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NO TIME FOR HAND-WRINGING: A COMMENT ON NAT'L WEATHER SERV. EMP.'S ORG. V. FLRA

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BY
SIMON X. CAO*

I. INTRODUCTION

The Federal Labor Relations Authority ("FLRA") is empowered to review arbitration awards that result from grievances between unions and federal agencies.[1] However, when the FLRA reviews arbitral awards, they are bound to remain consistent with Federal courts' jurisprudence towards private sector labor arbitration awards.[2] Additionally, the FLRA must not act arbitrarily and capriciously when adjudicating controversies under the Administrative Procedure Act ("APA") and must therefore "treat like cases alike."[3]

In *Nat'l Weather Serv. Emp.'s Org. v. FLRA*, the D.C. Circuit Court of Appeals reversed the FLRA's vacatur of an arbitral award because the FLRA did not apply the appropriate deference to a presiding arbitrator's decision.[4] However, the D.C. Circuit provided deference to the FLRA's finding that the employer did not act arbitrarily and capriciously on unfair labor practice ("ULP") charges.[5] *Nat'l Weather Serv. Emp.'s Org.* demonstrates how advocates can challenge a hostile FLRA to vindicate federal sector union rights through arbitration.[6] Although labor advocates may be demoralized when the agency tasked with adjudicating a claim is ideologically opposed to unions, fighting back with hand-wringing will not suffice to vindicate union members' workplace rights.

This comment demonstrates that the opinion from the D.C. Court of Appeals in *Nat'l Weather Serv. Emp.'s Org.* (1) provided the necessary deference to the arbitral award when the FLRA abandoned its congressional command, and (2) permitted the FLRA to reverse course on a rule that could have lasting impacts on labor-management relations in the federal sector. This comment will first provide a background of the facts

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1. *See* Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7122(a).

2. *See* AFGE, Council 220, 54 FLRA 156, 159 (1998) (citing US DOL (OSHA), 34 FLRA 573, 575 (1990).

3. *See* Motor Vehicle Mfr. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 40-44 (1983); Westar Energy Inc. v. FERC, 473 F.3d 1239, 1242 (D.C. Cir. 2007).

4. *See* Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875, 877 (D.C. Cir. 2020).

5. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at 383 (Nov. 4, 2019).

6. *See* Examining Labor-Management Relations Before the H. Committee on Oversight and Reform, 116th Cong. 1-2 (June 4, 2019); *see* HOUSE COMMITTEE ON OVERSIGHT AND REFORM, LETTER TO CHAIRMAN KIKO OF THE FLRA (Apr. 17, 2019); *see* HOUSE COMMITTEE ON OVERSIGHT AND REFORM, LETTER TO CHAIRMAN RING OF THE NLRB (Aug. 12, 2020).

and proceedings before the D.C. Circuit reviewed the FLRA's decision. Second, this comment will summarize the D.C Circuit's opinion in *Nat'l Weather Serv. Emp.'s Org*. Third, this comment will discuss why the D.C. Circuit's review of the FLRA's vacatur of an arbitral award can provide a hook for unions that seek to vindicate contractual rights against an antagonistic agency. Lastly, this comment will show why the D.C. Circuit erred when it determined that the FLRA did not act arbitrarily and capriciously when it reversed a long-standing rule, thus, shielding the FLRA from accountability.

II. CASE BACKGROUND

A. Facts of the case

In 1986, the National Weather Service Employees Organization ("Union") reached an impasse with the National Weather Service ("Employer") and used the assistance of the Federal Services Impasse Panel ("FSIP").[7] At the time, the parties were unable to reach an agreement on the duration of the collective bargaining agreement ("CBA").[8] The FSIP eventually compelled the Employer and Union to include a provision in the CBA.[9] That provision states:

> This Agreement will remain in effect for 90 calendar days from the start of formal renegotiation or amendment of said Agreement, exclusive of any time necessary for FMCS or FSIP proceedings. If at the end of the 90-calendar day period an agreement has not been reached and the services of neither FMCS [n]or FSIP have not been invoked, either party may, upon written notification to the other, terminate any or all sections of the agreement.[10]

After continuing labor-management relations under the CBA for the next twenty-nine years, the Employer requested to renegotiate the CBA.[11] In anticipation of stalled negotiations, the Union's chief negotiator formally requested the services of Federal Mediation & Conciliation Services[12] ("FMCS") shortly after the Employer's request to

7. *See* 5 C.F.R. § 2471.11(a). FSIP is a panel under the FLRA empowered to resolve negotiation impasses between federal agencies and unions. FSIP may also engage in fact-finding and order the parties to implement any recommended solution FSIP deems appropriate. *See Nat'l Weather Serv. Emp.'s Org.*, 71 FLRA, slip op. at 380.

8. *See Nat'l Weather Serv. Emp.'s Org.*, 71 FLRA, slip op. at 380.

9. *See id.*

10. *Id.* (footnote omitted).

11. *Id.* at 381.

12. *See* 29 U.S.C. § 173(a)-(f) (FMCS is a federal agency that may be requested by any party affecting commerce to assist in the resolution of disputes including the assignment of neutral arbitrators).

reopen negotiations.[13] Next, the chief negotiator for the Union sent a copy of the receipt of the request for FMCS and an email stating that the Union satisfied the provision implemented by FSIP in 1986.[14]

Nevertheless, the parties were unable to reach an agreement on ground rules for negotiations until December 2016.[15] While setting the terms for substantive negotiations, the Employer declared an impasse on three separate occasions and requested the assistance of FSIP.[16] With the assistance of FSIP, the parties agreed to ground rules[17] and the parties met for their first negotiating session on April 4, 2017.[18] Before the first negotiating session, the Employer sent initial substantive bargaining proposals in January 2017, and the parties held several negotiation sessions to no avail.[19]

On July 21, 2017, the Employer notified the Union that it was unilaterally terminating the CBA.[20] The Employer stated that it would adhere to the previous CBA as a past practice until a new agreement was reached.[21] In response, the Union filed a grievance alleging that the Employer's unilateral termination of the entire CBA violated the 1986 FSIP provision and was also an unfair labor practice ("ULP") under 5 U.S.C. § 7116(a)(1) and (5).[22]

After the employer denied the filed grievance on August 22, 2017, the Union and Employer submitted to arbitration with an FMCS-designated arbitrator.[23] After arbitration proceedings, the arbitrator found that because the Union's chief negotiator requested the services of FMCS and "formal negotiations" began in January 2017, the Employer was

13. *See* Brief for Petitioner at 6-7, Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

14. *Id.* at 7.

15. *Id.*; *see* U.S. Dep't of the Treasury, 59 FLRA 703, 709 (2004) (determining that the establishment of ground rules for negotiations is a mandatory subject of bargaining).

16. *See id.* at 7-9.

17. *Id*.

18. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at 381 (Nov. 4, 2019).

19. *Id*.

20. *Id*.

21. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 878.

22. *See id.*; *see also* 5 U.S.C. § 7116(a)(1) & (a)(5) (stating that "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 in any right under this chapter . . . (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter . . . .").

23. *See* Brief for Respondent at 10-11, Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

precluded from unilaterally terminating the CBA.[24] The arbitrator also found that because the Employer submitted to arbitration, the Employer's conduct sounded in termination and not a repudiation of the CBA.[25] Thus, the arbitrator determined that the Employer violated the 1986 FSIP provision but did not commit a ULP.[26]

B. FLRA Proceedings

After the arbitral award was announced, both the Union and Employer filed exceptions with the FLRA.[27] Because the exceptions to the arbitral award were based on law, the FLRA reviewed the award *de novo*.[28]

In the FLRA's initial[29] decision, the FLRA found that the arbitrator's determination that formal negotiations began in January 2017 was unconnected from an interpretation of the CBA.[30] Irrespective of the initiation of formal negotiations, the FLRA found that the Union's invocation of FMCS to aid in negotiations did not constitute the type of invocation contemplated in the 1986 FSIP contract provision.[31] Because the FLRA determined that the request did not stop the 90-day tolling of the 1986 FSIP provision, the Employer was within its rights to unilaterally terminate the CBA.[32] The FLRA reasoned that the arbitrator's "reliance on several extraneous factors . . . " to determine when formal negotiations began did not "draw its essence" from the CBA and was thus contrary to law.[33]

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24. *Id*. at 11.

25. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. 383, n.36 (Nov. 4, 2019) (reasoning that a "clear and patent breach of the terms of the agreement" must be found to constitute a repudiation of a CBA) (citing Scott Air Force Base, 51 FLRA 858, 862-63 (1984); Brief for Respondent at 11-12, Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

26. *Id*.

27. *Id*. at 12 (exceptions are the administrative law equivalent of an appeal to a superior authority).

28. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA, slip op. at 382, n.26 (citing NTEU, Chapter 24, 50 FLRA 330, 332 (1995)).

29. *Compare Nat'l Weather Serv. Emp.'s Org.*, 71 FLRA No. 72, slip op. at 382-83, *with* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 47, slip op. at 277 (Aug. 8, 2019); Order Denying Motion at 1 (Oct. 28, 2019) (*Per Curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163) (the FLRA would later amend the decision after the Union filed suit against the FLRA).

30. *See Nat'l Weather Serv. Emp.'s Org.*, 71 FLRA No. 47, slip op. at 276-77.

31. *Id*. at 277.

32. *See id*. at 276-77.

33. *See id.* (to find that an arbitral award did not "draw its essence" from a CBA, the award must be "so unfounded in reason and fact and so unconnected with the wording and purposes of the CBA as to manifest

Next, the FLRA determined that the Employer did not commit a ULP.[34] As a logical extension of failing to find a breach of the CBA, the Employer could not have unlawfully repudiated the CBA.[35] In its analysis of the ULP charges, the FLRA committed only three sentences of rationale to a decision that overruled long-standing precedent.[36]

After the FLRA announced its initial decision, the Union petitioned for review to the D.C. Court of Appeals on August 12, 2019.[37] A month later, the FLRA filed a motion for remand of reconsideration *sua sponte* but was denied.[38] Undeterred by the court order, the FLRA amended its decision on November 4, 2019 and included an additional rationale for its determination that a ULP was unwarranted against the Employer.[39] In its new rationale, the FLRA reasoned that because the 1986 FSIP provision was vague and the Employer could have reasonably interpreted the provision to allow unilateral termination, the Employer did not repudiate the CBA.[40]

C. D.C. Court of Appeals review of FLRA decision

Although the D.C. Court of Appeals denied remand and reconsideration of the issue because it would unduly prejudice the petitioner, the D.C. Circuit reviewed the amended decision and order.[41] In defense of the FLRA's decision concerning the grievance, the FLRA argued that the statute barred judicial review of the agency's

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an infidelity to the obligation to the arbitrator.") (citing U.S. Dep't. of State, Passport Servs., 71 FLRA 12, 13 n.18 (2019)).

34. *Id*. at 277.

35. *Id*.

36. *Id*.

37. *See* 5 U.S.C. § 7123(b) (establishing that the proper level of the forum for an appeal of an order by the FLRA involving a ULP is a federal court of appeals); *see* Brief for Petitioner at 44-45, Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163); *see* Petition for Review at 1 (Aug. 12, 2019), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

38. *See* Order Denying Motion at 1 (Oct. 28, 2019) (*Per Curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163); *see* Respondent's Motion for Remand at 1-3 (Sept. 12, 2019), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

39. *See* Brief for Petitioner at 44-45, Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

40. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at 382-83 (Nov. 4, 2019).

41. *See* Order Denying Motion at 1 (Oct. 28, 2019) (*Per Curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163); *see* Nat'l Weather Serv. Emp.'s Org. v. FLRA., 966 F.3d 875, *passim* (D.C. Cir. 2020).

decision.[42] The D.C. Circuit's analysis of the FLRA's argument determined that the text of the statute only precludes judicial review if the issue does not "involve an unfair labor practice," thus, judicial review was not precluded in this case because the agency decision concerned both an arbitral award and a ULP charge.[43]

Next, the Union argued that the FLRA erred when it did not provide proper deference to the arbitrator's award.[44] On review of the amended decision, the D.C. Circuit looked to 5 U.S.C. § 7122(a) and (b) which permits the FLRA to vacate an arbitral award "only when it is 'contrary to any law, rule, or regulation,' or 'on other grounds similar to those applied by Federal courts in private sector labor-management relations.'"[45] Because courts use the "essence test" established in *Enterprise Wheel & Car Corp* when adjudicating private sector arbitration awards, the FLRA was obligated to use the same test when adjudicating this case.[46] Subsequently, the court articulated that as long as the arbitrator arguably derives the award from the CBA, the FLRA may not vacate the award.[47] The court reasoned that because the arbitrator spent multiple pages of analysis determining when "formal negotiations" commenced under the 1986 FSIP provision to determine whether the Employer breached the CBA.[48] Consequently, the court determined that the arbitrator arguably interpreted the CBA and the FLRA acted contrary to law when it vacated the arbitral award.[49]

Finally, the FLRA argued that when it determined ULP charges were unwarranted, it did not engage in arbitrary and capricious decision-making in the amended decision.[50] The D.C. Circuit looked to the FLRA's precedent and applied the two-prong repudiation test.[51] The D.C. Circuit acknowledged FLRA precedent that when

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42. *See* 5 U.S.C. § 7123(b); *Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 879.

43. *See* 5 U.S.C. § 7123(b); *Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 879-80.

44. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 881.

45. *See* 5 U.S.C. § 7122(b); *Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 881.

46. *See* United Steelworkers of Am. V. Enterprise Wheel & Car Corp, 363 U.S. 593, 597 (1960) (announcing that "an arbitrator is confined to interpretation and application of the collective bargaining agreement . . . [the arbitrator] may of course look for guidance from many sources, yet [the] award is legitimate only so long as it draws its essence from the collective bargaining agreement."); *see Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 881.

47. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 881 (citing United Paper Workers Int'l Union v. Misco Inc., 484 U.S. 29, 38 (1987).

48. *See id*. at 881.

49. *See id*. at 881-82.

50. *See id*. at 882.

51. *See id.* (The inquiry under the repudiation test asks (1) whether the breach clearly violated the wording of the CBA, and (2) whether the violation goes to the heart of the agreement).

an agency rejects an agreement in its entirety, the agency commits a ULP.[52] However, the FLRA argued that when an alleged repudiation occurs as a result of a reasonable interpretation of the CBA, an agency may be excused from committing a ULP.[53] For its part, the Union proffered authority that contradicted this exception which stated "expressly rejecting an agreement in its entirety will always amount to a clear and patent breach that goes to the heart of the agreement."[54] The D.C. Circuit reasoned that although the FLRA is required to explain the reversal of precedent, the distinction used by the FLRA in its amended decision sufficiently distinguished why the "express rejection" rule did not apply to the facts in this case.[55] The D.C. Circuit deferred to the FLRA's judgment on departing from the "express rejection" rule.[56] Lastly, the D.C. Circuit reversed and remanded the vacatur of the arbitral award for any necessary proceedings but denied reversing the FLRA's disposition on the ULP claim.[57]

III. CRITIQUE

A. A practical hook for vindicating contractual rights of union members

Although Congress provided the FLRA more relative power to review and vacate arbitral awards than Federal courts,[58] that power is tempered by the "liberal federal policy favoring arbitration . . . ."[59] Where many courts are subject to review by a superior court after they have disposed of a case concerning arbitration, an FLRA decision concerning an arbitral award that was solely the result of a grievance is precluded from judicial review.[60] Nevertheless, this case demonstrated that a hook for judicial review of a generally unreviewable decision by the FLRA must also include a ULP.[61] *Nat'l Weather*

52. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 882.

53. *See id.* (citing Dep't. of Air Force, Scott Air Force Base, 51 FLRA 858, 862 (1996)).

54. *Id.* (citing *Dep't. of Justice, Bureau of Prisons*, 68 FLRA at 788).

55. *See id.* at 883-84 (citing Jicarilla Apache Nation v. U.S. Dep't. of Interior, 613 F.3d 1112, 1113 (D.C. Cir. 2010)).

56. *See id.* at 884.

57. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at 884-85.

58. *See* 5 U.S.C. § 7123(a) (precluding judicial review of decisions that vacate arbitral awards unless the award involves a ULP).

59. *See* Federal Arbitration Act, 9 U.S.C. § 2; *see* Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

60. *See* 5 U.S.C. § 7123(a).

61. *See* 5 U.S.C. § 7123(a)(1).

Serv. Emp.'s Org. also demonstrated that unions under federal agencies can, at times, rely on such a hook to enforce their contractual rights under a hostile FLRA.[62]

In *Nat'l Weather Serv. Emp.'s Org*., the FLRA attempted to be the forum of last resort concerning workers' rights and justifiably failed.[63] Although the FLRA's authority to vacate arbitral awards based solely on a CBA breach is precluded from judicial review,[64] the "liberal federal policy favoring arbitration . . . "[65] may provide some refuge to union workers' contractual rights. Because Federal courts apply a deferential standard of review for arbitral awards, the impact of the FLRA's decision, in this case, was partially limited.[66] Here, the *Steel Workers Trilogy*[67] played a significant role in limiting the potential damage imposed on the Union by the FLRA when it provided some access to "labor peace."[68]

Ironically, the FLRA's decision that the arbitral award was contrary to law[69] was itself contrary to basic precepts of long-standing labor arbitration jurisprudence.[70] Two facts demonstrate the irony of the FLRA's decision: (1) the arbitrator analyzed the 1986 FSIP contract provision and extrinsic evidence to determine that formal negotiations began in January 2017,[71] and (2) the arbitrator analyzed whether the Union's request for FMCS services constituted a valid invocation to preclude unilateral termination of the CBA under the 1986 FSIP provision.[72] Notwithstanding these facts, the FLRA claimed to

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62. *See* Fed. Educ. Ass'n v. FLRA, 2020 WL 1509329, *2 (D.D.C. 2020); *see* Examining Labor-Management Relations Before the H. Committee on Oversight and Reform, 116th Cong. 1-2 (June 4, 2019); *see* HOUSE COMMITTEE ON OVERSIGHT AND REFORM, LETTER TO CHAIRMAN KIKO OF THE FLRA, 1 (Apr. 17, 2019).

63. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 879-80.

64. *See* 5 U.S.C. § 7123(a)(1).

65. *See* Federal Arbitration Act, 9 U.S.C. § 2; *see* Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

66. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 884-85.

67. The *Steelworker's Trilogy* is the eponymous name given to United Steelworkers of Am. v. Enterprise Wheel & Car Corp, 363 U.S. 593 (1960), United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960), and United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) which established arbitration in labor disputes as a *quid pro quo* for a no-strike clause, afforded significant deference towards arbitral awards in labor law, in addition to Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450-51, 455-57 (1957) establishing a uniform federal labor law.

68. *See Warrior & Gulf Navigation Co*., 363 U.S. at 578.

69. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at 381 (Nov. 4, 2019).

70. *See Enterprise Wheel & Car Corp*., 363 U.S. at 597.

71. *See Nat'l Weather Serv. Emp.'s Org.*, 71 FLRA, slip op. at 382.

72. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 881; *see Nat'l Weather Serv. Emp.'s Org*., 71 FLRA, slip op. at 382.

have applied the "essence test."[73] In contrast, the D.C. Circuit declared that the proper standard was "whether the Arbitrator was 'even arguably construing or applying the [CBA].'"[74]

Though the FLRA relied on the arbitrator's award being unconnected to the language held in the CBA, the facts presented simply refute their argument.[75] The FLRA's support for the unconnected award argument relied on the arbitrator's use of extrinsic evidence[76] to support the 1986 FSIP provision's intent.[77] Even assuming the arbitrator used evidence outside of the CBA to interpret a provision in the CBA, *Enterprise Wheel & Car Corp*. permits arbitrators to look to outside sources so long as the award "draws its essence from the . . . agreement."[78]

Adding irony on top of irony, had the FLRA adhered to its precedent as well as the Federal court's deference to arbitral awards, review by the D.C. Circuit would have been unlikely[79] and the valuable resources spent by the Union and the FLRA would have been saved. Along with Congress' promotion of federal sector unionization under the Federal Service Labor-Management Relations Statute ("FSLMRS"), the FLRA was tasked with interpreting the FSLMRS "in a manner consistent with the requirement of an effective and efficient Government."[80] Here, the FLRA abandoned their congressional command and instead pursued ideological goals.

Under the FLRA's current majority, the congressional purpose enumerated in § 7101 to promote federal sector unionization is frustrated.[81] Because traditional economic

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73. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 882.

74. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 881 (citing United Paperworkers Int'l Union v. Misco Inc., 484 U.S. 29, 38 (1987); *see also* AFGE, Council 220, 54 FLRA 156, 159 (1998) (citing US DOL (OSHA), 34 FLRA 573, 575 (1990) (establishing that an arbitration award does not derive its essence from a CBA when "the award (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement, or (4) evidences a manifest disregard of the agreement.")).

75. *Cf. Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 881-82.

76. *But see Nat'l Weather Serv. Emp.'s Org*., 71 FLRA at 383 (FLRA characterizes this as "extraneous").

77. *See id.*

78. *See United Steelworkers of Am*., 363 U.S. at 597 (stating that the arbitrator "may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.").

79. Appellate judicial review is both expensive and time-consuming, considering a decisive victory on appeal would not reap significantly more rewards than what was won at arbitration, judicial review would have been unwarranted.

80. *See* 5 U.S.C. § 7101(b).

81. *See* 5 U.S.C. § 7101(A), (B), & (C) (proclaiming federal sector unions "(A) safeguard[] the public interest, (B) contribute[] to the effective conduct of public business, and (C) facilitate[] and encourage[] amicable settlements of dispute . . . "); HOUSE COMMITTEE ON OVERSIGHT AND REFORM, LETTER TO CHAIRMAN KIKO

weapons are prohibited by law, federal sector unions have limited recourse to enforce their bargained-for contractual rights.[82] Thus, federal sector unions must rely on adjudications from the forum of last resort to fully realize rights held under their CBA. However, if the underlying facts in a grievance even arguably support a ULP theory, federal sector unions should not hesitate to (1) enlist the services of FMCS arbitrators, and (2) tie the facts presented to a collateral[83] ULP theory to vindicate their members' contractual rights.

B. The D.C. Circuit erred in reviewing the amended decision by the FLRA.

In defiance of the D.C. Circuit Court of Appeals' order, the FLRA amended its decision and added rationale not previously used to justify the decision to deny the Union's ULP claim.[84] The order denying the motion for reconsideration reasoned that granting the motion would "delay and prejudice [] Petitioners . . . ."[85] Yet, the analysis provided by the D.C. Circuit ignores the initial decision that gave rise to the complaint without providing reasons.[86] Relying exclusively on the amended decision from the FLRA and the new rationale provided, the D.C. Circuit deferred to the FLRA's judgment on reversing or distinguishing the repudiation rule adhered to by the FLRA in prior adjudications.[87] By ignoring both the court order and initial decision, the D.C. Circuit prejudiced petitioners and shielded the FLRA from accountability for their erroneous decision.

When a federal agency reverses a rule through adjudication, the agency may depart from the prior rule as long as they are cognizant of the departure and provide

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OF THE FLRA, 1 (Apr. 17, 2019); Examining Labor-Management Relations Before the H. Committee on Oversight and Reform, 116th Cong. 2 (June 4, 2019) (Rep. Connelly reported that the FLRA has "allowed a backlog of over 200 documented violations of federal labor law to go unaddressed or unresolved."); U.S. Federal Labor Relations Authority, FLRA LEADERSHIP, https://www.flra.gov/about/flra-leadership (last visited Sept. 2, 2021) (current majority consists of two President Trump nominees and one President Obama nominee).

82. *See* 5 U.S.C. § 7116(b)(7)(A), (B) (prohibits unions from engaging in strikes, work stoppages, slowdowns, picketing that interferes with agency operations, supporting such actions, and creates an affirmative duty to prevent workers from engaging in such actions).

83. Collateral in the sense that the secondary objective is to gain a remedy through a successful ULP claim, while the primary objective is to enforce rights held in a CBA.

84. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at 382-83 (2019); *see* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 47, slip op. at 277 (Aug. 8, 2019); *see* Order Denying Motion at 1 (Oct. 28, 2019) (*per curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

85. *See* Order Denying Motion at 1 (Oct. 28, 2019) (*per curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

86. *See Nat'l Weather Serv. Emp.'s Org.*, 966 F.3d at *passim*.

87. *See id.* at 882-84.

reasons why the agency prefers the new rule.[88] However, when "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account[,]" the agency must provide a more detailed explanation for the departure.[89]

In *Nat'l Weather Serv. Emp.'s Org.*, the amended decision met the deferential burden to the D.C. Circuit's satisfaction.[90] Yet, because the agency was precluded from reconsideration by the D.C. Circuit Court's order, the agency was limited to providing a "fuller explanation of the agency's reasoning at the time of the agency action."[91] At this point, the D.C. Circuit could have reviewed the FLRA's rationale with greater scrutiny when it provided additional grounds to deny the ULP charges filed by the union.[92] Alternatively, the D.C. Circuit could have reviewed only the initial decision that gave rise to the complaint.[93] Faced with these two options, the court took a third option and disposed of the case by ignoring the court's order and reviewing the amended decision.[94]

In any event, the three-sentence rationale for refusing to issue a ULP against the Employer should have been declared arbitrary and capricious.[95] This is because the FLRA's brief rationale in the decision that gave rise to the appeal depended solely on the conclusion that there was no merit to a valid grievance.[96] Had the D.C. Circuit exercised more rigor and followed the example outlined in *Dept. Homeland Security v. Regents of the University of California*, *Dep't. of Commerce v. New York*, and *Overton Park*, the outcome should have resulted in a declaration that the FLRA acted arbitrarily and capriciously. Instead, the D.C. Circuit provided the distinction absent in the amended

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88. *See* F.C.C. v. Fox Television Stations Inc., 556 U.S. 502, 514-15 (2009) (establishing that Failing to provide a detailed explanation, would violate the Administrative Procedure Act).

89. *Id.* at 515.

90. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 884.

91. *See* Dept. Homeland Security v. Regents of the University of California, 140 S.Ct. 1891, 1907-08 (2020) (citing Pension Benefit Guaranty Corp. v. L.T.V. Corp., 496 U.S. 633, 654 (1990)); McClatchy Broadcasting Co. v. F.C.C., 239 F.2d 19, 23 (D.C. Cir. 1956) (stating that "it would obviously be unseemly for the Commission, without the knowledge or permission of the court, to substitute another grant for that which is being judicially examined on appeal . . . .").

92. *See* Dep't. of Commerce v. New York, 139 S.Ct. 2551, 2573-74 (2019).

93. *See id*.

94. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 882-84.

95. *Cf. id.* at 884.

96. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 47, slip op. at 277 (Aug. 8, 2019).

decision[97] to justify wide-berth deference to the FLRA's judgment.[98] The precedent set with this case reverses the rule set in *Dep't. of Justice, Bureau of Prisons*, that declares "expressly rejecting an agreement in its entirety will always amount to a clear and patent breach that goes to the heart of the agreement."[99] Unless "always" means sometimes and "order"[100] means suggestion, like in the D.C. Circuit's review of *Nat'l Weather Serv. Emp.'s Org*., the D.C. Circuit Court of Appeals provided cover for an otherwise unworthy decision and should have reversed the FLRA's decision to deny the ULP claim made by the Union.

IV. CONCLUSION

While Federal agencies often establish rules that fit their ideological and political goals,[101] combating ideologically biased adjudications with hand-wringing will not suffice. The D.C. Circuit's decision in *Nat'l Weather Serv. Emp.'s Org*. demonstrated that at least some vindication of contractual rights may still be viable for federal sector unions. The D.C. Circuit's disposition in *Nat'l Weather Serv. Emp.'s Org*., was likely a net-win for the Union considering the stakes at-risk for a loss would mean the Employer could lawfully decide to refuse their obligations under the terminated CBA.

Enforcing rights under a CBA faces formidable odds when considering the lack of economic weapons unions in the federal sector hold in their arsenal.[102] Even so, when agency leadership is hostile to the purpose they are commanded to uphold, practitioners must obtain substantial foresight. The message presented to union-side practitioners representing federal sector unions is clear: if the rights you seek to vindicate are important enough: (1) arbitrate the claim before an FMCS neutral arbitrator, and (2) do not hesitate to allege collateral claims of a ULP. Otherwise, the federal sector union employee may be precluded from receiving their contractual rights under their CBA.[103]

97. *See* Nat'l Weather Serv. Emp.'s Org., 71 FLRA No. 72, slip op. at *passim* (Nov. 4, 2019).

98. *See Nat'l Weather Serv. Emp.'s Org*., 966 F.3d at 883-84.

99. *See Dep't. of Justice, Bureau of Prisons*, 68 FLRA 786, 788 (2015).

100. *See* Order Denying Motion at 1 (Oct. 28, 2019) (*per curiam*), Nat'l Weather Serv. Emp.'s Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020) (No. 19-1163).

101. Amy Semet, *Political Decision-Making at the National Labor Relations Board,* 37 BERKELEY J. EMP. & LAB. L. 223, 284 (2016) (discussing the likelihood of partisan voting on the National Labor Relations Board).

102. *See* 5 U.S.C. § 7116(b)(7)(A) & (B).

103. *See* 5 U.S.C. § 7122(b).