CASE SCHEDULED FOR ORAL ARGUMENT ON APRIL 25, 2002

No. 01-1275

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

DEPARTMENT OF THE AIR FORCE,
315TH AIRLIFT WING,
CHARLESTON AIR FORCE BASE,
CHARLESTON, SOUTH CAROLINA,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1869,
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

ANN M. BOEHM
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

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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 Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina (Respondent) and American Federation of Government Employees, Local 1869 (Union). The Respondent is the petitioner in this court proceeding; the Authority is the respondent; the Union is the intervenor.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order in *Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina*, 57 FLRA 80 (2001).

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for the Authority are 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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*Authorities upon which we chiefly rely are marked by asterisks.

GLOSSARY

Add.	Addendum
Adtranz	*Adtranz Abb Daimler-Benz Transportation, Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001)
Air Force	Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina
ALJ	Administrative Law Judge
App.	Appendix
Atlantic Steel	Atlantic Steel Co., 245 N.L.R.B. 814 (1979)
Authority	Federal Labor Relations Authority
Burris	*Social Security Administration v. Burris*, 39 M.S.P.R. 51 (1988)
Chevron	*Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)
Dependents Schools	*Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988 (D.C. Cir. 1989), *vacated on other grounds*, 911 F.2d 743 (D.C. Cir.1989)
EEOC	*EEOC v. FLRA*, 476 U.S. 19 (1986)
Farris	*Farris v. United States Postal Service*, 14 M.S.P.R. 568 (1983)
Felix	*Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001)

GLOSSARY
(Continued)

Flight Test Center	*Air Force Flight Test Center, Edwards Air Force Base, California*, 53 F.L.R.A. 1455 (1998)
Gloster	*Gloster v. GSA*, 720 F.2d 700 (D.C. Cir. 1983)
Grissom	*Department of the Air Force, Grissom Air Force Base, Indiana*, 21 F.L.R.A. 7 (1995)
Marshals Service	*United States Department of Justice, United States Marshals Service*, 26 F.L.R.A. 890 (1987)
MSPB	Merit Systems Protection Board
NLRB	National Labor Relations Board
Pet. Br.	Petitioner's Brief
Petitioner	Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina
Power	*Power v. FLRA*, 146 F.3d 995 (D.C. Cir. 1998)
Puget Sound	*Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 2 F.L.R.A. 54 (1979)
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
ULP	Unfair Labor Practice
Union	American Federation of Government Employees, Local 1869

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STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) in 57 F.L.R.A. 80 (2001), a copy of which is found at Appendix (App.) 5 - 9. The Authority exercised jurisdiction over the case pursuant to § 7105(a)(2)(G) of the Federal Service Labor-Management Relations

Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review the Authority's final decisions and orders pursuant to § 7123(a) and (b) of the Statute.

STATEMENT OF THE ISSUES

I. Whether the administrative exhaustion requirement set forth in 5 U.S.C. § 7123(c) prevents the petitioner from raising for the first time before this Court the issue of whether the FLRA's standard for "flagrant misconduct" under 5 U.S.C. § 7102 is proper.

II. Whether the Authority's long-held standard for "flagrant misconduct" is a reasonable interpretation of its own organic statute, specifically 5 U.S.C. § 7102.

III. Whether the Authority properly applied its "flagrant misconduct" standard to the facts of this case in finding that an employee was wrongly disciplined for conduct occurring during the course of protected activity.

STATEMENT OF THE CASE

This case involves an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. Based upon a ULP charge filed by the American Federation of Government Employees, Local 1869 (Union), the Authority's General Counsel issued a complaint alleging that the Department of the Air Force, 315th Airlift Wing, Charleston Air Force Base, Charleston, South Carolina ("petitioner" or "Air Force") violated § 7116(a)(1) and (2) of the Statute. App. 5, 10. Specifically, the complaint alleged that the Air Force violated the Statute by suspending the Union president for three days because of his participation in activities protected by the Statute. *Id*. The Administrative Law Judge (ALJ) found that the Air Force had violated the Statute as alleged. App. 5, 18. The Air Force filed exceptions to the ALJ's decision and

[1] Pertinent statutory provisions are set forth in Addendum (Add.) A to this brief.

recommended remedial order. App. 5. The Authority issued a final decision concluding that the Air Force violated the Statute and ordering an appropriate remedy.[2] App. 5.

The Air Force now seeks review, and the Authority seeks enforcement of the Authority's decision and order pursuant to 5 U.S.C. § 7123(a) and (b). The Union has intervened in this proceeding.

STATEMENT OF THE FACTS

I. Background

This case arose from the October 1, 1998 performance feedback session of Sharon Richardson. App. 11. Ms. Richardson, a bargaining unit employee represented by the Union, is an aircraft structural technician who works in an organizational component known as Fabrication Flight at Charleston Air Force Base. App. 10. Ms. Richardson's supervisor for performance appraisal purposes is Georgia Fallaw. *Id.* Ms. Fallaw is an air reserve technician who serves as aircraft overhaul supervisor. *Id.* Ms. Fallaw and Ms. Richardson have had a strained relationship dating from Ms. Fallaw's October 1997 promotion to her current position. App. 10-11.

On the morning of October 1, 1998, Ms. Fallaw informed Ms. Richardson that she wanted to conduct a performance feedback session later that day. App. 11. Ms. Richardson informed Ms. Fallaw that she wanted a Union representative present. *Id.* Thereafter, Ms. Richardson contacted Richard Egal, the Union president, and asked him to represent her at the performance feedback session. *Id.*

Ms. Fallaw asked Senior Master Sergeant Grace Picicci to be present in the action flight office when Ms. Fallaw was to meet with Ms. Richardson. *Id.* Master

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[2] Chairman Cabaniss dissented from the Authority's opinion. App. 8.

Sergeant Picicci is the Fabrication Flight superintendent and shares the action flight office with Ms. Fallaw. *Id.* The action flight office is a private suite that includes a reception area and an inner office. *Id.*

At the scheduled time for the performance feedback session, Ms. Fallaw and Master Sergeant Picicci, and Mr. Egal and Ms. Richardson arrived in the suite area. App. 11, 12. These four were the only individuals present. Ms. Fallaw asked what Mr. Egal was doing there. *Id.* Ms. Richardson said that she had talked to Phillip Dalpiaz in the Air Force's Civilian Personnel Office, but nevertheless wanted a Union representative present. *Id.* She asserted a "Weingartner" right.[3] App. 11. Ms. Fallaw determined that Mr. Egal would not be allowed to attend the session and so informed Ms. Richardson and Mr. Egal. App. 11, 12. She then asked Ms. Richardson whether she was ready for her feedback, and Ms. Richardson said that she was. App. 12. Ms. Richardson walked into the action flight office, and Ms. Fallaw followed. *Id.*

Mr. Egal asked Ms. Fallaw whether she was denying Ms. Richardson's right to representation. *Id.* Ms. Fallaw responded that Ms. Richardson was not entitled to representation because it was a performance feedback session. *Id.* She added that she believed Mr. Egal had accompanied Ms. Richardson to the meeting in order to intimidate and harass her. *Id.*

Because of Ms. Fallaw's decision to exclude Mr. Egal from the session, Mr. Egal became angry and challenged her decision. He then moved close to Ms. Fallaw to the point of "marginal[]" physical touching. App. 15. During a brief exchange,

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[3] Ms. Richardson was referring to *NLRB v. Weingarten*, 420 U.S. 251 (1975), the private sector case upon which the right to Union representation in certain investigatory circumstances under § 7114(a)(2)(B) of the Statute is based. *See* App. 12 n.7.

Mr. Egal indicated that Ms. Fallaw was denying Ms. Richardson's union rights, and that action would be taken. *Id.* at 12, 13, 16. After this exchange, Ms. Fallaw suggested to Ms. Richardson that they postpone the feedback session, but Ms. Richardson wanted to proceed. App. 13.

On November 30, 1998, Mr. Egal received a "Notice of Proposed Suspension," proposing a three-day suspension for his "flagrant misconduct" toward Ms. Fallaw on October 1, 1998. App. 14. The Air Force then issued a "Notice of Decision to Suspend," and implemented the proposed suspension for three days without pay. *Id.*

Based upon a ULP charge filed by the Union, the Authority's General Counsel issued a complaint alleging that the Agency violated § 7116(a)(1) and (2) by suspending Mr. Egal because of his participation in protected activities. App. 10. The Chief ALJ denied both parties' motions for summary judgment. *Id.* The case proceeded before an ALJ.

II. The ALJ's Decision and Recommended Order

After a hearing and consideration of both parties' briefs, the ALJ held that Mr. Egal, "while engaged in protected activity, committed misconduct that was not 'flagrant' by Authority standards." App. 18. Therefore, the ALJ found, the Air Force violated § 7116(a)(1) and (2) by suspending Mr. Egal for the conduct. *Id.*

This determination by the ALJ came after thorough consideration of all facts and testimony. App. 14. He noted that all witnesses gave "what they believed to be honest accounts of their recollections of the incident," and attributed disparity in the testimony to various justifiable and unobjectionable factors. *Id.* In the final analysis, he determined that Master Sergeant Picicci was the most reliable witness because of her position to view the incident as well as her lack of intimate involvement in the matter. *Id.* Thus, he determined that her account was the closest to describing the actual event. *Id.*

Based upon this careful analysis, particularly the testimony of Master Sergeant Picicci, the ALJ determined that Mr. Egal engaged in physical "touching" of Ms. Fallaw, but "only marginally." App. 15. He also found that Mr. Egal's manual gestures that were within six inches of Ms. Fallaw's face or chest put Fallaw reasonably in fear of some unpredictable blow, but were not indicative of significant body contact. *Id.* Finally, he determined that the entire confrontation lasted only 10 to 20 seconds. App. 16.

The ALJ then analyzed the § 7102 right of employees to engage in protected activities without fear of penalty or reprisal. *Id.* He noted that this right does not immunize employees from discipline, explaining that "[m]anagement's right to take disciplinary action includes the right to discipline a union representative for activities that are not specifically on behalf of the union or which exceed the boundaries of protected activity, such as flagrant misconduct." *Id.*

The ALJ first determined that Mr. Egal's conduct occurred during the course of protected activity, and therefore should be evaluated under the Authority's "flagrant misconduct" standard. He next examined the Authority's criteria for flagrant misconduct as recently restated in *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 F.L.R.A. 7, 11-12 (1995) (*Grissom*) (citing *Dep't of Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 17 F.L.R.A. 71, 80-81 (1985)). The ALJ concluded that Mr. Egal's conduct "did not exceed the broad scope of intemperate behavior that remains within the ambit of protected activity." App. 16.

As the Authority's standard requires, the ALJ balanced the employee's right to engage in protected activity against the "employer's 'right to maintain order and respect for its supervisory staff on the jobsite.'" *Id.* (quoting *Grissom*, 51 F.L.R.A. at 11). He then applied the four relevant factors to be considered in analyzing this balance with regard to the incident at issue.

First, the ALJ found that neither the place nor the subject of Mr. Egal's discussion with Ms. Fallaw impinged on the Air Force's right to maintain order and respect. Significant, in this regard, was the incident's occurrence outside of the presence of any nonsupervisory employees other than Ms. Richardson and Mr. Egal. Second, the ALJ found that Mr. Egal's angry and somewhat out-of-control behavior showed no indication that the incident was pre-planned. *Id.* at 16-17. Third, Ms. Fallaw's conduct was also significant to the ALJ, as he found that she provoked Mr. Egal's behavior somewhat by telling him "that his very presence was designed to intimidate and harass her." App. 17. The ALJ found that her conduct could have frustrated Mr. Egal, and although it did not justify Mr. Egal's conduct, it "probably affected it." *Id.*

On the fourth factor, the nature of the language and conduct, the ALJ compared this incident to the situation considered by the Authority in *Air Force Flight Test Center, Edwards Air Force Base, California*, 53 F.L.R.A. 1455, 1455-56 (1998) (*Flight Test Center*). The ALJ found Mr. Egal's behavior to be comparable to that found to be protected in *Flight Test Center*. *Id.* The "marginal[]" touching, according to the ALJ, was balanced by other considerations such as the evidence of some provocation, the brevity of the incident, and the cessation of the incident without outside interference. The ALJ also noted that Mr. Egal's status as a Union official on 100% official time "might cause such an incident to have less effect on employee-supervisor relationships than would comparable incidents between employees and their own supervisors." *Id.*

The ALJ therefore determined that the Air Force committed a ULP. He recommended that the Authority order the Agency to cease and desist from its unlawful conduct, rescind the three-day suspension and remove any reference to the

suspension from the Air Force's file, and to post at all its facilities an appropriate notice. App. 18. The Agency timely excepted to the ALJ's decision.

III. The Authority's Decision and Order

The Authority adopted the ALJ's findings, conclusions, and recommended decision and order,[4] and thus concluded that Mr. Egal's conduct was protected activity that did not constitute flagrant misconduct. App. 5. As a result, it held that the Air Force violated the Statute by suspending Mr. Egal. *Id.*

Initially, the Authority noted a significant finding of fact to which the Air Force did not except. Specifically, the finding that "the disputed conduct was 'assuming a physical position with respect to [the supervisor] that was so close to have involved some "touching" and . . . his use of certain threat-like gestures and an angry demeanor, accompanied by a sort of ranting, all in the course of 10 to 20 seconds.'" App. 5 (quoting ALJ's Decision at 15). Also significant was the ALJ's finding that the touching was "marginal." *Id.* Although not excepting to these significant factual findings, the Air Force characterized Mr. Egal's conduct in ways that were "at odds with the [same] factual findings." *Id.* In this regard, the Authority stated that the Air Force's differing characterizations relied on testimony discounted by the ALJ. *Id.*

In reviewing the ALJ's decision, the Authority found that the ALJ "correctly applied the relevant factors for resolving the issue of alleged flagrant misconduct" set forth in *Grissom*, 51 F.L.R.A. at 11-12. *Id.* Particularly persuasive to the Authority were the conclusions that the incident occurred in a private office, outside the presence of nonsupervisory employees other than Ms. Richardson and Mr. Egal; that

[4] The Authority modified the Order to include interest on backpay for Mr. Egal. App. 5. This modification is not an issue before the Court.

Mr. Egal's behavior was impulsive; and that his behavior was "somewhat provoked by the supervisor." *Id.*

The Authority explained that although it does not condone "both verbal outbursts and allegedly belligerent nonverbal conduct," similar conduct was found protected in its *Flight Test Center* case. *Id.* (internal quotations and citation omitted). Further, the Authority noted, it had previously held that a management representative did not violate § 7116(a)(1) when the management representative made physical contact with a union representative causing the union representative to fall against a wall. App. 6 (citing *United States Dep't of Labor, Employment and Training Admin.*, 20 F.L.R.A. 568, 569 (1985)).

Recognizing the dissent's accuracy in stating that the Authority has considered physical responses by both union and management representatives, as a general rule, to be beyond the limits of acceptable behavior, the Authority nonetheless stated that it has "never adopted a *per se* rule that any touching violates the Statute." App. 6. The Authority acknowledged that circumstances in which physical contact is considered protected would be "rare." *Id.* Nevertheless, in this case the Authority was persuaded that because of the ALJ's undisputed finding that the touching was "marginal" and because of the ALJ's careful evaluation of the testimony, the touching in this case was protected. *Id.*

In response to the dissent's characterization of the incident as an assault and battery by Mr. Egal, the Authority observed that it has no jurisdiction or expertise over whether the incident could be so characterized. *Id.* In any event, the Authority concluded, such a characterization would not be dispositive of the question of flagrant misconduct. *Id.* The Authority also explained that by highlighting a reference by the ALJ to the incident as an "attack," the dissent ignored the context of the ALJ's finding in which he referred to the matter as an "attack." *Id.*

The Authority, in conclusion, addressed the dissent's concerns about workplace violence by noting that the holding in this case did not condone workplace violence. *Id.* Similarly, it explained that by finding Mr. Egal's conduct protected, it was not suggesting that such behavior is an example of effective communication between labor and management. *Id.* Nevertheless, the Authority clarified, "[t]he Statute protects those who conduct labor relations ineffectively as well as those who conduct it effectively, as long as they do not cross the line and engage in flagrant misconduct." *Id.*

In dissent, Chairman Cabaniss found significant the ALJ's description of the incident as an "attack." App. 8. Further, she stated that the conduct by Mr. Egal amounted to an assault and battery. *Id.* Because of current concerns regarding workplace violence, Chairman Cabaniss expressed concern that anyone would condone such conduct by not finding it to be flagrant misconduct. *Id.*

Discussing Authority precedent, Chairman Cabaniss stated that even if the conduct did not satisfy the standard for flagrant misconduct, "I would hold as our precedent has pointed out in the past, that 'flagrant misconduct' is not the sole and exclusive example of conduct that exceeds the boundaries of protected activity." *Id.* She added that if the Authority's test would allow an "assault and battery" to be considered protected activity, "it is time to reevaluate how we look at and define such activity." *Id.* She explained that she would "conclude that a physical response, such as what occurred here, is beyond the limits of acceptable behavior for an employee engaged in protected activity." *Id.* Chairman Cabaniss concluded that although she shares with the majority "the same principled idea that the Statute protects intemperate behavior by either party when engaged in protected activity so as to reasonably facilitate communication between the parties," she would have found the conduct in this case to have been flagrant misconduct. App. 9.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *American Fed'n of Gov't Employees, Local 2343 v. FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if "arbitrary, capricious, or 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); *Power v. FLRA*, 146 F.3d 995, 1000 (D.C. Cir. 1998). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). A court should defer to the Authority's construction as long as it is reasonable. *See id.* at 844. Further, as the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities of federal labor relations.'" *NFFE & FLRA v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

SUMMARY OF ARGUMENT

In this case, the Authority correctly adhered to its long-held standard regarding "flagrant misconduct" in holding that petitioner committed a ULP when it wrongly disciplined Mr. Egal for conduct that occurred during the course of protected activity. The Authority's determination on this point is entitled to deference because it is premised upon a reasonable interpretation of the Authority's own statute.

Petitioner attempts to challenge the Authority's "flagrant misconduct" standard as a misinterpretation of § 7102 of the Statute. However, pursuant to § 7123(c) of the Statute, petitioner is barred from raising this issue to the Court because it failed to raise the issue before the Authority. Petitioner mistakenly claims that Chairman Cabaniss's dissent satisfies the "extraordinary circumstances" exception of § 7123(c)

and thus allows petitioner to raise this issue for the first time before this Court. In this connection, petitioner wrongly relies upon this Court's decision in *Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988, 989 n.1 (D.C. Cir. 1989), *vacated on other grounds*, 911 F.2d 743 (D.C. Cir. 1990) (en banc) (*Dependents Schools*). Although this Court concluded in *Dependents Schools* that the requirements of § 7123(c) are satisfied if a dissenting opinion raises an issue so as to put the Authority on notice regard the issue, that has not occurred in the instant case.

Here, Chairman Cabaniss's dissent did not assert that the Authority's use of the "flagrant misconduct" standard is a misinterpretation of § 7102, as petitioner seeks to do before this Court. Rather, Chairman Cabaniss criticized the Authority's application of the standard based upon the facts of this case. Also, unlike the circumstances involved in *Dependents Schools*, Chairman Cabaniss had not similarly dissented in related cases as had the dissenting Chairman in the *Dependents Schools* case. Nor was Chairman Cabaniss's position so clearly opposed to the Authority's legal conclusions regarding the "flagrant misconduct" standard that one would presume that the Authority had been presented with a chance to consider a challenge to its standard, as was the case in *Dependents Schools*.

Even if petitioner's argument challenging the Authority's interpretation of § 7102 is considered, it fails. The Authority has consistently applied its standard regarding "flagrant misconduct," and the Authority's standard is parallel with the standard used by the National Labor Relations Board (NLRB). Like the NLRB, the Authority employs a four-factor test that carefully balances the potential for impulsive behavior by an employee engaged in protected activity against the employer's right to maintain order.

In addition, contrary to petitioner's suggestion, the "flagrant misconduct" standard is not inconsistent with the "efficiency of the service" analysis that is

applied in considering the propriety of discipline of federal employees. *See* 5 U.S.C. § 7503. That standard does not, as petitioner suggests, mandate that an agency take disciplinary action in order to ensure the efficiency of the service. Instead, agencies are required to demonstrate that because of the nature of the misconduct by an employee and its impact on the agency, disciplining the employee will promote the efficiency of the service. The standard in no way conflicts with the Authority's "flagrant misconduct" standard.

Finally, the Authority's ultimate finding of a ULP in this case was based upon its reasonable application of the facts here to the Authority's long-held "flagrant misconduct" standard. The Authority carefully considered each of the four factors it employs in determining whether the conduct fell within the boundaries of protected activity as provided by the Statute. Further, the Authority considered related cases in determining that its decision in this case was consistent with Authority precedent. Petitioner has not shown how the Authority misapplied the standard. Therefore, the Authority's decision should be enforced and the petition for review denied.

ARGUMENT

I. The Administrative Exhaustion Requirement of § 7123(c) Bars Petitioner from Raising to this Court for the First Time the Issue of Whether the Authority's Flagrant Misconduct Standard Is A Proper Interpretation of 5 U.S.C. § 7102

Petitioner argues that the flagrant misconduct standard employed by the Authority in deciding this case is an improper interpretation of 5 U.S.C. § 7102(1) and (2). Petitioner's Brief (Pet. Br.) at 23-29. As petitioner acknowledges (Pet. Br. at 29-31), it did not raise this issue before the Authority. Based upon § 7123(c) of the Statute, therefore, petitioner is barred from raising the issue to this Court in this proceeding.

A. The Language of § 7123(c)

Section 7123(c) of the Statute provides, as here pertinent, that "[n]o 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." 5 U.S.C. § 7123(c). In *EEOC v. FLRA*, 476 U.S. 19, 23 (1986) (*EEOC*), the Supreme Court explained that the purpose of this provision is to ensure "that the FLRA shall pass upon issues arising under the [Statute], thereby bringing its expertise to bear on the resolution of those issues."

Petitioner has sought to evade this rule in the instant case. Because of the Air Force's failure to raise the § 7102 interpretation issue before the Authority, the Authority has not had the opportunity to consider what would, in essence, be a reinterpretation of its position on § 7102 that the Authority has maintained since its origin.[5]

B. Petitioner Cannot Satisfy the "Extraordinary Circumstances" Exception

Despite acknowledging its failure to raise the issue before the Authority, petitioner nevertheless claims that the Court may consider the issue because the "extraordinary circumstances" exception of 5 U.S.C. § 7123(c) has been satisfied in this case. Pet. Br. at 29-30. Specifically, petitioner claims that the issue was raised by the dissent, and according to *Department of Defense Dependents Schools v. FLRA*, 863 F.2d 988, 989 n.1 (D.C. Cir. 1989), *vacated on other grounds*, 911 F.2d 743

[5] Petitioner also argues that it would have been futile for it to have raised this issue before the Authority. Pet. Br. at 31. Petitioner has not indicated, however, that the Authority has ever considered and rejected the argument petitioner seeks to make before this Court. Therefore, petitioner cannot demonstrate how or why it would have been futile to raise the issue before the Authority.

(D.C. Cir. 1990) (en banc) (*Dependents Schools*), the requirements of § 7123(c) have been satisfied. Pet. Br. at 29-30.

Although this Court did find in *Dependents Schools* that the requirements of § 7123(c) were satisfied when an issue raised by a party for the first time in court was originally raised by a dissenting member of the Authority, that circumstance is not present in this case. First, the dissenting opinion of Chairman Cabaniss does not challenge the Authority's interpretation of 5 U.S.C. § 7102(1) and (2) and its long-standing flagrant misconduct standard under that statutory provision. Moreover, this case is distinguishable from *Dependents Schools*.

Contrary to petitioner's suggestion, Chairman Cabaniss's dissent does not challenge the Authority's long-held "flagrant misconduct" standard under § 7102, but rather challenges the application of that standard based upon the facts of this case. In her conclusion, Chairman Cabaniss explicitly stated that she shares with the majority "the same principled idea that the Statute protects intemperate behavior by either party when engaged in protected activity so as to reasonably facilitate communication between the parties." App. 9. Her disagreement with the Authority's ultimate holding stemmed from her belief that Mr. Egal's "actions were beyond the limits of acceptable behavior for an employee engaged in protected activity." *Id.*

Petitioner, in asserting that the dissent raises the same question regarding the flagrant misconduct standard as does petitioner, quotes a comment in the dissent in which Chairman Cabaniss stated that she would hold that "'flagrant misconduct' is not the sole and exclusive example of conduct that exceeds the boundaries of protected activity." App. 8 In its brief (at 30), however, petitioner omits the Chairman's statement immediately preceding this quotation–"I would hold, *as our precedent has pointed out in the past . . . .*" App. 8 (emphasis added). As petitioner acknowledges (Pet. Br. at 31 n.12), the Authority has continually held that "flagrant

misconduct" is the standard to apply in determining whether conduct is protected. The quoted language from the dissent indicates the Chairman's acknowledgment of "flagrant misconduct" as a standard, and does not indicate that the Chairman believes the standard should be eliminated.[6]

Another statement in the dissent misconstrued by petitioner is the Chairman's comment that "[i]f the Authority really intends to follow a test that could condone an assault and battery situation by not declaring it to be outside the boundaries of protected activity, it is time to reevaluate how we look at and define such activity." App. 8. Rather than challenging the Authority's standard for analyzing protected activity, this statement only cautions that in the Chairman's view, if too much liberty is taken with the Authority's standard, it could be reconsidered. Through the dissent in this case, however, the Chairman did nothing more to suggest such reconsideration. This is substantially different than the argument petitioner is raising to this Court for the first time–that the flagrant misconduct standard is a misconstruction by the Authority of 5 U.S.C. § 7102(1) and (2). As a result, the instant case is clearly distinguishable from *Dependents Schools*, because the circumstances in *Dependents Schools* that caused the Court to find that the "strictures of § 7123(c) were satisfied" are not present here. 863 F.2d at 989 n.1.

In *Dependents Schools*, the challenges raised by the agency for the first time before the Court in *Dependents Schools* were "originally made by [then-]Chairman Calhoun in his dissent from the majority's determination." *Id*. *Dependents Schools*

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[6] Rather than challenging Authority precedent in the dissent, Chairman Cabaniss relied upon it. App. 8. She did not agree with the Authority's conclusion that *Flight Test Center* was a comparable case justifying the Authority's holding that Mr. Egal's conduct was protected. *Id.* Instead, she relied upon *Flight Test Center* as support for her objection with the Authority's holding. *Id.*

was a negotiability case under 5 U.S.C. § 7117(c). Then-Chairman Calhoun's dissent asserted that the Authority's majority opinion had wrongly concluded that certain proposals with respect to the compensation of teachers were negotiable. *Id.* at 989. In making this assertion, then-Chairman Calhoun maintained that the compensation of teachers fell outside the duty to bargain under the Statute and that the proposals were therefore nonnegotiable. *Id.* In fact, in a series of related cases, then-Chairman Calhoun established a pattern of finding nonnegotiable matters related to teacher compensation. The Authority had therefore been on notice and had opportunities to pass upon the issue raised by the dissent in *Dependents Schools.*

The instant case is distinguishable from *Dependents Schools* because nothing in Chairman Cabaniss's one-time dissent provided the Authority with an opportunity to pass upon the § 7102 interpretation issue being raised by petitioner for the first time before this Court. As noted above, Chairman Cabaniss's dissent does not raise any issues that parallel the argument petitioner attempts to raise before this Court for the first time. Therefore, the Authority has not been put on sufficient notice as it had been in *Dependents Schools*.[7] The extraordinary circumstances exception of § 7123(c) has not been satisfied, and petitioner's arguments regarding the Authority's interpretation of § 7102 of the Statute should not be considered by this Court.

[7] In a recent case involving a "flagrant misconduct" issue, Chairman Cabaniss again dissented from the Authority's decision because of the Authority's application of the facts to the "flagrant misconduct" standard. *United States Dep't of Energy, Oak Ridge, Tenn.*, 57 F.L.R.A. 343, 348-49 (2001). Notably, Chairman Cabaniss clearly applied the four *Grissom* factors to her consideration of the case. *Id.*

II. The Authority's Long-held "Flagrant Misconduct" Standard, Applied in this Case, Is A Reasonable Interpretation of § 7102 of the Authority's Own Organic Statute

Even if petitioner's first-time challenge to the Authority's standard is considered by the Court, the Court should defer to the Authority's reasonable interpretation of § 7102 and uphold the Authority. In this case, the Authority reaffirmed its long-standing interpretation of § 7102 of the Statute by holding that the Agency committed a ULP because it disciplined Mr. Egal for engaging in protected activity that did not constitute "flagrant misconduct." Section 7102 provides that employees "have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal." 5 U.S.C. § 7102. This protection extends to union representatives engaged in protected activity even when they use "intemperate, abusive, or insulting language." *Grissom*, 51 F.L.R.A. at 11 (internal citations omitted). However, the protection of § 7102 does not extend to an employee engaged in protected activity when the employee's remarks or actions constitute "flagrant misconduct." *Id.* That is, "[r]emarks or conduct that are of such 'an outrageous and insubordinate nature'" that they are removed from the protections of § 7102. *Id.* (quoting *Dep't of the Navy, Naval Facilities Eng'g Command, Western Div. San Bruno, Cal.*, 45 F.L.R.A. 138, 156 (1992)).

The Authority interpreted § 7102 in this manner in the first case it ever decided regarding the boundaries of protected activity under § 7102. *Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 2 F.L.R.A. 54 (1979) (*Puget Sound*). In that case, the Authority held that "flagrant misconduct by an employee, even though occurring during the course of protected activity, may justify disciplinary action by the employer." *Id.* at 55. The Authority added that "[t]he employee's right to engage in protected activity permits leeway for impulsive

behavior, which is balanced against the employer's right to maintain order and respect of its supervisory staff on the job site." *Id.*

A. The Authority's Long-held Standard Is Consistent with Related National Labor Relations Board Law

The Authority has consistently applied this standard first stated in *Puget Sound* throughout its history, and its standard has remained consistent with National Labor Relations Board (NLRB) law regarding the boundaries of protected activity. In the 1979 *Puget Sound* decision, the Authority upheld the ALJ's decision in which the ALJ had looked to the NLRB for guidance regarding acceptable behavior during the course of protected activity.[8] Like the Authority and as the NLRB recently recognized, the NLRB has "long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves." *Health Care and Retirement Corp. of Am.*, 306 N.L.R.B. 63, 65 (1992), *rev'd on other grounds, NLRB v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571 (1994). However, "an employee's flagrant, opprobrious conduct, even though occurring during the course of [protected] activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer." *Id.*

Both the Authority and the NLRB have developed factors to be considered for determining whether an employee engaged in protected activity loses protection from disciplinary action by flagrant conduct. The Authority's factors, which it employed in the instant case, are consistent with the NLRB's factors. In balancing the

[8] Referencing *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), the ALJ had concluded that "[f]lagrant conduct of an employee in the course of protected activity justifies disciplinary action by an employer, but there must be leeway for impulsive behavior." *Puget Sound*, 2 F.L.R.A. at 76.

employee's right to engage in protected activity which "'permits leeway for impulsive behavior'" against the employer's right to maintain order and respect, the Authority considers the following factors: "(1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct." *Grissom*, 51 F.L.R.A. at 12 (internal citations omitted). The NLRB's very similar factors for consideration are: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (*Atlantic Steel*); *see also Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1053 (D.C. Cir. 2001) (*Felix*) (recognizing these factors as the NLRB's standard).

Based upon the Authority's long-held use of the "flagrant misconduct" standard and the consistency of that standard with comparable NLRB law, the Authority properly interpreted § 7102 of the Statute. Moreover, the Authority is entitled to deference on its interpretation of § 7102. Petitioner has presented nothing to show that the Authority's construction of its enabling act is not one that Congress would have sanctioned, and thus the Authority's construction should be upheld. *Chevron*, 467 U.S. at 844. Interpretation of a statutory provision in this manner is precisely what the Supreme Court referred to regarding the "considerable deference" to which the Authority is entitled when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities of federal labor relations.'" *NFFE & FLRA v. Dep't of the Interior*, 526 U.S. 86, 99 (1999) (internal citations omitted).

B. Petitioner's Arguments and the Cases Relied upon by Petitioner to Support Its Position Are Not Persuasive

1. The Court decisions reviewing the NLRB's "flagrant" or "opprobrious" conduct standard are distinguishable

Petitioner wrongly contends (Pet. Br. at 23) that this Court rejected the NLRB's standard regarding protected activity in *Adtranz Abb Daimler-Benz Transportation, Inc. v. NLRB*, 253 F.3d 19, 25-27 (D.C. Cir. 2001) (*Adtranz*). *Adtranz*, however, did not involve NLRB review of employer discipline after misconduct by an employee engaged in protected activity, but rather involved NLRB review of an employer policy prohibiting "abusive and threatening language." *Id.* at 25. The NLRB had held that the employer's policy was a ULP because it interfered with protected activity. *Id*. The Court did not criticize the NLRB's "long held" position that "'an employee who is engaged in concerted protected activity, can, by opprobrious conduct, lose the protection of the Act.'" *Id*. at 26 (quoting *Atlantic Steel*, 245 N.L.R.B. at 816). Instead, the Court found that the NLRB's finding a ULP based solely on the employer's policy on abusive or threatening language was an overbroad interpretation of protected activity. *Id.* at 26, 28. Thus, this Court did not disapprove the NLRB's policy protecting certain types of misconduct occurring during protected activity, and the *Adtranz* case is not relevant to consideration of the Authority's interpretation of protected activity in the instant case.

Petitioner also erroneously relies upon this Court's decision in *Felix*, to support its claim that this Court has rejected NLRB holdings similar to the Authority's decision in this case. In *Felix*, this Court reversed the NLRB only because it concluded that the NLRB had not appropriately applied its *Atlantic Steel* factors in determining whether an employee had been wrongly discharged for offensive speech while engaged in protected activities. *Felix*, 251 F.3d at 1056. The Court found that

the NLRB did not properly consider the nature of the employee's offensive outburst. In that connection, the Court explained that the NLRB had to properly consider and balance the four factors set forth in the NLRB's own *Atlantic Steel* decision in considering whether the conduct was "flagrant, violent, or extreme behavior.'" *Id.* at 1055 (quoting *Aroostook County v. NLRB*, 81 F.3d 209, 215 n.5 (D.C. Cir. 1996)). In the instant case, the Authority properly considered its four factors for determining whether conduct is protected, and petitioner has not challenged the Authority's application of those factors.

Petitioner does accurately acknowledge that "[t]he union-related provisions invoked by the [Authority] do confer significant *additional* rights on federal employees comparable to those long enjoyed by employees in the private sector." Pet. Br. at 26. Nevertheless, petitioner then asserts that giving federal employees rights comparable to private sector employees conflicts with management's obligation to discipline employees under the "efficiency of the service" standard. As discussed below, petitioner misunderstands the "efficiency of the service" standard as it applies to disciplining federal employees.

2. Petitioner misinterprets the "efficiency of the service" standard under 5 U.S.C. § 7503(a)

Petitioner claims that the Authority's "flagrant misconduct" standard interferes with management's responsibility to maintain a proper work environment under the "efficiency of the service" standard set forth in 5 U.S.C. § 7503(a).[9] Pet. Br. at 26. Contrary to petitioner's suggestions, the "efficiency of the service" standard does not confer on the agency an obligation to discipline employees, but rather protects

[9] Petitioner also references the same standard under 5 U.S.C. § 7513. Because this case involves a three-day suspension for fourteen days or less, 5 U.S.C. § 7503, which governs suspensions for fourteen days or less, is the applicable reference.

employees from discipline by an agency unless such discipline "will promote the efficiency of the service." 5 U.S.C. § 7503(a).

This Court explained the "efficiency of the service" standard in the case mistakenly relied upon by petitioner, *Gloster v. GSA*, 720 F.2d 700, 703 (D.C. Cir. 1983) (*Gloster*). According to *Gloster*, the "efficiency of the service" standard has been interpreted "to require an agency that proposes to remove an employee for misconduct to demonstrate a sufficient nexus between the misconduct and the job performance of the employee or others to warrant removal." *Id.* The Authority's "flagrant misconduct" standard does not in any way conflict with the "efficiency of the service" standard, but serves only as a separate consideration of whether discipline is appropriate in the very specific situation where protected activity is involved.

Despite petitioner's suggestions to the contrary, the Merit Systems Protection Board (MSPB) has interposed no objection to applying the Authority's and NLRB's standards regarding the parameters of protected activity in cases arising before the MSPB. Thus, the cases cited by petitioner support continued application of the Authority's "flagrant misconduct" standard and not petitioner's arguments misinterpreting the "efficiency of the service" standard.

In *Farris v. United States Postal Service*, 14 M.S.P.R. 568, 574 (1983) (*Farris*), the MSPB applied NLRB case law in concluding "that while employees may generally not be discharged for rude or impertinent conduct in the course of presenting grievances, these protections do not extent to gross insubordination or threats of physical harm." *Id.* Similarly, in *Social Security Administration v. Burris*,

39 M.S.P.R. 51, 58 (1988) (*Burris*), the MSPB noted that, in a related context,[10] the case law "is clear that, in [the] absence of gross insubordination or threats of physical harm, an employee may generally not be discharged for rude or impertinent conduct" in the course of protected activity. *Id.* (internal quotations and citation omitted). In both *Farris* and *Burris*, the employee discipline was upheld by the MSPB because the misconduct during the protected activity exceeded the protections afforded for employees engaged in protected activity. *Farris*, 14 M.S.P.R. at 574; *Burris*, 39 M.S.P.R. at 58-59. The "efficiency of the service" standard was satisfied in both cases because there was sufficient nexus between the employees' misconduct and the employees' job performance.

In sum, petitioner has not demonstrated that the Authority's "flagrant misconduct" standard is a misinterpretation of § 7102. Its arguments in this regard should be rejected by this Court.

III. The Authority Properly Applied Its "Flagrant Misconduct" Standard to the Facts of this Case in Finding that Mr. Egal Was Wrongly Disciplined for His Conduct that Occurred during the Course of Protected Activity

The Authority properly applied its "flagrant misconduct" standard, as set forth in *Grissom*, to the facts of this case in concluding that Mr. Egal's conduct was not flagrant misconduct. Because the Authority's determination in this regard was not "arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law," this Court should uphold the Authority's finding that petitioner committed a

[10] *Burris* involved protections afforded to filing of grievances pursuant to 5 U.S.C. § 2302(b)(9). 39 M.S.P.R. at 58.

ULP when it disciplined Mr. Egal.[11] 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *Power v. FLRA*, 146 F.3d 995, 1000 (D.C. Cir. 1998) (*Power*).

The Authority considered the ALJ's application of the four *Grissom* factors and determined that he had done so correctly. With regard to the first three *Grissom* factors, significant to the Authority were the findings that the incident, "(1) occurred in a private office, outside the presence of any nonsupervisory employees other than those involved; (2) was impulsive; (3) was somewhat provoked by the supervisor." App. 5. The factual findings by the ALJ, which petitioner does not challenge, support the Authority's conclusion on these three factors.

First, only four individuals were involved in the entire incident–Ms. Fallaw, Master Sergeant Picicci, Mr. Egal, and Ms. Richardson. App. 5, 11-13. Also, the incident occurred within one office suite where only those named were present. Second, Mr. Egal's outburst was an immediate reaction to Ms. Fallaw's decision to disallow Union representation during her performance feedback session. App. 12. As the ALJ observed, nothing about the incident indicated "it was pre-planned or otherwise designed." App. 17. Third, because Ms. Fallaw told Mr. Egal she believed he was present "to intimidate and harass her," her comment frustrated and somewhat provoked Mr. Egal's actions. App. 12.

In its consideration of the fourth factor–the nature of the intemperate language and conduct–the Authority considered the incident in light of related Authority precedent. The Authority found the instant case to be comparable to *Flight Test*

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[11] As this Court has held in NLRB cases, the Court will "set aside the [NLRB's] decision only when the [NLRB] has acted arbitrarily or otherwise erred in applying established law to the facts." *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1358 (D.C. Cir. 1997) (internal quotations and citations omitted).

Center, 53 F.L.R.A. at 1455, in which very similar conduct was found to be protected. App. 5-6.

The incident at issue in *Flight Test Center* lasted fifteen minutes–considerably longer than the ten to twenty second exchange in this case. *Flight Test Center*, 53 F.L.R.A. at 1456. As in the instant case, a union representative confronted a supervisor with offensive language and threatening behavior. *Id*. Like Mr. Egal, the union representative physically approached the supervisor and pointed his finger at her. *Id*. When pointing his finger, the union representative in *Flight Test Center* was "'less than 18 inches . . ., no farther than 10 inches'" from the supervisor's face. *Id*. at 1461 (internal citations omitted). In the instant case, Mr. Egal's finger was pointed "within six inches or less" of Ms. Fallaw's body. App. 15.

The Authority also referenced its decision in *United States Department of Justice, United States Marshals Service*, 26 F.L.R.A. 890 (1987) (*Marshals Service*), in which it found physical contact to be inappropriate. That case involved pushing and shoving between a union representative and management representative. In that case, the Authority affirmed the ALJ's decision that such a physical assault was "beyond the limits of acceptable behavior." *Id*. at 901. Mr. Egal's physical contact in this case was far less than that involved in *Marshals Service*, and as both the Authority and ALJ found, was only "marginal[]." App. 5-6, 15.

Petitioner does not attempt to challenge the Authority's application of its *Grissom* test to the facts of this case. Instead, petitioner relies upon a dictionary definition of "flagrant" to support its position that Mr. Egal's conduct was flagrant misconduct. Pet. Br. at 31-32. The Authority's standard for determining whether behavior was protected does not require an analysis of the dictionary definition of "flagrant," and thus petitioner's arguments in this regard are unpersuasive.

Moreover, petitioner characterizes Mr. Egal's conduct as an "assault" (Pet. Br. at 32), a determination not made by the Authority or ALJ. As the Authority noted, even had the Authority characterized the conduct as an assault, such a characterization would not necessarily be determinative of whether Mr. Egal's conduct equated to flagrant misconduct. App. 6.

The Authority properly analyzed the incident in light of its long-held standard for flagrant misconduct. The Authority is therefore entitled to deference and its decision should be upheld. This is true because the Authority's "findings, supported by substantial evidence, 'may not be displaced on review even if the court might have reached a different result had the matter been before it *de novo*.'" *Power*, 146 F.3d at 1001 (quoting *LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997)). Because the facts are not disputed by petitioner, substantial evidence is not even an issue. Therefore, this Court should affirm the Authority's ULP determination in this case.

CONCLUSION

The Authority's decision and order should be enforced and the petition for review denied.

Respectfully submitted,

DAVID M. SMITH
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

ANN M. BOEHM
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424
(202) 482-6620

January 2002

CERTIFICATION PURSUANT 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 7774 words.

January 31, 2002

_____
Ann M. Boehm
Attorney

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

DEPARTMENT OF THE AIR FORCE, 315TH AIRLIFT WING, CHARLESTON AIR FORCE BASE, CHARLESTON, SOUTH CAROLINA, Petitioner	)	
v.	)	No. 01-1275
FEDERAL LABOR RELATIONS AUTHORITY, Respondent	)	
and	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869, Invervenor	)	

SERVICE LIST

I certify that copies of the Brief for the Federal Labor Relations Authority have been served this day, by hand delivery, upon the following:

Robert D. McCallum, Jr.
Assistant Attorney General
William Kanter
Attorney
Robert D. Kamenshine
Attorney
Attorneys, Appellate Staff
Civil Division, Room 9012
601 D Street, N.W.
Washington, D.C. 20530-0001

Ad by overnight mail, upon the following:

Stuart A. Kirsch
Assistant General Counsel
American Federation of Government Employees, AFL-CIO
6724 Church Street, Suite 2
Riverdale, GA 30274-4711

Jennifer Baker
Paralegal Specialist

January 31, 2002

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, 5 U.S.C. §§ 7101-7135 (2000), AND OTHER PERTINENT STATUTORY PROVISIONS

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§ 7102. Employees' rights

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

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

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

§ 7105. Powers and duties of the Authority

* * * * * * *

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

* * * * * * *

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

§ 7114. Representation rights and duties

* * * * * * *

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

* * * * * * *

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

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

(ii) the employee requests representation.

* * * * * * *

§ 7116. Unfair labor practices

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

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

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

* * * * * * *

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

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

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

(A) filing a petition with the Authority; and

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

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

(A) file with the Authority a statement—

(i) withdrawing the allegation; or

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

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

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

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

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

* * * * * * *

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no

complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any

such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

§ 7123. Judicial review; enforcement

* * * * * * *

(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.

* * * * * * *

§706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

* * * * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * * * *

§ 2302. Prohibited personnel practices

* * * * * * *

b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority -

* * * * * * *

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of -

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

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§ 7503. - Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to -

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any

order effecting[12] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

[12] So in original. Probably should be "affecting."

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to -

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.