No. 03-277

In the Supreme Court of the United States

BENOIT BROOKENS, II, PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY IN OPPOSITION

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QUESTION PRESENTED

Whether a federal court of appeals has jurisdiction under 5 U.S.C. 7123(a) to review a determination by the General Counsel of the Federal Labor Relations Authority not to issue an unfair labor practice complaint.

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OPINION BELOW

The order of the court of appeals (Pet. App. 5-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2003. A petition for rehearing was denied on March 26, 2003 (Pet. App. 7-8). The petition for a writ of certiorari was filed on June 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title VII of the Civil Service Reform Act of 1978 (CSRA or the Act), Pub. L. No. 95-454, 92 Stat. 1191 (5 U.S.C. 7101 *et seq.*), governs labor relations between federal agencies and their employees. The Act estab-

lishes the Federal Labor Relations Authority (FLRA or Authority), a three-member bipartisan body within the executive branch, which serves a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. 5 U.S.C. 7104; *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. 89, 92-93 (1983). The CSRA requires the FLRA to supervise the collective bargaining of federal employees and to administer other aspects of federal labor relations, including the adjudication of unfair labor practice complaints, negotiability disputes, bargaining unit issues, arbitration exceptions, and representational election matters. 5 U.S.C. 7105(a)(1) and (2); see *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Auth.*, 464 U.S. at 92-93.

The General Counsel of the FLRA acts as the body's enforcement arm. The Act provides that the General Counsel shall investigate any allegation that a labor organization or federal agency engaged in an unfair labor practice and that he "may issue and cause to be served upon the agency or labor organization a complaint." 5 U.S.C. 7118(a)(1). The Act does not otherwise limit the discretion of the General Counsel in his decision whether or not to issue an unfair labor practice complaint.

2. This case concerns a decision by the General Counsel of the FLRA not to issue an unfair labor practice complaint.

a. At all times relevant to this action, petitioner Benoit Brookens, II, was employed as an International Economist with the International Labor Affairs Bureau (ILAB) of the Department of Labor (Department). Petitioner also held the position of Chief Steward of his union, the American Federation of Government Employees, Local 12. Opinion & Award 4 (Award).

In January 2000, petitioner's second-line supervisor recommended that petitioner be suspended for ten days for "(1) Failure to Follow Supervisory Instructions" and "(2) Insubordination." Award 4-5. This recommendation followed a three month dispute between petitioner and ILAB management over the use of internal office space. During that time, petitioner repeatedly refused to remove materials he had placed in a vacant office, and indeed replaced those materials after they were removed by management, even after being directly ordered to vacate the office by at least two supervisors. *Id.* at 5-12. Petitioner believed that as Union Steward, he had the right to claim a second office for himself unilaterally. *Id.* at 11. The day after proposing a ten-day suspension for this behavior, petitioner's second-line supervisor rescinded the proposal and issued a new proposal to suspend petitioner for 20 days. *Id.* at 13.

Petitioner, through his union representative, protested the sanction. An arbitrator was appointed to hear the matter pursuant to the terms of the parties' collective bargaining agreement. Award 13-14. The arbitrator found that petitioner's conduct "was flagrant and went far beyond what was justified in order to carry out his legitimate union activities." *Id.* at 24. However, considering the ten factors laid out in *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981), the arbitrator overturned the twenty-day suspension, finding it "excessively harsh." Award 27. Under the ten factors, the arbitrator found that a ten-day suspension would be "for such cause as would promote the efficiency of the Service." *Id.* at 30. Accordingly, a ten-day suspension was sustained. *Id.* at 31.

Following this decision, the Department compensated petitioner for ten days of pay, plus interest. Petitioner, however, interpreted the award to mean that all 20 days of his suspension were nullified, and demanded back pay and interest for the full 20 days. When the Department demurred, petitioner filed an unfair labor practice charge with the FLRA's Regional Office in Washington, D.C., asking the General Counsel to file an unfair labor practice complaint against the Department. Letter from Michael W. Doheny, Regional Director, Federal Labor Relations Auth., to Benoit Brookins regarding decision in Case No. WA-CA-01-0555, at 1-2 (Sept. 14, 2001) (Regional Director's Letter).

The Regional Director determined that issuance of a complaint was not warranted. Regional Director's Letter at 1. Specifically, the Regional Director found that "the evidence is insufficient to establish that the [Department] violated the Statute as alleged." *Id.* at 2. Petitioner appealed the Regional Director's decision to the General Counsel of the FLRA. The General Counsel determined that the appeal "established no ground for reversing the Regional Director's decision or remanding the case for further investigation." Letter from Richard Zorn, Assistant Gen. Counsel for Appeals, Federal Labor Relations Auth., to Benoit Brookins regarding denial of appeal in Case No. WA-CA-01-0555, at 1 (July 9, 2002). Therefore, the General Counsel denied the appeal and closed the case. *Id.* at 1.

b. Invoking 5 U.S.C. 7123(a), petitioner sought review of the General Counsel's determination in the United States Court of Appeals for the District of Columbia Circuit. The FLRA moved to dismiss the petition for review for lack of subject matter jurisdiction. The court of appeals, citing *Patent Office Prof'l Ass'n*

v. *Federal Labor Relations Auth.*, 128 F.3d 751 (D.C. Cir. 1997), cert. denied, 523 U.S. 1006 (1998), and *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d 937 (D.C. Cir. 1982), granted the motion and dismissed the petition for review. Petitioner's requests for rehearing and rehearing en banc were also denied. Pet. App. 7-8.

ARGUMENT

The court of appeals correctly determined that it was without jurisdiction to review decisions of the FLRA's General Counsel not to issue unfair labor practice complaints. This holding does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is therefore not warranted.[1]

1. The court of appeals' dismissal of petitioner's petition for review is consistent with the language and history of the Act and the decisions of every other court of appeals to have addressed the question of appellate jurisdiction to review such decisions by the FLRA.

a. Section 7123(a) provides that "[a]ny person aggrieved by any final order of the [FLRA] * * * may * * * institute an action for judicial review of the [FLRA's] order in the United States court of appeals." 5 U.S.C. 7123(a). Section 7123 is the only provision of the CSRA that provides for judicial review of FLRA

[1] Petitioner has submitted a second petition for a writ of certiorari, dated August 19, 2003, containing an Administrative Procedures Act (APA) claim not presented in his original petition. Under Supreme Court Rule 13, the second petition is untimely and may not be filed. Alternatively, if the second petition is treated as a supplemental brief, Petitioner still may not raise the APA argument. Supreme Court Rule 15.8 restricts supplemental briefs to "intervening matter[s] not available at the time of the party's last filing." The APA claim was available at the time of petitioner's first submission to this Court; in fact, petitioner made this claim unsuccessfully in the lower court.

orders. However, the power to issue unfair labor practice complaints rests exclusively in the FLRA's General Counsel, not in the FLRA itself. 5 U.S.C. 7118(a)(1). Because the CSRA allows only for review of final orders of the FLRA, and the FLRA has no power to issue unfair labor practice complaints or review the General Counsel's decisions not to do so, the Act cannot properly be read to allow review of the General Counsel's decision not to issue an unfair labor practice complaint.

b. The conclusion that decisions by the FLRA General Counsel to file (or not file) unfair labor practice complaints are unreviewable is further supported by the history of the Act. In *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), this Court found that "the [NLRB's] General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint." Congress passed the CSRA against this background, explicitly proclaiming an intent to fashion the FLRA as a public sector analogue to the NLRB and to allocate authority between the FLRA and its General Counsel in the same manner as the NLRB and its General Counsel. See S. Rep. No. 969, 95th Cong., 2d Sess. 102 (1978) ("The General Counsel is intended to be autonomous in investigating unfair labor practice complaints * * *. Specifically, the Authority would neither direct the General Counsel concerning which unfair labor practice cases to prosecute nor review the General Counsel's determinations not to prosecute, just as the National Labor Relations Board does not exercise such control over its General Counsel."); H.R. Rep. No. 1403, 95th Cong., 2d Sess. 42 (1978) ("The committee intends that the General Counsel be analogous in role and function to the General Counsel of the [NLRB]."); see also *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor*

Relations Auth., 464 U.S. at 92-93. Given that *Vaca* was well-established precedent at the time that Congress decided to endow the FLRA's General Counsel with authority parallel to that of the NLRB's General Counsel, Congress clearly intended that the General Counsel's decisions regarding unfair labor practice complaints would be unreviewable.

c. Several courts of appeals have specifically examined the question of whether they can review a decision of the FLRA's General Counsel not to issue an unfair labor practice complaint, and each has concluded that it was without subject matter jurisdiction to review such a decision. See *Rizzitelli* v. *Federal Labor Relations Auth.*, 212 F.3d 710, 712-713 (2d Cir. 2003) ("It was the General Counsel, therefore, not the Authority, that made the final decision not to issue a complaint on petitioner's unfair labor practice charge. There is thus no 'final order of the Authority.'"); *Patent Office Prof'l Ass'n* v. *Federal Labor Relations Auth.*, 128 F.3d at 753 ("[A] decision of the General Counsel of FLRA not to file a complaint is not judicially reviewable given that the statute provides for review only of decisions of the Authority."); *American Fed'n of Gov't Employees, Local 1749* v. *Federal Labor Relations Auth.*, 842 F.2d 102, 105 (5th Cir. 1988) (per curiam) ("[T]he Authority's General Counsel has a role similar to that of a prosecutor, and his decision not to prosecute puts an end to the matter and is not reviewable, irrespective of the merits of the underlying unfair labor practice assertions."); *Martinez* v. *Smith*, 768 F.2d 479, 480 (1st Cir. 1985) ("[C]ourts have no jurisdiction to review a decision of the FLRA to refuse to issue an unfair labor practice complaint."); *Turgeon* v. *Federal Labor Relations Auth.*, 677 F.2d at 938 ("The Act affords the Authority no opportunity to review a decision of the General

Counsel declining to issue an unfair labor practice complaint—it is only upon the issuance of a complaint by the General Counsel that the Authority is empowered to exercise its decision-making functions."); *Columbia Power Trades Council* v. *United States Dep't of Energy*, 671 F.2d 325, 329 (9th Cir. 1982) ("There is no provision in [Section] 7118 for review in the courts of this determination."). Petitioner offers no authority for the proposition that the General Counsel's exercise of his discretion not to issue an unfair labor practice complaint may be construed as a "final order of the Authority," and does not otherwise offer any reason to abandon the courts of appeals' settled interpretation of the Act's judicial review provision.[2]

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[2] Although not cited by petitioner, the Ninth Circuit, relying on a footnote in this Court's decision in *Heckler* v. *Chaney*, 470 U.S. 821, 833 n.4 (1985), once stated that the General Counsel's determination not to issue a complaint is only "presumptively" unreviewable. *Montana Air Chapter No. 29* v. *Federal Labor Relations Auth.*, 898 F.2d 753, 756 (9th Cir. 1990). The Ninth Circuit adopted the view that a decision not to exercise enforcement authority is reviewable when the decision is based either on the agency's conclusion that it lacked jurisdiction or on a general policy "so extreme as to amount to an abdication of its statutory responsibilities." *Ibid.* (quoting *Heckler*, 470 U.S. at 833 n.4).

Montana Air did not purport to distinguish the Ninth Circuit's earlier conclusion in *Columbia Power Trades Council* that "[t]here is no provision in § 7118 for review in the courts of [the General Counsel's enforcement] determination." 671 F.2d at 329. To the extent that the Ninth Circuit's decision in *Montana Air* created an intra-circuit conflict, it is not a basis for an exercise of this Court's certiorari jurisdiction. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

In any event, even *Montana Air* fails to provide a basis for jurisdiction in this case. Nothing in the record suggests that the General Counsel either believed he lacked jurisdiction to issue unfair labor practice complaints in response to petitioner's allega-

2. Although petitioner contends that the order of the court of appeals presents constitutional questions, petitioner never articulates how the General Counsel acted in derogation of petitioner's constitutional rights. What petitioner does present is largely a request for error correction. In this regard, the petition cites several cases for the proposition that an agency which does not object to an arbitrator's award must implement that award. First, these citations are not on point. The issue at hand is not whether or not the Department of Labor committed an unfair labor practice; the question is whether or not a court of appeals has jurisdiction to review the FLRA General Counsel's determination that no unfair labor practice has been committed.

More fundamentally, petitioner's contentions amount to nothing more than a disagreement with the legal reasoning and factual findings of the General Counsel. Petitioner maintains that the arbitrator meant to vacate the entirety of his 20-day suspension. The Regional Director disagreed, and petitioner takes issue with that disagreement. However, where, as here, judicial review of agency action is precluded, allegations of legal or factual error are insufficient to confer jurisdiction. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964) (exception to preclusion of judicial review should "not * * * be extended to permit plenary district court review of [NLRB] orders * * * whenever it can be said that an erroneous assessment of the par-

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tions, or that the General Counsel otherwise had adopted a general policy of non-enforcement that amounted to an abdication of his statutory responsibilities. Here, the General Counsel investigated petitioner's allegations and decided not to file an unfair labor practice complaint after determining that the allegations lacked merit.

ticular facts * * * has led it to a conclusion which does not comport with the law").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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