No. 03-51264

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ARTHUR CELESTINO, and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,

Appellants

v.

FEDERAL LABOR RELATIONS AUTHORITY, et al.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

All employees at Kelly Air Force Base, San Antonio, Texas who were members of the bargaining unit represented by the American Federation of Government Employees, Local 1617 and who were subject to the arbitration award in FMCS Case No. 99-17655.

Plaintiffs/Appellants: 1) American Federation of Government Employees, Local 1617 (Local 1617); 2) Arthur Celestino; and 3) American Federation of Government Employees, Council 214.

Attorneys for Plaintiffs/Appellants: 1) Hal K. Gillespie; and 2) Joseph H. Gillespie.

Defendant/Appellee: The Federal Labor Relations Authority.

Attorneys for Defendants/Appellees: 1) David M. Smith; 2) William R. Tobey; and 3) James F. Blandford.

Respectfully submitted,

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James F. Blandford
Attorney, FLRA

STATEMENT REGARDING ORAL ARGUMENT

Appellees disagree with Appellants' characterization of this case as involving complex facts and a highly specialized area of law. (Appellants' Brief at p. ii) Rather, as the court below accurately recognized, this case is fully capable of resolution based on well-established, long-standing precedent, including the case law of this Court. Further, the legal principles involved in this case are ones of general applicability in administrative law, with which this Court is familiar. Accordingly, Appellees are not of the view that oral argument would materially assist the Court in deciding this case.

Nonetheless, if the Court should wish to obtain further information from counsel at oral argument concerning any particular issue, Appellees would not oppose holding oral argument.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF CONTENTS
(Continued)

Page

ADDENDUM

TABLE OF AUTHORITIES

CASES

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

FEDERAL STATUTES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

CODE OF FEDERAL REGULATIONS

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STATEMENT OF JURISDICTION

The judgment of the district court under review in this case was issued on October 21, 2003. A copy of the district court's judgment, adopting the Report and Recommendation of the United States Magistrate Judge is at Record Excerpts (RE) Tab E. The district court concluded that it was without subject matter jurisdiction over the complaint and dismissed the action. The appellant filed its notice of appeal of the district court's judgment on October 24, 2003, within the 60-day period for filing such an appeal under Fed. R. App. P. 4(a)(1). This Court has jurisdiction to review the district court's decision and order pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly held that it was without subject matter jurisdiction over a complaint seeking review of a Federal Labor Relations Authority decision reviewing an arbitrator's award under 5 U.S.C. § 7122, where judicial review of that type of decision is expressly barred by statute, and no exception to the bar is applicable.

STATEMENT OF THE CASE

The Federal Labor Relations Authority (Authority) is the federal agency responsible for administering the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000) (Statute). *See* 5 U.S.C. §§ 7104 and 7105.[1] Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters, and as specifically relevant here, resolving exceptions to arbitrator's awards. *See* 5 U.S.C. § 7105(a)(2). This case arose from exceptions to an arbitrator's award filed by the United States Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas (Kelly AFB) pursuant to § 7122 of the Statute. On those exceptions, the Authority vacated an award granting environmental differential pay (EDP) to a group of employees at Kelly AFB. *Am. Fed'n of Gov't Employees, Local 1617*, 58 F.L.R.A. 63 (2002), *order denying motion for*

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

reconsideration, 58 F.L.R.A. 183 (2002) (*AFGE, Local 1617*). Plaintiffs[2] filed suit in the district court, alleging that the Authority had committed various legal errors in its decision warranting review. The Authority moved to dismiss the complaint for lack of subject matter jurisdiction, and the district court granted the Authority's motion. This appeal followed.

STATEMENT OF THE FACTS

A. Factual Background

The union filed a grievance over Kelly AFB's failure to pay EDP to employees as a result of exposure to asbestos.[3] The case was ultimately submitted to arbitration.

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[2] Plaintiff American Federation of Government Employees, Local 1617 (Local 1617) is a labor organization within the meaning of § 7103(a)(4) of the Statute and was at all times material to this case the exclusive bargaining representative for a unit of employees at Kelly AFB. Plaintiff Arthur Celestino was, at all times material to this case, an employee of Kelly AFB and a member of the bargaining unit represented by Local 1617. The American Federation of Government Employees, Council 214 (Council 214), is a labor organization within the meaning of § 7103(a)(4) of the Statute and has assumed responsibility for this case from Local 1617 since the closing of Kelly AFB. Council 214 was a signatory of the collective bargaining agreement covering Kelly AFB. For convenience, the plaintiffs will hereinafter be referred to as "the union."

[3] Under regulations promulgated by the Office of Personnel Management (OPM), certain federal employees are entitled to EDP for working near concentrations of asbestos fibers "that may expose [them] to potential illness or injury," where protective measures have not "practically eliminated" the hazards. 5 C.F.R. pt. 532, Appendix A to subpt. E, pt. I, ¶ 16. The regulations do not establish a specific level of exposure required for EDP. These determinations are left to agency discretion. Where employees are members of recognized bargaining units, such determinations may be established through collective bargaining, including arbitration. *See United States*
(continued...)

The arbitrator sustained the grievance in part and awarded the affected employees backpay. The threshold issue before the arbitrator was the standard for exposure to asbestos for entitlement to EDP. The parties' collective bargaining agreement established no specific level of exposure warranting EDP. However, the Department of the Air Force (Air Force) had issued regulations adopting "accepted standards," such as those issued by the Occupational Safety and Health Administration (OSHA), as the minimal exposure for payment of EDP. It was conceded at arbitration that if the OSHA standards for exposure to asbestos were applied, there would be no entitlement to EDP. However, the arbitrator determined that the union had never acquiesced in the Air Force's regulations. In this circumstance, and because the collective bargaining agreement was silent on the matter, the arbitrator ruled that it was up to him to determine whether the employees were entitled to EDP. The arbitrator found that employees had been exposed to asbestos at levels where it is reasonably possible that illness or injury could result, and therefore concluded that the employees were entitled to EDP. *AFGE, Local 1617*, 58 F.L.R.A. at 63-64.

Pursuant to § 7122 of the Statute, Kelly AFB filed exceptions to the award with the Authority.

B. The Authority's Decision

On exceptions, the Authority vacated the award, holding that it was contrary to law and regulation under § 7122(a)(1) of the Statute. *AFGE, Local 1617*, 58 F.L.R.A.

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[3] (...continued)
Dep't of the Army, Red River Army Depot, Texarkana, Tex., 53 F.L.R.A. 46, 51 (1997) (*Red River*).

at 69. The Authority first noted that under its precedent, an arbitrator may make a case-by-case determination of the minimal level of exposure required for EDP only in the absence of standards set by law, regulation, or collective bargaining agreement (citing *Red River*, 53 F.L.R.A. at 51). *AFGE, Local 1617*, 58 F.L.R.A. at 66. Next, the Authority held that minimal levels of exposure may be set by agency regulations (citing *O'Neall v. United States*, 797 F.2d 1576, 1581-82 (Fed. Cir. 1986) (*O'Neall*) and *United States Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, 37 F.L.R.A. 186 (1990) (*Ft. Campbell*)). *AFGE, Local 1617*, 58 F.L.R.A. at 66-67.

According to the Authority, the Air Force regulations in question sufficiently linked the payment of EDP to the standard set by OSHA, an appropriate standard for awarding EDP (*citing O'Neall*, 797 F.2d at 1582). Disagreeing with the arbitrator's position that the regulation was not binding on the union, the Authority held that "the proper statement of the law is that where an agency regulation sets a specific standard that addresses a matter in dispute, that standard applies unless it conflicts with the parties' collective bargaining agreement" (*citing Ft. Campbell*, 37 F.L.R.A. at 195). *AFGE, Local 1617*, 58 F.L.R.A. at 68. Finding that the collective bargaining agreement did not set a standard for entitlement to EDP, the Authority held that the regulation did not conflict with the collective bargaining agreement. Accordingly, the Authority held that the arbitrator erred as a matter of law and vacated the award.[4]

[4] The arbitrator had issued a supplemental award relating to the proper amounts of back pay to be awarded. The Authority dismissed Kelly AFB's exceptions to the supplemental award as moot. *Am. Fed'n of Gov't Employees, Local 1617*, (continued...)

AFGE, Local 1617, 58 F.L.R.A. at 67-69.

C. The District Court's Decision

The union filed suit in the district court seeking review of the Authority's decision. The Authority filed a motion to dismiss, contending that the court was without jurisdiction to hear the union's complaint. Adopting the Report and Recommendation of the United States Magistrate Judge (magistrate), the district court dismissed the complaint for lack of jurisdiction.

1. The Magistrate's Report and Recommendation

First, relying on the decision of the United States Court of Appeals for the D.C. Circuit in *Griffith v. FLRA*, 842 F.2d 487 (D.C. Cir. 1988) (*Griffith*), the magistrate noted that § 7123 of the Statute provides a "complex statutory scheme" for judicial review of final orders of the Authority. RE C-15. After analyzing "the statutory language, the legislative history, and the purpose of the arbitration and review provisions," the magistrate concluded that § 7123 precludes district courts from reviewing Authority decisions on exceptions to arbitrator's awards. RE C-16 to C-18.

Next, the magistrate determined that the exception to statutory preclusion of judicial review enunciated in *Leedom* v. *Kyne*, 358 U.S. 184 (1958) (*Leedom*) does not apply in this case. The magistrate noted that the *Leedom* exception is narrow and rarely used, and applies only where an agency has exceeded its delegated powers or facially violated a statute. Before the district court, the union argued that the Authority

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[4] (...continued)
58 F.L.R.A. 71 (2002).

had exceeded three of its delegated powers. RE C-22 to C-24. The magistrate rejected each of the union's contentions.

First, the magistrate held that the Authority had not impermissibly "usurped the authority of OPM." RE C-24 to C-28. "At best," the magistrate ruled, the union raised only a dispute about statutory and regulatory interpretation and, therefore, could not establish jurisdiction under *Leedom*. RE C-27. Next, the magistrate considered the union's contention that the Authority had "undermined collective bargaining" by permitting federal agencies to nullify collective bargaining agreements through unilateral promulgation of regulations. Noting that the Authority had neither explicitly or implicitly held that an agency regulation may nullify a collective bargaining agreement, the magistrate held that *Leedom* jurisdiction cannot be grounded in this basis. RE C-28 to C-29.

Finally, the magistrate held that the Authority did not usurp the power of the arbitrator by "interpreting the [collective bargaining agreement] and by interpreting laws, regulations, and rules." RE C-29 to C-33. To the contrary, the magistrate noted that the Authority's decision was based on the arbitrator's interpretation of the agreement. RE C-31. According to the magistrate, the fact that the union and the dissenting member of the Authority would rely on other parts of the arbitrator's award to arrive at a different result did not show that the Authority exceeded its powers. *Id.* In addition, the magistrate held that under relevant precedent, the Authority may conduct a *de novo* review of an arbitrator's interpretation of law and regulation. RE C-31 to C-33. The magistrate therefore concluded that the *Leedom* exception was not

applicable.

In sum, the magistrate held that § 7123 of the Statute precludes judicial review of the Authority's decision and that the *Leedom* exception to such preclusion was not applicable. RE C-33. Accordingly, the magistrate recommended that the case be dismissed for lack of jurisdiction. RE C-33 to C-34.

2. The District Court's Order

Adopting the magistrate' report, the district court held that § 7123 of the Statute precludes judicial review of the Authority's decision on exceptions to arbitrators' awards and that the narrow *Leedom* exception does not apply in this case. The court, therefore, dismissed the union's complaint for lack of jurisdiction. RE D-7. This appeal then followed.

STANDARD OF REVIEW

The standard for this Court's review of the district court's dismissal of the complaint for lack of jurisdiction is *de novo*. *Richard v. Hoechst Celanese Chemical Group, Inc.*, 355 F.3d 345, 349 (5th Cir. 2003). However, the party asserting jurisdiction constantly bears the burden of proof that jurisdiction does in fact exist. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). To the extent that the Court finds it necessary to construe and apply provisions of the Statute, the Court must defer to the Authority's interpretation of those provisions. *E.g.*, *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (*BATF*); *United States Dep't of Justice v. FLRA*, 955 F.2d 998, 1001 (5th Cir. 1992).

SUMMARY OF ARGUMENT

It is well established and not disputed that Congress intended to bar judicial

review of Authority decisions on exceptions to arbitrators' awards. Rejecting the union's contention that the narrow exception to the statutory preclusion of judicial review found in *Leedom v. Kyne* should be applied here, the district court properly determined that it was without jurisdiction over the union's complaint. The union's arguments on appeal provide no basis for disturbing the lower court's findings.

1. The district court correctly followed the D.C. Circuit's well-reasoned decision in *Griffith* and determined that Congress clearly intended to bar district court review of Authority arbitration decisions. As the D.C. Circuit held, "the specific language of § 7123, the structure of [the Statute's] arbitration and review provisions, and the relevant legislative history all provide clear and convincing evidence that Congress intended to cut off judicial review of [Authority arbitration decisions]." *Griffith*, 842 F.2d at 492.

2. The district court correctly rejected the union's argument that the *Leedom* exception applies in this case. This and every other court to consider the issue have stressed the extremely narrow scope of the *Leedom* exception and have rarely found it applicable. *See, e.g., Lundeen v. Mineta*, 291 F.3d 300, 304-05 (5th Cir. 2002) (*Lundeen*). Under *Leedom*, jurisdiction will be found in the face of statutory preclusion only "when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen*, 291 F.3d at 312 (internal quotations omitted). The circumstances of this case are not comparable to *Leedom* or any case where *Leedom* jurisdiction has been found.

3. The union's principal argument is that *Leedom* jurisdiction lies because the Authority failed to apply private sector standards in its review of the arbitrator's award in violation of § 7122(a)(2) of the Statute. The union's contentions are without merit.

First, the union misconstrues the Authority's decision. The exceptions on which the Authority ruled were not filed under § 7122(a)(2), the section relied upon by the union. Rather, the Authority ruled on exceptions filed under § 7122(a)(1) of the Statute, alleging that the arbitrator's award was deficient because it was contrary to regulation. Accordingly, the provision of the Statute that the union alleges was violated is not even implicated in this case.

Second, and in any event, the Authority did not substitute its interpretation of the parties' collective bargaining agreement for that of the arbitrator, the error cited by the union. Instead, the Authority expressly relied on the findings of the arbitrator. In that regard, the magistrate correctly characterized the reliance of the union on other findings of the arbitrator to reach a different conclusion as a dispute over interpretation of the arbitrator's award. The union's contentions in this regard involve at most an allegation of a "garden variety" error, and thus do not present a basis upon which to ground *Leedom* jurisdiction.

Third, and finally, even if § 7122(a)(2) were applicable to this case and the Authority arguably violated the section, jurisdiction would not be present because § 7122(a)(2) is not the kind of "unambiguous and mandatory" provision required by *Leedom*. Unlike the statutory provisions at issue in *Leedom* and in *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983), § 7122(a)(2) establishes only general standards for the Authority to apply in the exercise of its judgment and expertise. In that regard, § 7122(a)(2) merely provides that the Authority is to apply grounds "similar to" those applied in the private sector. Congress clearly intended, therefore, that private sector

practice was to be simply a guide for the Authority to look to in the exercise of its statutory functions.

4. In addition to its mistaken contention that *Leedom* jurisdiction lies in this case, the union also contends that there are "compelling policy reasons" for finding district court jurisdiction. These contentions are likewise meritless.

In essence, the union's policy arguments merely restate their *Leedom* arguments, namely that the Authority committed grievous errors that the court must remedy. However, to the extent these arguments seek to expand the exceptions applicable to the review preclusion of § 7123(a)(1), the arguments must be rejected. It is the job of Congress, not the courts, to set policy and Congress has done so clearly by expressly barring judicial review of Authority arbitration decisions.

The union also erroneously contends that the Authority has "undermined" all collective bargaining by permitting agencies to nullify collective bargaining agreements through unilaterally promulgated regulations. According to the union, this action violates § 7101 of the Statute. As the magistrate correctly noted, however, the Authority's decision does *not* explicitly or implicitly hold that an agency regulation can nullify the terms of a collective bargaining agreement. Further, and in any event, the reference to § 7101 is unavailing as it applies to *Leedom* jurisdiction. Section 7101 is not a specific, unambiguous, and mandatory provision of the Statute, but rather sets forth only the Statute's general purpose and the congressional findings that underlie the Statute.

5. Finally, the union also mistakenly contends that the district court erred in denying the union's motion for summary judgment, arguing that the district court

should have conducted a *de novo* review of the underlying arbitration award and reached the merits of the case. As the district court properly held, however, no such review is required where the court's jurisdiction is foreclosed by statute and the *Leedom* exception is inapplicable.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT IT WAS WITHOUT SUBJECT MATTER JURISDICTION OVER A COMPLAINT SEEKING REVIEW OF A FEDERAL LABOR RELATIONS AUTHORITY DECISION REVIEWING AN ARBITRATOR'S AWARD UNDER 5 U.S.C. § 7122, WHERE JUDICIAL REVIEW OF THAT TYPE OF DECISION IS EXPRESSLY BARRED BY STATUTE, AND NO EXCEPTION TO THE BAR IS APPLICABLE

The district court correctly held that: A) § 7123(a) of the Statute precludes district court review of Authority decisions on exceptions to arbitrators' awards; and B) the *Leedom* exception to the bar on judicial review is not applicable. The union's contrary arguments are without merit and should be rejected. In addition, the union's contentions that there are additional "policy" reasons for granting district court jurisdiction in this case, and that the district court erred in denying the Union's motion for summary judgment, are likewise without merit.

A. The District Court Correctly Held That § 7123(a)(1) of the Statute Precludes District Court Review of Authority Decisions on Exceptions to Arbitrators' Awards

It is axiomatic that federal court jurisdiction is conferred by Congress and that Congress may limit or foreclose review as it sees fit. *Am. Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940). Congress prescribed a specific statutory scheme for judicial review of Authority orders. The only provision for judicial jurisdiction is set forth in

§ 7123 of the Statute.

Pursuant to § 7123(a), a party who is aggrieved by a final Authority order may petition a United States Court of Appeals for judicial review. However, Congress limited the opportunity for judicial review in two areas, one of which is relevant here:

> Any person aggrieved by any final order of the Authority *other than* an order under–
>
> > (1) *section 7122 of this title (involving an award by an arbitrator)*, unless the order involves an unfair labor practice under section 7118 of this title
> > . . . . .
>
> may . . . institute an action for judicial review of the Authority's order . . . .

5 U.S.C. § 7123(a)(1) (emphasis added). Thus, the plain language of 5 U.S.C. § 7123(a)(1) bars judicial review of Authority decisions reviewing arbitration awards that do not involve an unfair labor practice, such as the decision involved in the instant case.[3] *See Griffith*, 842 F.2d at 490-92.

In addition to foreclosing circuit court review of certain types of Authority decisions, the specific statutory scheme in § 7123(a) for judicial review of Authority orders also renders inapplicable general jurisdictional grants that might otherwise provide original jurisdiction in federal district courts. *See Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984) (In a case involving a component of the Authority, the D.C. Circuit held that where Congress, in the clear statutory language of § 7123(a), establishes a specific review procedure, general federal question and mandamus jurisdiction are foreclosed, and accordingly the federal district court

[3] The union has never asserted that the arbitrator's award involved an unfair labor practice.

has no jurisdiction.). In addition, where judicial review is otherwise precluded by statute, review under the Administrative Procedures Act (5 U.S.C. §§ 702, 704) is not available. 5 U.S.C. § 701(a)(1); *see also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 131 (1987) (*Food and Commercial Workers*) ("[I]t would be illogical in the extreme to hold that Congress [purposefully precluded a matter from judicial review] only to permit review under the APA."); *Lundeen v. Mineta*, 291 F.3d 300, 304-05 (5th Cir. 2002) (*Lundeen*) (agency actions precluded from judicial review by statute are not reviewable under the general provisions of the APA).

That Congress intended to preclude *all* judicial review (including district court review) of Authority arbitration decisions is "fairly discernible in the statutory scheme." *Lundeen*, 291 F.3d at 305 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) for the standard to be applied in determining whether judicial review is preluded). In ascertaining congressional intent in this regard, the court "cast[s] a broad evidentiary net," looking "to the statute's language, structure, and legislative history." *Id.* This broad evidentiary net is what the D.C. Circuit in *Griffith* looked to when it held that "the specific language of § 7123, the structure of [the Statute's] arbitration and review provisions, and the relevant legislative history all provide clear and convincing evidence that Congress intended to cut off judicial review of [Authority arbitration decisions]." *Griffith*, 842 F.2d at 492; *see also Ass'n of Civilian*

Technicians, Inc. v. FLRA, 283 F.3d 339, 341-42 (D.C. Cir. 2002) (*ACT*) (finding that parallel language in § 7123(a)(2) excepting appropriate unit determinations from judicial review precluded district court as well as circuit court review); *Food and Commercial Workers*, 484 U.S. at 133 (it would be "absurd" to allow district court review of agency action where statute expressly precludes direct review of such determinations in the courts of appeals). As the court in *Griffith* held, "Congress could hardly have made its view on the matter clearer."[4] 842 F.2d at 492.

B. The District Court Correctly Held That Jurisdiction Is Not Available under the *Leedom* Exception

As demonstrated above, and not contested by the union before this Court, Congress intended in § 7123(a)(1) of the Statute to bar district court review of Authority arbitration decisions. The union asserts, nonetheless, that jurisdiction lies in the district court in this case under the seldom-applicable *Leedom* exception to statutory review preclusion. Rejecting this assertion, the district court correctly held that the union's reliance on *Leedom* to establish jurisdiction is misplaced because the union cannot establish that the Authority's action in this case constituted "a plain violation of an unambiguous and mandatory provision of the [S]tatute." *Lundeen*, 291 F.3d at 312.

1. The *Leedom* Exception

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[4] Although the union argued before the district court that *Griffith* is not binding precedent in this circuit, the magistrate adopted the D.C. Circuit's analysis as well reasoned and persuasive . RE C-15 n.79. In that regard, the standards applied by the *Griffith* court comport with those found applicable by this Circuit in *Lundeen*.

Under the *Leedom* exception, even if Congress generally intended to preclude judicial review of an agency action, review may be obtained "when an agency exceeds the scope of its delegated authority or violates a clear statutory mandate." *Lundeen*, 291 F.3d at 312 (internal quotations omitted). Although the narrow doctrine articulated by the Supreme Court in *Leedom* is arguably an exception to §7123(a)(1)'s jurisdictional bar, the *Leedom* exception is intended to be of extremely limited scope.[5] *Russell v. NMB*, 714 F.2d 1332, 1340 (5th Cir. 1983) (exception is narrow and rarely successfully invoked). The exception is not applicable unless the party asserting jurisdiction can demonstrate "a plain violation of an unambiguous and mandatory provision of the [Statute]." *Lundeen*, 291 F.3d at 312.

Analysis of the Supreme Court's *Leedom* decision demonstrates the rigorous character of the exception's requirements. In *Leedom*, the National Labor Relations Board (Board) had determined that employees, who were held not to be professional employees within the meaning of the National Labor Relations Act (NLRA), 29 U.S.C. § 152(12), should be included in a bargaining unit of acknowledged professional

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[5] Indeed, the Supreme Court has ruled that where congressional intent to categorically preclude judicial review is clear, *Leedom* jurisdiction is not available. *See Bd. of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (*MCorp*). In *MCorp*, the Court stated that *Leedom* simply stands for the familiar proposition that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the court restrict access to judicial review." 502 U.S. at 44 (internal quotations omitted). As demonstrated above, the evidence is clear and convincing that Congress intended to deny district courts the jurisdiction to review Authority arbitration decisions. *See Griffith*, 842 F.2d at 492; *see also ACT*, 283 F.3d. at 341-42.

employees. *Leedom*, 358 U.S. at 185-86. This determination by the Board directly contravened the NLRA's explicit requirement that "'the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.'" *Id.* at 188-89 (quoting § 9(b) of the NLRA, 29 U.S.C. § 159(b)). Because of the Board's patent and admitted violation of the NLRA, the Court affirmed the district court's assertion of jurisdiction.

Cases decided since *Leedom* have emphasized that Leedom is not available for mere "error correction." *See 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 that does not comport with law.") Challenges to agency decisions alleging nothing more than "'garden-variety' errors of law or fact" fall outside the *Leedom* exception. *United States Dep't of Justice, Fed. Bureau of Prisons* v. *FLRA*, 981 F.2d 1339, 1343-44 (D.C. Cir. 1993) (quoting *Griffith*, 842 F.2d at 494). In that regard, this Court has specifically recognized that *Leedom* jurisdiction is not available to resolve disputes over statutory interpretation. *Lundeen*, 291 F.3d at 312. As will be discussed below, the circumstances of this case are not comparable to *Leedom* or any case where *Leedom* jurisdiction has been found. The Authority did not operate outside its statutory mandate in making its decision here. Rather, the Authority followed its ordinary process of considering and interpreting the

relevant statutory and regulatory provisions implicated by the arbitrator's decision, applying these provisions to the facts in the record, and ultimately making a determination on exceptions. The union's mere disagreement with the merits of the Authority's holding in this regard does not rise to the level of a colorable *Leedom* claim.[6]

2. *Leedom* Does Not Apply in the Instant Case

According to the union (Br. 30), the core error in the case is that the Authority "supplant[ed] its own interpretation of the parties' collective bargaining agreement in lieu of the arbitrator's." The union contends that this action "directly violates" § 7122(a)(2) of the Statute and, presumably, provides the district court with *Leedom* jurisdiction. Section 7122(a)(2) of the Statute provides that the Authority may find an arbitrator's award deficient on "grounds similar to those applied by the federal courts in private sector labor-management relations." 5 U.S.C. § 7122(a)(2). According to the union (Br. 25-28), private sector practice generally bars reviewing courts from overturning an arbitrator's interpretation of a collective bargaining agreement.

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[6] As demonstrated in this section, it is well established that a party seeking to apply the *Leedom* exception bears a heavy burden of persuasion. Despite this, the union mistakenly relies (Brief (Br.) 22-23) on cases arising in other contexts to suggest a different standard, namely that motions to dismiss are "disfavored by the courts" and "rarely granted." However, the cases cited by the union involve either motions to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted (*Lowery v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)), or cases where "the basis of federal jurisdiction is also an element of the plaintiff's federal cause of action" (*Clark v. Tarrant County, Tex.*, 798 F.2d 736, 741 (5th Cir. 1986)). None of the cases cited involve the situation here, namely a plaintiff attempting to assert jurisdiction in the face of statutory preclusion. In cases like this, it is the party seeking the exception to the general rule that bears the heavy burden. *See, e.g., In Re Dennis*, 330 F.3d 696, 703-04 (5th Cir. 2003) (party asserting exception to general rule bears the burden of proving exception).

The union's arguments are without merit. First, the union misconstrues the Authority's decision because the Authority found the award deficient under § 7122(a)(1) of the Statute, not § 7122(a)(2). Second, even if § 7122(a)(2) applies to this case, the Authority did not substitute its judgment for that of the arbitrator with respect to the collective bargaining agreement. Finally, and in any event, an alleged violation of § 7122(a)(2) cannot be grounds for *Leedom* jurisdiction because that section is not the kind of "unambiguous and mandatory" provision required to obtain *Leedom* jurisdiction.

a. Section 7122(a)(2) of the Statute is not implicated in the Authority's Decision

The union's extensive reliance on private sector practice (*e.g.*, Br. 25-28) is misplaced. At issue in this case is the overlap and interplay between collective bargaining agreements and laws, rules and regulations, considerations absent in private sector arbitration. Although arbitrators in the private sector are normally called upon only to find facts and interpret collective bargaining agreements, arbitrators in the federal sector must also interpret and apply federal laws and regulations. *See United States Dep't of the Treasury, United States Customs Serv. v. FLRA*, 43 F.3d 682, 689 (D.C. Cir. 1994) (*Customs*); *see also* Elkouri & Elkouri, How Arbitration Works 76-79, (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997). Congress clearly intended that arbitrators in the federal sector would have to look beyond collective bargaining agreements when Congress included alleged violations of law, rule, or regulation affecting conditions of employment in the definition of grievance. 5 U.S.C. § 7103(a)(9).

The impact of law and regulation on federal sector arbitration is also reflected

in § 7122. There, Congress recognized that the role of the Authority in reviewing arbitrators would not be wholly analogous to that of the federal courts in cases involving private sector arbitration awards. Specifically, although providing in § 7122(a)(2) that arbitrators awards could be found deficient on grounds "similar to those applied by Federal courts in private sector labor-management relations," Congress further provided in § 7122(a)(1), the section involved here, that awards could also be found deficient if they are "contrary to law, rule, or regulation." Thus, Congress recognized that the unique nature of the federal sector might require a higher degree of arbitral review than that appropriate in the private sector.[7]

As the D.C. Circuit noted, the Authority's role in reviewing arbitrators' awards is determined on the nature of the exceptions filed by the complaining party. *Customs*, 43 F.3d at 686. Where as here, an arbitrator's award is challenged as being contrary to law, rule, or regulation, including agency regulations, the Authority's review of the award is under § 7122(a)(1) and such review is *de novo*. *See NTEU, Chapter 24*, 50 F.L.R.A. 330, 332 (1995) (citing *Customs*, 43 F.3d at 686-87). For the purposes of § 7122(a)(1), the term "rule or regulation" includes not only government-wide

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[7] The union's reliance (Br. 30, quoting from H.R. Conf., Rep. No. 95-1717, at 153) on the Conference Report's statement that "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" is unavailing. The plain language of § 7122(a) makes it clear that federal sector arbitration is subject to greater review than its private sector counterpart. *See Thompson v. Goetzmann*, 337 F.3d 489, 495 (5th Cir. 2003) (courts "need not--and, indeed, should not--look to legislative history when the statute is clear on its face").

regulations, but also rules and regulations issued at the agency level. *Fort Campbell*, 37 F.L.R.A. at 191-92. Accordingly, a conflict with agency regulations provides a basis for finding an award deficient under section 7122(a)(1) when such regulations govern the matter at issue. *Id*. at 192. In applying the standard of *de novo* review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable legal standards. *See NFFE, Local 1437*, 53 F.L.R.A. 1703, 1710 (1998).

In this case, Kelly AFB contended before the Authority that the arbitrator's award was deficient because it was contrary to regulation. *AFGE Local 1617*, 58 F.L.R.A. at 64. Accordingly, the Authority's review was under § 7122(a)(1), not § 7122(a)(2). The arbitrator had found that the Air Force regulation was not binding on the union because there was no evidence that the union had consented to the regulation. *Id*. at 68. The Authority held that the arbitrator had applied an incorrect standard in assessing the effect of the regulation, a determination of law, not contract. Applying the correct standard, the Authority found that the regulation was effective because it did not conflict with the terms of the collective bargaining agreement.

Because the Authority's determination was based upon a finding that the arbitrator's award was contrary to law under § 7122(a)(1), a violation of § 7122(a)(2) cannot be established.

b. The Authority Did Not Substitute its Interpretation of the Collective Bargaining Agreement for That of the Arbitrator

As the magistrate properly found (RE C-31), the Authority did not overturn the arbitrator's interpretation of the agreement, but rather expressly relied upon it. The Authority noted that the arbitrator ruled that the collective bargaining agreement set no

specific standard for entitlement to EDP. *AFGE Local 1617*, 58 F.L.R.A. at 68. The Authority reasonably held therefore that the collective bargaining agreement did not conflict with the specific standards established in the regulations. *Id*. The magistrate correctly characterized the reliance of the union and the dissenting member of the Authority on other findings of the arbitrator to reach a different conclusion as a dispute over interpretation of the arbitrator's award. RE C-31. Even if the Court were to agree that the majority's reading of the arbitrator's award was in error, such error would not violate § 7122(a)(2) or any other specific statutory command. Rather, the error would be of the "garden variety" and thus not a sufficient basis upon which to ground *Leedom* jurisdiction.

c. Section 7122(a)(2) Is Not an "Unambiguous and Mandatory" Provision of the Statute

In any event, even if § 7122(a)(2) were applicable to this case and the Authority arguably violated the section, jurisdiction would not be present because § 7122(a)(2) is not the kind of "unambiguous and mandatory" provision required by *Leedom*. In *Leedom*, the NLRB had determined that employees, who were held not to be professional employees within the meaning of the NLRA, 29 U.S.C. § 152(12), should be included in a bargaining unit of acknowledged professional employees. *Leedom*, 358 U.S. at 185-86. This determination by the Board directly contravened the NLRA's explicit requirement that "'the Board shall not (1) decide that any unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for

inclusion in such unit.'" *Id.* at 188-89 (quoting § 9(b) of the NLRA, 29 U.S.C. § 159(b)). The statutory provision applied in *Leedom* left no room for agency discretion.

Similarly, in *Russell v. NMB*, 714 F.2d 1332 (5th Cir. 1983) (*Russell*), the case principally relied upon by the union, the statutory provision at issue was specific and mandatory. The relevant statute in *Russell* provides that "it shall be the duty of the [National] Mediation Board, upon request of either party to the [representational] dispute, to investigate such dispute . . . ." *Russell*, 714 F.2d at 1338 n.4 (quoting 45 U.S.C. § 152, Ninth). Larry Russell had filed an "Application for Investigation of Representational Dispute" with the National Mediation Board (NMB), seeking to be named as the "representative" of a unit of railroad employees. *Id.* at 1335. After considering only limited evidence, the NMB dismissed Russell's application without "progressing" the application for investigation. *Id.* at 1335-36. The Court held that although NMB decisions concerning representational disputes are not judicially reviewable, the Court had jurisdiction under *Leedom* because by failing to progress Russell's application for investigation, the NMB had violated a clear statutory duty. *Id.* at 1346-47. As the magistrate noted in the instant case (RE C-22 n.107), the Court in *Russell* explained that the relevant statute did not provide the NMB with any discretion as to whether to take action or withhold action. *Id.* at 1347. Recognizing that the statute in the instant cases does not compel any specific action, the magistrate properly distinguished *Russell*.

In contrast to the statutory provisions at issue in *Leedom* and *Russell*,

§ 7122(a)(2) establishes only general standards for the Authority to apply in the exercise of its judgment and expertise. *See Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983) (Authority is accorded "considerable deference when it exercises its 'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations."); *see also Davis v. Ball Mem'l Hosp. Ass'n*, 640 F.2d 30, 47 n.29 (7th Cir. 1980) (*Leedom* applicable only where agency violates statutory duty not involving substantial discretion).

In addition, careful attention to the wording of § 7122(a)(2) reveals that § 7122(a)(2) does not establish any specific limitations on Authority review of arbitrators' awards. Rather, § 7122(a)(2) only provides that the Authority is to apply grounds "*similar to* those applied by the Federal courts in private sector labor management relations" (emphasis added). Congress' use of the phrase "similar to" indicates a recognition that the Authority was to rely on private sector practice as a guideline, but would be expected to adapt such practices to the vagaries of the federal sector. *See* 5 U.S.C. § 7101(b) (Statute is designed to meet "the special requirements and needs of the Government).

In sum, the union has failed to meet its burden of demonstrating that the Authority violated an "unambiguous and mandatory" provision of its enabling act. Accordingly, the *Leedom* exception to the statutory preclusion of judicial review cannot be applied in this case.

C. The Union's "Policy" Arguments Are Without Merit

In addition to its mistaken contention that *Leedom* jurisdiction lies in this case

because the Authority violated § 7122(a)(2) of the Statute, the union also contends (Br. 40-43) that there are "compelling policy reasons" for finding district court jurisdiction. Just as the union's *Leedom* arguments are without merit, so too are the union's policy contentions.

1. The Court Should Not Expand the *Leedom* Exception

The union's first policy argument (Br. 40-41) is that, "[i]f the district court lacks jurisdiction, there is no mechanism to ensure that the [Authority] restricts its review of arbitration decisions to the narrow review mandated by Congress." Of course, *Leedom* provides protection against egregious violations of unambiguous and mandatory congressional commands. As demonstrated above, however, the union has failed to meet the heavy burden of establishing jurisdiction under *Leedom*.

On the other hand, the union may not be simply restating the policy considerations underlying *Leedom*, but may be arguing for a less stringent exception to § 7123(a)(1)'s preclusion of judicial review. The Court should reject any such attempt. The union's initial error is that it is asking this Court to make a policy determination properly left to Congress. *See Miss. Poultry Ass'n, Inc. v. Madigan*, 31 F.3d 293, 310 (5th Cir. 1994) ("Policy choices are for Congress -- not the courts."). As noted above (p. 12), Congress may limit or foreclose a court's jurisdiction as it sees fit. In this case, Congress has clearly spoken on the issue and determined that Authority decisions on exceptions to arbitration awards are not subject to judicial review. *See Buckhannon Bd. and Care Home, Inc. v. W.Va. Dep't of Health and Human Res.*, 532 U.S. 598, 610 (2001) (Court will not evaluate competing policy arguments where meaning of statute is clear).

Secondly, and in any event, the union presents no case for expanding review of Authority arbitration decisions. In that regard, the union contends that the negative policy implication of foreclosing judicial review is that the Authority will have broader review of arbitration awards than do the courts in the private sector. Contrary to the union's contention, Congress has recognized that arbitrators in the federal sector are subject to broader review than those in the private sector. *See* ¶ B.2.a above; *see also AFGE v. FLRA*, 850 F.2d 782, 785 (D.C. Cir. 1988) ("[J]udicial review of private sector labor arbitration is, if anything, more restricted than is the [Authority's] review of arbitration arising out of federal employee collective bargaining.").

2. The Authority's Decision Does Not Undermine All Collective Bargaining

The union mistakenly contends (Br. 42-43) that the Authority's decision undermines collective bargaining, arguing that the decision grants federal agency employers the power to nullify collective bargaining agreements through the unilateral promulgation of regulations. As the magistrate correctly found (RE C-28 to C-29), however, the Authority's decision "does *not* explicitly or implicitly hold that an agency regulation can nullify the terms of a [collective bargaining agreement]." (emphasis in original).[8]

The union misstates the basis of the Authority's decision. The Authority did not hold that agency regulations may override collective bargaining agreements. To the

[8] Before the district court, the union presented this contention as one of the three ways in which the Authority had exceeded its delegated powers, not as a distinct "policy argument."

contrary, the Authority restated the restrictive principle that agency regulations govern matters to which they apply only "when the rules and regulations do not conflict with provisions of an applicable collective bargaining agreement." *AFGE, Local 1617*, 58 F.L.R.A. at 68 (quoting *Ft. Campbell*, 37 F.L.R.A. at 195). The agency regulation in this case governed *only* because, as the Authority determined, there was no conflict between the regulation and the collective bargaining agreement.

The union concedes (Br. 43) that the Authority did not expressly state that agency regulations may nullify collective bargaining agreements, but argues that "anyone who reads the decision and the dissent knows that the [Authority] allowed an agency to write a regulation that overrules the terms of a [collective bargaining agreement]." This statement is pure hyperbole. As noted above, the Authority expressly reiterated the operative legal principle that agency regulations govern matters to which they apply only when the regulations do not conflict with the applicable collective bargaining agreement. Accordingly, it is clear that nothing in the legal conclusions of the Authority in this case can be construed as precedent permitting agency regulations to negate collective bargaining provisions. In that regard, only the Authority's legal holding in a given case that has precedential effect. *See Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993) (*stare decisis* deals only with law, not facts).

Finally, the union contends that by its actions the Authority violated § 7101 of the Statute and, thereby, undermined collective bargaining. As noted by the union, § 7101 sets forth the congressional finding that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. § 7101(a). If the

union's intent is to assert another *Leedom* ground, its intentions must fail. First, as noted above, nothing in the Authority's decision can correctly be characterized as undermining collective bargaining. Second, § 7101 merely expresses the Statute's general purpose and the congressional findings that underlie the Statute. *Leedom* jurisdiction cannot be grounded on such general policy admonitions. Rather, *Leedom* jurisdiction can only be founded on a clear violation of a specific, unambiguous, and mandatory provision of the agency's enabling act. No such violation is present here.

D. The District Court Properly Denied the Union's Motion for Summary Judgment

The union separately asserts (Br. 43-46) that the district court erred in denying the union's motion for summary judgment. Essentially, the union argues that the district court should have conducted a *de novo* review of the underlying arbitration award and reached the merits of the case. As the district court properly held, however, no such review is required where the court's jurisdiction is foreclosed by statute and the *Leedom* exception is inapplicable. In the cases cited by the union (*Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)), the court's jurisdiction was not in question.

CONCLUSION

The district court's dismissal of the union's complaint for lack of subject matter jurisdiction should be affirmed.

Respectfully submitted,

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March 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, ARTHUR CELESTINO, and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL NUMBER 214,	)	
Appellants	)	
v.	)	No. 03-51264
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Appellees	)	

CERTIFICATE OF SERVICE

I certify that both paper and electronic (Portable Document File (PDF) format) copies of the Brief for the Federal Labor Relations Authority have been served this day, by mail, upon the following:

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Paralegal Specialist

March 15, 2004

TABLE OF CONTENTS

Page

§ 7101. Findings and purpose

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service a in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

§ 7103. Definitions; application

(a) For the purpose of this chapter—

* * *

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include—

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

* * *

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * *

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority. The Chairman is the chief executive and administrative officer of the Authority.

(c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of—

(1) the date on which the member's successor takes office, or

(2) the last day of the Congress beginning after the date on which the member's term of office would (but for this paragraph) expire.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and decisions it has rendered.

(f) (1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

§ 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—

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

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

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

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

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

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

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

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

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

* * *

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient—

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date the award is served on the party, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

§ 7123. Judicial review; enforcement

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

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

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

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

* * *

5 U.S.C. § 701. Application; defintions

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

* * *

5 U.S.C. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

29 U.S.C. § 152. Definitions

* * *

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

* * *

29 U.S.C. § 159. Representatives and elections

* * *

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *