[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 11-1102

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

UNITED STATES DEPARTMENT OF THE TREASURY,
BUREAU OF THE PUBLIC DEBT, WASHINGTON D.C.,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent,

and

NATIONAL TREASURY EMPLOYEES UNION,
Intervenor.

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

BRIEF OF INTERVENOR NATIONAL TREASURY EMPLOYEES UNION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, counsel for the National Treasury Employees Union (NTEU) hereby certifies the following:

A. Parties

All parties and intervenors appearing before the Federal Labor Relations Authority (FLRA) and in this Court are listed in the Brief for Respondent. There are no amici before the Court.

B. Ruling Under Review

A description of the ruling at issue appears in the Brief for Respondent.

C. Related Cases

A description of United States Department of Commerce, Patent and Trademark Office v. FLRA, No. 11-1019 (D.C. Cir.), which the Court ordered be argued on the same day before the same panel, appears in the Brief for Respondent. Intervenor is aware of no other related cases.

RULE 26.1 DISCLOSURE STATEMENT

The National Treasury Employees Union (NTEU) is an unincorporated, non-profit organization serving as the exclusive representative of approximately 150,000 employees of the federal government pursuant to 5 U.S.C. §§ 7101-7135.

NTEU has no parent companies.

No publicly-held company has any ownership interest in NTEU.

/s/ Larry J. Adkins
Larry J. Adkins
Attorney for Intervenor NTEU
September 2, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page:

Cases

*** Denotes authorites chiefly relied upon**

Statutes and Regulations

Federal Service Labor-Management Relations Statute

Miscellaneous:

GLOSSARY

Authority or FLRA	Federal Labor Relations Authority
BPD	United States Department of the Treasury, Bureau of the Public Debt, Washington, D.C.
EEOC	Equal Employment Opportunity Comm'n v. FLRA, 476 U.S. 19 (1986)
EPA	Environmental Protection Agency and Am. Fed'n of Gov't Employees Council 238, 65 FLRA 113 (2010)
NAGE	Nat'l Ass'n of Gov't Employees, Local R5-136 v. FLRA, 363 F.3d 468 (D.C. Cir. 2004)
NLRB	National Labor Relations Board v. FLRA, 2 F.3d 1190 (D.C. Cir. 1993)
NTEU	National Treasury Employees Union
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)

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FEDERAL LABOR RELATIONS AUTHORITY,

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NATIONAL TREASURY EMPLOYEES UNION,

Intervenor.

BRIEF OF INTERVENOR NATIONAL TREASURY EMPLOYEES UNION

The National Treasury Employees Union (NTEU) is a labor organization that represents 150,000 federal employees in 30 agencies and departments, including employees of the United States Department of the Treasury, Bureau of Public Debt (BPD or Agency). BPD challenges the standard used by the Federal Labor Relations Authority (FLRA or Authority), in appeals from agency head disapprovals of collective bargaining agreements under 5 U.S.C. § 7114(c)(2), to determine whether a negotiated provision

constitutes an appropriate arrangement under § 7106(b)(3) or is instead contrary to certain statutory management rights. Those rights are set forth in 5 U.S.C. § 7106(a).[1] NTEU's motion to intervene was granted on June 2, 2011.

SUMMARY OF ARGUMENT

NTEU urges the Court to dismiss the Agency's petition for review because the Agency never raised with the FLRA arguments made here, as required by 5 U.S.C. § 7123(c). Thus, this Court has no jurisdiction over the petition. The Agency's explanation for its failure to seek reconsideration of the FLRA's decision does not constitute the "extraordinary circumstances" necessary for the Court to assert jurisdiction. Moreover, BPD's failure to comply with the requirements of § 7123(c) is not excused by the FLRA's failure to object to the Court's jurisdiction.

Should the Court nevertheless decide to assert jurisdiction, BPD's petition for review should be denied. In its brief, the FLRA demonstrated that it reasonably determined to adopt the "abrogation" standard as the method of deciding, in

[1] NTEU, along with the American Federation of Government Employees, AFL-CIO, and the International Federation of Professional and Technical Engineers, AFL-CIO, is amicus curiae in another case before this Court, Department of Commerce, Patent and Trademark Office v. Federal Labor Relations Authority (BPD), No. 11-1019, which will be argued before the same panel on the same day as this case. The FLRA standard challenged in PTO is similar to the abrogation standard on appeal in this case, but was applied in the context of the FLRA's review of an arbitrator's decision pursuant to 5 U.S.C. § 7122.

appeals from agency head review decisions, whether a negotiated provision constitutes an appropriate arrangement. Under the "abrogation" standard, the FLRA will find that a provision is an appropriate arrangement unless it abrogates, or waives, a statutory management right. The Authority showed that its standard is consistent with the statutory text and buttressed by legislative history. It also showed that application of the standard gives effect to choices made by the parties during the negotiation of a collective bargaining agreement. NTEU endorses the FLRA's arguments in support of its decision to apply the "abrogation" standard to give effect to decisions made at the bargaining table. In keeping with Circuit Rule 28(d)(2), NTEU will not repeat those arguments here. Instead, we supplement the FLRA's argument with additional supportive legislative history.

In addition to urging the Court to reject the FLRA's "abrogation" standard, BPD asks the Court to rule that the provisions at issue here are not appropriate arrangements because they allegedly excessively interfere with the Agency's statutory management rights. The FLRA, however, has not applied the "excessive interference" standard to these provisions. Should the Court rule that the Authority's adoption of the "abrogation" standard was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and order

the FLRA to apply some other standard, it should remand the case to the FLRA for further proceedings consistent with its decision.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THIS PETITION FOR REVIEW

A. The Agency Has Not Shown that Extraordinary Circumstances Excused Its Failure to File a Motion For Reconsideration of the FLRA's Sua Sponte Decision to Adopt the "Abrogation" Standard.

In pertinent part, 5 U.S.C. § 7123(c) mandates that "[n]o objection that has not been urged before the Authority . . . shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." BPD seeks to do precisely what 5 U.S.C. § 7123(c) forbids: raise objections to the "abrogation" standard that were not urged before the Authority. Because BPD has not demonstrated that extraordinary circumstances kept it from seeking reconsideration of the FLRA's sua sponte decision to adopt the "abrogation" standard, its petition for review must be dismissed for lack of jurisdiction.

The administrative record shows that neither party asked the Authority to apply the "abrogation" standard to determine whether the disapproved provisions constitute appropriate arrangements. See the parties' submissions to the FLRA at J.A. 123-140, J.A. 142-167, and J.A. 176-191. Instead, both parties presented their arguments under the "excessive interference"

standard that was in effect prior to the issuance of the FLRA's decision at issue here. Id.

When the FLRA ruled that, despite the absence of any pertinent argument from the parties, it had decided to apply the "abrogation" standard, BPD could have, puoa6 T a5 C.F.R. ion

BPD has not shown the "extraordinary circumstances" required by § 7123(c) to excuse its failure to seek reconsideration. The Agency claims that it did not file a motion for reconsideration because it "viewed such a motion as futile given the majority's definitive decision over a vigorous dissent that raised virtually all of the issues raised in this brief." Petitioner's Br. at 26, n.11, citing to NAGE, 363 F.3d at 479. But, in NAGE, the Court expressly rejected the notion that a dissenting opinion can, for purposes of satisfying § 7123(c)'s requirements, substitute for the presentation of a party's views to the Authority. Id. at 479-80. As the Court aptly stated, "Section 7123(c) requires a *party* to present its own views to the Authority in order to preserve a claim for judicial review." Id. (emphasis in original). Here, BPD did not present its views on the abrogation standard to the FLRA and cannot, under this Court's NAGE rationale, rely on views expressed in the dissenting opinion to establish jurisdiction.

The Agency's argument, at n.11 of its brief, that the FLRA's earlier decision in Environmental Protection Agency and Am. Fed'n of Gov't Employees Council 238, 65 FLRA 113 (2010)(EPA), excused its failure to seek reconsideration is also unavailing. Application of the "abrogation" standard to appeals from § 7114(c) agency head reviews was not addressed in EPA. Instead, the FLRA announced a return to the "abrogation"

standard, which had been used from 1990 to 2002 to decide cases involving the review of arbitration decisions under § 7122(a). Contrary to BPD's claims, the FLRA did not decide in EPA that the "abrogation" standard should apply to cases involving agency head review as well as to cases involving arbitration decisions. The Authority merely stated in EPA that its analysis called into question the standard applied in reviews of agency head decisions pursuant to § 7114(c), and it pointedly refused to decide that issue. EPA, 65 FLRA at 118, n.11 ("[A]s that issue is not raised here, we leave it for another day."). BPD's suggestion that, in EPA, the FLRA had already decided to extend the abrogation standard to cases involving agency head review must, therefore, be rejected.

B. The FLRA's Failure To Invoke § 7123(c) Does Not Excuse the Agency's Failure To File a Motion for Reconsideration.

The FLRA did not, in its brief, contest the Court's jurisdiction over BPD's petition for review. For purposes of determining the Court's jurisdiction, the FLRA's silence is of no moment. In EEOC, the Supreme Court held that § 7123(c) "is not 'waived' simply because the FLRA fails to invoke it." 476 U.S. at 23. The Supreme Court noted that § 7123(c) is directed at the courts, and its plain language indicates that the FLRA shall resolve issues arising under the Statute, unless there are

extraordinary circumstances excusing a party's failure to raise an issue before the FLRA. Id.

C. This Case Is Distinguishable From Cases in Which Failure to File a Motion for Reconsideration Has Been Excused.

BPD can find no support in cases in which a failure to file a motion for reconsideration was excused as futile under § 7123(c). In National Labor Relations Board v. FLRA, 2 F.3d 1190 (D.C. Cir. 1993)(NLRB), the Court cited four pertinent FLRA decisions prior to the case then at bar as evidence that the agency's arguments would have been futile. Id. at 1196. Unlike the NLRB case, this case was the first instance in which the FLRA made the abrogation standard applicable to cases involving agency head decisions under § 7114(c). Similarly, in Dep't of the Interior, Minerals Mgmt. Serv., New Orleans v. FLRA, 969 F.2d 1158, 1161 (D.C. Cir. 1992)(DOI), the Court excused the failure to file a motion for reconsideration because a "rehearing petition would have been futile given that the Authority had just found an *identical* proposal negotiable under § 7106(b)(3)" (emphasis added)).[2]

[2] NLRB and DOI were described in NAGE as "exceptions to [the] rule" precluding the Court from considering an objection not raised to the FLRA in a request for reconsideration. NAGE, 363 F.3d at 479. The Court cited both cases in support of the proposition that a failure to request reconsideration can be excused when it would have been "patently futile" in view of recent FLRA decisions "squarely addressing the issue in question." Id.

In W&M Properties of Connecticut, Inc. v. NLRB, 514 F.3d 1341 (D.C. Cir. 2008)(W&M Properties), the Court rejected arguments very similar to those now made by BPD.[3] The petitioner there argued that its failure to file a motion for reconsideration should have been forgiven because it would have been futile in light of a new remedial framework announced in another NLRB decision. 514 F.3d at 1346. The petitioner relied on NLRB and claimed that "given the Board's fanfare in unveiling a new remedial standard just seven weeks before the decision under review here, it is manifestly clear it would have been a useless exercise for W&M to seek reconsideration by the Board in this case." Id. (internal quotations omitted).

The Court rejected the petitioner's attempt to press before the Court arguments that had not been advanced to the NLRB and, in the process, distinguished its NLRB decision. The Court ruled that W&M's "assessment of the Board's likely disposition . . . is insufficient to prove patent futility because it does not show that a motion for reconsideration was 'clearly doomed' by

[3] In W&M Properties, the Court construed § 10(e) of the National Labor Relations Act (NLRA) which, like § 7123(c), forbids judicial review of arguments not raised before the National Labor Relations Board. 29 U.S.C. § 160(e). As the Supreme Court recognized in EEOC, § 10(e) of the NLRA and § 7123(c) are essentially identical provisions. 476 U.S. at 23-24. Cases involving § 10(e) of the NLRA, like W&M Properties and Contractors' Labor Pool, Inc. v. NLRB, 323 F.3d 1051 (D.C. Cir. 2003), relied on by the Court in NAGE, are, therefore, instructive. NAGE, 363 F.3d at 479-480 (Court saw no reason to interpret provisions differently in this context).

the agency's rejection of identical arguments." Id. The Court contrasted W&M Properties' argument with the circumstances of NLRB, in which the FLRA had already rejected the NLRB's argument in other proceedings. Id.

As in W&M Properties, BPD has not shown that its arguments to the FLRA concerning the "abrogation" standard would have been clearly doomed. The FLRA's announcement in EPA of a restoration of the abrogation standard to the § 7122 arbitration exception process cannot be viewed as a definitive rejection of BPD's argument that the standard should not be applied in a different context to appeals from agency head review decisions issued under § 7114(c). The Agency's failure to submit a motion for reconsideration to the Authority cannot be excused.

II. THE FLRA'S APPLICATION OF THE ABROGATION STANDARD IS CONSISTENT WITH STATUTORY TEXT AND LEGISLATIVE HISTORY

NTEU concurs with the FLRA's arguments regarding its adoption and application of the abrogation standard in appeals from agency head review decisions. See Brief for Respondent at pp. 19-35. As the Authority explained, the abrogation standard is consistent with both the plain language of the Statute and Congressional intent. Accordingly, should the Court assert jurisdiction over BPD's petition for review, NTEU urges that it be denied.

NTEU negotiated the three provisions at issue in this case --Article 11, Section 4B; Article 18, Section 4B; and Article 22, Section 3B[4]--as appropriate arrangements for employees adversely affected by the exercise of management rights, under § 7106(b)(3). Both Article 11, Section 4B, and Article 18, Section 4B, concern the performance-appraisal process for employees detailed or temporarily promoted to a position for fewer than 120 days. The provisions set forth a process for providing performance expectations to those employees in writing, which protects employees from being held accountable for expectations that have not been clearly communicated to them. See FLRA Op. at 3, J.A. at 194. Similarly, Article 22, Section 3B, protects employees who have been suspected by management of abusing emergency annual leave from being required to support future emergency annual leave requests with documentation without first receiving counseling and the opportunity to correct any problematic usage of emergency annual leave. See FLRA Op. at 13-14, J.A. at 204-205.

None of these provisions prevents management from exercising its rights: management will still be able to hold employees on details or temporary promotions to performance expectations, and will still be able to restrict the

[4] See FLRA Op. at 2-3, 11, J.A. 193-194, 202. The text of the proposals appears in Addendum B to the Petitioner's Brief.

availability of emergency leave to those employees who abuse it. All of these provisions, however, serve to protect groups of employees from the adverse effects of management's exercise of its rights. And, they are all the product of negotiations that necessarily required agency representatives to weigh their effect on those rights. The FLRA's "abrogation" standard, as explained at pp. 29-34 of the Authority's brief, gives appropriate effect to decisions made by union and agency negotiators at the bargaining table.

A. The FLRA's Application Of the Abrogation Standard Furthers the Goal of Stability In Collective Bargaining

The abrogation standard furthers the Statute's stated goals of advancing "effective and efficient Government" and promoting collective bargaining. 5 U.S.C. § 7101(a),(b). As is recognized by the Statute, both agencies and unions must bargain in good faith. 5 U.S.C. § 7114(b). As part of this duty to bargain in good faith, the Statute also requires that agencies be represented by authorized individuals who are prepared to discuss and negotiate on any condition of employment. § 7114(b)(2). Exclusive representatives of employees must be able to rely upon the positions advanced by agency representatives at the bargaining table. Uncertainty that agency representatives have the authority to reach agreement undermines the process of collective bargaining.

Therefore, once agency representatives and unions have reached agreement at the bargaining table, it makes sense that the issue of negotiability should be moot. Agency representatives have a duty to assert non-negotiability before agreement is reached. At the stage of agency head review, the issue should be whether a provision is contrary to law because it passes the outer boundary of what an agency may agree to—-a boundary defined by the FLRA as the "abrogation" or waiver line. This is, as the FLRA argues, consistent with the statutory language at § 7114(c)(2), an agency head must approve an agreement within 30 days, unless it is contrary to law, rule or regulation.

B. The Abrogation Standard Is Faithful to § 7114(c)'s Legislative History

The Authority cited Rep. Ford's post-enactment statements regarding the purpose and meaning of § 7114(c) in its brief (Respondent's Br. at 22). This Court has, in prior cases, recognized the significance of Rep. Ford's views. See NTEU v. FLRA, 856 F.2d 293, 300 (D.C. Cir. 1988) (citing to October 14, 1978 statements of Representative Ford: "Mr. Ford's comments are consistent with statutory language and were offered to compensate for an otherwise sparse legislative history; we believe his remarks therefore merit some attention."); Office of Personnel Management v. FLRA, 864 F.2d 165, 168 (D.C. Cir. 1988)

(citing with approval to post-passage statements of Reps. Ford and Udall).

It is thus appropriate to consider the extensive comments made by Rep. Ford concerning the intended scope of agency head review:

> Section 7114(c) was added to the House version of title VII by the conferees. . . . This section must be read in conjunction with section 7114(b)(2) requiring that an agency be represented in collective bargaining by representatives fully prepared and empowered to negotiate. Nothing in section 7114(c) or in section 7106 gives an agency the right to frustrate negotiations by imposing a cumbersome consultation process between agency representatives and agency headquarters or by precluding negotiations in permissible areas. . . . In section 7114(b)(2), agencies are placed on notice that they may not allow negotiations to proceed with untrained agency representatives while the agency relies on section 7114(c) to "save the day" by having the agency head refuse to approve the negotiated agreement. Furthermore, the agency head shall approve that agreement if it is in accordance with applicable law, rule, or regulation. Thus, the discretion to disapprove the agreement is a very limited discretion.

124 CONG. REC. H13,608 (daily ed. Oct. 14, 1978) (statement of Rep. Ford), reprinted in Subcommittee on Postal Personnel and Modernization of the House Committee on Postal and Civil Service, Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Action of 1978, 96th Cong., 1st Sess. 995 (1979).

The Authority's decision to use the abrogation standard instead of the excessive interference standard when reviewing

agency head disapprovals under § 7114(c)(2) is consistent with this express statement of Congressional intent. It is a strict standard, contemplated to require approval of agreements unless they are contrary to law--a standard that, as this Court has recognized, leaves little room for discretion on the part of the agency head. Ass'n of Civilian Technicians, Montana Air Chapter No. 29 v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994). For this reason and for all of the reasons Respondent enumerated in its brief, the abrogation standard should be upheld.

III. BPD'S EXCESSIVE INTERFERENCE ARGUMENT IS NOT APPROPRIATELY BEFORE THE COURT

Petitioner devotes several pages of its brief to arguing that the three provisions at issue in this case excessively interfere with management rights. Petitioner's Br. at pp. 40-44. This issue cannot be properly decided by the Court. If the Court determines that the "abrogation" standard is not appropriate, the Court should remand the case to the FLRA to apply the appropriate standard in the first instance.[5] See, e.g., Am. Fed'n of Gov't Employees, Local 2924 v. FLRA, 470 F.3d

[5] NTEU also argued before the FLRA that the provisions at issue constituted procedures negotiated pursuant to § 7106(b)(2), but the FLRA specifically declined to address that argument in its decision. See FLRA Op. at 4, 11, 14; J.A. 195, 202, 205. In the event of remand, the FLRA may have occasion to consider this question. See Dep't of Treasury, BATF v. FLRA, 857 F.2d 819, 821 (D.C. Cir. 1988), describing the FLRA's "acting at all"/"directly interfere" test to determine negotiability under § 7106(b)(2).

375, 383-384 (D.C. Cir. 2006) (setting aside the Authority's dismissal of the general counsel's complaint because it was based on an "entirely untenable" interpretation of the parties' agreements and remanding to the Authority with instructions to consider issues not previously considered below); NTEU v. FLRA, 466 F.3d 1079, 1082 (D.C. Cir. 2006) (determining that the Authority's decision was arbitrary and capricious and remanding for further proceedings "given the deference we owe the Authority . . .").

CONCLUSION

For the reasons stated herein, intervenor NTEU respectfully requests that the Court dismiss the petition for review for lack of jurisdiction. Should, however, the Court exercise jurisdiction and consider the petition for review, NTEU respectfully requests that the decision of the FLRA be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word 2007 with Courier New, 12 point, which has 10.5 characters per inch.

/s/ Larry J. Adkins
Larry J. Adkins
Attorney for Intervenor NTEU
September 2, 2011

ADDENDUM A

STATUTES AND REGULATIONS

Addendum A - Statutes and Regulations

Pursuant to D.C. Cir. R. 29(a)(5), NTEU states that all applicable statues and regulations are contained in the Brief for Respondent Federal Labor Relations Authority, except for the following:

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

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

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

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

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

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

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and

filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

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

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

29 U.S.C. § 160(e). Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be

excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United

States upon writ of certiorari or certification as provided in section 1254 of title 28.

5 C.F.R. § 2429.17. Reconsideration.

After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. The motion shall be filed within ten (10) days after service of the Authority's decision or order. A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. The filing and pendency of a motion under this provision shall not operate to stay the effectiveness of the action of the Authority, unless so ordered by the Authority. A motion for reconsideration need not be filed in order to exhaust administrative remedies.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2011, I caused the foregoing Brief for Intervenor NTEU to be filed by way of the ECF filing system. I also caused the Brief to be served on counsel by way of the Court's ECF notification system at the following address:

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