He noted PTO's argument that the phrase "in a manner consistent with OPM regulations" found in the first sentence of Section A.2, should be interpreted as requiring the existence of supporting recruitment and retention data before PTO would be obligated to submit a rate increase request to OPM. JA 59. The arbitrator found that the parties "specifically rejected" such a prerequisite while negotiating the MA. JA 60. In addition, the arbitrator credited testimony that POPA had proposed the quoted language to ensure that PTO would present OPM with a complete application in accordance with all aspects of the applicable regulations. JA 60.

The arbitrator also concluded that the breached provision "went to the heart of the parties' agreement." JA 65. The arbitrator found that Section A.2 was a "critical part" of Section A, which was, in turn, necessary to POPA's acceptance of the rest of the agreement. *Id*. The arbitrator concluded that PTO repudiated the agreement in violation of § 7116(a)(1) and (5) of the Statute. *Id*.

The arbitrator required PTO to comply with Section A.2 by entering into discussions with POPA regarding substantially equivalent alternatives to an increase in the special pay schedule. JA 67. The arbitrator found that PTO's misconduct resulted in withholding, for a considerable time, funds that employees were entitled to receive. JA 67A. He found that an appropriate remedy should include interest "on any money the employees might receive pursuant to the discussion envisioned in [Section] A.2." *Id*.

The Authority's Decision on the Second Award

Although, as relevant here, PTO filed exceptions to the Second Award contending that it was contrary to law, JA 17-35, it did not contend before the Authority either that the award was based on nonfact or that Arbitrator Arrigo's interpretation of the MA failed to draw its essence from the MA. The Authority denied PTO's exceptions.

In its first exception, PTO contended that the award violates OPM regulations by requiring PTO to: 1) increase the special pay rate without OPM

approval; 2) pay employees both special pay and locality pay; and 3) make false certifications to OPM regarding the need for special pay. JA 287. The Authority noted that the award did not require any of these actions. Rather, the Authority explained, the award required PTO to comply with the second sentence of Section A.2 by entering into discussions with POPA with the goal of achieving "the agreed-upon and express objective of maintaining" the pay differential between the special rate schedule and the General Schedule. JA 289.

In its second exception, PTO contended that the award was contrary to management's right to retain employees under § 7106(a)(2)(A) of the Statute. JA 287. In addressing this exception, the Authority applied a recently revised analysis under which it first assesses whether the award affects the exercise of the asserted management right. JA 289, *citing U.S., Environmental Prot. Agency* , 65 FLRA 113, 115 (2010) (*EPA*). The Authority explained that, under its modified analysis, if it determines that the award affects the management right, then, as relevant here, it examines whether the award enforces a contract provision negotiated under § 7106(b)(3) of the Statute. JA 290. To perform this examination, the Authority assesses: 1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and 2) if so, whether the arbitrator's enforcement of the arrangement abrogates, or waives, the exercise of the management right. *Id*. Before it decided *EPA*, the Authority

would have assessed whether the provision, as interpreted by the arbitrator, excessively interferes with the exercise of a management right instead of whether there is abrogation of the management right. *Id*.

The Authority found that Section A.2, as enforced in Arbitrator Arrigo's award, affects management's right to retain employees. JA 290. As for whether Section A.2 is an arrangement, the Authority first addressed PTO's contention that the decision in *PTO I* precluded the arbitrator from making an appropriate arrangement determination. *Id*. In rejecting PTO's contention, the Authority explained that the enforceability of a contract provision depends on the particular circumstances of each case. Observing that Arbitrator Arrigo was presented with facts and arguments different from those presented earlier to Arbitrator Evans, the Authority found that *PTO I* did not preclude Arbitrator Arrigo from making his own appropriate arrangement determination. *Id*. In addition, to the extent that PTO's exceptions could be construed as contending that Arbitrator Arrigo was collaterally estopped from making his own appropriate arrangement assessment, the Authority rejected such a contention finding that this case and *PTO I* did not involve the same issue. *Id*. and n. 5.

On the merits, the Authority upheld Arbitrator Arrigo's finding that PTO exercised a management right when it reduced paper search files and adopted a computerized patent-search system. The Authority explained that although the

arbitrator did not specify what management right PTO was exercising, the Authority noted earlier precedent in which it held that PTO's conversion to computer files involved the exercise of the right to determine the method and means of performing work under §7106(b)(1) of the Statute. *Id*. The Authority also upheld the arbitrator's findings that management's reduction of the paper files adversely affected employees by slowing down their work and making it more difficult. JA 291.

The Authority recognized that the management right affected by the award (the right to retain employees) is different from the management right that adversely affected the employees (the right to determine the method and means of performing work). However, it explained that under Authority precedent, the adverse effect on employees that the provision is intended to ameliorate need not flow from the same management right that the provision affects. JA 291.

With regard to PTO's claim that Section A was not sufficiently tailored to constitute an appropriate arrangement, the Authority, relying on its analysis in *EPA*, 65 FLRA at 116, explained that it does not apply a tailoring analysis to arbitration awards because such awards are inherently tailored to the adversely affected employees. JA 291-92.

Based on the forgoing, the Authority denied PTO's exception to the arbitrator's finding that Section A.2 was intended to be an arrangement. JA 291-

292. Then it found Section A.2 to be an appropriate arrangement under the abrogation standard because it does not preclude PTO from exercising its right to retain employees. JA 292.

In its third exception, PTO contended that its failure to comply with the first sentence of Section A.2 was not a repudiation of the parties' agreement because compliance would be inconsistent with OPM regulations. JA 287. Rejecting that contention, the Authority found the breach to be "in clear violation of the plain terms" of the first sentence of Section A.2 and concluded that PTO committed a clear and patent breach of the agreement. JA 293. Further, the Authority rejected PTO's contention that *PTO I* precluded the arbitrator from determining, as he did, that a *quid pro quo* existed between the rate increase schedule and the paper files and customer service element issues. The Authority upheld the arbitrator's determination that the breach went to the heart of the MA. *Id.*

The Authority concluded that the arbitrator properly found that PTO repudiated the first sentence of Section A.2 of the MA. The Authority noted that this was a separate and independent basis for a determination that PTO repudiated Section A.2 and, thus committed a ULP in violation of § 7116(a)(1) and (5) of the Statute. Therefore, the Authority found it unnecessary to decide whether the arbitrator erred in finding that PTO also repudiated the second sentence of Section A.2. *Id.*

In its fourth exception, PTO contended that the award is contrary to the Back Pay Act because it requires an award of interest without an underlying award of back pay. JA 287-288. The Authority denied this exception, finding the award to be consistent with the Back Pay Act in that it required interest only if the parties agreed to the payment of back pay. JA 294.

Member Beck dissented in part. In his view, the arbitrator and the Authority were collaterally estopped by *PTO I* from finding that Section A.2 was an appropriate arrangement. JA 299.

STANDARD OF REVIEW

The Court's review over this matter 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 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).

This Court has noted that "[w]e accord considerable deference to the Authority when reviewing an unfair labor practice determination, recognizing that such determinations are best left to the expert judgment of the FLRA." *Fed. Deposit Ins. Corp.* v. *FLRA*, 977 F.2d 1493, 1496 (D.C. Cir. 1992) (internal quotations omitted). As a result, "[o]ur scope of review is limited." *Pension Benefit Guaranty Corp.*, 967 F.2d 658, 665 (D.C. Cir. 1992). So long as the Authority "provide[s] a rational explanation for its decision," it will be sustained on appeal. *Fed. Deposit Ins. Corp.*, 977 F.2d at1496.

The Authority's recent modification of its test for determining whether a contract provision is enforceable in arbitration as an appropriate arrangement under § 7106(b)(3) of the Statute does not subject the Authority to a heightened standard of review. *See FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S.Ct. 1800, 1810-11 (2009) (*FCC*); Dillmon v. NTSB, 588 F.3d 1085, 1089 (D.C. Cir. 2009) (*Dillmon*). To the contrary, an agency "is free to alter its past rulings and practices even in an adjudicatory setting." *Dillmon*, 588 F.3d at 1089, *quoting Airmark Corp. v. FAA*, 758 F.2d 685, 691-92 (D.C. Cir. 1985). To be sure, an agency must display awareness that it is changing its position and provide an adequate

explanation for its departure from its established precedent. *Id*. at 1090. But, it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one. *FCC*, 129 S.Ct. at 1811. Instead, it suffices "if the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better." *Id*. (emphasis removed).

SUMMARY OF ARGUMENT

This Court should affirm the Authority's decision. None of the reasons that PTO offers for granting its petition for review has merit.

First, contrary to PTO's contention, the Authority's earlier decision in *PTO I* did not bar Arbitrator Arrigo or the Authority from determining whether Section A.2 is an appropriate arrangement. Even though *PTO I* and the instant decision concern Section A.2, in the two decisions, the Authority assessed the enforceability of different arbitral awards that addressed different issues. An earlier decision does not have collateral estoppel effect over a subsequent decision if the two decisions do not involve the same issue.

Second, PTO's assertion that Section A.2 is not an appropriate arrangement is incorrect. PTO contends that Section A.2 is not an arrangement because it is not tailored to address those employees suffering harm from the exercise of a management right. The Authority is not required to conduct a tailoring analysis

when reviewing an arbitral award because such an award is inherently tailored to adversely affected employees. Moreover, as Arbitrator Arrigo concluded, based on his findings of fact and interpretation of the MA (neither of which PTO excepted to), Section A.2 is tailored to employees suffering the adverse effects of the removal of paper patent files and assignment of new customer service duties.

In addition, PTO contends that the Authority erred in employing the abrogation standard instead of the excessive interference standard when determining that Section A.2 of the MA is an appropriate arrangement intended to address the adverse effects of PTO's exercise of a management right. Under the abrogation standard, which the Authority applied from 1990 to 2002, and recently reinstated in *EPA*, a contract provision intended as an appropriate arrangement is enforceable so long as it does not abrogate, or waive, the exercise of a management right. Both in *EPA* and in the instant decision, the Authority, based on a careful analysis of the Statute, and on its expertise in labor-management relations, clearly explained why it was reinstating the abrogation standard.

In addition, there is no support for PTO's contention that the abrogation standard is contrary to law because it accords deference to an arbitrator's interpretations of law; it does not. Nor is the abrogation standard contrary to law just because, thus far, application of the standard has not reversed an arbitration award. All this signifies, if anything, is that management representatives come to

the bargaining table prepared to represent management adequately, as § 7114(b)(2) of the Statute requires.

Third, PTO argues that it could not have repudiated the first sentence of Section A.2 because it could not have truthfully certified that it had a long-term need to increase the special pay rate. However, the arbitrator made a factual finding that PTO could so truthfully certify, a finding to which PTO did not except and to which the Authority was bound.

Besides asking this Court to ignore the arbitrator's factual findings, PTO also asks the Court to overrule the arbitrator's interpretation of Section A.2, pursuant to which PTO must bargain with POPA over substantially equivalent alternatives when PTO has not obtained a rate increase from OPM. But, that interpretation is what the parties bargained for, and thus, it is entitled to deference from both the Authority and the Court. Therefore, this Court should not adopt PTO's interpretation of Section A.2, that is, that its breach of the first sentence permits it to also breach the second sentence.

Finally, the award did not violate the Back Pay Act; it did not order any back pay at all. Instead, the award simply noted, correctly, that any award of back pay must include interest.

ARGUMENT

I. THE AUTHORITY PROPERLY HELD THAT ITS DECISION IN *PTO I* DID NOT PRECLUDE IT OR THE ARBITRATOR FROM DETERMINING WHETHER SECTION A.2 OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT IS AN APPROPRIATE ARRANGEMENT.

PTO contends that the Authority's decision in *PTO I* is "binding precedent" which precluded the Authority, in this decision, from finding that Section A.2 is an appropriate arrangement and, also, that the Authority erred in failing to confer *PTO I* collateral estoppel effect. PB 24-32. This contention is based, in large part, on the premise that the same issue is involved in this decision as was involved in *PTO I*. That premise is incorrect because the two decisions reviewed exceptions to two different arbitration awards involving different interpretations of Section A.2.

As the Authority explained, "if a particular arbitrator's interpretation of a contract provision is inconsistent with a management right, then the award will be set aside, but 'the contractual provision, susceptible to a different and sustainable interpretation by a different arbitrator, will not be affected.'" JA 290, *quoting Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990) (*Customs Serv.*).[2]

[2] The Authority's explanation is consistent with court decisions holding that an arbitrator is not bound by a prior arbitration award absent a provision in the collective bargaining agreement so requiring. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber Workers*, 461 U.S. 757, 765 (1983); *Hotel Ass'n of Washington, D.C., Inc. v. Hotel & Restaurant Employees Union, Local 25, AFL-*

That is what happened here. The Authority's decision in *PTO I* set aside the First Award as contrary to law; it did not affect Section A.2. However, PTO's argument, taken to its full extent, would require all subsequent arbitrators interpreting Section A.2 to find it unenforceable, in effect, removing Section A.2 from the MA and also removing a fundamental role of an arbitrator – to interpret contract provisions. *See United Steel Workers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960) (*United Steel*)(It is the arbitrator's construction of a collective bargaining agreement that the parties bargain for).

Nonetheless, PTO argues that Arbitrator Arrigo was bound by the holding in *PTO I* because he interpreted Section A.2 "exactly the same way" as Arbitrator Evans did in *PTO I*, and the Authority set aside Arbitrator Evans' interpretation. PB 29. But, as the Authority found, the two arbitrators' interpretations of Section A.2 were quite different.

The Authority observed that Arbitrator Arrigo, unlike Arbitrator Evans, expressly determined that Section A.2 constitutes an arrangement under § 7106(b)(3) of the Statute. JA 290. That issue was before Arbitrator Arrigo but not before Arbitrator Evans. Indeed, the sole issue before Arbitrator Evans was whether PTO violated Section A.2 of the MA. *PTO I*, 60 FLRA at 840. By

---

CIO, 963 F.2d 388, 390 (D.C. Cir. 1992); *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 916 F.2d 1161, 1162-63 (7th Cir. 1990) ("[w]hether more than one arbitrator can take a crack at interpreting the contract is itself a question of contractual interpretation").

contrast, the issues before Arbitrator Arrigo included that issue and also: 1) whether Section A.2 is an appropriate arrangement; 2) whether PTO engaged in contract repudiation and committed a ULP; and 3) whether PTO breached its duty to negotiate in good faith thereby committing a ULP. JA 284-285.

In his interpretation of Section A.2, Arbitrator Evans determined only that the second sentence of Section A.2 required PTO to engage in good faith discussions in an attempt to find a monetary equivalent to the denied request for a rate increase. *PTO I*, 60 FLRA at 840. Arbitrator Arrigo interpreted Section A.2 similarly, JA 61, but, in addition, 1) interpreted the first sentence of Section A.2 as obligating PTO to make yearly rate increase requests to OPM and not preventing PTO from submitting an honest certification of a long-term need for a rate increase (JA 60); 2) interpreted the discussion requirement of the second sentence of Section A.2 as being triggered when PTO refuses to comply with the first sentence of Section A.2 (JA 61); 3) found that Section A.2 affects a management right (JA 62); 4) found that Section A.2 is an appropriate arrangement (JA 62-64); and 5) found PTO's breach of Section A.2 to be clear and patent. (JA 64-65).

It is clear, then, that in *PTO I* and in this case, the Authority reviewed different awards, made under different circumstances, addressing different issues, and containing different interpretations by arbitrators of the same contractual provision. Having found, correctly, that this case and *PTO I* do not involve the

same issue, because they concern the review of different arbitral awards, the Authority concluded that, even if PTO raised collateral estoppel, it did not establish collateral estoppel. *See U.S. Air Force, Scott Air Force Base, Ill.*, 35 FLRA 978, 982-83 (1990) (*Scott AFB*) (The Authority applies collateral estoppel only when, *inter alia*, the same issue is involved in both cases).[3]

For the foregoing reasons, neither the Authority nor Arbitrator Arrigo was required to give collateral estoppel effect to *PTO I*.

II. THE AUTHORITY REASONABLY HELD THAT SECTION A.2 OF THE AGREEMENT IS AN APPROPRIATE ARRANGEMENT.

a. The applicable standard

When a party contends that an award is contrary to a management right under § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of a management right. *E.g., U.S. Dep't of the Navy, Puget Sound Naval Shipyard & Intermediate Maint. Facility, Bremerton, Wash.*, 62 FLRA 4, 5 (2007). If an arbitrator's award affects a management right, then the Authority determines whether the award provides a remedy for a contract provision negotiated under § 7106(b) of the Statute. *See FDIC, Div. of Supervision & Consumer Prot., S.F.*

[3] The other requirements that must be met for a prior decision to have collateral estoppel effect over a subsequent decision are: (1) the issue must have been actually litigated in the first case; (2) the resolution of the issue must have been necessary to the decision in the first case; (3) the prior decision is final; and (4) the party precluded must have been fully represented at the prior hearing. *Scott AFB*, 35 FLRA at 982-83.

Region, 65 FLRA 102, 104-05 (2010); *Customs Serv.*, 37 FLRA at 313-14. In this regard, § 7106(a) of the Statute provides that "[s]ubject to subsection (b) of this section, nothing in this chapter shall affect" the exercise of management rights. Accordingly, if an arbitrator's award affects a management right, it is contrary to law unless it enforces a contract provision negotiated under § 7106(b) of the Statute. *EPA*, 65 FLRA at 115.

In *EPA*, the Authority revised the standard it applies when examining whether an award enforces a contract negotiated under § 7106(b)(3).[4] Under the revised standard, the Authority assesses: 1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and 2) if so, whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *EPA*, 65 FLRA at 118.

The Authority first adopted the abrogation standard in 1990 in *Customs Serv.* and continued to apply it until 2002 when, in *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 110 (2002) (*BOP Okla. City II*), the Authority returned to the excessive interference standard that it had applied prior to *Customs Serv.* Under the excessive interference

[4] Section 7106(b)(3) states that "[n]othing in this section shall preclude an agency and any labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section by . . . management officials."

standard, which the Authority applies when determining whether a proposal is negotiable, the Authority assesses whether a proposal's burdens on management rights outweigh the proposal's benefits to employees. *AFGE, Local 1770*, 64 FLRA 953, 959 (2010). Under the abrogation standard, the Authority assesses whether an arrangement "precludes [the] agency from exercising" the affected management right. *U.S. Dep't of Transp., FAA*, 65 FLRA 171, 174 (2010).

b. The Authority reasonably held that Section A.2 is an arrangement

The Authority concluded that Arbitrator Arrigo's finding that Section A.2 of the MA is an arrangement intended to ameliorate the adverse effects of PTO's decisions to introduce a computerized patent-search system and eliminate paper search files was not deficient. JA 291. PTO contends that Section A.2 is not sufficiently tailored to constitute an appropriate arrangement. PB 38-41. However, because the award is inherently tailored to the adversely affected examiners covered by the award, the Authority was not required to conduct a separate tailoring analysis. *EPA*, 65 FLRA at 116.

Although, as the courts held in the decisions PTO cites in its brief, PB 38-39, a tailoring analysis is required when determining whether a proposal is negotiable as an appropriate arrangement, it is not required when reviewing an arbitrator's interpretation of a provision (that inherently has been agreed to by both parties). As the Authority has explained, unlike in a negotiability proceeding, in an

arbitration proceeding, the Authority reviews a contract provision that an arbitrator applies to particular aggrieved employees to address their specific harms. *U.S. Dep't of Justice, Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158,160 (2001) (*BOP Okla. City I*). That awards necessarily involve grievants make them inherently tailored.

Yet, PTO contends that the award is not tailored because it provides a benefit to bargaining unit employees not adversely affected by the reduction of paper search files or the inclusion of a customer service element. PB 40. PTO raises Section B.6 of the MA as an example of a purported lack of tailoring. Section B contains a removal schedule for paper files whereby no more than 50% of the total files were to be eliminated by the end of calendar year 2002, and, eventually, virtually all were to be eliminated. JA 71-72. According to PTO, this means that by the end of calendar year 2002, 50% of examiners were not to be at all affected by the removal of paper files and yet still would reap the benefits of Section A.2. PB 40.

But, that is not how Arbitrator Arrigo interpreted the MA. Based on his factual findings and interpretation of the MA, Arbitrator Arrigo found that Section A was tailored; he found that it was intended to ameliorate the adverse effects upon patent examiners of the elimination of paper patent files and the addition of customer service work. JA 62-64. The Authority, as it did here, defers to the

arbitrator's findings of fact when determining whether the award is contrary to law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). The Authority also defers to an arbitrator's interpretation of contract provisions unless that interpretation fails to draw its essence from the agreement, that is, if it does not represent a plausible interpretation of the agreement or evidences a manifest disregard of the agreement. *Customs Serv.*, 37 FLRA at 317. PTO did not claim in its exceptions that the arbitrator's interpretation of Section A failed to draw its essence from the MA. Therefore, the Authority properly upheld the arbitrator's interpretation of Section A.2.

Moreover, PTO's interpretation of the MA seems inconsistent with its plain language. It is clear from Section B of the MA that the priorities in the removal schedule were based on the classifications of the paper files (*e.g.*, classifications in which the fewest patents had been issued over the last two years were to be removed first), not on individual examiners using them. JA 70. Because patents typically span multiple classifications, examiners typically search in multiple classifications when reviewing a patent application. JA 206 (Transcript at 275-76). Therefore, the impact of only 50 percent of the paper files being removed by the end of calendar year 2002 would not have been that 50 percent of patent examiners were unaffected by the reduction of paper files. Instead, all examiners would

suffer the adverse effects of the reduction, and eventual disappearance, of the paper files.[5]

c. The Authority's reinstatement of the abrogation standard for determining whether a contract provision is an appropriate arrangement is adequately explained and is permissible under the Statute

The Authority's decision, in *EPA*, to reinstate the abrogation standard is not subject to a heightened standard of review. *Dillmon v. NTSB*, 588 F.3d 1085, 1089-90 (D.C. Cir. 2009), *citing FCC v. Fox Television Stations, Inc*., 129 S.Ct. 1800, 1810-11 (2009). *See* Brief for Respondent at 16-17. This is because the Authority's decision reflects its awareness that it was changing its policy and contains an adequate explanation for the change.[6]

In *EPA*, the Authority explained that it was reinstating the abrogation standard because it found it appropriate, in assessing whether an arbitrator is enforcing an appropriate arrangement under § 7106(b)(3) of the Statute, to apply a different standard than it applies when determining whether a proposal is within the duty to bargain. *EPA*, 65 FLRA at 117. As the Authority explained, in the

---

[5] It appears that PTO has abandoned its argument before the Authority that a potential increase in compensation may not constitute an appropriate arrangement. *See* JA 23, 291.

[6] Where, as here, an agency's reason for its change in policy is clear both from its decision being challenged and from its earlier decisions, the change should be upheld as adequately explained. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 312 (D.C. Cir. 2003) (decision upheld where its rationale could be reasonably discerned from both the decision, itself, and from the agency's decisions in other cases).

negotiability context, it is necessary for the Authority to balance competing burdens and benefits. By contrast, the Authority explained, this is not necessary in the arbitration context because the parties' representatives are authorized to, and should, assess the burdens that a proposal would have on management rights and the benefits that the proposal would afford employees. *Id*. (citing *BOP Okla. City I*, 57 FLRA at 162). *See Dep't of Defense, Army-Air Force Exchange Service v.* FLRA, 659 F.2d 1140, 1157 (D.C. Cir. 1981) (*DoD*) ("In collective bargaining, managers are presumably competent to look out for government interests"). The Authority's adoption of the abrogation standard reflects its reluctance to interfere with decisions that parties make at the bargaining table. *EPA*, 65 FLRA at 117-118.

The analysis underlying the Authority's reinstatement of the abrogation standard was based on "the plain wording of the Statute." *EPA*, 65 FLRA at 117. In *EPA*, the Authority observed that:

> [N]either § 7106(b)(3) nor any other provision of the Statute defines the standard to be used in determining whether an award is contrary to § 7106 and, as a result, contrary to law under § 7122(a)(1). Thus, the Statute does not expressly preclude the Authority from distinguishing between the standards used to determine whether a matter is within the duty to bargain under § 7106(b)(3) and the standard used to determine whether an award is contrary to law under § 7122(a)(1).

Id.

In further discussing the distinction between the negotiability determination of whether there is a duty to bargain over a matter and the enforceability determination of whether an arbitral award is contrary to law, the Authority explained that it is "beyond dispute" that that many matters that are not within the duty to bargain are nevertheless not contrary to law and that management may choose to bargain over them. *Id.* For example, the Authority explained, there is no duty to bargain over matters encompassed by § 7106(b)(1) of the Statute. However, the Authority noted, once the parties have reached agreement on such a matter, it may not be disapproved by an agency head under § 7114(c)(3) of the Statute and is fully enforceable in arbitration. *Id.* The Authority found, likewise, that although there is no duty to bargain over matters that are not conditions of employment, once parties reach agreement on these matters, they are fully enforceable. *Id*. The Authority found no basis for concluding that the situation is different when management rights under § 7106(a) are involved. *Id*.

Thus, the Authority's reinstatement of the abrogation standard was based on a careful analysis of § 7106 of the Statute, and PTO's contentions to the contrary, PB 42 and 44-45, are meritless.

Also meritless are PTO's arguments that the abrogation standard is not permissible under the Statute. First, PTO contends that the existence of the term "appropriate arrangements" in only one section of the Statute, § 7106(b)(3),

indicates that Congress intended the term to have one meaning under all circumstances. PB 45. As the Authority explained in *EPA*, though, the plain language of § 7106(b)(3) does not dictate any particular standard of review or require that the same standard be applied all contexts. Also, this Court found that "appropriate" is a "broad limiting word" which permits the Authority to place needful limitations upon the sweep of [§ 7106(b)(3)]." *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1187 (D.C. Cir. 1983). Although the Court suggested in *AFGE Local 2782* that a proposal that impinges upon a management right "to an excessive degree" may not be negotiable as an "appropriate arrangement" under §7106(b)(3) of the Statute, the Court also found that the "precise content [of the word "appropriate"] is for the Authority to determine in the first instance, based on its knowledgeable estimation of the competing practical needs of federal managers and union representatives." *Id*. at 1188. The Authority exercised this very discretion when it decided, based on the plain language of the Statute and its expertise in federal labor-management relations, to reinstate the abrogation standard when examining whether an arbitral award enforces a contract negotiated under §7106(b)(3).

PTO also contends that the abrogation standard is contrary to law because it accords deference to arbitrators' interpretations of the law. PB 46-48. That is simply untrue. In applying the abrogation standard in this case, the Authority

conducted a *de novo* review of the arbitrator's legal conclusions. *See* JA 288. The Authority has consistently taken this approach when determining whether an arbitrator's award is contrary to law. In *BOP Okla. City I*, 57 FLRA at 162, the Authority made clear that it does not provide arbitrators deference "when none is permitted in the *de novo* review of exceptions contending that the award is contrary to § 7106." As it did here, the Authority defers to an arbitrator's determination of what a contract provision means, not whether, given that interpretation, the provision is enforceable. *Id*. The abrogation standard is simply the standard under which the Authority conducts its *de novo* review of whether a contract provision, as the arbitrator interprets the provision, abrogates a management right.

In PTO's view, the abrogation standard is "demonstrably meaningless" (PB 48) because the Authority has yet to find that a contract provision abrogates a management right. However, whether or not this Court upholds the Authority's decision to reinstate the abrogation standard should not depend on the number of times that application of the standard has reversed, or may result in the reversal of, arbitration awards. Instead, as discussed above, the relevant inquiry is whether the Authority's policy is adequately explained and permissible under the Statute.

That the Authority is yet to find that a contract provision abrogates a management right proves, if anything at all, that agency negotiators are sufficiently aware of the statutory management rights so as to not inadvertently agree to

contract provisions that waive them. *See NTEU*, 65 FLRA at 514-15 n. 8; *DoD*, 659 F.2d at 1157. As the Authority illustrated in *NTEU*, numerous Authority decisions on negotiability appeals, from just the past two years alone, evidence that agency representatives routinely declare proposals outside the duty to bargain because they are contrary to management rights. *NTEU*, 65 FLRA at 514 (*citations omitted*). The lack, thus far, of Authority decisions finding that a contract provision abrogates a management right does not signify that abrogation is a meaningless standard. Instead, it merely reflects that negotiating parties know better, and indeed should know better, than to agree to contract provisions that waive management rights. In fact, the Statute requires that agencies provide bargaining representatives who can adequately represent management's interests at the bargaining table. *See* 5 U.S.C. § 7114(b)(2) (It is the duty of bargaining parties "to be represented at negotiations by . . . representatives prepared to discuss and negotiate on any conditions of employment"). Should management ever fail in this duty, the Authority could find that a provision to which it agreed abrogates a management right.

III. THE AUTHORITY REASONABLY HELD THAT THE AGENCY REPUDIATED SECTION A.2 OF THE AGREEMENT.

The Authority has recognized that a party to a collective bargaining agreement can breach the agreement in such a way as to repudiate it, which constitutes a ULP under § 7116(a)(1) and (5) of the Statute. *U.S. Dep't of Labor, Washington, D.C.*,

59 F.L.R.A. 112, 116 (2003) (discussing the difference between a mere contract breach and repudiation).[7]

The Authority's lead case on repudiation is *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Ill.*, 51 F.L.R.A. 858 (1996) (*Scott AFB*). In *Scott AFB*, the Authority identified two elements necessary to establish a ULP violation based on repudiation: 1) the nature and scope of the breach, *i.e.*, whether the breach was "clear and patent"; and 2) the nature of the agreement provision allegedly breached, *i.e.*, did the breach go to the "heart of the parties' agreement." *Scott AFB*, 51 F.L.R.A. at 862.

As to the first element, the Authority found "no dispute" that PTO refused to request OPM approval, as the first sentence of Section A.2 requires. JA 292. Further, the Authority found` that Section A.2 "clearly" requires PTO to make a request for the next five years, and that PTO's refusal to do so one of the five years violated the plain terms of the requirement. JA 293. Thus, the Authority reasonably found a "clear and patent" breach.

As to the second element, the Authority noted that PTO did not dispute the arbitrator's factual findings that Section A was negotiated as a *quid pro quo* for the

[7] The Authority's repudiation doctrine has roots in private sector labor law. *See, e.g., Crest Litho, Inc.*, 308 N.L.R.B. 108, 110 (1992); *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. 905, 906 (1986). The Supreme Court has recognized the Authority's use of the doctrine. *Cornelius* v. *Nutt*, 472 U.S. 648, 664 (1985).

elimination of paper patent files and the addition of customer service duties for examiners and that there would have been no MA but for the inclusion of Section A. *Id*. Therefore, the Authority found that the arbitrator, based on factual findings that PTO did not assert were nonfacts, correctly determined that PTO's breach of Section A.2 went to the heart of the entire MA. *Id*.

Nonetheless, PTO argues that it did not repudiate Section A.2. PTO explains that Section A.2, as interpreted by the arbitrator, is contrary to law because it would require PTO to make a false certification to OPM as to the need for a special pay rate increase. PB 33. The certification would be false, and in violation of 18 U.S.C. § 1018, according to PTO, because PTO did not believe that OPM would find that the agency's recruitment and retention data would support an increase. *Id*.

But, as the Authority explained, JA 289, the arbitrator made a factual finding that PTO could truthfully certify, in accordance with OPM regulations, that there was a long-term need to increase the special pay rate. PTO did not except to that finding or present any evidence that the arbitrator erred in making that finding. Instead, PTO contends that submitting such a certification would be insufficient under OPM's regulations, which anticipate that agencies will submit recruitment

and retention data. PB 35.[8] However, the arbitrator neither discouraged nor prohibited PTO from submitting with the certification whatever recruitment and retention data it had. JA 60. Moreover, OPM regulations do not prohibit PTO from submitting whatever data it has even if it reflects improved recruitment and retention rates.[9]

Likewise, PTO would not violate 18 U.S.C. §1018 by submitting a certification as to long-term needs along with its data, a certification that the arbitrator found, as fact, would be true. Section 1018 prohibits a public official from signing any certification "containing any statement that he knows to be false." Submitting a certification to OPM would not implicate § 1018 as long as any factual information, including any attrition rate data submitted, is not known to be false.

PTO contends that if it is correct that the first sentence of Section A.2, as Arbitrator Arrigo interpreted it, is contrary to law, then the Court need not remand the case to the Authority so that it may determine whether the arbitrator properly held that PTO repudiated the second sentence of Section A.2. PB 36. According

---

[8] *See*, 5 C.F.R. §530.305(b)("The authorizing agency official is responsible for submitting complete supporting data for any request for new or higher special rates").

[9] PTO appears to have acknowledged this during negotiations over the MA. Arbitrator Arrigo found that during discussions between the parties that led to the wording of Section A.2, PTO proposed language that would condition the request to OPM on the existence of recruitment and retention data that would support the request. JA 59. He found that the proposal was rejected, and that PTO agreed that the yearly request to OPM was to be without conditions as what the data reveal. JA 59-60. PTO did not except to these factual findings.

to PTO, it was unable to comply with the first sentence because it did not have data to establish a staffing problem. Thus, it claims, "it would make no sense to hold discussions to look for alternatives to solve a nonexistent problem." *Id*. Further, PTO contends, the second sentence was not triggered in 2003 because PTO made no request to OPM, and so there was no OPM refusal. PB 37.

PTO is asking this Court to overrule Arbitrator Arrigo's interpretation of Section A.2, an interpretation that PTO and POPA had bargained for, because PTO would now prefer a different interpretation. The Court should deny this request. *See United Steel*, 363 U.S. at 599 (It is the arbitrator's construction of the collective bargaining agreement which the parties bargain for, and the courts have no business overruling the arbitrator because their interpretation of the contract is different from his).

Instead, Arbitrator Arrigo's interpretation of Section A.2 is entitled to the deference of the Authority and this Court even if the interpretation is wrong. This Court has recognized that the Authority's role in reviewing an arbitrator's interpretation of a collective bargaining agreement is "limited to that of 'federal courts in private sector labor-management relations.'" *U.S. Dep't of the Treasury, U.S. Customs Service*, 43 F.3d 682, 687 (D.C. Cir. 1995). In that role, the Authority and the Court must uphold the arbitrator's contractual interpretation if it "draws its essence" from the parties' agreement. *Id*. (citing *United Steel*, 363 U.S.

at 597). That standard is met if the arbitrator "premise[d] his award on his construction of the contract." *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441 (D.C. Cir. 2009) (citing *United Steel*, 363 U.S. at 597). *See also Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (as long as an arbitrator is even arguably construing the collective bargaining agreement, that a court is convinced that the arbitrator committed serious error does not suffice to find the award deficient).[10]

Also, it is plain that Arbitrator Arrigo's interpretation of Section A.2 did draw its essence from the MA. As Arbitrator Arrigo interpreted Section A.2, its clear intent is to protect the salary differential between the OPM-approved special rate schedule and the General Schedule from the erosion that occurs whenever GS employees receive locality pay increases that the examiners are not eligible to receive. As Arbitrator Arrigo recognized, Section A.2 provides two alternatives for maintaining the differential: 1) get OPM to approve a pay rate increase; or 2) if that fails, have the parties bargain over "substantially equivalent alternatives." JA 61, 65. As Arbitrator Arrigo explained, the second sentence is triggered "whenever application or consideration of the first sentence of A.2 fails to achieve

[10] PTO attempts to support its request that this Court overrule Arbitrator Arrigo's interpretation of the MA with citations to decisions in which the Court criticized the Authority's contractual interpretations as not beginning with the plain language of the contract. PB 35-36. However, those decisions are not relevant here because they did not involve an arbitrator's contractual interpretations. Instead, they concerned unfair labor practice complaints heard directly by the Authority.

the agreed upon and express objective of maintaining" the differential between the special pay schedule and the General Schedule. JA 61. Arbitrator Arrigo rejected the argument PTO makes here – that PTO can evade its obligations under the second sentence of Section A.2 simply by intentionally breaching its obligation under the first sentence. JA 65. This Court should do so as well.

IV. THE AUTHORITY REASONABLY HELD THAT THE AWARD DID NOT VIOLATE THE BACK PAY ACT.

The award provided that interest should be paid "on any money the employees *might* receive pursuant to the discussions envisioned in Section A.2." JA 67A (emphasis added). The award did not order PTO to pay any back pay or interest. Instead, it provided that if the parties decide that any back pay is warranted, then PTO must pay interest on the back pay. That is consistent with the Back Pay Act, which requires that interest be paid on back pay. *See* 5 U.S.C. § 5596(b)(2)(A) (amounts awarded "shall be payable with interest").

PTO contends that the Back Pay Act does not apply to its repudiation of the MA because: 1) the Back Pay Act does not apply to compensation that an agency agrees to pay in accordance with a collective bargaining agreement; and 2) the examiners did not suffer a withdrawal or reduction of pay as a result of PTO's violation of Section A.2. PB 50. PTO's contentions are incorrect.

To be entitled to an award of back pay, "1) the employee must have been affected by an unjustified or unwarranted personnel action; 2) the employee must

have suffered a withdrawal or reduction of all or part of his pay, allowances, or differentials; and 3) but for the action, the employee would not have experienced the withdrawal or reduction." *SSA v. FLRA*, 201 F.3d 465, 468 (D.C. Cir. 2000).

PTO argues that breach of a collective bargaining agreement is not an "unjustified or unwarranted personnel action" to which the Back Pay Act applies. PB 51. However, by its terms, the Back Pay Act applies to an employee who is found "under applicable law, rule, regulation, *or collective bargaining agreement*, to have been affected by an unjustified or unwarranted personnel action. . . ." 5 U.S.C. § 5596(b)(1) (emphasis added). *See also Dep't of the Air Force, Tinker Air Force Base*, 42 FLRA 1342, 1347 (1991) (violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action).[11]

PTO also argues that the examiners did not suffer a withdrawal or reduction of pay, allowance or differentials because the "substantially equivalent alternative" derives solely from the collective bargaining agreement, and not from statute or regulation. PB 52. This is an argument that PTO cannot legitimately make before

[11] PTO suggests, at PB 52-53, that this Court's decision in *SEC v. FLRA*, 568 F.3d 990 (D.C. Cir. 2009), supports PTO's contention that the examiners did not suffer a withdrawal or reduction of pay, allowances or differentials under the Back Pay Act. According to PTO, neither the denied special rate increase nor its equivalent is a "mandatory" or "virtually automatic" increase. PB 53, *quoting SEC v. FLRA*, 568 F.3d at 996. However, this Court, in *SEC v. FLRA*, relied upon the definition of "unjustified or unwarranted personnel action" that it applied earlier in *Brown v. Sec'y of the Army*, 918 F.2d 214, 220 (D.C. Cir. 1990) – that is – violation of the requirements of a "nondiscretionary provision", *i.e.*, a "mandatory" provision, which the Court noted includes a provision of a collective bargaining agreement.

knowing the alternative to which the parties will agree. In order to constitute "pay, allowances, and differentials" recoverable under the Back Pay Act, a remedy must not only constitute "pay, allowance, or differentials" but also must be something to which the employee "is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment." 5 C.F.R. § 550.803. In determining whether an employee "is entitled by statute or regulation" to a remedy, the Authority has considered whether a Federal statute or regulation other than the Back Pay Act itself permits payment of that type of remedy. *See, e.g., U.S. Dep't of Health and Human Services, Gallup Indian Medical Center,* 60 FLRA 202, 212 (2004) (considering whether the Whistleblower Protection Act permits payment for moving expenses, medical expenses, and related travel expenses under the Back Pay Act); *U.S. Dep't of Transp., FAA*, 52 FLRA 46, 50 n.6 (1996) (considering whether 5 U.S.C. §§ 7901 and 8101 *et seq*. permit payment for medical expenses under the Back Pay Act).

Here, the arbitrator left it to the parties to determine, through discussions, what form the "substantially equivalent alternative" would take. Depending on the alternative to which the parties agree, the examiners could be entitled to back pay and interest under the Back Pay Act. However, without knowing what the

alternative will be, neither the Authority nor this Court has any basis for concluding that the award violates the Back Pay Act.[12]

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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

Federal Labor Relations Authority
1400 K Street, N.W., Suite 300
Washington, D.C. 20424-0001
(202) 218-7907

August 1, 2011

[12] PTO's suggestion that the substantially equivalent alternative for which Section A.2 provides circumvents the statute and regulations that give OPM sole discretion to grant an increase in the special pay rate (PB 52) lacks merit. As the Authority explained, the arbitrator did not find that Section A.2 required PTO either to increase the special pay rate without OPM approval or pay employees both special pay and locality pay. Rather, the arbitrator found that the MA required negotiations with the express goal of maintaining the differential between the special pay rate schedule and the General Schedule. JA 289.

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 9,910 words excluding exempt material.

/s/ Rosa M.Koppel
Rosa M. Koppel
Counsel for the Respondent

Certificate of Service

I hereby certify that on this 1st day of August, 2011, I caused eight (8) hard copies of the foregoing Brief for Respondent to be filed with the Court and an original to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel for the Agency by way of the Court's ECF notification system and by hand delivery of hard copies to:

William G. Kanter, Esq.
Howard S. Scher, Esq.
Attorneys, Appellate Staff
Civil Division, Room 7239
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Richard J. Hirn, Esquire
Law Office of Richard J. Hirn
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, D.C. 20015

/s/ Rosa M. Koppel
Rosa M. Koppel

Relevant Statutes, Regulations, and Rules

TABLE OF CONTENTS

§ 5596. Back pay due to unjustified personnel action

(a) For the purpose of this section, “agency” means—
(1) an Executive agency;
(2) the Administrative Office of the United States Courts, the Federal Judicial Center, and the courts named by section 610 of title 28;
(3) the Library of Congress;
(4) the Government Printing Office;
(5) the government of the District of Columbia;
(6) the Architect of the Capitol, including employees of the United States Senate Restaurants; and
(7) the United States Botanic Garden.
(b)
(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—
(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—
(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, or under chapter 11 of title I of the Foreign Service Act of 1980, shall be awarded in accordance with standards established under section 7701 (g) of this title; and
(B) for all purposes, is deemed to have performed service for the agency during that period, except that—
(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and
(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552 (1) of this title but

may not be retained to the credit of the employee under section 5552 (2) of this title.
(2)
(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.
(B) Such interest—
(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;
(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and
(iii) shall be compounded daily.
(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.
(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.
(4) The pay, allowances, or differentials granted under this section for the period for which an unjustified or unwarranted personnel action was in effect shall not exceed that authorized by the applicable law, rule, regulations, or collective bargaining agreement under which the unjustified or unwarranted personnel action is found, except that in no case may pay, allowances, or differentials be granted under this section for a period beginning more than 6 years before the date of the filing of a timely appeal or, absent such filing, the date of the administrative determination.
(5) For the purpose of this subsection, “grievance” and “collective bargaining agreement” have the meanings set forth in section 7103 of this title and (with respect to members of the Foreign Service) in sections 1101 and 1002 of the Foreign Service Act of 1980, “unfair labor practice” means an unfair labor practice described in section 7116 of this title and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980, and “personnel action” includes the omission or failure to take an action or confer a benefit.
(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees, or to the agencies specified in subsection (a)(2) of this section.

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolve issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

§ 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.

*****

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

§ 7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

§ 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.

§ 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.

18 U.S.C. §1018. Official certificates or writings

Whoever, being a public officer or other person authorized by any law of the United States to make or give a certificate or other writing, knowingly makes and delivers as true such a certificate or writing, containing any statement which he knows to be false, in a case where the punishment thereof is not elsewhere expressly provided by law, shall be fined under this title or imprisoned not more than one year, or both.

5 C.F.R. § 530.304 - Establishing or increasing special rates

(a) OPM may increase the minimum rates of pay otherwise payable to a category of employees in one or more areas or locations, grades or levels, occupational groups, series, classes, or subdivisions thereof, when it is necessary to address existing or likely significant recruitment or retention difficulties. OPM will consider the circumstances listed in paragraph (b) of this section and the factors listed in ? 530.306 when evaluating the need for special rates. When OPM establishes a minimum special rate under this authority, corresponding increases also may be made in one or more of the remaining rates of the affected grade or level. For any given grade, a minimum special rate may not exceed the maximum rate of basic pay for the rate range (excluding any locality rate, other special rate, or similar payment under other legal authority) by more than 30 percent. A special rate may not exceed the rate for level IV of the Executive Schedule.

(b) The circumstances considered by OPM in evaluating the need for special rates are the following:
(1) Rates of pay offered by non-Federal employers which are significantly higher than those payable by the Government within the area, location, occupational group, or other category of positions under GS pay system;
(2) The remoteness of the area or location involved;
(3) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or
(4) Any other circumstances OPM considers appropriate.

(c) In setting the level of special rates within a rate range for a category of employees, OPM will compute the special rate supplement by adding a fixed dollar amount or a fixed percentage to all GS rates within that range, except that an alternate method may be used for grades GS-1 and GS-2, where within-grade increases vary throughout the range.

(d) If OPM establishes a special rate schedule that covers only law enforcement officers, OPM may compute the special rate supplement for grades GS-3 through 10 as a fixed percentage of LEO special base rates instead of GS rates. With respect to such a schedule, references to GS rates in § 530.307 are deemed to be references to LEO special base rates.

5 C.F.R. § 530.305 - Agency requests for new or increased special rates

(a) An agency may request that a special rate schedule be established or increased or that its employees be covered by an existing special rate schedule at any time. An authorized agency official in the agency headquarters office must submit to OPM any request to establish or increase special rates for a category of agency employees. The request must include a certification by the authorized agency official that the requested special rates are necessary to ensure adequate staffing levels to accomplish the agency's mission.

(b) The authorized agency official is responsible for submitting complete supporting data for any request for new or higher special rates. OPM may require that the supporting data include a survey of prevailing non-Federal pay rates in the relevant labor market.

(c) OPM may coordinate an agency special rate request with other agencies that have similar categories of employees. OPM may designate a lead agency to assist in coordinating the collection of relevant data. Each affected agency is responsible for submitting complete supporting data upon request to OPM or the lead agency, as appropriate, unless the agency determines that a category of its employees will not be covered by the proposed special rate schedule, as provided in § 530.303(c).

5 C.F.R. § 530.306 - Evaluating agency requests for new or increased special rates

(a) In evaluating agency requests for new or increased special rates, OPM may consider the following factors:

(1) The number of existing vacant positions and the length of time they have been vacant;

(2) The number of employees who have quit (i.e., voluntarily left Federal service), including, when available, a subcount of the number of employees who quit to take a comparable position offering higher pay;

(3) Evidence to support a conclusion that recruitment or retention problems likely will develop (if such problems do not already exist) or will worsen;

(4) The number of vacancies an agency tried to fill, compared to the number of hires and offers made;

(5) The nature of the existing labor market;

(6) The degree to which an agency has considered and used other available pay flexibilities to alleviate staffing problems, including the superior qualifications and special needs pay-setting authority in 5 CFR 531.212 and recruitment, relocation, and retention incentives under 5 CFR part 575;

(7) The degree to which an agency has considered relevant non-pay solutions to staffing problems, such as conducting an aggressive recruiting program, using appropriate appointment authorities, redesigning jobs, establishing training programs, and improving working conditions;

(8) The effect of the staffing problem on the agency's mission; and

(9) The level of non-Federal rates paid for comparable positions. Data on non-Federal salary rates may be supplemented, if appropriate, by data on Federal salary rates for comparable positions established under a non-GS pay system.

(b) In determining the level at which to set special rates, OPM may consider the following factors:

(1) The pay levels that, in OPM's judgment, are necessary to recruit or retain an adequate number of qualified employees based on OPM's findings with respect to the factors set forth in paragraph (a) of this section;

(2) The dollar costs that will be incurred if special rates are not authorized;

(3) The level of pay for comparable positions; and

(4) The need to provide for a reasonable progression in pay from lower grade levels to higher grade levels to avoid pay alignment problems (e.g., such as might result from applying the two-step promotion rule in 5 U.S.C. 5334(b)).

(c) No one factor or combination of factors specified in paragraph (a) or (b) of this section requires OPM to establish or increase special rates or to set special rates at any given level.

5 C.F.R. § 531.608 - Relationship of locality rates to other pay rates

(a) An employee must receive the greatest of the following rates of pay, as applicable:
(1) The scheduled annual rate of pay payable to the employee;
(2) A locality rate under this subpart;
(3) A special rate under 5 CFR part 530, subpart C, or a similar rate under other legal authority (e.g., 38 U.S.C. 7455); or
(4) A retained rate under 5 CFR part 536 or a similar rate under other legal authority.
(b) A GS employee receiving a special rate is entitled to any applicable locality payment on the same basis as any other GS employee. The locality payment is computed based on the employee's scheduled annual rate of pay, which excludes any special rate. The employee is entitled to the higher of the locality rate or the corresponding special rate. As provided in 5 U.S.C. 5305(h) and 5 CFR 530.303(d), when an employee's locality rate exceeds a corresponding special rate, the employee's entitlement to the special rate is terminated.

5 C.F.R. § 550.803 – Definitions

Agency has the meaning given that term in section 5596(a) of title 5, United States Code.
Appropriate authority means an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court, (b) the Comptroller General of the United States, (c) the Office of Personnel Management, (d) the Merit Systems Protection Board, (e) the Equal Employment Opportunity Commission, (f) the Federal Labor Relations Authority and its General Counsel, (g) the Foreign Service Labor Relations Board, (h) the Foreign Service Grievance Board, (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

Collective bargaining agreement has the meaning given that term in section 7103(a)(8) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1002 of the Foreign Service Act of 1980 (22 U.S.C. 4102(4)).

Employee means an employee of an agency. When the term employee is used to describe an individual who is making a back pay claim, it also may mean a former employee.

Grievance has the meaning given that term in section 7103(a)(9) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1101 of the Foreign Service Act of 1980 (22 U.S.C. 4131). Such a grievance includes a grievance processed under an agency administrative grievance system, if applicable.

Pay, allowances, and differentials means pay, leave, and other monetary employment benefits to which an employee is entitled by statute or regulation and which are payable by the employing agency to an employee during periods of Federal employment. Agency and employee contributions to a retirement investment fund, such as the Thrift Savings Plan, are not covered. Monetary benefits payable to separated or retired employees based upon a separation from

service, such as retirement benefits, severance payments, and lump-sum payments for annual leave, are not covered.

Unfair labor practice means an unfair labor practice described in section 7116 of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980 (22 U.S.C. 4115).

Unjustified or unwarranted personnel action means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).