DEFINING DEFERENCE DOWNWARD: HOW THE FEDERAL LABOR RELATIONS AUTHORITY UNDERMINES ARBITRATION FOR UNIONIZED FEDERAL EMPLOYEES

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INTRODUCTION

In one of the three seminal Supreme Court cases on labor arbitration known as the *Steelworkers* Trilogy, Justice Douglas observed that "[t]he present federal labor policy is to promote industrial stabilization through the collective bargaining agreement . . . [A]rbitration is the substitute for industrial strife."[1] Binding arbitration has been permitted in collective bargaining agreements covering Federal employees since President Nixon issued an executive order governing Federal employee collective bargaining rights.[2] After finding that "[i]t has worked well as an expeditious, credible and cost-effective means of dispute resolution," Congress extended the coverage of negotiated arbitration procedures when it expanded and codified Federal employees' collective bargaining rights in the Federal Service Labor-Management Relations Statute.[3] Congress established a three-member, Presidentially-appointed Federal Labor Relations Authority, modeled after the National Labor Relations Board, and gave it authority to adjudicate unfair labor practices committed by Federal agencies and their employee unions, as well as the responsibility to review arbitration decisions involving Federal employee unions that were contrary to law or on grounds "similar to those applied by Federal courts in private sector labor-management relations[.]"[4] As the D.C. Circuit later noted, "Congress thus appears to have intended that in

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1. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

2. Exec. Order No. 11,491, 3 C.F.R. § 870 (1966-1970).

3. 124 CONG. REC. 25,722 (1978).

4. 5 U.S.C. § 7122(a). There is a jurisdictional carve-out for arbitration cases involving what are known as major "adverse actions" - disciplinary suspensions for more than 14 days, furloughs in excess of 30 days, downgrades, and removals based on poor performance or misconduct. These arbitration decisions are reviewed by the U.S. Court of Appeals for the Federal Circuit as if they were decisions of the U.S. Merit Systems Protection Board, which adjudicates appeals from such disciplinary and performance-based adverse actions for non-unionized Federal employees and from those unionized Federal employees who elect to appeal to the MSPB in lieu of filing a grievance under their collective bargaining agreement. 5 U.S.C. § 7122(f), 5 U.S.C. § 7703.

the area of arbitral awards the Authority would play in federal labor relations the role assigned to district courts in private sector labor law."[5]

In the private sector, arbitration awards are owed "the greatest deference imaginable."[6] Courts may not set aside an arbitrator's decision on the merits even if it rests on factual errors or misinterprets the parties' agreement, so long as the arbitrator's award draws its essence from the collective bargaining agreement.[7] Stated another way, an arbitrator "has the right to be wrong" when she interprets an agreement, and a court may not second-guess her decision.[8] As then Circuit Judge Kavanaugh explained, "[t]his extraordinarily deferential standard is essential to preserve the efficiency and finality of the labor arbitration process."[9]

The FLRA has historically paid lip service to this extraordinarily deferential standard.[10] However, in one of its earliest cases, the Authority adopted a test that has allowed it to set aside an arbitrator's award if, in the Authority's view, it was not based on a "plausible" interpretation of the parties' collective bargaining agreement.[11] A majority of the current members of the FLRA, all of whom were appointed by President Trump, have utilized this flexible, subjective standard to reverse the overwhelming majority of arbitration decisions that have been in the favor of Federal employee labor unions when Federal agencies have alleged that the award did not draw its "essence" from the parties' collective bargaining agreement.[12] In the spring of 2020, the FLRA abandoned all pretense of being constrained by the limited scope of review under private sector arbitration. It held that the private sector standard was only "guidance" and that it was free to set aside arbitration awards when it disagreed with the arbitrator's interpretation of the underlying collective bargaining agreement.[13] The impact of this decision is consequential. There are over 1.2 million unionized Federal employees who work under, and whose employment rights are defined by, collective bargaining agreements negotiated on their behalf by a myriad of Federal employee unions.[14]

Part I of this article will briefly review the standards under which Federal courts review arbitration awards in the private sector. In Part II, I will discuss how the FLRA has skirted this standard and why, because review of the FLRA's own decisions in arbitration cases is so limited, it has largely been able to avoid judicial review of its failure to adhere to private sector standards. Part III will

5. Griffith v. FLRA, 842 F.2d 487, 491 (D.C. Cir. 1988).
6. Verizon New England, Inc. v. NLRB, 826 F.3d 480, 487 n.3 (D.C. Cir. 2016).
7. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).
8. U.S. Postal Serv. v. Am. Postal Workers Union, 553 F.3d 686, 693 (D.C. Cir. 2009).
9. Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, 589 F.3d 437, 441 (D.C. Cir. 2009).
10. *See* Social Security Admin., 63 F.L.R.A. 691, 692 (2009).
11. U.S. Army Missile Materiel Readiness Command, 2 F.L.R.A. 432, 437–38 (1980).
12. See Appendixes A and B.
13. U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Inst., Miami, Fla., 71 F.L.R.A. 660 (2020).
14. U.S. OFFICE OF PERSONNEL MANAGEMENT, OFFICIAL TIME USAGE IN THE FEDERAL GOVERNMENT, FISCAL YEAR 2014 app. B at 8 (2017), https://www.opm.gov/policy-data-oversight/labor-management-relations/reports-on-official-time/reports/2014-official-time-usage-in-the-federal-government.pdf.

discuss the Authority's recent decision in *United States Dep't. of Justice, Federal Bureau of Prisons*, in which it held that it was no longer bound by private sector standards when reviewing an arbitrator's interpretation of an agreement. And in Part IV, I will demonstrate that the Authority's decision in *Bureau of Prisons* is contrary to Congress's intent in enacting the FSLMR Statute. The Authority based its decision in *Bureau of Prisons* on the distinction it attempted to draw between private and public sector arbitration. Part V discusses how this underlying rationale for the Authority's decision has been rejected by the courts who have found that deference to an arbitrator's interpretation of a collective bargaining agreement in public sector arbitration is as salient as it is in private sector.

I. THE STANDARD OF REVIEW IN PRIVATE SECTOR ARBITRATION.

Sixty years ago, the Supreme Court issued three decisions, known as the *Steelworkers* Trilogy, that established a strong national policy favoring resolution of labor disputes by arbitration.[15] One of those cases, *United Steelworkers of America v. Enterprise Wheel and Car Co*.,[16] is the foundational decision that establishes the principle that an arbitrator's interpretation of a collective bargaining agreement should not be disturbed. "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards," wrote Justice Douglas.[17] As he explained, "[i]t is the arbitrator's construction of the contract which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation is different from his."[18] The decision contains one caveat that regularly forms the basis of an appeal by those who attempt to overturn an arbitration award:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He 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.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[19]

The Supreme Court refined the standard of review in this area in two cases, *United Paperworkers Int'l Union v. Misco, Inc*.,[20] and *Major League Baseball*

15. Pittsburgh Metro Area Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 938 F. Supp. 2d 555, 559 (W.D. Pa. 2013).

16. 363 U.S. 593 (1960).

17. *Id.* at 596.

18. *Id.* at 599.

19. *Id.* at 597 (emphasis added).

20. 484 U.S. 29 (1987).

Players Ass'n v. Garvey,[21] which made it even harder to overturn a labor arbitrator's award. In *Misco*, the Court wrote that "parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract."[22] The Court refined the test for determining whether an arbitrator's award draws its essence from the collective bargaining agreement. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[23] In *Garvey* the Court reiterated what it said in *Misco*: "even 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority."[24]

More recently, the Supreme Court applied *Enterprise Wheel* and *Misco* to review of a commercial arbitration award between a health insurance company and a contracted physician. It observed that "convincing a court of an arbitrator's error–even his grave error–is not enough . . . The potential for mistakes is the price of agreeing to arbitration."[25] In her opinion for the Court, Justice Kagan boiled the "essence" test down even further, writing that "the question for the judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all."[26] This is in contrast to a case in which "an arbitrator exceeded his jurisdiction by basing his award solely upon his perception of the equities of the situation without even referring to the collective bargaining agreement."[27] In such cases an arbitrator's award may be set aside under *Enterprise Wheel* because he is "dispens[ing] his own brand of industrial justice."[28]

II. THE FLRA'S HISTORIC APPROACH.

The FLRA has historically purported to accept this limitation on the scope of its authority to review arbitration awards:

> The Authority's role when addressing exceptions claiming that an arbitrator's award does not draw its essence from the parties' agreement has been narrowly defined by Congress. . . . Consistent with this narrow definition,

21. 532 U.S. 504, 509 (2001).
22. 484 U.S. at 371.
23. *Id.*
24. 532 U.S. at 510.
25. Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 572–73 (2013).
26. *Id.* at 573.
27. Loveless v. Eastern Air Lines, Inc., 681 F.2d 1272, 1279 (11th Cir. 1982).
28. 363 U.S. at 597. There are other grounds upon which Federal courts may set aside a private sector arbitration award that do not involve a challenge to the arbitrator's interpretation of the collective bargaining agreement, and they are incorporated in the Authority's regulations. They include cases in which the arbitrator exceeded his or her authority, was biased, or denied the excepting party a fair hearing. Awards may also be set aside if they are "based on a nonfact," are incomplete, ambiguous, so contradictory as to make implementation of the award impossible; or contrary to public policy. 5 C.F.R. § 2425.6(b).

the Authority has consistently reviewed arbitral awards under the deferential standards adopted by the Federal courts.[29]

The Authority has, at times, professed fidelity to *Misco.*[30] Nonetheless, the Authority has rejected the limitations which *Misco* placed on the ability to review an arbitrator's interpretation of a collective bargaining agreement. In *Social Security Administration and American Federation of Government Employees,* the Authority rejected the *Misco* standard of review because it would require the Authority to affirm an arbitrator's interpretation of an agreement "regardless of how absurd that interpretation might be."[31]

The Authority often sets aside arbitration awards because it does not agree that the arbitrator's interpretation of the collective bargaining agreement was "plausible."[32] The "plausible interpretation" test for determining whether an award draws its essence from the collective bargaining agreement first appeared in the Authority's 1980 decision in *United States Army Missile Materiel Readiness Command*, issued well before *Misco* and *Garvey* were decided.[33] In *United States Army Missile Materiel Readiness Command,* the FLRA relied on a decision in which the Ninth Circuit wrote that an arbitration award must be confirmed "if, on its face, the award represents a plausible interpretation of the contract in the context of the parties' conduct[.]"[34] However, relying on *Misco* and *Garvey,* the Ninth Circuit more recently "retire[d] the use of 'plausibility' as a term to describe the courts' role in reviewing labor arbitration awards" because it is "somewhat misleading" and "could suggest some inquiry into the *quality* of the arbitrator's interpretation. . . [which] is, and has always been, beside the point."[35] "Instead, the appropriate question for a court to ask when determining whether to enforce a labor arbitration award interpreting a collective bargaining agreement is a simple binary one: Did the arbitrator look at and construe the contract, or did he not?"[36]

The Authority's failure to pay fidelity to *Enterprise Wheel, Misco* and their progeny has caused great mischief of late. Although Congress intended the FLRA to be "free from bias towards either party,"[37] its pro-management bias is patent. An analysis of the decisions issued through August 1, 2020 by the present

29. Social Security Admin., 63 F.L.R.A. 691, 692 (2009).

30. *E.g.*, U.S. Information Agency, 55 F.L.R.A. 197, 199 (1999); U.S. Dep't of Labor*,* 34 F.L.R.A. 573, 575 (1990).

31. 64 F.L.R.A. 1119, 1121 (2010).

32. *E.g.*, U.S. Dep't of the Treasury, Off. of the Comptroller of the Currency, 71 F.L.R.A. 387, 398 (2019); U.S. Dep't of Def., Domestic Elementary & Secondary Schs., 71 F.L.R.A. 236, 237 (2019); U.S. Dep't of the Army, Aberdeen Proving Ground Rsch., Dev. & Admin., Aberdeen Proving Ground, Md.,71 F.L.R.A. 54, 55 (2019); U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Inst., Phx., Ariz, 70 F.L.R.A. 1028, 1030 (2018); U.S. Dep't of the Navy, Naval Supply Sys. Command, Fleet Logistics Ctr., 70 F.L.R.A. 817, 818 (2018); U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Detention Ctr., Guaynabo, P.R., 58 F.L.R.A. 553, 554 (2003).

33. 2 F.L.R.A. 432, 437–38 (1980).

34. Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers Int'l Union, AFL-CIO, 412 F.2d 899, 903 (9th Cir. 1969).

35. Sw. Regional Council of Carpenters v. Drywall Dynamics, Inc., 823 F.3d 524, 532 (9th Cir. 2016).

36. *Id.*

37. 124 CONG. REC. 25721 (1978).

membership of the FLRA reveals that its insufficiently deferential standard has allowed it to set aside arbitration awards in the overwhelming majority of cases in which the union had earlier prevailed. In contrast, the FLRA has yet to set aside an arbitration award in management's favor on "essence" grounds. Federal agencies filed Exceptions alleging that the arbitrator's award did not draw its essence from the parties' agreement in 46 cases. The FLRA set aside the arbitrator's award in 28 of those cases. In other words, although the Supreme Court has said that arbitration awards should be set aside "only in rare instances,"[38] the FLRA substituted its interpretation of the contract for that of the arbitrator and set aside on essence grounds arbitration awards that were in a union's favor nearly *two-thirds of the time*.[39] In contrast, unions filed Exceptions to arbitration awards on "essence" grounds in 16 cases, and none were granted.[40]

The Authority's sole Democratic member,[41] Ernest DuBester, has taken "strong issue with the majority's continuing effort to undermine our longstanding national policy favoring labor-management arbitration and to erode the attendant deference that should be accorded to arbitrators in their interpretation of collective-bargaining agreements."[42] In another dissent, Member DuBester specifically accused the Authority's majority of ignoring the *Misco* standard. "[W]hile it is clear that the majority does not care for this Arbitrator's interpretations," DuBester wrote, "the majority should heed the U.S. Supreme Court's injunction that 'if an arbitrator is *even arguably construing or applying the contract* . . . the fact that a court is convinced he committed serious error does not suffice to overturn his decision.'"[43] DuBester has repeatedly accused the majority of intentionally substituting its interpretation of a collective bargaining agreement for that of an arbitrator "simply to reach a different outcome on the merits."[44]

Among the arbitration awards set aside were those that rescinded the unilateral implementation of a new performance appraisal system,[45] reinstated the termination of the collective bargaining agreement,[46] mitigated discipline,[47]

38. Eastern Associated Coal Corp. v. United Mineworkers of Am.., 531 U.S. 57, 62 (2000).

39. *See* Appendix A.

40. *See* Appendix B.

41. No more than two members of the Authority may be adherents of the same political party. 5 U.S.C. § 7104(a).

42. U.S. Dep't of Homeland Security, U.S. Customs & Border Prot., U.S. Border Patrol, Laredo, Tex., 71 F.L.R.A. 106, 108 (2019) (Member DuBester, dissenting).

43. U.S. Small Bus. Admin., 70 F.L.R.A. 525, 532 (2018) (Member DuBester, concurring in part and dissenting in part) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001)).

44. Nat'l Weather Serv. Emps. Org.., 71 F.L.R.A. 275, 279 (2019); *Homeland Security*, 71 F.L.R.A. at 110.

45. U.S. Dep't of Defense Educ. Activity, Alexandria, Va., 71 F.L.R.A. 765 (2020).

46. Nat'l Weather Serv. Emps. Organ., 71 F.L.R.A. 275 (2019).

47. U.S. Dep't of the Air Force, 673rd Air Base Wing Joint Base Elmendorf-Richardson, Alaska, 71 F.L.R.A. 781 (2020); U.S. Dep't of Veterans Affairs, James A. Haley Veterans Hosp., 71 F.L.R.A. 699 (2020).

reimbursed travel expenses,[48] granted temporary promotions,[49] remedied the loss of overtime opportunities,[50] and awarded overtime or other premium pay.[51]

Remarkably, the FLRA has been able to escape scrutiny of the freewheeling manner in which it has overturned arbitration awards because the Authority's decisions in arbitration cases are largely unreviewable. Only those FLRA decisions in arbitration cases which also "involve" unfair labor practices prohibited by the FSLMR Statute are subject to judicial review.[52] Such a case did arise, however, after the National Weather Service terminated its collective bargaining agreement with its employees' union in what the Associated Press characterized as perhaps "the first major labor showdown of the Trump Administration."[53] According to the NWS, the union had not timely sought the assistance of the Federal Mediation and Conciliation Service during negotiations for a successor agreement as required by the expiring agreement. Arbitrator Laurence Evans subsequently ruled that the NWS violated the parties' agreement by terminating it, but that the NWS had not committed an unfair labor practice is so doing, as the union had alleged.[54] The FLRA affirmed the arbitrator's finding that the NWS had not committed an unfair labor practice, but set aside the remainder of his award because the arbitrator's interpretation of the termination clause of the agreement was "not consistent with the undisputed purpose and intent" of that clause.[55] The FLRA concluded that the arbitrator's award did not draw its "essence" from the agreement because his interpretation was "unconnected with the wording and purposes" of the agreement.[56]

The D.C. Circuit set aside the FLRA's decision in *NWSEO* because the Authority "failed to apply the correct standard of review" to Evans' arbitration award.[57] "The Authority's view that the Arbitrator erred in his interpretation of the CBA is inadequate to warrant vacatur of the Arbitrator's Award," the Court wrote.[58] Citing *Misco,* the Court said that "the Authority's sole inquiry under the proper standard of review should have been whether the Arbitrator was 'even arguably construing or applying'" the collective bargaining agreement [59]

48. U.S. Dep't of Homeland Security, U.S. Customs & Border Prot., 71 F.L.R.A. 744 (2020).

49. U.S. Dep't of Veterans Aff. Med. Ctr., Asheville, N.C., 70 F.L.R.A. 671 (2018); U.S. Small Bus. Admin., 70 F.L.R.A. 525 (2018).

50. U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Inst., 71 F.L.R.A. 660 (2020); U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Inst., Aliceville, Ala.., 71 F.L.R.A. 716 (2020).

51. U.S. Dep't of the Navy, Naval Supply Sys. Command, Fleet Logistics Ctr., 70 F.L.R.A. 817 (2018); U.S. Dep't of the Navy, Military Sealift Command, 70 F.L.R.A. 671 (2018).

52. 5 U.S.C. § 7123(a)(1); Overseas Educ. Ass'n v. FLRA, 824 F.2d 61, 62–63 (D.C. Cir. 1987).

53. Seth Borenstein, *National Weather Service Cancels Its Union Contract,* SEATTLE TIMES (July 21, 2017, 1:51 PM), https://www.seattletimes.com/nation-world/nation-politics/national-weather-service-cancels-its-union-contract/ [https://perma.cc/9PB8-CY48].

54. Nat'l Weather Ser., Nat'l Oceanic and Atmospheric Admin., Dep't of Commerce, FMCS Case No. 170914-54764 (2018) (Evans, Arb.).

55. Nat'l Weather Serv. Emps. Org., 71 F.L.R.A. 380, 382 (2019).

56. *Id.*

57. Nat'l Weather Serv. Emps. Org. v. FLRA, 966 F.3d 875 (D.C. Cir. 2020).

58. *Id.* at 882.

59. *Id.* at 881.

"Whether the Arbitrator correctly interpreted the CBA was beyond the scope of the Authority's review."[60]

III. THE FLRA JETTISONS THE *STEELWORKERS* TRILOGY.

Shortly after NWSEO was briefed and argued, but before it was decided, a two-member majority of the FLRA simply ruled in *United States Dep't. of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Miami, Florida*[61] that *Enterprise Wheel* and the standard of review of private sector arbitration awards no longer applies to it. The Authority noted that although the FSLMR Statute permits it to review arbitration awards "on grounds *similar* to those applied by Federal courts in the private sector," Congress did not say "the same as."[62] It therefore concluded that "[t]he Statute does not address what degree of deference should be accorded arbitrators."[63] It reasoned that "the applicability of the *Steelworkers* cases in the federal public sector is limited" because "[t]he foundations which underlie collective bargaining in the private and public sectors are quite distinct."[64] In a non sequitur, the Authority wrote that it should not apply the same degree of deference to an arbitrator's interpretation of a Federal sector collective bargaining agreement because, unlike in the private sector, certain conditions of employment are provided for by statute or regulation rather than entirely by the agreement.[65] The majority accused its dissenting colleague of elevating the *Steelworkers* Trilogy "to mythological status," and that henceforth it would consider the Trilogy to be "valuable guidance" rather than binding precedent that limits its scope of review.[66] In his concurrence, Member Abbott wrote that he would have gone further by holding that the Authority should no longer defer to any arbitrator's decision that it deems erroneous.[67]

In his dissent, Member DuBester argued that there were other features in the FSLMR Statute that respected the differences between Federal government and private sector employment, such as a limitation on the scope of what can be bargained for inclusion in a Federal sector collective bargaining agreement, and a prohibition against strikes, work stoppages and picketing that interferes with an agency's operations.[68] Notably, the Statute specifically allows the Authority to set aside arbitration awards that conflict with the myriad of Federal laws and regulations that govern much of Federal employment.[69] "But it simply does not follow that private sector principles governing essence exceptions to arbitration awards, including the standards set forth in the *Steelworkers* Trilogy, are not

60. *Id.*
61. 71 F.L.R.A. 660 (2020).
62. *Bureau of Prisons*, 71 F.L.R.A. at 664 (citing 5 U.S.C. § 7122(a)(2)).
63. *Id.*
64. *Id.*
65. *See id.*
66. *Id.* at 663, 664.
67. *Id.* at 667–68.
68. *Id*. at 673.
69. *Id.* at 673; 5 U.S.C. § 7122(a)(1).

appropriately applied to federal sector arbitration awards."[70] He concluded the majority's decision was nothing more than license to substitute their own interpretation of Federal sector collective bargaining agreements for that of arbitrators. "Congress could not have been clearer that this is not the role it intended the Authority to play in federal sector collective bargaining."[71]

IV. THE FLRA'S DECISION DEFIES CONGRESSIONAL INTENT

The Authority's fundamental error in *Bureau of Prisons* was its mistaken belief that "[t]he Statute does not address what degree of deference should be accorded to arbitrators."[72] As we have discussed, the Authority may only vacate arbitration awards if they are "contrary to any law, rule, or regulation," or "on other grounds similar to those applied by Federal courts in private sector labor-management relations."[73] That later phrase had an established meaning when Congress enacted the Statute, and it incorporated the *Steelworkers* standard. As we will see, "grounds similar to" those applied in the private sector was intended to mean "the same as."

A series of executive orders issued by Presidents Kennedy and Nixon governed relations between Federal agencies and the unions that represented their employees before Federal employee collective bargaining was codified by the FSLMR Statute in 1978.[74] One of those executive orders created the Federal Labor Relations Council, which was the forerunner of today's Federal Labor Relations Authority.[75] The order provided that "[e]ither party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council."[76] The Council's regulations provided that a review of an arbitration award will be granted if it violates "applicable law, appropriate regulation, or the [executive] order, or *other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations*."[77] The Council explicitly held that this phrase was intended to incorporate the *Steelworkers* Trilogy standard which precluded it from reviewing an arbitrator's interpretation of a collective bargaining agreement. In rejecting a request from the Department of Labor to set aside an arbitrator's award, the Council held:

> [T]he Supreme Court has emphasized that "If the arbitrator's decision concerns construction of the contract, the courts have no business overruling

70. *Id.* at 674.

71. *Id.* at 676.

72. *Id.* at 664.

73. 5 U.S.C. § 7122(a).

74. *See A Short History of the Statute*, FLRA, https://www.flra.gov/resources-training/resources/statute-and-regulations/statute/short-history-statute [https://perma.cc/E4UB-NEBM] (last visited Oct. 15, 2020).

75. Exec. Order No. 11,491, 3 C.F.R. § 861 (1966-1970).

76. 3 C.F.R. § 870.

77. Former 5 C.F.R. § 2411.32, reprinted at Information Announcement, 4 F.L.R.C. 719, 721–22 (July 2, 1976) (emphasis added). Decisions of the Federal Labor Relations Council are available at *Archival Decisions, Legislative History, & Foreign Service Decisions*, FLRA, https://www.flra.gov/decisions/archival-decisions-legislative-history-foreign-service-decisions [https://perma.cc/T735-5LY8] (last visited Oct. 18, 2020).

> him because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 599 (1960). Therefore, a challenge to the arbitrator's interpretation of the agreement does not assert a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations, and provides no basis for acceptance of your petition for review under section 2411.32 of the Council's rules.[78]

The Council repeatedly applied *Enterprise Wheel* and the private sector standard for review of arbitration awards.[79] "[C]onsistent with the clear practice followed by the courts in reviewing private sector arbitration awards, [we] will not interfere with the arbitrator's award solely because our own interpretation of the agreement might have been different," wrote the Council.[80] Congress incorporated the private-sector standard of review employed by the Council when it adopted into the FSLMR Statute the same scope of review contained in the Council's regulations at §2411.32 nearly verbatim.[81] There is no indication in the words of the Statute or its legislative history that Congress intended that the Authority would be empowered to re-interpret collective bargaining agreements, or that it intended the Authority to be less solicitous of binding arbitration. On the contrary, the conference report on the FSLMR Statute confirms that "[t]he 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 public sector."[82] Subcommittee Chairman Clay, a major proponent of the Statute, explained that Congress was aware of how arbitration was working under the Executive Order and did not intend to change the process:

> Binding arbitration has been permitted for grievances (as opposed to statutory appeals) since President Nixon issued his Executive Order in 1969. It has worked well as an expeditious, credible and cost-effective means of dispute resolution. Thus, [the FSLMR Statute] does not represent a change, but rather an extension of the well-tested provisions of the Executive order.[83]

78. Am. Fed'n of Gov't. Emps, Local 12, 1 F.L.R.C. 545, 547 (1973).

79. *E.g.*, Prof. Air Traffic Controllers Organization, 2 F.L.R.C. 146, 159 (1974); Am. Fed'n Gov't. Emps., Local 2649, 2 F.L.R.C. 289, 292 (1974); Charleston Naval Shipyard, 3 F.L.R.C. 416, 418–19 (1975); Supervisor, New Orleans, La. Commodity Inspection Branch, Grain Div., U.S. Dep't of Agriculture, 3 F.L.R.C. 406, 408 (1975); Social Security Admin., 3 F.L.R.C. 433, 425 (1975); Fed. Aviation Admin., 3 F.L.R.C. 452, 456 (1975); Nat'l Ass'n of Gov't. Emps., Local R8-14, 3 F.L.R.C. 476, 478-79 (1975); Norfolk Naval Shipyard, 3 F.L.R.C. 509, 512 (1975); Community Services Admin., 3 F.L.R.C. 543, 545 (1975).

80. Nat'l Assn. of Gov't Emps., 3 F.L.R.C. at 481–82.

81. "When Congress codifies language that has already been given meaning in a regulatory context, there is a presumption that the meaning remains the same." Strickland v. Comm'r, Me. Dep't of Human Servs., 48 F.3d 12, 20 (1st Cir. 1995). "Congress is presumed to be aware of an administrative agency's interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Lorillard v. Pons, 434 U.S. 575, 580 (1978). "[W]here Congress has re-enacted the statute without pertinent change. . . congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 75, (1974); *accord* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986).

82. H.R. REP. No. 95-1717, at 153 (1978) (Conf. Rep.).

83. 124 CONG. REC.25722 (1978).

In *Griffith v. FLRA,*[84] the D.C. Circuit concluded that Congress sought to incorporate the policies and practices of private sector arbitration, including the limited scope of review of arbitration awards, into the FSLMR Statute:

> Our reading of the Act comports also with what we believe to have been a major object of the legislation: extending the benefits of arbitration in labor relations from the private to the public sector. In *The Steelworkers Trilogy,* the Supreme Court exalted the role of the arbitrator in labor-management disputes and set out a general policy of judicial deference to the decisions of arbitrators. . . Moreover, the policies underlying judicial deference to arbitral decisions are as important for public as for private employment.

Similarly, the D.C. Circuit later wrote that "[w]e thought it clear that Congress expected the FLRA's review of arbitrators' awards to track closely the federal court's limited review of arbitrators' awards in the private sector."[85] The Court then noted that "[t]he private sector arbitrator must confine himself to interpreting the agreement; as long as he does his award is virtually unreviewable."[86]

V. THE FLRA'S REASONING HAS BEEN REJECTED BY THE COURTS.

In *Bureau of Prisons* the Authority rejected the application of the *Steelworkers* Trilogy because "[t]he foundations which underlie collective bargaining in the private and public sectors are quite distinct."[87] But, as the D.C. Circuit has succinctly stated, "the possible grounds for treating arbitral decisions in the federal sector less deferentially than private sector decisions cannot withstand careful scrutiny."[88] It observed that the management rights that the FLRA thought essential are adequately protected by other provision of the statute and that "limiting the deference due arbitrators' decisions is not necessary to ensure that these rights are respected."[89] In declining to review the FLRA's decision in an arbitration case, the Second Circuit opined that "[t]he policy in favor of quick and definite resolution is strong whether in the private sector, or the public sector."[90] Numerous state courts have also rejected the private/public sector distinction as a basis for not applying the *Steelworkers* Trilogy and its deferential standard.[91]

84. 842 F.2d 487, 492 (D.C. Cir. 1988).

85. U.S. Dep't of the Treasury v. FLRA, 43 F.3d 682, 688 (D.C. Cir. 1995).

86. *Id.* at 689.

87. 71 F.L.R.A. at 664.

88. Devine v. White, 697 F.2d 421, 439 (D.C. Cir. 1983), *abrogated by* Cornelius v. Nutt, 472 U.S. 648 (1985).

89. *Id.* at 437.

90. U.S. Dep't of Justice v. FLRA, 792 F.2d 25, 29 (2d Cir. 1986) (internal citations omitted).

91. *E.g.*, Iowa City Cmty. Sch. Dist. v. Iowa City Educ. Ass'n, 343 N.W.2d 139, 142 (Iowa 1983); Ramsey Cty. v. Am. Fed'n of State, Cty. & Mun. Emp., Council 91, Local 8, 309 N.W.2d 785, 790 (Minn. 1981); Jacinto v. Egan, 391 A.2d 1173, 1176 (R.I. 1978); Community College of Beaver County v. Society of Faculty, 375 A.2d 1267, 1274, 1278 (Pa. 1977).

For example, the Supreme Judicial Court of Maine has concluded that "the Steelworkers' philosophy . . . is equally acceptable in the public sector."[92]

In a thorough analysis, the Sixth Circuit rejected a government corporation's claim that the principles developed in private sector labor arbitration are not applicable to the Federal sector.[93] "In particular, [Tennessee Valley Authority] objects to the lower court's reliance on the Steelworkers Trilogy as those cases were brought under § 301(a) of the Labor Management Relations Act," the Court noted.[94] But the Court of Appeals disagreed. Although it recognized that the Tennessee Valley Authority (TVA) is an agency of the United States, it could "find no valid reason not to apply principles of arbitration law developed in the context of private sector labor disputes."[95] It went on to hold that "the principles of arbitration law developed in private sector labor disputes and enunciated by the Supreme Court in the Steelworkers Trilogy shall be applied to labor disputes between the TVA and unions with which it has a collective bargaining agreement."[96] The Court of Appeals explained that the "TVA has presented us with no compelling reason why principles of arbitration law developed in the private sector should not be applied to TVA's labor disputes. To the contrary we find several reasons why it is appropriate to apply such principles."[97] The Court observed that grievance and arbitration provisions in both private sector and federal sector collective bargaining agreements "serve the same basic function - to provide efficient procedures for resolving labor disputes" and that "[t]he functions served by grievance and arbitration procedures in the private sector are almost identical to those served by such procedures in the public sector."[98] The Court identified those functions as providing a relatively speedy and inexpensive method of resolving labor disputes, a way to give employees the satisfaction of knowing that the resolution of any dispute they may have with their employer lies with a neutral party rather than with her employer, preserving judicial resources by establishing a method for resolving labor disputes independent of the courts and ultimately preserving industrial peace.[99] The Court also wrote that its "conclusion is reinforced by the fact that state courts increasingly are applying principles developed in the private sector to public employee labor disputes."[100] In sum, the Court wrote that "[w]e find the reasons for applying federal common law principles of private sector labor arbitration law compelling."[101]

92. Lewiston Firefighters Ass'n, Local 785 v. City of Lewiston, 354 A.2d 154, 166 (Me. 1976).

93. Salary Pol'y Emp. Panel v. Tenn. Valley Auth., 731 F.2d 325 (6th Cir. 1984). The Tennessee Valley Authority is not covered by either the FSLMR Statute or the private sector Labor Management Relations Act, but has collectively bargained with its employees voluntarily since the late 1930s. *See generally* Coleman v. Tenn. Valley Trades & Labor Council, 396 F. Supp. 671 (E.D. Tenn. 1975).

94. *Salary Pol'y Emp. Panel*, 731 F.2d at 328.

95. *Id.* at 328.

96. *Id.*

97. *Id*. at 330.

98. *Id.*

99. *Id*. at 330–31.

100. *Id*. at 331.

101. *Id.*

CONCLUSION

In its recent decision in *NWSEO*, the D.C. Circuit confirmed that "[w]hen reviewing an arbitrator's award, the Authority is required to apply a similarly deferential standard of review that a federal court uses in private-sector labor-management issues."[102] However, neither the D.C. nor other circuits of the Court of Appeals have yet to confront the Authority's new reasoning in *Bureau of Prisons.* Time will tell whether the Authority will reassess its standard of review in light of *NWSEO*, or whether it will continue to cavalierly substitute its interpretation of the collective bargaining agreement for that of the arbitrator when the union prevails.

102. Nat'l Weather Serv. Emps. Org. v. FLRA, 966 F.3d 875, 881 (D.C. Cir. 2020).

APPENDIX A

Decisions issued by the current membership of the FLRA on Exceptions to arbitration awards filed by Federal agencies alleging that the award failed to draw its "essence" from the collective bargaining agreement. Awards set aside in whole or in part are denoted by *. Exceptions which were dismissed without addressing the merits (as untimely, interlocutory, or outside of the FLRA's jurisdiction) and requests for reconsideration have been excluded. These decisions are reported by the Authority by the issuance number identified below on its website at https://www.flra.gov/decisions/authority-decisions. Data is current through August 1, 2020.

70 FLRA No. 100
70 FLRA No. 107*
70 FLRA No. 109
70 FLRA No. 111*
70 FLRA No. 125*
70 FLRA No. 133*
70 FLRA No. 136*
70 FLRA No. 146*
70 FLRA No. 150*
70 FLRA No. 161*
70 FLRA No. 163*
70 FLRA No. 169
70 FLRA No. 183*
70 FLRA No. 198*
71 FLRA No. 4
71 FLRA No. 12*
71 FLRA No. 18
71 FLRA No. 19*
71 FLRA No. 31*
71 FLRA No. 41
71 FLRA No. 43*
71 FLRA No. 47*
71 FLRA No. 50
71 FLRA No. 52
71 FLRA No. 57
71 FLRA No. 64
71 FLRA No. 67
71 FLRA No. 70
71 FLRA No. 65*
71 FLRA No. 73*
71 FLRA No. 108

71 FLRA No. 111* (set aside in part on other grounds)
71 FLRA No. 117
71 FLRA No. 122* (set aside in part on other grounds)
71 FLRA No. 125*
71 FLRA No. 126
71 FLRA No. 129* (set aside on other grounds)
71 FLRA No. 132*
71 FLRA No. 135*
71 FLRA No. 143*
71 FLRA No. 148*
71 FLRA No. 153*
71 FLRA No. 155*
71 FLRA No. 160*
71 FLRA No. 164*
71 FLRA No. 170*

APPENDIX B

FLRA decisions on Exceptions to arbitration awards filed by unions alleging that the award failed to draw its "essence" from the collective bargaining agreement. Awards set aside in whole or in part are denoted by *. Exceptions which were dismissed without addressing the merits (as untimely, interlocutory, or outside of the FLRA's jurisdiction) and requests for reconsideration have been excluded. Data is current through August 1, 2020.

70 FLRA No. 121
70 FLRA No. 130
70 FLRA No. 156
70 FLRA No. 158
70 FLRA No. 170
70 FLRA No. 190
71 FLRA No. 21
71 FLRA No. 53
71 FLRA No. 62* (set aside in part on other grounds)
71 FLRA No. 69
71 FLRA No. 96
71 FLRA No. 106
71 FLRA No. 128
71 FLRA No. 151
71 FLRA No. 163
71 FLRA No. 166