No. 98-667

In the Supreme Court of the United States

OCTOBER TERM, 1998

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

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

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record

FRANK W. HUNGER
Assistant Attorney General

WILLIAM KANTER
WILLIAM G. COLE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7114(a)(2)(B), gives a federal employee the right to the participation of a union representative at an interview by a "representative of the agency" when the employee reasonably believes the interview may result in disciplinary action. The questions presented are:

1. Whether the "extraordinary circumstances" provision of 5 U.S.C. 7123(c) permitted the court of appeals to deny enforcement of an order of the Federal Labor Relations Authority (FLRA) applying 5 U.S.C. 7114(a)(2)(B) when the order had not been challenged before the FLRA.

2. Whether an investigator from the Office of Inspector General (OIG) is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B), notwithstanding the provisions of the Inspector General Act of 1978, 5 U.S.C. App. 3, §§ 1 *et seq.*, that insulate the OIG from agency control.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-667

FEDERAL LABOR RELATIONS AUTHORITY, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

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

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 137 F.3d 683, amending an opinion reported at 125 F.3d 106. The decision and order of the Federal Labor Relations Authority (Pet. App. 19a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was originally entered on September 25, 1997. The opinion was modified on rehearing on February 5, 1998. A second petition for rehearing was denied on June 4, 1998. Pet. App. 17a-18a. On August 18, 1998, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to November 2, 1998, and the petition was

filed on October 22, 1998. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Service Labor-Management Relations Statute (FSLMRS or Statute), 5 U.S.C. 7101 *et seq.* (1994), provides generally for collective bargaining between federal agencies and the union representatives of their employees. 5 U.S.C. 7111-7114. The FSLMRS makes it an unfair labor practice for a federal agency to "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the FSLMRS. 5 U.S.C. 7116(a)(1) and (8).

The Statute provides that an "exclusive representative of an appropriate unit"—ordinarily a union—"shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2) (B). That provision is frequently referred to as the "*Weingarten*" provision of the FSLMRS, because it is similar to a right available to private sector employees recognized by this Court in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).

2. In November 1994 and January 1995, three Immigration and Naturalization Service (INS) inspectors working at JFK International Airport were interrogated by special agents of the Office of the Inspector General, U.S. Department of Justice (OIG). Pet. App. 3a. The interrogations concerned, in part, allegations of involvement in espionage, participation in an alleged

group of INS inspectors termed the "night riders," and acceptance of bribes from Chinese nationals. *Id.* at 25a-26a. The "night riders" were alleged to be a group of immigration inspectors who patrolled the streets during their off duty time actively searching for criminal activity so that they could make arrests. *Id.* at 25a & n.4.

In August 1995, three INS detention officers working at a holding center for criminal aliens were also interrogated by OIG special agents. Those interviews focused on whether the officers had violated the INS District Director's policy prohibiting detention officers from purchasing or carrying personal firearms. Pet. App. 30a.

3. Some of the INS inspectors and detention officers requested union representation when directed by their INS supervisors to appear at the interviews conducted by the OIG agents. The OIG agents rejected those requests. Pet. App. 3a. The union representing those INS employees filed unfair labor practice charges with the FLRA, alleging that the OIG, DOJ, and New York office of the INS (INS-NY) had improperly prohibited the attendance of a union representative during questioning of employees. *Ibid.* In August and November 1995, the Boston region of the FLRA issued complaints and notices of hearing to the OIG, DOJ, and INS-NY. *Id.* at 41a-46a. After a consolidated hearing, an administrative law judge (ALJ) found that the OIG had committed an unfair labor practice by prohibiting the attendance of a union representative during the interrogations, that the DOJ had committed an unfair labor practice by failing to exercise its supervisory authority over the OIG, and that INS-NY had committed an unfair labor practice by failing to inform its employees that they could insist on the attendance of a union

representative. *Id.* at 3a. The ALJ recommended that the FLRA issue an order requiring the OIG, INS, and INS-NY to cease and desist from denying employees in INS-NY their right to have a union representative present during interrogations. The ALJ also recommended various affirmative actions and ordered that no disciplinary action could be taken against the six INS employees based on their interrogations by OIG agents in November 1994, and January and August 1995. *Id.* at 39a.

4. None of the three federal respondents filed exceptions with the FLRA to challenge the ALJ's order. Pet. App. 4a. On July 30, 1996, the FLRA issued an order adopting the findings, conclusions, decision, and order of the ALJ. *Id.* at 20a. More than five months later, the FLRA brought an enforcement proceeding in the court of appeals. The federal respondents filed an answer opposing the FLRA petition. *Id.* at 7a. After requesting and receiving briefs from the parties, the court of appeals denied enforcement. *Id.* at 4a, 16a.

5. The court of appeals ruled first that it had jurisdiction to decide whether to enforce the FLRA's order. The court noted (Pet. App. 6a) that the FSLMRS provides that, on appeals to courts from FLRA orders, "No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances." 5 U.S.C. 7123(c). The court explained that the FLRA had in earlier rulings come to the conclusion that 5 U.S.C. 7114(a)(2)(B) applies to questioning by OIG agents, based on the theory that OIG agents are "representatives of" the agencies to which they are assigned. Pet. App. 7a-8a. The court stated that, since that established rule had rendered futile any attempt to

persuade the FLRA to the contrary, the agencies' failure to file an objection before the Authority was "excused because of extraordinary circumstances." *Id.* at 6a-7a. The court also noted with approval a decision by the District of Columbia Circuit holding that a court considering an FLRA's petition for enforcement may review the contentions of a respondent who has not previously raised them in a petition for review. *Id.* at 8a (citing *FLRA* v. *United States Dep't of Commerce*, 962 F.2d 1055, 1057-1059 (D.C. Cir. 1992)).

On the merits of the case, the court recognized that 5 U.S.C. 7114(a)(2)(B) requires that a union representative have the opportunity to be at an investigative interview of an employee in the appropriate unit in an agency when that interview is conducted by "a representative of the agency." The court ruled, however, that an OIG agent, when questioning agency employees for bona fide purposes within the authority of the Inspector General Act of 1978 (Inspector General Act), 5 U.S.C. App. 3, §§ 1 *et seq.* (1994), is not "a representative" of the employee's agency for purposes of Section 7114(a)(2)(B). Pet. App. 14a. Since the court concluded that this case involved interrogations about matters within the scope of bona fide OIG functions under the Inspector General Act, the court concluded that none of the respondents had committed an unfair labor practice, and denied the FLRA's petition for enforcement. *Id.* at 16a.

DISCUSSION

The jurisdictional decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. The first question presented in the petition, therefore, does not warrant further review. The second question pre-

sented, whether an OIG investigator is a "representative of the agency" within the meaning of 5 U.S.C. 7114(a)(2)(B), is currently before this Court in *National Aeronautics and Space Administration* v. *Federal Labor Relations Authority*, cert. granted, No. 98-369 (November 2, 1998). Accordingly, the petition should be held pending this Court's decision in *NASA*, and disposed of as appropriate in light of the resolution of that case.

1. The court of appeals held that it had jurisdiction under 5 U.S.C. 7123(c) to decide this case, because it concluded that the federal respondents were excused from objecting to the FLRA's order due to "extraordinary circumstances." The court followed circuit precedent in ruling that the "extraordinary circumstances" exception to Section 7123(c) excuses a litigant from presenting an issue to the FLRA if doing so would be futile. See *Overseas Education Ass'n (OEA)* v. *FLRA*, 961 F.2d 36, 38 (2d Cir. 1992) (When it is futile to challenge "deeply rooted and well-documented" FLRA precedent, the court will not require "the party to make hopeless arguments for no other purpose than to preserve them on appeal."). The court of appeals' continuing adherence to that interpretation of the "extraordinary circumstances" exception to 5 U.S.C. 7123(c) does not conflict with any decision of this Court or any other court of appeals.

Petitioner advances four reasons why the court of appeals should have required exhaustion of administrative remedies, but each is unpersuasive.

a. Petitioner contends that the FLRA's previously expressed view that an OIG agent is a "representative of the agency" within the meaning of Section 7114(a)(2)(B) was not, in fact, "deeply rooted and well-documented" under the *OEA* v. *FLRA* standard. Pet. 19.

The court of appeals held that the FLRA had left no doubt, in a July 1995 decision filed less than a year before the ALJ's ruling in this case, that OIG agents would be subject to the *Weingarten* provision of the FSLMRS. Pet. App. 7a-8a. See *Headquarters Nat'l Aeronautics & Space Admin.*, 50 F.L.R.A. 601 (1995), enforced, 120 F.3d 1208 (11th Cir. 1997), cert. granted, No. 98-369 (Nov. 2, 1998). In that case the FLRA noted that, "[t]he Authority has *long held* that an OIG investigator can, under certain circumstances, be a 'representative of the agency' within the meaning of section 7114(a)(2)(B) of the [FSLMRS]." 50 F.L.R.A. at 612 (citations omitted and emphasis added). The ALJ in the present case made its decision "[i]n light of" the Authority's decision in *NASA*. Pet. App. 36a. The court of appeals thus did not err in concluding that established FLRA precedent made filing exceptions to the ALJ's decision an exercise in futility.

Petitioner contends that FLRA precedent was not "deeply rooted and well-accepted" since the *NASA* decision "was only two years old" and a circuit split existed "regarding the application of section 7114(a)(2)(B) to OIG investigations." Pet. 17-18. But neither the circuit split nor the date of the *NASA* decision casts any doubt on the firmness of the Authority's position, because the Authority explained in *NASA* that it did not intend at that time to change its precedent. 50 F.L.R.A. at 612.[1]

b. The FLRA also argues that administrative exhaustion would not have been futile because it would

---

[1] Nor has the Authority subsequently suggested any mechanism to reconsider its conclusion in this case. Instead, as the court noted, "the FLRA's petition for rehearing has fully informed [the court] of its views on the merits." Pet. App. 11a n.6.

have given the FLRA the opportunity to review two elements of this case that might have caused it to reach a contrary result. Pet. 17-19. But neither issue could in fact have changed the outcome. First, petitioner suggests that the "criminal" aspect of the allegations of this case might have led it to approve of the OIG conducting the interview outside the presence of the union representative. Pet. 18. Elsewhere, however, petitioner states that in its view the OIG investigation was not a "criminal" probe since the U.S. Attorney had declined criminal prosecution. Pet. 6. Moreover, the possible "criminal" aspect of the investigation was irrelevant to the court of appeals' decision, which upheld the exclusion of the union representative because the questioning was "bona fide" under the Inspector General Act. See Pet. App. 14a. Given petitioner's disagreement with that approach, the court below was correct to hold that any presentation of this case to the Authority would have been an exercise in futility.

Second, petitioner suggests that administrative exhaustion would not have been futile, because the Authority might have wished to consider whether the agency component, INS-NY, was liable in this case. Pet. 18-19. Petitioner argues that it had never before held a component agency liable for a Section 7114(a)(2)(B) violation by an OIG and that filing an exception with the Authority on that issue would not have been futile. The court of appeals, however, considered only the "contention that agents of the OIG are not 'representatives of the agency' within the meaning of section 7114(a)(2)(B)," Pet. App. 6a, and did not consider the liability of component agencies. Once it concluded that an unfair labor practice claim against the OIG was not justified, there was no basis for inquiring into the

possibility of holding responsible not only the OIG but also DOJ or INS-NY. Because the court of appeals did not reach that issue, the failure to present it to the FLRA was of no consequence.[2]

c. Petitioner also contends that the decision by the court of appeals cannot be reconciled with this Court's ruling in *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952). Pet. 15-16. In that case the Court held that a court reviewing the action of the Interstate Commerce Commission should have refused to consider a technical error that had been raised for the first time in federal court and was "brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of considerations of practical justice." 344 U.S. at 36. But the reasons for requiring exhaustion in that case are not present here. In *L.A. Tucker*, the court was diverted from the merits by an unpreserved question of procedural law; here, by contrast, the court decided the merits of a question that was unpreserved only because it would have been futile to present the question to the Authority. Thus, "considerations of practical justice" (*ibid.*) required judicial review in this case.

d. Finally, petitioner argues (Pet. 19-21) that the court of appeals erred in holding in the alternative that it had jurisdiction pursuant to 5 U.S.C. 7123(c), which provides that when a party seeks review upon a petition for enforcement, "the court * * * shall have jurisdiction of the proceeding and of the question deter-

---

[2] A similar issue, whether an agency headquarters commits an unfair labor practice by failing to require the OIG to comply with the *Weingarten* rule, is now before this Court in *NASA* v. *FLRA*, No. 98-369.

mined therein * * * and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority." The decision below is, as petitioner points out (Pet. 19), consistent with *FLRA* v. *Commerce*, in which the D.C. Circuit held that 5 U.S.C. 7123(c) allows a court of appeals to review the lawfulness of FLRA orders in an enforcement action brought by the Authority and to set them aside if they are contrary to law. 962 F.2d at 1058. That unremarkable conclusion in *FLRA* v. *Commerce* is, as the Second Circuit noted, directly applicable to the present case. Pet. App. 8a. Petitioner's efforts to re-argue the correctness of *FLRA* v. *Commerce* (Pet. 20 n.8) are misplaced, and petitioner can point to no conflict among the courts of appeals on that issue.

2. On the merits, this case presents the question whether an OIG investigator is a "representative of the agency" for purposes of the *Weingarten* rule, 5 U.S.C. 7114(a)(2)(B). That issue is before this Court in *NASA* v. *FLRA*, No. 98-369. As we have argued in that case, the better reading of the *Weingarten* provision in the FSLMRS, in conjunction with the Inspector General Act, is that an OIG investigator is not a representative of the agency for that purpose. Since the Court's resolution of *NASA* v. *FLRA* will likely be dispositive of the merits issue in this case, the petition should be held for *NASA* on that issue and disposed of in light of the decision in that case.

CONCLUSION

The petition for writ of certiorari should be denied as to the first issue. As to the second issue, the petition should be held pending this Court's decision in *NASA* v. *FLRA*, No. 98-369, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
WILLIAM KANTER
WILLIAM G. COLE
Attorneys

NOVEMBER 1998