

**IN THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FOURTH CIRCUIT**

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**ASSOCIATION OF ADMINISTRATIVE LAW JUDGES,**  
**Petitioner,**

**v.**

**FEDERAL LABOR RELATIONS AUTHORITY, and**  
**FEDERAL SERVICE IMPASSES PANEL,**  
**Respondents.**

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**PETITION FOR REVIEW**

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The Association of Administrative Law Judges (“Union”), a certified national federal sector labor union serving as the exclusive bargaining unit for the approximately 1,300 Administrative Law Judges (“ALJs”) assigned to hearing offices at the Social Security Administration (“SSA”) in every state of the United States, as well as Puerto Rico, petitions this Honorable Court pursuant to Rule 15 of the Federal Rules of Appellate Procedure to review *de facto* final agency orders (failure to afford relief requested) by the Federal Labor Relations Authority

(“Authority”) and the Federal Service Impasses Panel (“FSIP”) pursuant to 5 U.S.C. §7123 and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202-204 (1994).

Specifically, the Union seeks review of the Authority’s constructive denial of its request for a stay and a decision on the merits by failing to respond, as well as failing to afford any relief restraining the FSIP from asserting jurisdiction over a labor dispute between the Union and the SSA.<sup>1</sup> Similarly, the Union seeks review of the determination of the FSIP to assert jurisdiction despite the Union’s objections.

The Union alleged before both the FSIP and the Authority that 5 U.S.C. §7119, the statute governing the appointment of the members of the FSIP violates Article II, Section 2, Clause 2 of the U.S. Constitution (“Appointments Clause”) and, as a result, the FSIP is unconstitutionally constituted and accordingly cannot legally exercise jurisdiction over the Union. Specifically, the Union alleges the method by which the members of the FSIP are appointed under the statute unconstitutionally

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<sup>1</sup> 5 U.S.C. § 7123 (a) provides that final orders of the Authority are reviewable by the U.S. Court of Appeals. “Final order” is not defined in the FLRA Statute, but “order” is defined in the Administrative Procedure Act. Order means “the whole or part of a final disposition whether affirmative, negative, injunctive, or declaratory in form, of an agency. . . .” 5 U.S.C. § 551(6).

confers upon the President plenary power to appoint principal officers in violation of the Appointments Clause.

Under prevailing case law, the chair and all panel members of the FSIP are principal officers. The panel members' current method of appointment does not require Senate confirmation. The statute is unconstitutional because it violates the Appointments Clause. *See Lucia v. Securities and Exchange Commission*, 585 U.S. \_\_\_, 138 S. Ct. 2044, 2054-56 (2018) (holding that Administrative Law Judges are officers within the meaning of the Appointments Clause and remanding to the D.C. Circuit); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878-882 (1991) (adopting the "significant authority" test to distinguish Appointments - Clause officers from run-of-the-mill employees of the federal government).

### **FACTS**

The Association of Administrative Law Judges is the collective bargaining unit for approximately 1,300 Administrative Law Judges of the Social Security Administration. As of October 1, 2019, approximately 167 Union members were stationed at local Social Security Offices of Hearing Operations in Maryland, Virginia, West Virginia, North Carolina, and South Carolina.

For a total of seven weeks between March 2019 to June 2019, the SSA and the Union engaged in term collective bargaining negotiations for a successor collective bargaining agreement. On June 28, 2019, Federal Mediation and

Conciliation Service Commissioner Randall J. Mayhew certified the parties' negotiations at impasse. Approximately four months later, on October 2, 2019, the SSA requested that the FSIP assert jurisdiction over the Union and the issues certified at impasse.

On October 18, 2019, the Union objected to the FSIP asserting jurisdiction on the grounds that the FSIP is not constitutionally constituted, and is thus a nullity incapable of lawfully functioning in this case. The objection set forth the reasons for granting the relief requested and the facts relied upon, and included evidence to support the facts relied upon in the motion. Additionally, on November 14, 2019, the Union filed a supplemental opposition to the FSIP asserting jurisdiction over the labor dispute, renewing its objections and asserting additional grounds for the FSIP's lack of jurisdiction.

However, on January 9, 2020, the Union received an email from Merritt Weinstein, an Attorney Advisor with the FSIP, advising that the FSIP was asserting jurisdiction over the labor dispute. The FSIP did not rule on or even acknowledge any of the Union's jurisdictional objections. As a result, on January 10, 2020, the Union filed a Motion with the Authority, requesting that it stay the proceedings before the FSIP, enjoin the FSIP from continuing to assert jurisdiction, and issue a decision on the merits. The motion set forth the constitutional reasons for granting

the relief requested, the authority for granting the relief requested, the facts relied upon, as well as the evidence to support the facts relied upon in the motion.

On January 13, 2020, the Union requested that the Executive Director of the FSIP stay the FSIP from taking any further actions in the case until the Authority ruled on the Union's Motion. Neither the Executive Director nor the FSIP responded. Instead, on January 16, 2020, the FSIP advised the Union that the FSIP will retain jurisdiction over the Union, despite the Motion for Stay filed with the Authority, and required the Union to submit responsive documents to it under deadline.

On January 17, 2020, the Union filed an Amended Motion with the Authority informing it of the FSIP's continued action in the case and the need for issuance of a temporary stay or an immediate ruling. To date, the Union has not received a response from the Authority on its Motion for Stay or underlying Motion.<sup>1</sup>

Under protest, on January 17, 2020 the Union was forced to submit the document ordered by the FSIP, and again asserted the FSIP's lack of jurisdiction. Despite the Union's continued objections and requests for relief, on January 24, 2020, the FSIP issued a formal procedural determination letter to the parties

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<sup>1</sup> On January 29, 2020, the SSA filed its "Agency's Motion for Leave to File an Opposition to the Union's Motion for Stay Enjoining the Federal Service Impasses Panel from Asserting Jurisdiction."

officially asserting jurisdiction over eight of the nine articles certified at impasse. The letter did not address any of the jurisdictional arguments raised in opposition by the Union, nor did it address the Union's motion for a stay. Instead, the FSIP ordered the Union to present its final case before it by February 7, 2020.

### **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

The January 24, 2020 decision of the FSIP is the final order on its determination of jurisdiction. The Authority failed to respond to the Union's motions. As a result, it also failed to afford the Union the relief requested. The Authority's failure to act is a constructive denial. The Union will suffer irreparable injury if it is forced to present its case before the FSIP on February 7, 2020 because final decisions of the FSIP on the merits of labor disputes are not subject to direct judicial review absent extraordinary circumstances as defined in *Leedom v. Kyne*, 358 U.S. 184 (1958). Thus, the FSIP's exercise of unlawful jurisdiction would virtually be irreversible.

5 U.S.C. § 7123(a) provides in pertinent part:

Any person aggrieved by any final order of the Authority ... 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.

Approximately 167 Union members reside or transact business in this Circuit, including counsel for the Petitioner. This case is properly before the Court and the Court has jurisdiction over the parties and subject matter.

**THIS CONSTITUTIONAL CLAIM IS OUTSIDE  
THE STATUTORY SCHEME**

Although the Union has exhausted all administrative remedies, an additional basis for review of the constitutional challenges raised by the Union exists. Put simply, the FSIP's composition and appointments are not the type of claims Congress intended to be reviewed within the statutory scheme requiring exhaustion of administrative remedies. *See Thunder Basin Coal Co.*, 510 U.S. at 212.

For preclusion to apply, the type of claims raised must be "fairly discernible in the statutory scheme." *Id.* at 207. The United States Court of Appeals for the D.C. Circuit has endorsed three "general guideposts useful for channeling the inquiry into whether the particular claims" are of the type Congress intended to be reviewed by the statutory scheme. *Jarkesy v. SEC*, 803 F.3d 9, 17 (D.C. Cir. 2015). Claims "will be found to fall outside of the scope of a special statutory scheme in only limited circumstances, when (1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim[s] [are] wholly collateral to the statutory review provisions; and (3) the claims are beyond the expertise of the agency." *Arch*

*Coal, Inc. v. Acosta*, 888 F.3d 493, 500 (D.C. Cir. 2018) (citing *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 489 (2010); *Thunder Basin*, 510 U.S. at 212–13).

Here, all three guideposts show the Union’s claims are not of the type Congress intended to be reviewed by the statute. A finding of preclusion would most certainly foreclose all meaningful judicial review. The Union raises constitutional claims objecting to the very existence of the FSIP itself and whether the current method of appointment of the panel members violates the Appointments Clause. These claims are wholly collateral to any FSIP orders or other labor management decisions from which review might be sought. *See Free Enterprise*, 561 U.S. at 490. Furthermore, these constitutional claims are outside the FSIP’s competence and expertise. *See id.*

The nature of the Union’s claims against the FSIP are similar to those the Supreme Court found outside the statutory scheme in *Free Enterprise*. *See Free Enterprise*, 561 U.S. at 490. Like the plaintiffs in *Free Enterprise*’s “object[ion] to the Board’s existence,” the Union challenges the lawful existence of the Panel and, thus its authority. *See id.* In accordance with the Supreme Court’s holding in *Free Enterprise*, this Court has jurisdiction to hear the Union’s claims.

## **QUESTIONS PRESENTED**

The Union specifically seeks judicial review of the following questions:

1. Are the panel members of the Federal Service Impasses Panel principal officers pursuant to Article II, Section 2, Clause 2 of the Constitution of the United States?
2. If so, does 5 U.S.C. §7119 violate Article II, Section 2, Clause 2 of the Constitution of the United States by failing to require that the President's nomination of the members of the Federal Service Impasses Panel be made with the advice and consent of the Senate?
3. If so, can the Federal Service Impasses Panel, as currently constituted, constitutionally exercise jurisdiction over the Union's labor dispute with the Social Security Administration?

## **DISCLOSURE OF CORPORATE AFFILIATIONS**

The Association of Administrative Law Judges, Judicial Council 1, is a local union of the International Federation of Professional and Technical Engineers, which is a member of the American Federation of Labor and Congress of Industrial Organizations, a voluntary federation of fifty-five national and international labor unions.

## **RELIEF REQUESTED**

The Association of Administrative Law Judges seeks an opinion from this Court holding that the panel members of the Federal Service Impasses Panel are

unconstitutionally appointed in violation of Article II, Section 2, Clause 2 of the U.S. Constitution thus finding the Panel a nullity, and enjoining it from exercising jurisdiction over the labor dispute between the Union and the Social Security Administration until such time as the members of the Panel are lawfully appointed under the U.S. Constitution.

**LIST OF RESPONDENTS**

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**/s/ Danette L. Mincey**

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