ORAL ARGUMENT NOT YET SCHEDULED

No. 05-1123

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2510,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

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

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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ORAL ARGUMENT NOT YET SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the American Federation of Government Employees, Local 2510 (AFGE) and the United States Department of Defense, Defense Finance and Accounting Service (DFAS). AFGE is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *United States Department of Defense, Defense Finance and Accounting Service and American Federation of Government Employees, Local 2510*, Case No. 0-AR-3756, decision issued on September 24, 2004, reported at 60 F.L.R.A. (No. 62) 281; reconsideration denied, 60 F.L.R.A. (No. 126) 636 (February 25, 2005).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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* *Leedom v. Kyne*, 358 US 184 (1958) 17, 25, 30, 31, 32, 34

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* *Sailor-Nimocks v. OPM*, 66 M.S.P.R. 438 (1995) 10, 37, 38

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

GLOSSARY

Act	Back Pay Act
AFGE, Local 2986	*Am. Fed'n of Gov't Employees, Local 2986 v. FLRA*, 130 F.3d 450 (D.C. Cir. 1997)
Alabama Guard	*Alabama Association of Civilian Technicians and Department of Defense, Alabama State Military Department, Alabama National Guard*, 56 F.L.R.A. 231 (2000)
Authority	Federal Labor Relations Authority
AWOL	absence without leave
Br.	Brief
Bureau of Prisons	*United States Dep't of Justice, United States Fed. Bureau of Prisons v. FLRA*, 981 F.2d 1339 (D.C. Cir. 1993)
Crumbaker	*Crumbaker v. MSPB*, 781 F.2d 191 (Fed. Cir. 1986)
CSRA	Civil Service Reform Act of 1978
DFAS	United States Department of Defense, Defense Finance And Accounting Service
Fanning	*Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981)
Griffith	*Griffith v. FLRA*,842 F.2d 487 (D.C. Cir. 1988)
Hensley	*Hensley v. Eckerhart*, 461 U.S. 424 (1983)
Interior	*United States Dep't of the Interior v. FLRA*, 26 F.3d 179 (D.C. Cir. 1994)
JA	Joint Appendix

GLOSSARY
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Leedom	*Leedom v. Kyne*, 358 U.S. 184 (1958)
MSPB	Merit Systems Protection Board
OEA	*Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61 (D.C. Cir. 1987)
Statute	Federal Service Labor-Management Relations Statute
Union	American Federation of Government Employees, Local 2510

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (Authority) issued the decision under review in this case on September 24, 2004. The decision is published at 60 F.L.R.A. 281, and is included in the Joint Appendix (JA) at JA 6. The Authority's decision denying reconsideration of this decision was issued on February 25, 2005, and is published at 60 F.L.R.A. 636. The decision on reconsideration is at JA 23. The Authority exercised jurisdiction over the

case pursuant to § 7105(a)(2)(H) of the Federal Service Labor-Management Relations Statute (Statute).[1] This Court is without jurisdiction over the case pursuant to § 7123(a)(1) of the Statute.[2]

STATEMENT OF THE ISSUES

I. Whether the Court is without subject matter jurisdiction in this case under § 7123(a)(1) of the Statute because the Authority decision at issue involves review of an arbitration award, and none of the exceptions to the prohibition on judicial review of such decisions are applicable.

II. Whether the Authority reasonably reduced the arbitrator's attorney fee award in an employee suspension case, because the award was based on an unreasonable number of hours found by the arbitrator to have been expended by the employee's attorney in the case.

STATEMENT OF THE CASE

This case arose as an arbitration proceeding conducted pursuant to § 7121 of the Statute and the collective bargaining agreement covering the American Federation of Government Employees, Local 2510 (Union), and

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

[2] The Authority filed a motion to dismiss the petition for review in this case, for lack of subject matter jurisdiction, on June 7, 2005. By order of the Court dated September 2, 2005, this motion was referred to the merits panel. The jurisdictional issues in the case are addressed at pp. 21 to 34, below.

the United States Department of Defense, Defense Finance and Accounting Service (DFAS). The Arbitrator issued an award holding that DFAS had improperly suspended an employee for 14 days, and directed that the employee be reinstated with back pay. The attorney representing the employee then sought attorney fees pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(1)(A)(ii). In a separate award, the arbitrator granted the fee request. DFAS then filed exceptions to the arbitrator's fee award with the Authority under § 7122(a) of the Statute. The Authority reduced the fee award based on its holding that the number of hours claimed by the attorney was unreasonable.

STATEMENT OF THE FACTS

A. Background

1. The merits arbitration award

The Union's president, an accounting technician, was charged with four hours of absence without leave (AWOL) for failing to promptly return to DFAS's Charleston, South Carolina facility after attending a labor-management meeting in Arlington, Virginia. (JA at 38-40.) He was also charged with "lack of candor" as the result of a conversation with a supervisor regarding this matter. Based on these charges, the employee was suspended without pay for 14 days. (JA at 41.)

The Union filed a grievance over the suspension. The grievance also alleged that DFAS had improperly barred the employee from the work site during his suspension; and had refused to furnish the Union with certain information related to the grievance, as required by the parties' negotiated agreement and § 7114(b)(4) of the Statute.[3] (JA at 41.) When the grievance could not be resolved, the matter was submitted to arbitration. The employee was represented throughout the grievance arbitration proceeding by an attorney who had been employed on the staff of the American Federation of Government Employees since 1979. (JA at 93.)

The arbitrator held that the suspension was without just cause and ordered DFAS to rescind the suspension, expunge all references to the suspension and the underlying charges from the employee's personnel file, and pay the grievant 14 days of back pay. (JA at 58-59.) In addition, the Arbitrator found that DFAS violated the parties' collective bargaining agreement and the Statute by denying the grievant access to the facility during his suspension, and ordered DFAS to cease and desist from such conduct. (JA at 59.) The arbitrator also found that DFAS violated the

[3] Section 7114(b)(4) of the Statute requires agency employers to provide, with certain exceptions, exclusive representatives with data necessary to allow the exclusive representative to carry out its representational responsibilities under the Statute.

parties' agreement and the Statute by failing to provide the Union with the requested information and ordered an appropriate remedy. (*Id.*) Lastly, the arbitrator retained jurisdiction to allow the Union to file an application for attorney fees. DFAS did not file exceptions with the Authority as to any aspect of the arbitrator's award on the merits of the grievance. Pursuant to § 7122(b) of the Statute, the award therefore became final and binding 30 days after the arbitrator served it on the parties.[4]

2. The attorney fee arbitration award

On an application for attorney fees filed by the Union, the arbitrator examined the requirements for a fee award set forth in the Back Pay Act and 5 U.S.C. § 7701(g), and found that the employee was entitled to attorney fees.[5] (JA at 101.) The arbitrator first found that the criteria provided for in 5 U.S.C. § 5596(b)(1) were met. That is, the arbitrator found that the employee was affected by an unwarranted personnel action; the unwarranted personnel action resulted in a reduction in pay; and but for the unwarranted

[4] The fact that the arbitrator retained jurisdiction to consider attorney fees does not affect the finality of the merits award. *U.S. Dep't of the Treasury, U.S. Customs Serv., Nogales, Ariz.*, 47 F.L.R.A. 1391, 1392 (1993).

[5] The Back Pay Act incorporates by reference the standards for awarding attorney fees found in § 7701(g), governing fee awards in Merit Systems Protection Board (MSPB) proceedings. 5 U.S.C. § 5596(b)(1)(A)(ii).

personnel action, the employee would not have suffered the pay reduction. (JA at 92-93.)

The arbitrator also held that the initial requirements of § 7701(g) were met, namely, that an attorney-client relationship existed, and the employee was the prevailing party in the proceeding. (JA at 93.) The arbitrator further found that attorney fees were warranted "in the interest of justice," as required by §7701(g). (JA at 94-97.) In this connection, the arbitrator found that DFAS knew or should have known that it would not prevail in the arbitration case. The arbitrator also found that resolution of the grievance provided a "service to the Federal work force," in that it corrected an erroneous standard established by DFAS, that employee union representatives are held to a higher standard concerning their hours of work than other employees. (JA at 97.)

Having found these threshold criteria for a fee award to have been met, the arbitrator then proceeded to consider what fee would be reasonable. He first examined Union counsel's background, and determined that an hourly rate of $225 was appropriate. (JA at 99.) Next, the arbitrator found that the Union was entitled to fees for 332 hours of work, which was the total amount of hours set out in the Union's fee application. (JA at 100; 206-211.) The arbitrator rejected a claim by DFAS, that the 33½ hours

claimed for research should be reduced. (JA at 100.) The arbitrator concluded that DFAS had not shown that the research time requested was inflated. Accordingly, the arbitrator ordered DFAS to pay the Union fees in the amount of $74,700.00, along with expenses of $1,978.48 incurred by the Union's attorney while representing the employee.

B. The Authority's Decision

1. The initial decision

DFAS filed exceptions to the attorney fee award with the Authority pursuant to § 7122 of the Statute. Specifically, DFAS asserted that: 1) the arbitrator had no authority under the parties' collective bargaining agreement to award attorney fees; 2) the amount of fees awarded was not reasonable; 3) the award was not in the interest of justice as required under 5 U.S.C. § 7701(g); and 4) the award was deficient because it was not set out in a fully articulated and reasoned decision as required by case law interpreting § 7701(g). (JA at 62-63.)

The Authority denied the exceptions contending that the award of fees was not in the interest of justice, and that the arbitrator failed to set out a fully articulated basis for his fee determination. With respect to the contention that the arbitrator had no authority under the parties' agreement to award fees, the Authority found that this argument was not made to the

arbitrator and the Authority declined to consider the issue pursuant to § 2429.5 of its regulations, 5 C.F.R. § 2429.5 (2005). (JA at 12.) Thus, the Authority held that the Union was entitled to an award of attorney fees. (JA at 10-12.)

In agreement with DFAS, however, the Authority (Member Pope dissenting) held that the award of $74,700, based on 332 hours billed, was unreasonable. It reduced the award to $33,412, for reasons discussed below. (JA at 16.)

The Authority began by noting that in deciding cases involving attorney fees, it had considered the case law of the MSPB and the Federal Circuit, since they are forums that have frequently interpreted and applied the fee provisions in the Back Pay Act and § 7701(g). (JA at 13.) However, the Authority also noted that it, the MSPB, and the Federal Circuit have, where appropriate, considered the case law of other circuits dealing with attorney fee awards under fee shifting statutes similar to the Back Pay Act and § 7701(g). (*Id*.)

Turning to the fee award in this case, the Authority identified the starting point for determining a reasonable fee as the number of hours reasonably expended by the attorney. (JA at 14.) In this connection, the Authority noted that the MSPB, in its case law, imposes a standard of

"efficiency and economy of time" claimed by the attorney.[6] Thus, the Authority noted, the MSPB has reduced fee awards by a percentage amount if the hours claimed were "excessive or not necessary."[7] (*Id*.)

The Authority went on to say that one of the factors for judging reasonableness of a fee award, as identified by the court in *Johnson* v. *Georgia Highway Express*¸ 488 F.2d 714 (5th Cir. 1974), is whether the amount of fees sought is disproportionate to the amount involved in the case. (JA at 14.) The Authority also identified other important principles in considering whether a fee application establishes "efficiency and economy of time," namely, the attorney's expertise in labor and employment law; and whether the fee application reflects "billing judgment" on the part of the

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[6] The Authority cited *Kling* v. *Department of Justice*, 2 M.S.P.R. 464, 472-73 (1980) for this proposition. (JA at 14.)

[7] The Authority cited *Rose* v. *Department of the Navy*, 47 M.S.P.R. 5, 12 (1991) on this point. The Authority also observed at this juncture that the MSPB has remanded fee awards to its administrative judges (AJ) when there is a question about the adequacy of the explanation provided for hours billed. (JA at 18-19 n.8.) However, the Authority noted that this practice is not binding on it, as the remand consequences for the parties from an MSPB remand to an AJ are different from those resulting from an Authority remand to the parties with direction to resubmit the matter to an arbitrator. (*Id.*) In any event, the Authority found that the record before it was sufficient to allow it to rule on the reasonableness issue. (*Id.*)

prevailing party's attorney, that is, whether the prevailing attorney is billing his/her adversary as he/she would bill his/her client. (*Id.*)[8]

Next, the Authority considered the particulars of the fee application submitted by the Union attorney in this case. The Authority first observed that the case involved a 14-day suspension and "ancillary issues" concerning the employee's access to the work place during the suspension and DFAS' production of documents for the Union. (JA at 15.) The Union's attorney stated in his fee application that he spent 33 hours on research, 44 hours in preparing the post-hearing brief to the arbitrator, and 31 hours in preparing the fee application. (*Id*.)

The Authority concluded that, given the Union counsel's extensive experience in the field of federal sector labor and employment law, the 33 hours for research time and 44 hours for preparing the post-hearing brief to the arbitrator were "excessive given the nature of the case." (JA at 15.) Noting that the MSPB had reduced fee requests for excessive research time, the Authority reduced the hours to be compensated to 13 for research and 18 for preparation of the post-hearing brief.[9] (*Id.*)

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[8] The Authority cited *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983) (*Hensley*), on this point.

[9] The Authority here cited *Emelio* v. *Postal Service*, 27 M.S.P.R. 233, 237 (1985); and *Sailor-Nimocks* v. *OPM*, 66 M.S.P.R. 438, 443-44 (1995).

The Authority next observed that the MSPB has also ruled that time spent preparing fee applications is "mostly clerical," citing *McKinney* v. *Department of the Air Force*, 26 M.S.P.R. 267, 269 (1985), and several other cases in which the MSPB had reduced the hours submitted for preparing a fee application. (JA at 15.) Accordingly, the Authority in this case reduced the hours in this category from 31 to 9. (*Id.*)

Turning to the remaining 264 hours submitted by the Union attorney, the Authority noted that it was reducing those hours for two reasons: 1) the arbitrator's fee award was "significantly disproportionate to the amount involved" in the case; and 2) to remedy the attorney's "failure to exercise billing judgment." (JA at 15.)

As to the first reason, the Authority noted that the case was "fairly straightforward," involving a 14-day suspension and the ancillary issues of access to the work place during the suspension and document production. (JA at 16.) The Authority recognized that because the Union president was involved, there were some "institutional interests" beyond the suspension itself. However, the amount of the fee award was nonetheless found to be disproportionate to the amount and interests involved, and should therefore be reduced. (*Id*.)

The Authority next noted (JA at 16) that given its finding that the number of hours claimed was excessive, it was also finding that there was no evidence of the exercise of "billing judgment" by the Union attorney. In this regard, the Authority referred to holdings of the Supreme Court and the Federal Circuit, that hours not properly billed to one's client should not be billed to one's adversary.[10]

The Authority went on to note that it had not had occasion to apply a remedy in such a situation, nor had the MSPB or the Federal Circuit. (JA at 16.) However, the Authority observed that several cases in the Fifth Circuit have applied the remedy of reducing the number of hours submitted by a percentage.[11] As a result, the Authority reduced the remaining total hours by 25% to account for the award being significantly disproportionate to the amount involved in the grievance, and another 25% for the failure of Union counsel to exercise "billing judgment." (*Id.*) Accordingly, the Authority reduced the original amount of attorney fees from $74,700 to $33,412.50.

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[10] The cases cited for this proposition were *Hensley* and *Crumbaker* v. *MSPB*, 781 F.2d 191 (Fed. Cir. 1986) (*Crumbaker*).

[11] The Fifth Circuit cases cited were *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 684 F.2d 1087, 1097 (5th Cir. 1982); *Hopwood* v. *State of Texas*, 236 F.3d 256, 278-79 (5th Cir. 2000); and *Walker* v. *United States Department of Housing and Urban Development*, 99 F.3d 761, 770 (5th Cir. 1996).

2. The Authority's decision on reconsideration

The Union filed, and the Authority (Member Pope dissenting) denied, a request for reconsideration. As relevant here, the Authority first rejected the Union's claim that the Authority was "factually inaccurate" in identifying 33 hours of research time in the Union's fee application. (JA at 26.) The Union said that it had only billed for 11 hours of pure research time. However, the Authority noted that it based its 33-hour figure on the arbitrator's own specific factual finding. (*Id*.)

The Authority next rejected the Union's argument that it did not have the opportunity to justify the reasonableness of its fee award. (JA at 26-27.) The Authority said that reasonableness of the fee award was not an issue raised *sua sponte* by the Authority in its initial decision. Rather, DFAS questioned the reasonableness of the fee requested by the Union both before the arbitrator and the Authority, and the Union therefore had every opportunity to establish the reasonableness of its request. (JA at 27.) The Authority also rejected the Union's claim that the Authority's reduction of the fee amount was not reasonable, holding that such an argument was simply an attempt to relitigate the reasonableness issue resolved by the Authority in its initial decision. (*Id*.)

Further, the Authority was not persuaded by the Union's argument that the Authority had departed from precedent by relying on several Fifth Circuit cases, wherein the court made percentage cuts in fee requests, as opposed to case law of the Federal Circuit. (JA at 27.) The Authority noted in this connection that it has consistently followed fee award decisions of the MSPB and Federal Circuit, but that it has also considered the decisions of other federal courts where appropriate. (*Id*.) Indeed, as the Authority pointed out, the MSPB and Federal Circuit themselves have relied on decisions of other courts in deciding attorney fee cases. (*Id*.)

STATEMENT OF THE STANDARD OF REVIEW

The Court determines its subject matter jurisdiction in this case *de novo*. *Ruiz-Morales* v. *Ashcroft*, 361 F.3d 1219, 1221 (9th Cir. 2004).

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

sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 845.

Although the Back Pay Act provision that the Authority construes in this case is not part of the Authority's enabling act,[12] Congress clearly intended the Authority to have an important role in construing and applying the provision. The Act itemized only two of the administrative determinations to which it applies, unfair labor practices and grievances, and in the case of each of these determinations the Authority either directly applies the terms of the Act or, in the case of grievances, often has a role in reviewing the Act's application. Thus, Congress clearly intended that the Authority's administrative expertise extend to the provisions of the Back Pay Act at issue in this case.

Accordingly, unless it appears that the Authority's construction of the Back Pay Act provision in question is not one that Congress would have sanctioned, the Authority's construction should be respected. *See Chevron*, 467 U.S at 844. Furthermore, because the determinations the Authority has

[12] The Statute was enacted as § 701 of Title VII of the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1111, 1191 (1978), whereas amendments to the Back Pay Act were made in § 702 of the CSRA, 92 Stat. at 1216.

made pursuant to that construction are supported by substantial evidence, the Authority's decision should be upheld. *E.g., American Fed'n of Gov't Employees, Local 3748* v. *FLRA*, 797 F.2d 612, 615 (8th Cir. 1986).

SUMMARY OF ARGUMENT

I. The Court is without subject matter jurisdiction in this case. The Union has petitioned for review of an Authority decision reviewing an arbitration award. Under § 7123(a)(1) of the Statute, 5 U.S.C. § 7123(a)(1), judicial review of such an Authority decision is generally prohibited. The only express exception to this prohibition in § 7123(a)(1) is if an unfair labor practice (ULP) under § 7116 of the Statute is either "an explicit ground for, or [is] necessarily implicated by, the Authority's decision." *Overseas Educ. Ass'n* v. *FLRA*, 824 F.2d 61, 67-68 (D.C. Cir. 1987) (*OEA*).

This exception does not apply here. The Authority's decision concerned solely whether an arbitrator's attorney fee award was consistent with the attorney fee provision of the Back Pay Act, § 5596(b)(1)(A)(ii). The Authority's decision does not even refer to any purported violation of § 7116 of the Statute, much less that a ULP an "explicit ground for," or "necessarily implicated by," the Authority's decision.

The Union's arguments concerning the ULP exception are without merit. The fact that the arbitrator mentioned a statutory ULP in his initial

award on the merits of the grievance does not mean that the Authority's decision reviewing a subsequent award, dealing exclusively with attorney fees under the Back Pay Act, involves a ULP within the meaning of § 7123(a)(1). Nor was the Authority required to consider a statutory ULP in assessing the reasonableness of fees.

The Union also incorrectly argues that the Court has jurisdiction to review the Authority's decision under *Leedom* v. *Kyne*, 358 U.S. 184 (1958), in which the Supreme Court held that federal district courts have jurisdiction to review agency action which exceeds "clear and mandatory" statutory prohibitions. The Authority reviewed the arbitration award at issue in accordance with all statutory mandates.

The Union argues that the Authority exceeded its review powers in this case by reversing the arbitrator's reasonableness findings concerning the amount of attorney fees requested. However, application of a statutory "reasonableness" standard to an established set of facts is a legal issue for the Authority to resolve *de novo* under the Statute. Further, the Authority did not violate its own regulations. Regulations not mandated by statute, as here involved, cannot form the basis for *Leedom* jurisdiction. Moreover, the Agency did in fact raise the reasonableness of the fee amount to the arbitrator and the Authority. Thus, the Authority did not violate its rules

requiring, among other things, that only issues raised to an arbitrator can be raised to the Authority.

II. Assuming the Court does have jurisdiction, the Authority reasonably reduced the number of hours deemed reasonable (332) for fee calculation purposes by the arbitrator. First, based squarely on applicable precedent, the Authority reasonably reduced the number of hours in three specific categories of time billed by the Union, *i.e.*, research (from 33 to 13), post-hearing brief preparation (44 to 18), and fee application preparation (31 to 9).

As to research and brief preparation, the Authority properly held that, in light of the considerable experience and expertise of the attorney, and the relatively straightforward nature of the underlying grievance, the number of hours billed was excessive. Moreover, contrary to the Union's claim, the Authority is empowered to review the arbitrator's conclusions as to reasonableness of hours claimed. Finally, there is no support in the record for the Union's claim that the arbitrator needed to be extensively "educated" by counsel as to the issues involved in the underlying grievance.

As to preparation of the fee application, the Authority properly reduced the hours in part because the application itself revealed that some of the functions performed were ministerial in nature. As to the remaining

hours, the Authority relied on relevant Merit Systems Protection Board precedent in concluding that the number of hours billed was excessive.

The second category of hours reduced by the Authority involved two summary 25% reductions in the remaining 264 hours approved by the arbitrator. The first summary reduction was based, in accordance with established precedent, on the disproportionality between the number of hours billed and the relatively straightforward nature of the issues raised in the underlying grievance. Although resolution of the underlying 14-day suspension grievance was certainly important to the individual employee involved, the value to him of prevailing was not nearly as great as it would have been if a more serious personnel action (*e.g.*, removal) was involved. Moreover, the arbitrator's merits award on issues of significance to the Union is of limited use, because federal sector arbitration awards are not precedential. Given the rather modest value derived from resolution of this grievance, the Authority reasonably concluded that the 264 remaining hours awarded for compensation was excessive.

Nothing in the Federal Circuit's *Crumbaker* decision is contrary to the Authority's holding. That decision simply holds that unadorned conclusions on reductions are inadequate. The Authority here, in contrast, provided fully supported reasoning for its reductions in hours.

The Authority's second summary reduction in hours, again based on established precedent, was predicated on the Union's failure to demonstrate "billing judgment" in its fee application. The premise for this reduction is that an attorney should bill an opponent under a fee shifting statute the same as he/she would a client. An attorney usually shows such judgment by writing off unproductive, excessive, or redundant hours. The Authority reasonably concluded here that the Union's fee application reflects no such judgment. The fee application shows that every hour spent on the case was billed, without any effort to critically evaluate whether all those hours were truly necessary to advance the client's interest. The Union's only claim here is essentially an *ipse dixit* statement that all 332 hours billed were in fact necessary. Such a bare assertion is inadequate to establish the exercise of billing judgment.

Finally, the Authority correctly decided that a remand to the parties for resubmission of the fee issue to the arbitrator was unnecessary. A decision to remand is discretionary with the agency, and the Authority did not abuse its discretion. The record was complete, including the arbitrator's conclusions. The only issue before the Authority was a legal one, *i.e.*, the reasonableness of the number of hours billed. Therefore, no purpose would have been served by a remand.

Accordingly, the Union's petition for review should be dismissed for lack of subject matter jurisdiction or, alternatively, denied on its merits.

ARGUMENT

I. THE COURT IS WITHOUT SUBJECT MATTER JURISDICTION IN THIS CASE UNDER § 7123(a)(1) OF THE STATUTE BECAUSE THE AUTHORITY DECISION AT ISSUE INVOLVES REVIEW OF AN ARBITRATION AWARD, AND NONE OF THE EXCEPTIONS TO THE PROHIBITION ON JUDICIAL REVIEW OF SUCH DECISIONS ARE APPLICABLE.

This Court has previously recognized that under § 7123(a)(1) of the Statute, Authority decisions on exceptions to arbitrators' awards are generally not subject to judicial review. *See Am. Fed'n of Gov't Employees, Local 2986* v. *FLRA*, 130 F.3d 450, 451 (D.C. Cir. 1997) (*AFGE, Local 2986*); *United States Dep't of the Interior* v. *FLRA*, 26 F.3d 179 (D.C. Cir. 1994) (*Interior*); *United States Dep't of Justice, United States Fed. Bureau of Prisons* v. *FLRA*, 981 F.2d 1339, 1342 (D.C. Cir. 1993) (*Bureau of Prisons*); *Griffith* v. *FLRA*, 842 F.2d 487, 490-91 (D.C. Cir. 1988) (*Griffith*); *Overseas Educ. Ass'n* v. *FLRA*, 824 F.2d 61, 63 (D.C. Cir. 1987) (*OEA*). Moreover, the narrow exceptions to this general rule of judicial nonreviewability are not applicable here. Accordingly, the Union's petition for review should be dismissed.

A. The Statute's Language And Legislative History Make Clear That Congress Intended To Bar Judicial

Review Of Authority Decisions On Exceptions To Arbitrators' Awards In Virtually All Cases

Examination of the Statute's language and legislative history reveals "unusually clear congressional intent generally to foreclose review" of virtually all Authority decisions in arbitration cases pursuant to section 7123(a). *Griffith*, 842 F.2d at 490. Section 7123(a) of the Statute specifically precludes judicial review of certain Authority decisions and orders. This section states, in relevant part:

> Any person aggrieved by any final order of the Authority other than an order under--
>
> (1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118[13] of this title, . . .
>
> * * * * *
>
> may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a). Thus, the plain language of 5 U.S.C. § 7123(a) bars judicial review of Authority decisions on exceptions to arbitrators' awards and narrowly restricts the jurisdiction of the courts of appeals to review an

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[13] As this Court has noted, although the text of the Statute refers to § 7118, that reference "has been recognized to be an error; the correct reference is to section 7116." *OEA*, 824 F.2d at 63 n.2; *see also Am. Fed'n of Gov't Employees, Local 916 v. FLRA*, 951 F.2d 276, 277 n. 4 (10th Cir. 1991) (calling the reference an "inadvertent miscitation").

FLRA arbitration decision to those instances that "involve[] an unfair labor practice" under the Statute. *OEA*, 824 F.2d at 63. This broad jurisdictional bar to the review petitioner seeks here has been recognized by all of the courts of appeals, including this one, that have considered the issue.[14]

The legislative history of section 7123(a) underscores the tight restrictions Congress placed on review of Authority decisions issued under section 7122, involving an award by an arbitrator. Congress strongly favored arbitrating labor disputes, and sought to create a scheme characterized by finality, speed, and economy. To this end, the conferees discussed judicial review in the following terms:

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

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[14] *See, e.g., NTEU* v. *FLRA*, 112 F.3d 402, 405 (9th Cir. 1997); *United States Dep't of the Interior, Bureau of Reclamation, Missouri Basin Region* v. *FLRA*, 1 F.3d 1059, 1061 (10th Cir. 1993); *Philadelphia Metal Trades Council* v. *FLRA*, 963 F.2d 38, 40 (3rd Cir. 1992); *United States Dep't of Justice* v. *FLRA*, 792 F.2d 25, 27 (2nd Cir. 1986); *Tonetti* v. *FLRA*, 776 F.2d 929, 931 (11th Cir. 1985); *Am. Fed'n of Gov't Employees, Local 1923* v. *FLRA*, 675 F.2d 612, 613 (4th Cir. 1982).

H.R. Rep. No. 95-1717 at 153 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Serv., 96th Cong., 1st Sess., *Legislative History of the Federal Serv. Labor-Management Relations Statute, Title VII of the Civil Serv. Reform Act of 1978*, at 821 (1978) (*Legis. Hist.*) (emphasis added). The conference committee also indicated its intent that once an arbitrator's award becomes "final," it is "not subject to further review by *any* . . . *authority* or administrative body" other than the Authority. *Id.* at 826 (emphasis added).

Accordingly, the language and legislative history of the Statute establish conclusively that Congress intended to restrict review of arbitration awards exclusively to the Authority, and intended that there be "no judicial review of the Authority's action on . . . arbitrators awards," except those involving ULPs. *Legis. Hist.* at 821.

B. None Of The Few Exceptions To The General Bar To Judicial Review Of Authority Arbitration Decisions Under Section 7122 Of The Statute Is Applicable To This Case

A few exceptions have been recognized to the general bar to judicial review of Authority arbitration decisions. However, none of them apply in this case. In addition to the express exception in § 7123(a)(1), concerning Authority decisions involving a ULP, this Court has indicated that an exception to the jurisdictional bar may be present where the Authority

exceeds its delegated powers and acts contrary to a clear statutory mandate. *AFGE, Local 2986*, 130 F.3d at 451 (citing *Leedom* v. *Kyne*, 358 U.S. 184 (1958) (*Leedom*)).[15]

1. The Authority's decision does not "involve an unfair labor practice" within the meaning of section 7123(a)(1) of the Statute

As indicated above, the one exception to the bar to judicial review that is expressly recognized in the Statute arises where the Authority's arbitration decision "involves an unfair labor practice." 5 U.S.C. § 7123(a)(1). In *OEA*, this Court definitively identified two important principles concerning the application of the ULP exception in § 7123(a)(1). First, as to what kind of ULP is referred to in § 7123(a)(1), "[t]he FLRA order must deal with an unfair labor practice 'under' the [Statute], or more precisely, 'under' [§] 7116." *OEA*, 824 F.2d at 65. That is, *only* if the Authority's order itself, as opposed to the arbitrator's award, addresses an alleged violation of § 7116 of the Statute will judicial review be available. Second, as to what circumstances warrant a conclusion that an Authority decision "involves" a statutory ULP under § 7123(a)(1), this Court held that "a statutory [ULP]

[15] Other exceptions to the prohibition on judicial review are not raised by the Union, and therefore will not be discussed here.

must be either an explicit ground for, or be necessarily implicated by, *the Authority's decision*." *OEA*, 824 F.2d at 67-68 (emphasis added).[16]

Applying these standards to the instant case, it is evident that a ULP is not a ground for the Authority's decision. The Authority's decision makes no reference whatsoever to any purported violation of § 7116 of the Statute, nor can it be said that a statutory ULP was "necessarily implicated by" the Authority's decision. Rather, the only matters presented to or considered by the Authority concerned whether the arbitrator's award of attorney fees was consistent with the requirements of the Back Pay Act, 5 U.S.C. § 5596. (JA at 6-19; 60-87.) Accordingly, the Authority's order does not involve a ULP within the meaning of § 7123(a)(1) of the Statute.

The Union argues (Union Brief (Br.) at 8-15), however, that because the underlying arbitration award found that DFAS committed a ULP, jurisdiction lies under § 7123(a). The Union's arguments are meritless.

Initially, as demonstrated by the plain language of § 7123(a), it is the Authority's decision, not the underlying arbitrator's award, that must involve

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[16] Although there is no legislative history on the "involves a ULP" exception, it appears likely that it was intended to promote consistent decision making under § 7116, thereby avoiding forum shopping. *Cf. Cornelius* v. *Nutt*, 472 U.S. 648, 661 and n.16 (1985) (in enacting § 7121(e) and (f) of the Statute, allowing federal employees to appeal adverse actions either through arbitration or through a statutory appeal to the MSPB, Congress intended reviewing courts to review such arbitrator and MSPB decisions under the same standards).

a ULP in order to establish the Court's jurisdiction.[17] Section 7123(a)(1) precludes judicial review unless "the [Authority's] order" involves a ULP. There is no reference in § 7123(a) to the arbitration award itself. Accordingly, the mere fact that ULPs were expressly found by the arbitrator cannot be sufficient to invoke § 7123(a)(1)'s ULP exception.

The Union's attempts to graft the arbitrator's ULP findings onto the Authority's decision are unavailing. First, the arbitrator's sole statutory ULP finding, that DFAS violated § 7116(a)(1) and (5) of the Statute by refusing to allow the grievant to enter the work place while on suspension, was set out in his initial award.[18] (JA at 54.) Yet as the Union concedes (Br.

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[17] The Union incorrectly argues (Br. 9, 12) that in *Interior*, this Court ruled that an arbitrator's resolution of a statutory ULP can on its own satisfy the ULP exception. In the passages cited by the Union, however, the Court was refuting an employer claim that it had raised a statutory ULP to the arbitrator. The Court gave no indication in *Interior* that it intended to disregard the statutory mandate, i.e., that the *Authority's* decision must involve a statutory ULP. In any event, the Union overlooks the fact that the arbitrator's award in which ULP findings were made is not the one that was on review by the Authority in this case.

[18] The Union erroneously argues (Br. 11) that the Authority's references to arbitrator findings concerning allegations that *could* have been, but were *not*, alleged as statutory ULPs under § 7116, suffice to invoke the ULP exception. First, this Court clearly established in *OEA*, 824 F.2d at 67-68, that Authority review of claims that could have been, but were not, raised as statutory ULPs does not satisfy the requirements of § 7123(a)(1). Second, as set out above, mere reference by the Authority to an arbitrator ULP finding does not in any event mean that a statutory ULP is a "necessary ground" for the Authority's decision.

at 2), only the arbitrator's Supplemental Award concerning attorney fees was before the Authority on exceptions.

Further, although the Union notes references to the ULP finding in the Supplemental Award, such references occur only where the arbitrator was recounting his initial award. (JA at 97.) Finally, the mere fact that the Authority's decision mentions the ULP findings does not demonstrate that the Authority's order "involved" a ULP within the meaning of § 7123(a)(1). None of the Union's citations to the Authority's decision (Br. at 10-11) demonstrate that the arbitrator's ULP findings in any way informed the Authority's decision on the attorney fees issue before it. Rather, the Authority's references to the ULP findings constitute only background factual references.

If, as demonstrated at p. 26, n.16, above, the purpose of the ULP exception to the preclusion of judicial review in arbitration cases is to insure consistency in the interpretation and application of the relevant law, *i.e.*, § 7116 of the Statute, then judicial review should obtain only where the decision impacts that body of law. In that regard, nothing in the Authority's substantive discussion and analysis of the attorney fees issues before it implicates the development of ULP law.

Applying these principles, this case is readily distinguishable from this Court's decision in *OEA* where this Court found that an Authority decision involved a ULP. There, the Authority had set aside an arbitrator's award, finding that the subject grievance was precluded from arbitration under § 7116(d) of the Statute because the grievance raised the same issue as had previously been raised as a ULP.[19] Although the Court rejected the Authority's argument that for jurisdiction to lie, the Authority's decision must address "the merits" of a ULP allegation, the Court nonetheless required more than a passing reference to a ULP. *OEA*, 824 F.2d at 71.

Unlike the instant case, where the substance of the alleged ULPs played no part in the Authority's decision, the Court found that in *OEA* that the Authority was required to make a detailed assessment of the previously filed ULP charge and compare the substance and legal theory of the charge to that raised at arbitration. *Id*. Further, in *OEA*, the Authority's decision concerned a procedural question arising under § 7116 regarding the overlap of the statutory ULP process and negotiated grievance/arbitration procedures. The Authority's decision thus implicated ULP law and could properly be said to involve a ULP. In contrast, no aspect of ULP law,

[19] Section 7116(d) provides in relevant part that issues which may be raised under a grievance procedure or the Statute's ULP procedures may be raised under either one, but not under both procedures.

substantive or procedural, is implicated in the Authority's order in the instant case.[20]

2. The narrow *Leedom* v. *Kyne* exception to nonreviewability of Authority arbitration case decisions is inapplicable here because a clear and specific violation of the Statute cannot be shown

As this Court stated in *AFGE, Local 2986*, another theoretical exception to § 7123's jurisdictional bar is the doctrine articulated by the Supreme Court in *Leedom*. In *Leedom*, the Supreme Court set forth a narrow exception to the general rule of nonreviewability of National Labor Relations Board (Board) representation proceedings. The Court held that district court equity jurisdiction existed where the Board had violated a clear mandate of its enabling statute. *Leedom*, 358 U.S. at 188.[21]

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[20] The Union mistakenly asserts (Br. 10) that the Authority must, in assessing the reasonableness of the fee award, have reviewed the attorney's work that went into litigating the ULP violation, and that this qualifies for the ULP exception. This falls far short of the Authority's decision "necessarily implicat[ing]" a ULP, however. The focus of the Authority's analysis here is the reasonableness of the hours spent on the work, not the legal underpinnings of the work being done. The work done by the attorney could as easily have dealt with a contract grievance claim, rather than a statutory ULP, and the Authority's analysis would have been the same.

[21] Specifically, the Board had approved a mixed bargaining unit of professional and nonprofessional employees without first affording the professionals an opportunity to elect whether to be separately represented or included in the mixed unit as expressly required by section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. ' 159(b)(1).

There are two reasons why this Court should reject any attempt by the Union to invoke jurisdiction on the authority of *Leedom*. First, federal district courts, not the courts of appeals, have original jurisdiction to consider the merits of such claims under general jurisdictional provisions such as 28 U.S.C. §§ 1331, 1337 (1994). *Leedom*, 358 U.S. at 189; *U.S. Dep't of the Treasury, U.S. Customs Serv.*, 43 F.3d 682, 688 n.6 (D.C. Cir. 1994) (*Customs Service*); *Physicians Nat'l House Staff Ass'n* v. *Fanning*, 642 F.2d 492, 495 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) (*Fanning*). Nothing in *Leedom* provides a basis for *de novo* circuit court review.

Second, even if the claim were in the proper forum, the Union cannot establish jurisdiction under *Leedom.* The *Leedom* exception is "intended to be of extremely limited scope," applicable only where an agency has acted "contrary to a specific prohibition in [its enabling statute] that was clear and mandatory." *Griffith* 842 F.2d at 493 (internal quotes omitted). *Leedom* jurisdiction is not available to review Authority decisions for errors of fact or law. *See Bureau of Prisons*, 981 F.2d at 1343; *see also Boire* v. *Greyhound*, 376 U.S. 473, 481 (1964) (*Leedom* should "not . . . be extended to permit plenary district court review of Board orders . . . whenever it can be said that an erroneous assessment of the particular facts . . . has led it to a

conclusion which does not comport with the law."). As stated by this Court, "[g]arden variety errors of law or fact are not enough [to confer *Leedom* jurisdiction]." *Griffith*, 842 F.2d at 493.

The Union can point to no clear and mandatory provision of the Statute violated in the instant case. Rather, the Authority has fulfilled all aspects of its statutory mandate. Section 7122(a) provides, in pertinent part, that the Authority may take action concerning an award that it finds "deficient (1) because [the award] 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[.]" 5 U.S.C. § 7122(a). Consistent with its obligations under § 7122 of the Statute, the Authority reviewed the arbitrator's attorney fees award according to those standards. Having found the award of attorney fees to be excessive under the applicable laws, the Authority modified the award. Although the Union may disagree with the merits of the Authority's decision, such disagreement provides no basis for jurisdiction based on *Leedom*.

Nonetheless, the Union contends that *Leedom* jurisdiction is available in the instant case because: 1) the Authority "exceeded its limited review" under § 7122(a) of the Statute; and 2) the Authority violated §§ 2429.5 and 2425.2 of its regulations, 5 C.F.R. §§ 2429.5 and 2425.2 (2005).

As to its first point, the Union argues (Br. 17-20) that the Authority reversed the arbitrator's findings of fact as to the reasonableness of the fee award, a review power the Authority does not have under § 7122(a). This claim misconstrues the Authority's action in this case. The Authority applied the Back Pay Act standard that a prevailing employee can recover "reasonable attorney fees." 5 U.S.C. § 5596(b)(1)(A)(ii). Adjudicatory applications of a "reasonableness" standard created by law involve mixed questions of fact and law. *Cf. Ornelas* v. *United States*, 517 U.S. 690, 696-97 (1996) ("reasonable suspicion" standard for police stop is mixed question). However, where, as here, the "historical facts" are not in dispute, determination of whether the action under review was "reasonable" is a matter of law, and is made *de novo* by the reviewing tribunal.[22] *Id.* Thus, the Authority acted well within its mandate when it simply applied the appropriate legal standard to the arbitrator's fee award.

With respect to the Authority's regulations, this Court has held that violations of agency rules not mandated by statute do not provide a basis for *Leedom* jurisdiction. *Lawrence Typographical Union* v. *McCulloch*,

[22] In this connection, the Authority did not question the credibility of the factual representations in the fee application of hours actually expended. Rather, the Authority held (JA at 12-16) that those hours were not reasonably expended under the applicable legal standard.

349 F.2d 704, 707 n.5 (D.C. Cir. 1965) ("Even an unreasonable departure from a rule of the [agency] is not reviewable by the District Court on the principle of *Leedom* v. *Kyne* unless the rule is expressly required by [statute]"). The procedural rules cited by the Union, 5 C.F.R. §§ 2425.2 and 2429.5, are not mandated by statute and cannot, therefore, be the basis of a *Leedom* action.[23]

Second, the Union essentially contends (Br. 21-22) that the Authority violated §§ 2429.5 and 2425.2 by considering matters not presented to the arbitrator or in the agency's exceptions. However, as the Authority noted (JA at 27), the reasonableness of the Union's fee request was specifically raised before the arbitrator and on exceptions. Although the Union may dispute the clarity or specificity with which these matters were raised, such disagreement, even if meritorious, is insufficient to confer jurisdiction under *Leedom*. *Griffith*, 842 F.2d at 493 ("garden variety" errors of law or fact are not enough [to confer *Leedom* jurisdiction]). Accordingly, the Union's *Leedom* claim must fall for this reason as well.[24]

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[23] Section 2425.2 provides for the required content of exceptions to arbitration awards; and, as relevant here, § 2429.5 provides that the Authority will not consider matters not presented to an arbitrator.

[24] In any event, the Authority is free to address issues in a case *sua sponte*, if it is in the interest of the efficient administration of justice to do so. *E.g.*, *U.S. Dep't of Justice*, 52 F.L.R.A. 1093, 1098 (1997). Further, this Court

II. THE AUTHORITY REASONABLY REDUCED THE ARBITRATOR'S ATTORNEY FEE AWARD IN AN EMPLOYEE SUSPENSION CASE, BECAUSE THE AWARD WAS BASED ON AN UNREASONABLE AMOUNT OF HOURS FOUND BY THE ARBITRATOR TO HAVE BEEN EXPENDED BY THE EMPLOYEE'S ATTORNEY IN THE CASE.

The Authority agreed with the arbitrator, that all the prerequisites for granting an attorney fee award under the Back Pay Act (Act), 5 U.S.C. § 5596(b)(1)(A)(ii), were met. (JA at 10-11.) The sole issue on which the Authority altered the arbitrator's fee award was whether the number of hours claimed by the Union's attorney was excessive, thus resulting in an award that was not "reasonable" as required under the Act.

The Authority made two types of reductions in hours. First, the Authority made specific reductions in the hours claimed in three discrete categories of time billed for by the Union attorney (33 hours for research, 44 for preparation of the post-hearing brief to the arbitrator, and 31 hours for preparation of the fee application itself). (JA at 15.) Second, for the remaining 264 hours claimed, the Authority made two summary percentage reductions of 25% each, based on its conclusions that the record evidenced a disproportion between the fees sought and the result obtained in the case,

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has considered on the merits cases where the Authority addressed issues *sua sponte*. *E.g., Patent Office Professional Ass'n* v. *FLRA*, 26 F.3d 1148 (D.C. Cir. 1994).

and a lack of "billing judgment." (JA at 16.) The record and applicable precedent support both of these types of reductions, and they should be affirmed.

A. The Authority's Specific Reductions In Hours For Three Categories Of Time Billed Are Supported In The Record And Under Applicable Case Law

1. Research and brief preparation time

The Authority reduced the number of hours claimed for research from 33 to 13, and for preparation of the post-hearing brief to the arbitrator from 44 to 18, given the nature of the case and the level of the Union attorney's experience in federal sector labor and employment law. (JA at 15.)

Union counsel stated in his affidavit in support of the fee application (JA at 192-98), among other things, that he has been counsel for the Union for 26 years; that he has represented "numerous" employees in disciplinary and other types of personnel cases before arbitrators and the MSPB; has considerable experience in litigation before the Authority and the federal courts; and has extensive experience in brief preparation, including briefs to the United States Supreme Court.

Moreover, as the Authority noted (JA at 15), the case involved a 14-day suspension and two "ancillary" issues, concerning the grievant's access to the premises during the suspension and production of documents.

These ancillary issues did not explore novel legal issues, and were resolved by the arbitrator relatively briefly. The access issue was decided in a page and a half of the arbitrator's decision (JA at 23-24) and cited no case law whatsoever, while the document issue was decided in three pages (JA at 55-57) based on existing case law.

Thus, the Authority was presented with a highly qualified and experienced attorney handling a case that may fairly be characterized as rather routine in nature. This is precisely the formula that has prompted the MSPB to make reductions in hours claimed for research. In *Emelio* v. *U.S. Postal Service*, 27 M.S.P.R. 233, 237 (1985), cited by the Authority (JA at 15), the MSPB reduced the number of hours claimed by an attorney for research from 24.4 to 10 hours, solely based on the attorney's "claimed expertise in labor law, especially in Postal Service matters." Similarly, in *Sailor-Nimocks* v. *OPM*, 66 M.S.P.R. 438, 443-44 (1995), also cited by the Authority (JA at 15), the MSPB approved an administrative judge's reduction of research time from 28 to 8 hours, based solely on the observations that the issue involved was not complex, and the attorney had

sufficient experience in federal sector labor law to have done the work in less time than requested.[25]

As the Authority held (JA at 15), the same considerations apply to the hours claimed for post-hearing brief preparation. Certainly, an attorney of such extensive experience should have been able, in a fairly routine case of this nature, to prepare an adequate brief in considerably less than 44 hours.

In sum, the Authority relied on specific considerations in the record of the case and, exercising its expertise in federal sector labor and employment law, made concrete reductions in research and brief writing hours in a manner fully consistent with applicable MSPB precedent.[26] These actions should therefore be affirmed.

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[25] The MSPB's *Sailor-Nimocks* decision refutes the Union's claim (Br. 39) that *Crumbaker* "effectively overruled" *Emelio*. Thus, the MSPB engaged in the same kind of decision-making in this area in *Sailor-Nimocks*, which post-dated *Crumbaker*, as it did in *Emelio.*

[26] The Union is accordingly incorrect when it argues (Br. 35) that the Authority reduced these hours "capricious[ly]," contrary to *Crumbaker*. The Authority engaged in the kind of concrete record analysis called for by the Federal Circuit in that case. *Crumbaker* only requires that the reasons for a reduction be "carefully explained," and not be "conclusory." *Mudrich* v. *Dep't of Agriculture*, 92 M.S.P.R. 413, 419 (2002). However, the number of hours claimed may be reduced even when it is "not outrageous or unprecedented but there is insufficient evidence to establish that it is reasonable." *Casali* v. *Dep't of the Treasury*, 81 M.S.P.R. 347, 354 (1999). The Authority's decision-making here satisfies these requirements.

The Union argues (Br. at 32) on this point that the case before the arbitrator involved "far more" than a 14-day suspension. The Union references interpretations of government travel regulations, Comptroller General decisions to review, issues arising under the Statute, etc. However, the need to assess regulations and case law precedent in a federal sector arbitration case is not at all unusual. Further, the Authority expressly recognized (JA at 16) that issues arising under the Statute were also involved in the case. None of these points warrant promoting this case as something that it is not, *i.e.*, a complicated case demanding extensive research and brief-writing time.

The Union also argues (Br. 30-31) that the Authority cannot disturb the arbitrator's findings of reasonableness of hours expended. This claim misconstrues the Authority's role in reviewing arbitration awards. The Authority reviews awards *de novo* as to legal issues. *E.g., United States Dep't of Justice, Fed. Bureau of Prisons, United States Penitentiary, Terre Haute, Ind.*, 58 FLRA 327, 329 (2003). As shown at p. 33, above, whether a certain number of hours claimed in an attorney fee application meets a statutory standard of reasonableness is a legal matter. Hence, the Authority properly ensures that statutory requirements, such as the "reasonable

attorney fee" standard in the Back Pay Act, are adhered to when, as here, an arbitrator is insufficiently vigilant in enforcing them.

The Union relies (Br. 25) on *Alabama Association of Civilian Technicians and U.S. Department of Defense, Alabama State Military Department, Alabama National Guard*, 56 F.L.R.A. 231, 235 (2000) (*Alabama Guard*); and *U.S. Department of the Army, Red River Army Depot, Texarkana, Tex. and NAGE, Local R14-52*, 54 F.L.R.A. 759, 762 (1998), for the proposition that the arbitrator, not the Authority, is the appropriate decider of fees. However, these cases are inapposite.

In both cases, arbitrators took action on attorney fees but omitted mandatory procedural requirements in 5 C.F.R. § 550.807, which governs fee awards under the Back Pay Act. The Authority declined requests in those cases to overlook the omitted steps the arbitrators were mandated to observe, and proceeded to resolve the fee issues. In the present case, in contrast, the arbitrator's fee award complies with 5 C.F.R. § 550.807. Nothing in its case law bars the Authority from carrying out its duty under § 7122 of the Statute, to review the arbitrator's award for consistency with law.[27]

[27] The Union's reliance (Br. 24) on the Supreme Court's *Steelworkers Trilogy* and progeny, which establishes limited judicial review of arbitration awards in the private sector, is thus off the mark. Such private sector

The Union further points out (Br. 33-35) that it had to submit a 67-page brief to "educate" the arbitrator. This contention is, however, wholly unsupported. There is no showing in the record that this arbitrator is a novice to the federal sector, or is otherwise in need of special "educa[tion]" by counsel. In fact, at Br. 39, the Union touts his "vast knowledge." The Union thus fails on this point to sustain its burden of showing the reasonableness of its hours requested. *E.g.*, *Walker* v. *City of Mesquite, Tex.*, 313 F.3d 246, 251 (5th Cir. 2002).

2. Preparation of the fee application

The Authority reduced the hours requested for preparation of the fee application from 31 to 9, finding the requested hours to be "excessive in light of the record before us." (JA at 15.) In this regard, the Authority noted that the 31 hours billed for included time spent in preparing time charges and calculating fees, which are essentially clerical functions. An examination of the record supports this holding.

The Union attorney's statement of hours lists (JA at 211), as regards the fee application, that counsel spent:

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principles govern Authority arbitration review under § 7122(a)(2) of the Statute, concerning "grounds [for review] similar to those applied by Federal courts in private sector labor-management relations." However, review for consistency with law under § 7122(a)(1), as involved here, has no private sector counterpart.

- 3 hours contacting Atlanta attorneys to discuss billing rates,
- two 7 hour entries each for "Preparation of Application for Fees,"
- a separate 7 hour entry for "Preparation of Application for Fees, update Affidavit," and
- a 7 hour entry for "Complete Application for Fees."

The Authority reasonably concluded from these entries, particularly the contacts with other attorneys and updating the affidavit, that a considerable part of the 31 hours was devoted to ministerial functions.

Moreover, as to preparation of the motion portion of the fee application, the Authority was consistent with MSPB precedent when it reduced the number of hours requested. In *May* v. *Department of Transportation*, 28 M.S.P.R. 357, 364 (1985), the MSPB found the 20.75 hours requested for preparation of a fee application to be excessive, and reduced that number to 10 hours, which it considered a more reasonable amount. Similarly, in *Logan* v. *HUD*, 23 M.S.P.R. 345, 351 (1984), the MSPB approved a reduction by more than half (from 36 hours to 14 hours) in the hours requested by an attorney for preparing a fee application. This precedent establishes that it is appropriate for a reviewing authority to make judgments about the number of hours needed to prepare a fee application, and thus fully supports the Authority's rulings on this point.

The Union complains (Br. 35-36) that it told the Authority in its motion for reconsideration that "only a few hours" went into preparing time charges and calculating fees, and that the Authority did not distinguish between clerical and motion drafting time in making its reduction. However, the Authority reasonably relies on what the Union said in its fee application, and not some *post hoc* explanation of the application provided in litigation papers. Moreover, the Authority did not rely exclusively on the fact that some of the hours requested for preparing the application involved clerical work. It also concluded (JA at 15) that the entire process of preparing the fee application simply should not have required 31 hours to complete.

The Union also again argues (Br. 36) that it was "necessary to fully educate" the arbitrator on attorney fees because DFAS was making erroneous arguments to the arbitrator concerning the Union's ineligibility for fees. However, there is certainly nothing unusual about an opposing party making arguments (sometimes erroneous) on the fee issue. None of what the Union says explains why the Authority, acting consistent with MSPB on this point, is wrong for reducing these hours. The Union's recounting (Br.

37-38) of the length of documents it filed,[28] and the number of citations in them, does not establish that such voluminous papers were necessary to prove its point to the arbitrator. To hold otherwise would be to reward prolixity. The Authority should therefore be affirmed on this point as well.

B. The Authority's Use Of Two Summary Percentage Reductions Of 25% Each, For Disproportion Between The Fees Requested And The Amount And Interests Involved In The Case, And For Failure To Exercise "Billing Judgment," Was Reasonable

1. The 25% reduction for disproportionality

The Authority correctly identified the interests vindicated in this case as the employee's 14 day suspension and Union "institutional interests," i.e., employee access to the workplace during the suspension and document disclosure. (JA at 16.) However, the Authority reasonably found the $74,700 in fees requested to be "significantly disproportionate" to these interests. (JA at 16.)

The Authority noted (JA at 14) that disproportionality is one of the factors set out in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974), for determining whether efficiency and economy of time are

[28] Time spent on several of the documents mentioned by the Union (Br. at 38), such as its reply brief on fees (JA at 213), was not even included in the fee application, presumably because they are largely redundant of material contained in the original fee application itself. Reference in the Union's brief to the Court therefore seems irrelevant.

established in an attorney fee application. The Authority further noted that the MSPB has applied these *Johnson* factors in assessing the reasonableness of fees under 5 U.S.C. § 7701(g). *Kling* v. *Dep't of Justice*, 2 M.S.P.R. 464, 471 (1980).

In the present case, a 14-day suspension is certainly an important matter for the individual employee involved. However, its impact on the employee is not nearly as great as would be other personnel actions, such as a lengthier suspension, removal, or permanent reassignment to a distant location. Further, the value of the arbitrator's ruling on the Union's "institutional interests" is minimal. In this connection, it is firmly established that federal sector arbitration awards are not precedential. *E.g.*, *United States Dep't of the Treasury, Internal Revenue Serv., Washington, D.C. and Nat'l Treasury Employees Union*, 60 F.L.R.A. (No. 171) 966, 967 n.3 (May 23, 2005). The Union cannot use the award in this case to compel the resolution of future cases that may involve the same issues.[29]

Thus, although the benefits generated from this arbitration are not inconsequential, they are limited to a relatively small sum of money (2 weeks' back pay for the employee), and a resolution of Union interests

[29] Accordingly, the arbitrator's opinion (JA at 97) that his award "rendered a service to the federal work force," and would "certainly benefit federal employees" at the agency, is purely speculative.

that is limited to this very case. Against this, we have 264 hours, or about 6½ solid weeks (assuming a 40 hour work week), of attorney time billed for. It is not unreasonable for the Authority to conclude that such a substantial time expenditure is not appropriate for a case of such limited consequences.

Moreover, the use of a summary percentage reduction to remedy this disproportion is consistent with precedent. In *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 684 F.2d 1087, 1097 (5th Cir. 1982), cited by the Authority (JA at 16), the court of appeals approved a trial court reduction of 25% in the lodestar fee amount when it was 16½ times the amount of damages suffered by the plaintiff in the case. The court concluded that "the principle vindicated did not warrant such ample recompense." *Copper Liquor*, 684 F.2d at 1097. The same result applies here. *See also Watson* v. *State Farm Lloyds*, 2000 WL 42174 (N.D. Tex. 2000) (attorney fee request reduced by summary percentage because fee request was for 55% of damages awarded, and "[n]o novel legal principle was involved . . . , nor were issues of wide public concern involved.")[30]

[30] The Union cites (Br. 43) cases in which this Court declined to apply the *Johnson* disproportionality factor. Thus, in *Thomas* v. *National Football League Players Association*, 273 F.3d 1124, 1129 (D.C. Cir. 2001); and in *Williams* v. *First Government Mortgage and Investors Corp.*, 225 F.3d 738, 747 (D.C. Cir. 2000), the Court approved fees under the Civil Rights Act of 1964 and the D.C. Consumer Protection Procedures Act, respectively, that were several times the amount of the recovery. However, the Court cited the

The Union points out (Br. at 42) that the court in *Copper Liquor* also said that a proper basis for fee reduction based on disproportionality would be if a case is "solely of private interest and involves only money damages." *Id.* However, the court also noted that "[o]ther unusual circumstances may likewise warrant a reduction." The limited impact of the results in this case qualifies as either "solely of private interest," or an "unusual circumstance[]" warranting a fee reduction.

The Union also argues on this point (Br. at 41) that the 25% summary percentage reduction for disproportionality is antithetical to the required inquiry under *Crumbaker*. However, nothing in *Crumbaker* establishes that the court there intended to bar summary percentage reductions in fees, where such reductions are appropriate. Indeed, the MSPB has used just such an approach post-*Crumbaker*. *See Rose* v. *Dep't of the Navy*, 47 M.S.P.R. 5, 17 (1991) (MSPB approves administrative judge's 50% fee reduction for certain work, based on a finding of reiteration).

Rather, the court in *Crumbaker* simply intended to eliminate unadorned conclusions that certain hours are excessive. *Crumbaker*, 781 F.2d at 195. The Authority here, however, has not engaged in such

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specific "public policy interests served" by these laws in reaching this result. There is no basis to conclude that the Back Pay Act has comparable policy interests to those laws. Moreover, nothing in these holdings suggests that the Court intended to disregard this *Johnson* factor in all fee cases.

purely conclusory decision-making. Rather, as set out above, it has provided a "concise but clear explanation of its reasons" for making this 25% fee reduction for disproportionality. *Id.*

Finally, the Union argues (Br. at 40) that DFAS did not in its exceptions raise disproportionality as an issue concerning the reasonableness of the arbitrator's fee award. As the Authority pointed out in its decision on reconsideration (JA at 26-27), DFAS specifically contested the issue of reasonableness of the fee requested to both the arbitrator and the Authority,[31] so the Union had every opportunity to establish the validity of its request.

2. The 25% reduction for lack of "billing judgment"

Finally, the Authority referred to the principle that an attorney requesting fees under a fee-shifting statute must exercise "billing judgment," that is, he/she must bill the adversary as if it were his/her own client. The Authority relied on *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); and *Crumbaker*, 781 F.2d at 195, for this proposition. The Authority noted that

[31] DFAS argued in its exceptions to the arbitrator's fee award, among other things, that "[a]n award of seventy-five thousand dollars is clearly excessive in a case involving a two-week suspension on charges of AWOL and lack of candor." Agency's Exceptions to the Arbitration Award, Nov. 17, 2003, at p. 5 (Add. B to this brief). Thus, while DFAS did make a specific challenge to the research time billed for, it also made the broad-based charge that the overall fee amount requested was unreasonable under applicable law.

it had not previously had occasion to address this issue in an attorney fee case. (JA at 16.)

Further, the Authority noted (JA at 16) case law of the Fifth Circuit that used percentage reductions of fee requests for, among other things, failure to exercise billing judgment. Thus, in *Hopwood* v. *State of Texas*, 236 F.3d 256, 279 (5th Cir. 2000), the court approved a summary 25% reduction of a fee request because, among other things, the fee application did not reflect the exercise of billing judgment by the requesting attorney. The attorney's mere insistence that such judgment was exercised was insufficient. *Id.* *See also Walker* v. *U.S. Dep't of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996) ("The proper remedy when there is no evidence of billing judgment is to reduce the hours awarded by a percentage intended to substitute for the exercise of billing judgment"); *Walker* v. *City of Mesquite, Tex.*, 313 F.3d 246, 251 (5th Cir. 2002) (same).[32]

Billing judgment is "usually shown by the attorney writing off unproductive, excessive, or redundant hours." *Green* v. *Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 662 (5th Cir. 2002). It is evident that, as the Authority held, counsel exercised no such billing judgment in the 264 hours

[32] This Court and others have also used summary percentage reductions in fee awards for lack of billing judgment. *See, e.g., Action on Smoking and Health* v. *Civil Aeronautics Bd.*, 724 F.2d 211, 220-22 (D.C. Cir. 1984); *Bryant* v. *Colgate Univ.*, 996 F. Supp. 170, 172 (N.D.N.Y. 1998).

remaining, after the Authority made specific hourly reductions. The Union's fee application indicates that any hour spent in connection with the case was billed. The application shows no effort to critically evaluate these hours, to determine which were truly necessary and which ones were not. The absence of this hallmark for showing the exercise of billing judgment supports the Authority's 25% reduction.

The Union argues (Br. at 45) that it need not have shown that it "wrote off" hours as unnecessary, because all hours were in fact necessary to preparation of the case to the arbitrator. The gist of the Union's claim here appears to be that all time spent on the case is *per se* necessary, if the Union says it is. The Authority rightly declined to adopt this approach, because it is the antithesis of the billing judgment requirement. The party moving for fees has the burden of showing that it exercised billing judgment. *Walker*, 99 F.3d at 770. That is, the fee application must evidence on its face that counsel made a good faith effort to closely scrutinize all hours devoted to a case, and made a rigorous effort to weed out those hours that were not truly necessary, as if counsel was submitting a bill to his own client. As the Authority held here, that kind of analysis is entirely missing from counsel's fee application. It therefore properly applied the 25% reduction in light of that failure by Union counsel.

C. The Authority Correctly Concluded That A Remand To The Arbitrator Was Not Necessary On The Facts In This Case.

The Union mistakenly argues (Br. at 25 n.6) that the Authority erred in not remanding the case to the parties for resubmission to the arbitrator for further proceedings. The decision of an agency as to whether to remand a case for further proceedings is a highly discretionary one, to be reviewed on an abuse of discretion standard. *Palacios-Torres* v. *Immigration and Naturalization Serv.*, 995 F.2d 96, 101 (7th Cir. 1993). The Authority clearly did not abuse its discretion in this case.

As the Authority said (JA at 18-19), the factual record on the fee issue was fully developed, and the arbitrator made specific findings as to the reasonableness of the award. The Union does not dispute this, stating that "[t]he Arbitrator's reasonableness findings were thorough and reasoned." (Br. at 25 n.6.) The relevant issue before the Authority was a legal one, i.e., whether the arbitrator awarded "reasonable" fees within the meaning of the Back Pay Act. Thus, nothing was to be gained by remanding the case to the parties for further arbitral proceedings.

The Union argues (Br. at 25 n.6) that DFAS did not present a sufficient record on which the Authority could base a conclusion that the fee request was unreasonable. This point has no merit. The Authority found the

record as a whole to be sufficient to make a decision. It is irrelevant which portion of the record is attributable to which party.

Moreover, contrary to the Union's claim (*id.*), the Authority's decision in *Alabama Guard*, 56 F.L.R.A. at 235, does not require a remand. The arbitrator in that case refused to provide the required findings on a fee application. In the instant case, by contrast, the arbitrator made the requisite findings and conclusions. His conclusions were simply in error, as the Authority held. Accordingly, the Authority correctly found that no remand was necessary.[33]

CONCLUSION

The petition for review should be dismissed for lack of subject matter jurisdiction in the Court. In the alternative, the petition for review should be denied on the merits.

[33] Although not necessary to the Authority's holding, nor challenged by the Union, the Authority also accurately distinguished the consequences of its remanding to an arbitrator, as opposed to the MSPB remanding to one its administrative judges. (JA at 18-19.) For example, the parties must pay the arbitrator's fee on remand from the Authority, whereas an MSPB remand to an administrative judge has no such cost consequence for the parties. Thus, the Authority properly reserves the right in arbitration cases to decline to remand in circumstances where the MSPB might do so in adverse action cases coming before it.

Respectfully submitted.

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DECEMBER 2005

CERTIFICATION PURSUAN TO FRAP 32

Pursuant to Federal Rule of Appellate Procedure 32, I certify that the attached brief is written in a proportionally-spaced 14-point font and contains 12,069 words.

December 9, 2005

William E. Persina
Attorney

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2510, Petitioner	)	
v.	)	No. 05-1123
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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