UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, National Council of HUD Locals Council 222, AFL-CIO,

Plaintiff,

v.

FEDERAL LABOR RELATIONS AUTHORITY, et al.,

Defendants.

Civil Action No. 1:19-cv-00998 (CJN)

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is

ORDERED that Plaintiff's Motion for Summary Judgment, ECF No. 28, is **GRANTED**; and it is further

ORDERED that Defendants' Motion for Reconsideration and Cross-Motion for Summary Judgment, ECF No. 27, is **DENIED**.

This is a final appealable order.

The Clerk is directed to terminate this case.

DATE: September 27, 2022

CARL J. NICHOLS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, National Council of HUD Locals Council 222, AFL-CIO, *Plaintiff,* v. FEDERAL LABOR RELATIONS AUTHORITY, et al., *Defendants.*	Civil Action No. 1:19-cv-00998 (CJN)

MEMORANDUM OPINION

The American Federation of Government Employees claims that the Federal Labor Relations Authority exceeded its statutory authority when it vacated a number of arbitration awards issued over a thirteen-year period. *See generally* Compl., ECF No. 1. The Court previously denied the Authority's Motion to Dismiss, holding that it had jurisdiction to review the Authority's decision under the doctrine established in *Leedom v. Kyne*, 358 U.S. 184 (1958). *See generally* Mem. Op., ECF No. 25. For many of the same reasons, the Court now grants the Union's Motion for Summary Judgment, ECF No. 28, and denies the Authority's Motion for Reconsideration and Cross-Motion for Summary Judgment, ECF No. 27.

I. BACKGROUND

A. Statutory Context

The Court previously laid out the relevant statutory framework, *see* Mem. Op. at 1–3, but given its complexity, another review is necessary.

This case involves the Federal Service Labor Management Relations Statute, 5 U.S.C. §§ 7101, *et seq.* The Statute seeks to ensure that federal employees can "organize, bargain collectively, and participate through labor organizations" because, Congress determined, doing so "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." *Id.* § 7101(a)(1). Congress also created the Federal Labor Relations Authority—Defendant here—to administer the Statute and to "regulate labor-management relations for the federal government." *Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 392 F.3d 498, 499 (D.C. Cir. 2004) ("*Treasury Union*").

As the Court previously explained, "the Authority has the power to review arbitration awards between unions and agencies." Mem. Op. at 2. Indeed, the Statute requires that every union-agency collective-bargaining agreement "provide procedures for the settlement of grievances, including questions of arbitrability," 5 U.S.C. § 7121(a)(1), such that "any grievance not satisfactorily settled under the negotiated grievance procedure" is resolved through "binding arbitration," *id.* § 7121(b)(1)(C)(iii). This arbitration can be invoked by either party, *id.*, and either party may ask the Authority to review an arbitration award by filing an "exception" to the award, *id.* §§ 7105(a)(2)(H), 7122(a).

"If a party files an exception, and if the Authority concludes that the arbitral award is unlawful or 'deficient' on 'grounds similar to those applied by Federal courts in private sector labor-management' disputes, then the Authority may take whatever 'action . . . it considers necessary, consistent with applicable laws, rules[,] or regulations.'" Mem. Op. at 2 (quoting 5 U.S.C. § 7122(a)). But if no party files an exception within thirty days, the arbitrator's award becomes "final and binding." 5 U.S.C. § 7122(b). This process thus "ensure[s] that arbitration

awards are subject to review and are obeyed once upheld by the Authority." *Treasury Union*, 392 F.3d at 499.

"The Authority's review is narrow, which promotes finality." Mem. Op. at 2 (citing 5 U.S.C. §§ 7105(a)(2)(H), 7122(b)). And the Statute shields the Authority's final orders on arbitration awards from judicial review, unless the underlying dispute involves an unfair labor practice. *See* 5 U.S.C. § 7123; *see also Griffith v. Fed. Lab. Rels. Auth.*, 842 F.2d 487, 491 (D.C. Cir. 1988). This "circumscribed judicial review . . . is firmly grounded in the strong Congressional policy favoring arbitration of labor disputes and accordingly granting arbitration results substantial finality." *Overseas Educ. Ass'n v. Fed. Lab. Rels. Auth.*, 824 F.2d 61, 63 (D.C. Cir. 1987). Indeed, once "an arbitrator's award" becomes "final and binding," an agency must "take the actions required by" that "final award." 5 U.S.C. § 7122(b). Failure to do so constitutes an unfair labor practice. *Id.* § 7116(a)(8); *Treasury Union*, 392 F.3d at 499.

B. Facts

There is no genuine dispute regarding the following material facts, *see* Fed. R. Civ. P. 56(a):

"This case involves a complicated saga dating back to 2002." Mem. Op. at 3. The American Federation of Government Employees is a labor organization that represents employees in the Department of Housing and Urban Development. Defs.' Amended Statement of Undisputed Material Facts ("Facts"), ECF No. 29, at ¶¶ 8–9.[1] It has "a longstanding and continuing collective

[1] Any citation to "Facts" indicates that the Union did not dispute the cited material in its Reply to the Authority's Statement of Facts, ECF No. 32-1. The Court notes that the Authority failed to comply with Local Civil Rule 7(h)(1) by not responding to the Union's Statement of Proposed Facts. Such failure allows the Court to thus "assume the facts identified by the [Union] in its statement of material facts are admitted." Loc. Civ. R. 7(h)(1). But for purpose of these motions, the Court will rely on the facts affirmatively admitted by the Union in its Response instead.

bargaining relationship under the Statute" with HUD, *id.* ¶ 11, which is a federal agency subject to the Statute, *id.* ¶ 10.

Since 2002, the Union and HUD have been in arbitration over a grievance involving promotional opportunities for the Union's members. *Id.* ¶ 12. The Union alleged that HUD had violated their collective-bargaining agreement by advertising and filling certain positions with promotion potential to GS-13, even though there were existing qualified employees who were in similar positions with promotion potential to GS-12. *See* Appendix ("App."), ECF Nos. 16-1–16-3, at A1–A4; *see also* Facts ¶ 40. The Union claimed that this "harmed" its members because "they d[id] not have an opportunity to be promoted to the GS-13 without competition." App. at A3. HUD denied the grievance, sending it to arbitration. Facts ¶ 42.

The Arbitrator had to first determine whether the subject matter of the grievances was arbitrable. *Id.* ¶ 43. She found it was arbitrable because it did not involve a classification issue. *Id.* HUD disagreed with this conclusion, and thus filed exceptions to the Authority. *Id.* The Authority, in turn, remanded for clarification. *See id.* ¶ 44; *see also* App. at C1–C4; *U.S. Dep't of Hous. & Urb. Dev.*, 59 F.L.R.A. 630, 632 (2004). The Authority noted that the Arbitrator "would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions," but "would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions." App. at C3. The Parties refer to this decision by the Authority as "*HUD I*."

On remand, the Arbitrator clarified that the grievance alleged the right to be placed in a previously classified position, making it arbitrable. *See* App. at D1–D8. The Parties refer to this as the second arbitrability award. *See* Facts ¶ 44. A few months later the Arbitrator issued her first merits award, sustaining the Union's grievance and directing the upgrade of the grievants'

positions. *See* App. at F1–F16. HUD once again filed exceptions to these awards with the Authority. *See* Facts ¶ 43; *see also* App. at G1–G4; *U.S. Dep't of Hous. & Urb. Dev.*, 65 F.L.R.A. 433, 632 (2011). The Authority left in place the finding of a violation, but remanded for the determination of an alternative remedy. *See* Facts ¶ 44; App. at G4.[2] The Parties refer to this decision as "*HUD II*."

On remand, the Parties again were unable to reach an agreement, and thus resubmitted the issue to the Arbitrator. *See* App. at H2. The Arbitrator "directed both parties to submit proposed alternative remedies. The Union submitted its remedial proposals. However, [HUD] neither submitted any remedial proposals . . . nor responded to the Union's proposals." App. at I2 (footnotes omitted); *U.S. Dep't of Hous. & Urb. Dev.*, 66 F.L.R.A. 867, 868 (2012). The Arbitrator thereafter issued a second merits award requiring HUD to "'process retroactive permanent selections of all affected [Union members] into currently existing career ladder positions with promotion potential to the GS-13 level,' and outlined other alternative remedies in the event that the Authority vacated the first remedy." Facts ¶ 45 (quoting App. at H2).

Once again, HUD filed exceptions to this award. *See id.* ¶ 46. But the Authority dismissed each exception. *See id.*; *see also* App. at I1–I3, *U.S. Dep't of Hous. & Urb. Dev.*, 66 F.L.R.A. 867, 868 (2012). The Authority concluded that, because HUD had failed to raise its objections to the award below, HUD was barred from doing so before the Authority. *See* Facts ¶ 46; *see also* App. at I3. The Parties refer to this decision as "*HUD III*."

[2] Specifically, and as this Court has previously noted, *see* Mem. Op. at 4 n.1, the Authority held that the Arbitrator correctly found that the "grievance was arbitrable because [the grievance] did not concern classification within the meaning of § 7121(c)(5)." *HUD II*, 65 F.L.R.A. at 436. But it concluded that the Arbitrator could not compel HUD to remedy that grievance by upgrading positions because that remedy "involves classification," and "the Statute does not authorize the Arbitrator to change the promotion potential of employees' permanent positions." *Id.* (internal quotation omitted).

"From February 4, 2014 through April 12, 2016, the Arbitrator held ten implementation meetings with [the Union] and HUD and issued a written summary of each meeting." *See* Facts ¶ 47 (collecting citations for each Summary). In each Summary, the Arbitrator noted that she would "continue to maintain jurisdiction over the award, as well as other matters related to implementation." *Id.* ¶ 48 (collecting citations). Similarly, each Summary noted that nothing therein "should be construed as a new requirement or modification of the existing Award." *Id.* ¶ 49 (collecting citations). But HUD often took a different view, filing various exceptions to Summaries with the Authority, claiming in particular that the Arbitrator had exceeded her authority by modifying the award in Summaries 3, 6, and 10. *Id.*

The Authority dismissed the exceptions to Summaries 3 and 6 in four opinions, *HUD IV* through *HUD VII*. *See id.* ¶ 50; App. at U1–U13, *U.S. Dep't of Hous. & Urb. Dev.*, 68 F.L.R.A. 631 (2015) ("*HUD IV*"); App. at AA1–AA7, *U.S. Dep't of Hous. & Urb. Dev.*, 69 F.L.R.A. 60 (2015) ("*HUD V*"); App. at CC1–CC16, *U.S. Dep't of Hous. & Urb. Dev.*, 69 F.L.R.A. 213 (2016) ("*HUD VI*"); App. at KK1–KK4, *U.S. Dep't of Hous. & Urb. Dev.*, 70 F.L.R.A. 38 (2016) ("*HUD VII*"). None of the decisions examined the merits of the underlying awards; instead, each addressed only whether Summaries 3 and 6 had improperly modified the second merits award. Facts ¶ 51 (collecting citations). While each of HUD's exceptions was pending before the Authority, the Arbitrator continued to hold implementation meetings with the Union and HUD. *Id.* ¶ 52 (collecting citations).

The ninth implementation meeting happened in February 2016. Its summary—Summary 9—followed a month later. *Id.* ¶ 53. "In Summary 9, the Arbitrator found that HUD had not answered whether it had requested funding for the second merits award, and ordered HUD to respond to [the Union's] requests for funding data within 14 days." *Id.* ¶ 54. The Arbitrator further

ordered, pursuant to *HUD VI* and *HUD VII*, that HUD must comply with Summaries 3.5 and 6. *Id.* ¶ 55. The Summary also noted that the Parties agreed "to conduct a formal hearing on the record, with testimony, if necessary" regarding "all outstanding matters." *Id.* ¶ 56 (quoting App. at DD4). HUD filed no exceptions with the Authority to Summary 9. *Id.* ¶ 57.

Next came the tenth (and, as it turned out, final) implementation meeting. The Arbitrator issued the summary of this meeting—Summary 10—on June 30, 2016. *Id.* ¶ 58. In it, the Arbitrator stated that she thought an evidentiary hearing was necessary: "This Arbitrator finds that given the current posture of the case, there is a need for a formal evidentiary hearing so that this Arbitrator can ascertain the status of implementation." *Id.* ¶ 59 (quoting App. at FF3–FF4). HUD filed exceptions to this Summary with the Authority on July 29. *Id.* ¶ 60. It argued that the second merits award made no mention of a formal hearing on a record, and thus objected to the Arbitrator ordering one now. *See id.*

On September 15, 2016, the Authority directed HUD to show cause why its exceptions to Summary 10 should not be dismissed. *See* JJ1–JJ5. In particular, the Authority wanted to know why the exceptions should not be dismissed as untimely, given that the Agency's arguments appeared to be directed at arbitral findings made in Summary 9. *See id.*

After issuing this show-cause order, the Authority took no action on the exceptions for over twenty months. But then, on May 24, 2018, it issued its decision in *HUD VIII*. *See id.* ¶ 61; App. at LL1–LL7, *U.S. Dep't of Hous. & Urb. Dev.*, 70 F.L.R.A. 605 (2018). Instead of resolving the exceptions before it, the Authority vacated the Arbitrator's previous awards, Summaries 1 through 10, and its own previous decisions in *HUD I* through *HUD VII*. Facts ¶ 61. In particular, and reversing its position in *HUD II*, the Authority held that the underlying grievance *did* concern a classification matter and that therefore the Arbitrator had always lacked jurisdiction over the

Parties' dispute. *See* App. at LL3, *HUD VII*, 70 F.L.R.A. at 608. The Union moved for reconsideration; the Authority denied that request. *See* Facts ¶ 63; App. at MM1–MM5, *U.S. Dep't of Hous. & Urb. Dev.*, 71 F.L.R.A. 17 (2019) ("*HUD IX*"). This action followed.

C. Procedural History

The Authority previously moved to dismiss, arguing that this Court lacked subject-matter jurisdiction. *See* Mot. to Dismiss, ECF No. 6-1, at 20–22. The Court heard oral argument on the Motion, *see* Minute Entry for January 29, 2020, and subsequently requested supplemental briefing, *see* Minute Order of February 14, 2020. In an opinion that the Court discusses below, it denied the Motion to Dismiss. *See generally* Mem. Op.

The Parties then filed Cross-Motions for Summary Judgment, along with the Authority's Motion for Reconsideration.

II. LEGAL STANDARDS

A. Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, this Court may grant summary judgment when the pleadings, discovery, affidavits, and other material on file show no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). When there are cross-motions for summary judgment, "the [C]ourt shall grant summary judgment only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed." *Airlie Found. v. IRS*, 283 F. Supp. 2d 58, 61 (D.D.C. 2003).

B. Reconsideration under Federal Rule of Civil Procedure 54(b)

Under Rule 54(b), the Court has the power to revise any order or decision that does not constitute a final judgment "at any time before the entry of a judgment adjudicating all the claims

and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). This is an inherent power, but the Court need exercise it only "as justice requires." *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 227 (D.C. Cir. 2011) (quoting *Greene v. Union Mut. Life Ins. Co. of Am.*, 764 F.2d 19, 22–23 (1st Cir. 1985)); *see also Klayman v. Judicial Watch, Inc.*, 296 F. Supp. 3d. 208, 213 (D.D.C. 2018) (collecting citations). The proponent must show "some harm, legal or at least tangible, [that] would flow from a denial of reconsideration." *United States v. Dynamic Visions, Inc.*, 321 F.R.D. 14, 17 (D.D.C. 2017). "In general, a court will grant a motion for reconsideration of an interlocutory order only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Klayman*, 293 F. Supp. 3d at 213 (quotations omitted). But a motion for reconsideration "cannot be used . . . as a vehicle for presenting theories or arguments that could have been advanced earlier." *Est. of Gaither ex rel. Gaither v. District of Columbia*, 771 F. Supp. 2d 5, 10 (D.D.C. 2011) (quoting *Secs. & Exch. Comm'n v. Bilzerian*, 729 F. Supp. 2d 9, 14 (D.D.C. 2010)).

III. THE UNION IS ENTITLED TO SUMMARY JUDGMENT

As the Court has stated several times, the posture of this case is atypical. In determining that the Court had *Leedom* jurisdiction, the Court effectively concluded that the Union had established its claim for relief. On the posture of a motion to dismiss, of course, the Court reached that determination relying on the facts alleged in the Complaint. But those allegations are identical in all relevant respects to the undisputed material facts.

The Court is thus in the unique situation in which it has already performed the legal analysis to conclude that the Union is entitled to relief. *See* Mem. Op. at 9–20. Because the Authority has not attempted to show that there is a disputed question of material fact—or a material difference between the Complaint's allegations and the record facts—the Court will grant the Union's Motion

for Summary Judgment, ECF No. 28, and deny the Authority's Cross-Motion for Summary Judgment, ECF No. 27. Its explanation, which largely echoes the analysis performed in the previous opinion, *see* Mem. Op. at 9–20, follows.

A. Jurisdiction under *Leedom v. Kyne*

As the Court previously explained, the Union asserts that the Authority overstepped its statutory authority by "act[ing] contrary to the clear and mandatory requirements in § 7121(b)(1)(C)(iii) and . . . § 7122(b)." Compl. ¶¶ 81–87, 95–99; *see* Mem. Op. at 9. Under *Leedom v. Kyne*, courts have authority to "strike down" such agency actions, assuming the "order [was] made in excess of its delegated powers and contrary to a specific prohibition" in the agency's enabling statute. 358 U.S. at 188. Such claims may be heard "[e]ven where Congress is understood generally to have precluded review, [because *Leedom* provides] an implicit but narrow exception, closely paralleling the historic origins of judicial review for agency actions in excess of jurisdiction." *Griffith*, 842 F.2d at 492 (citing L. Jaffe, Judicial Control of Administrative Action 327–36 (1965)).

The Court of Appeals has emphasized that "[t]he invocation of *Leedom* jurisdiction . . . is extraordinary," *Ass'n of Civilian Technicians, Inc. v. Fed. Lab. Rels. Auth.*, 283 F.3d 339, 344 (D.C. Cir. 2002) (quoting *Council of Prison Locs. v. Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984)), and "extremely narrow in scope." *Nat'l Air Traffic Controllers Ass'n AFL-CIO & Pro. Airways Sys. Specialists, AFL-CIO v. Fed. Serv. Impasses Panel*, 437 F.3d 1256, 1263 (D.C. Cir. 2006). Indeed, the *Leedom* standard demands a "nearly insurmountable" showing of "exceptional circumstances." *U.S. Dep't of Justice v. Fed. Lab. Rels. Auth.*, 981 F.2d 1339, 1342–43 (D.C. Cir. 1993).

To proceed on a *Leedom* claim, a plaintiff must demonstrate: (i) that "the statutory preclusion of review is implied rather than express"; (ii) that "there is no alternative procedure for review of the statutory claim"; and (iii) that "the agency plainly acts 'in excess of its delegated powers and contrary to a specific prohibition in the' statute that is 'clear and mandatory.'" *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 449 (D.C. Cir. 2009) (citations omitted). Much like in its Motion to Dismiss, the Authority does not dispute the second requirement. *See* Mem. Op. at 10; *see generally* Defs.' Mot. for Recons. & Cross-Mot. for Summ. J. ("Defs.' Mot."), ECF No. 27. Rather, it argues again that the Statute expressly precludes judicial review, *see id.* at 14–19, and that the agency did not plainly act in excess of its delegated authorities, *see id.* at 19–45. The Court again disagrees.

B. The Statutory Preclusion in 5 U.S.C. § 7123 Is Implied, Not Express

As the Court previously explained, "[c]ourts 'cannot lightly infer that Congress did not intend judicial protection . . . against agency action taken in excess of delegated powers,' so the party seeking *Leedom* jurisdiction must demonstrate that the relevant statute only impliedly precludes judicial review." Mem. Op. at 10–11 (quoting *Lepre v. Dep't of Lab.*, 275 F.3d 59, 72 (D.C. Cir. 2001)). But as the Court also previously held, both text and precedent show that the Statute's limits on federal district court jurisdiction are implied, not express. *See* Mem. Op. at 10–12.

Start with the text. *See Am. Fed'n of Gov't Emps., AFL-CIO, Loc. 3090 v. Fed. Lab. Rels. Auth.*, 777 F.2d 751, 754 (D.C. Cir. 1985). Section 7123, which addresses judicial review and enforcement, provides:

> Any person aggrieved by any final order of the Authority other than an order under . . . 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, 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. § 7123(a). As the Court previously noted, § 7123(a) mentions only one type of court: a "court of appeals." *Id.* It then grants those courts of appeals the power to review all but one type of "final [Authority] order": those involving arbitration awards (unless the order implicates "an unfair labor practice"). *Id.* Section 7123(a) does not mention district courts at all, despite their being mentioned in other parts of the Statute, *see, e.g.*, *id.* § 7123(d).

The Authority argues that the Statute's express authorization of judicial review in certain circumstances is an express prohibition of judicial review outside those circumstances. *See* Defs.' Mot. at 18–19. But of course, there is no express language limiting judicial review. That is what makes it implied. *See* Mem. Op. at 12 n.11.

Turning to precedent, and as the Court previously explained, "the Court of Appeals has held that Congress's 'complex scheme' limiting judicial review of arbitration-related orders in one type of court 'powerfully suggests an intent to preclude review in every court.'" Mem. Op. at 11 (quoting *Griffith*, 842 F.2d at 491). But again, that inference (however strong) is implicit: "Congress did not *explicitly* deny to district courts the power to review [Authority] decisions." *Griffith*, 842 F.2d at 491 (emphasis modified). The Court of Appeals has therefore held that while, "as a general matter," the statutory scheme "preclude[s]" district courts from reviewing Authority "decisions concerning arbitral awards," it "leaves the door ajar for review of clear violations of statutory authority under *Leedom*." *Id.* at 490–91.[3]

[3] The Authority argues that, "[t]o the extent that *Griffith*'s dicta that § 7123(a) 'leaves the door ajar for review of clear violations of statutory authority under *Leedom*' could be read to imply any exception to § 7123(a)'s jurisdictional bar for *non*-constitutional claims, *Scobey* abrogated that exception." Defs.' Mot. at 17. But this argument doubly misses the mark. First, in *United States*

The Authority argues that this conclusion is inconsistent with the Court's analysis of § 7122, *see* Defs.' Mot. at 18–19, but the two inquiries are different. The question at this step in the analysis is whether the Statute's affirmative grant of judicial review to the courts of appeals in certain circumstances constitutes an *express*, rather than implied, preclusion of judicial review over other claims in district courts. That is a different question than whether the Agency has violated a clear prohibition in the Statute, best understood. *See infra* at 13–16.

"In short, to the extent § 7123 limits district court review over Authority orders, it does so by implication, which satisfies the first requirement of *Leedom*." Mem. Op. at 12.[4]

C. The Authority Violated a Clear Statutory Prohibition

Turning to the third element of a *Leedom* claim—recall that no Party contests that there is no other alternative procedure for review of this statutory claim—the Court adheres to its prior decision.

As the Court previously explained, "[i]f the timing and scope" of the Authority's decision in *HUD VIII* were different, things might be different. Mem. Op. at 13. "But, here, the Authority

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Department of Homeland Security v. Fed. Lab. Rels. Bd., 784 F.3d 821 (D.C. Cir. 2015), better known as *Scobey*, the Court of Appeals held that it did not have jurisdiction over a direct petition for review of an award by an arbitrator. 784 F.3d at 823. That is because 5 U.S.C. § 7123(a)(1) gives the Court of Appeals "jurisdiction to review the Authority's final orders other than an order involving an award by an arbitrator." *Scobey*, 784 F.3d at 823 (alterations adopted) (quotations omitted). The Court then noted that it had gotten past this limitation in *Griffith*, but only because a constitutional claim was at issue. *See id.* But because no constitutional question was presented in *Scobey*, the Court of Appeals could not use *Griffith* to vest it with jurisdiction. *Id.* Notably, the Court never mentions, lets alone discusses, *Leedom*. And perhaps more importantly, the first prong of the *Leedom* test asks whether the preclusion is implied or express. Nothing in *Scobey* holds that the preclusion in § 7123(a) is express.

[4] The Authority also argues that the Court misunderstood the relevant test by not citing *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin., Inc.*, 502 U.S. 32 (1991). *See* Defs.' Mot. at 15–16. But *MCorp* is irrelevant, as the statute at issue in *MCorp* contained precisely the kind of express language that is lacking here. *See* 12 U.S.C. § 1818(i)(1) (1988) ("[*N*]*o court shall have jurisdiction* to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section." (emphasis added)).

made its jurisdictional determination long after the disputed awards had become final and binding (under the Statute and the Authority's own regulations), and its Order vacated those final and binding awards, some of which had never been challenged or appeared before the Authority." *Id.* The issue is thus whether the Authority's decision to vacate arbitral awards that had long ago become final exceeded "its delegated powers" and violated a "clear," "mandatory," and "specific" statutory prohibition. *Nyunt*, 589 F.3d at 449 (citing *Leedom*, 358 U.S. at 188). It did.

This flows from the text. The Statute provides: "If upon review [of an excepted-to award] the Authority finds that *the* award is deficient[,] . . . the Authority may take such action and make such recommendations concerning *the* award as it considers necessary, consistent with applicable laws, rules, or regulations." 5 U.S.C. § 7122(a) (emphasis added). "The Statute thus grants the Authority a great deal of remedial latitude, but that latitude is not unbounded: the text limits remedial actions to 'the award' at issue." Mem. Op. at 13. The language references a single object, 5 U.S.C. § 7122—"the award," which may be reviewed and remedied only after a party files an exception, *id.* §§ 7105(a)(2)(H), 7122. And if no exceptions are filed challenging that award within thirty days, it "shall be final and binding." *Id.* § 7122(b). "Congress thus delegated no more than the power to review a particular award and remedy any deficiencies it finds in that award." Mem. Op. at 13–14.[5]

[5] The Authority attempts to shift the focus from "the award" to its neighbor: "concerning." *See* Defs.' Mot. at 21–24. As the Authority puts it, "[t]he Authority's decision to vacate Summaries 1–9 was an action 'concerning' Summary 10." *Id.* at 21. But even accepting its definition of "concerning"—"[it] means 'relating to,' and is the equivalent of 'regarding, respecting, about,'" *id.* at 21 (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1755 (2018))—the argument does not follow. An action reversing long-settled "final and binding" awards is an action concerning those awards—not the award before the Authority. And while the Court appreciates that Congress did not write "such actions concerning *only* the award," Defs.' Mot. at 23, Congress also did not write "such actions concerning the award, or any prior ones."

Of course, as the Complaint alleges and the undisputed material facts establish, that is not what the Authority did. Rather than resolve only the excepted-to award that was before it, the Authority vacated fourteen final arbitration awards and summaries dating back to 2004. *See HUD VIII*, 70 F.L.R.A. at 605–07; *see also* Mem. Op. at 14 n.12 (explaining how the awards became final). While the Authority's delegated remedial powers extended to "the award" before it, "the Authority's decision to go further—by vacating other final awards that were not before it—violated the Statute's affirmative command that unchallenged arbitration awards 'shall be final and binding.'" Mem. Op. at 14 (quoting 5 U.S.C. § 7122(b)).

Similarly, and as the Court previously explained, it matters not that the Authority violated an affirmative statutory command—finality under 5 U.S.C. § 7122(b)—rather than a negative prohibition. *See* Mem. Op. at 14. *Leedom* "is not so narrowly limited." *Ry. Lab. Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 661 (D.C. Cir. 1994) ("*RLEA*"). The Court previously explained how *RLEA* itself provides an instructive example here. *See* Mem. Op. at 15–16.

Finally, the Court rejects the Authority's argument that "final and binding," both as a phrase and broken out into individual words, is ambiguous such that § 7122 does not provide a "specific affirmative command." *See* Defs.' Mot. at 26–40. Of course, stripped of context, all words are ambiguous. But the surrounding context here makes it clear that "final and binding" are clear, affirmative commands. If a party dislikes an arbitration award, it can file exceptions to that specific award. If the Authority agrees that the award is deficient, it can take actions concerning that specific award it considers necessary. But if no exceptions to the award are filed, the award is final and binding. It may be that, in other contexts, "final and binding" can mean something different, but that simply is not the interpretive question before the Court.

The Court will not rehash the remainder of its previous Memorandum Opinion, which discussed purely legal arguments, both from other cases and the Authority. *See* Mem. Op. at 16–20. The Court has carefully considered the Authority's arguments and does not see a reason to depart from its prior analysis, which remains applicable even though this matter is at the summary judgment stage. *See supra* at 9–10. The Court therefore concludes that the Authority violated a clear statutory prohibition in vacating fourteen arbitral awards, instead of "*the* award" before it. 5 U.S.C. § 7122(a) (emphasis added).

* * *

The Authority's decision to vacate the final and binding arbitral awards was therefore *ultra vires*. Summary judgment is accordingly appropriate for the Union, but not for the Authority.

IV. THE COURT WILL NOT RECONSIDER ITS DECISION

"In general, a court will grant a motion for reconsideration of an interlocutory order only when the movant demonstrates: (1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order." *Klayman*, 293 F. Supp. 3d at 213 (quotations omitted). The first two are not implicated in the Authority's Motion, and the Court does not believe the Authority has identified an error, let alone a clear one, in its prior opinion. The Court will thus deny the Motion.

* * *

For the reasons stated above, the Union's Motion for Summary Judgment, ECF No. 28, is granted, and the Authority's Motion for Reconsideration and Cross-Motion for Summary Judgment, ECF No. 27, is denied. An appropriate order will accompany this Memorandum Opinion.

DATE: September 27, 2022

CARL J. NICHOLS
United States District Judge