

**67 FLRA No. 131**

UNITED STATES  
DEPARTMENT OF THE NAVY  
MARINE CORPS  
COMBAT DEVELOPMENT COMMAND  
MARINE CORPS BASE  
QUANTICO, VIRGINIA  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1786  
(Union)

0-AR-4848

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DECISION

August 6, 2014

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Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members  
(Member Pizzella dissenting)

**I. Statement of the Case**

The Agency unilaterally implemented a single, new position description (the joint PD) for all of its non-supervisory firefighters, replacing two separate position descriptions (PDs) – one for lead firefighters and one for non-lead firefighters. The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to provide the Union with notice and an opportunity to bargain over the impact and implementation of the joint PD. Arbitrator Seymour Strongin sustained the grievance, finding that the Agency was required to provide the Union with notice and an opportunity to bargain before implementing the joint PD. This case presents the Authority with four substantive questions.

The first substantive question is whether the award is contrary to law because the grievance is barred either as a classification matter or by previously filed unfair-labor-practice (ULP) charges involving the same subject matter. The grievance does not concern a classification matter. Further, the grievance was filed before one of the ULP charges and was based on a legal theory different than the legal theory on which the other ULP charge was based. Therefore, the answer is no.

The second substantive question is whether the award fails to draw its essence from the parties' agreement either because the Agency's implementation of the joint PD is "covered by" the agreement or because the Arbitrator's interpretation of the agreement is deficient. Because the grievance alleges, and the Arbitrator found, only a contractual failure to bargain, and because the Authority's "covered-by" doctrine does not apply to a contractual duty to bargain, the Agency's reliance on that doctrine is misplaced. And the Arbitrator does not implausibly interpret or manifestly disregard the parties' agreement. Therefore, the answer is no.

The third substantive question is whether the Arbitrator exceeded his authority by failing to consider whether the Agency's implementation of the joint PD was a de minimis change in conditions of employment. As the issue before the Arbitrator involved only a contractual duty to bargain, the Arbitrator was not required to consider the de-minimis issue. Therefore, the answer is no.

The fourth and final substantive question is whether the Arbitrator erred in relying on matters that the Agency claims are excluded from the grievance-arbitration procedure. Because these matters are not excluded from the grievance-arbitration procedure by statute or by contract, the answer is no.

**II. Background and Arbitrator's Award**

The grievants work as non-supervisory firefighters. From 2007 to 2011, the grievants worked under either the lead-firefighter PD or the non-lead-firefighter PD. Both PDs classified the grievants in the same general schedule (GS)-7 grade level and GS-0081 occupational series. However, employees working under the lead-firefighter PD were provided certain benefits that were not provided to employees working under the non-lead-firefighter PD. The benefits permitted lead firefighters to: (1) be titled as "sergeant";<sup>1</sup> (2) wear insignia denoting the sergeant rank; (3) act in the absence of a captain; and (4) be primary drivers of certain complex fire vehicles.

In 2011, the Agency unilaterally replaced the lead-firefighter and non-lead-firefighter PDs with one, joint PD, which covered all non-supervisory firefighters. The joint PD neither changed the grade level or occupational series of the affected firefighters nor changed their duties. However, the joint PD effectively eliminated the benefits that had been available under the lead-firefighter PD. On July 3, 2011, the Union filed a grievance alleging that the Agency violated Article 2, Section 18 and Article 4, Section 2 of the parties' agreement – the relevant provisions of which are set forth in the appendix to this

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<sup>1</sup> Award at 2.

decision – by failing to provide the Union with notice and an opportunity to bargain before eliminating the prior PDs and implementing the joint PD.

When the parties could not resolve the grievance, they submitted it to arbitration. The Arbitrator initially held a proceeding concerning issues of arbitrability, which he resolved in an interim award. Before the Arbitrator, the Agency claimed that the grievance was not arbitrable because it concerned a classification matter within the meaning of § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute) – the wording of which is set forth in section IV.A.1. below – and Article 11, Section 2 of the parties’ agreement, which contains wording identical to § 7121(c)(5) of the Statute. But the Arbitrator found that the grievance did not concern a classification matter. Instead, he determined that the grievance concerned whether the Agency violated its contractual obligations by eliminating the lead-firefighter PD without providing the Union with notice and an opportunity to bargain over the impact and implementation of the change. The Arbitrator also rejected the Agency’s claim that the grievance was barred under § 7116(d) of the Statute (set forth in section IV.A.2. below) by two ULP charges filed by the Union on December 29, 2010 (2010 ULP) and on July 5, 2011 (2011 ULP), respectively. The Arbitrator concluded that the grievance did not pertain to the same issues raised in the ULP charges. Thus, the Arbitrator found the grievance arbitrable.

In the proceeding on the merits, the parties did not stipulate to, and the Arbitrator did not frame, any issues. As relevant here, the Agency submitted the following issue statement: “Was the Agency required to bargain with the Union over the impact and implementation of its decision to change the [PDs] for [non-supervisory] [f]irefighters at [the Agency]?”<sup>2</sup>

The Arbitrator found that the lead-firefighter benefits constituted conditions of employment, and that the Agency’s practice of providing those benefits was consistently exercised and followed by both parties over an extended period of time. Therefore, he found that the practice constituted a past practice under Article 2, Section 18 of the parties’ agreement. He rejected the Agency’s claim that § 7106 of the Statute barred negotiations, and found that, under Article 4, Section 2 of the parties’ agreement, the Agency was required to provide the Union with notice and an opportunity to bargain before eliminating the past practice by issuing the joint PD.

Finally, the Arbitrator rejected the Agency’s argument that it had no obligation to bargain because the subject matter of the grievance is “covered by” Article 17, Section 1 of the parties’ agreement. The Arbitrator

concluded that Article 17, Section 1 requires the Agency to properly maintain and update established PDs, and does not address eliminating established PDs.

The Agency filed exceptions to the Arbitrator’s award, and the Union filed an opposition to the Agency’s exceptions.

### III. Preliminary Matters

- A. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations bar the Agency’s claim that the award is contrary to § 7103(a)(14)(B) of the Statute.

As part of its contrary-to-law argument, the Agency contends that the Arbitrator erred in finding that the sergeant title and the wearing of the sergeant insignia constituted conditions of employment.<sup>3</sup> According to the Agency, § 7103(a)(14)(B) of the Statute – which states that “conditions of employment” do not include policies, practices, and matters “relating to the classification of any position”<sup>4</sup> – excludes these two matters from the definition of conditions of employment because they relate to the classification of a position.<sup>5</sup>

The record shows that the Union’s argument before the Arbitrator concerned whether the Agency satisfied its contractual obligation to bargain before it implemented changes to conditions of employment.<sup>6</sup> As the Agency was on notice of the Union’s argument, the Agency had the opportunity to raise any related defenses or responsive arguments before the Arbitrator, including its claim that the sergeant title and the wearing of the sergeant insignia are not conditions of employment.<sup>7</sup> But the record does not demonstrate that the Agency made this claim to the Arbitrator. Under §§ 2425.4(c) and 2429.5 of the Authority’s Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the Arbitrator.<sup>8</sup> As the Agency could have, but did not, make this claim to the Arbitrator, we dismiss this exception under §§ 2425.4(c) and 2429.5.<sup>9</sup>

- B. Sections 2425.4(c) and 2429.5 of the Authority’s Regulations do not bar the Agency’s claim that the award is contrary to § 7121(c)(5) of the Statute.

<sup>3</sup> Exceptions at 10.

<sup>4</sup> 5 U.S.C. § 7103(a)(14)(B).

<sup>5</sup> Exceptions at 10.

<sup>6</sup> See Exceptions, Ex. 5, Attach. 8 (Union’s Grievance); Exceptions, Attach., Ex. 3 (Union’s Post-Hr’g Br.) at 4; Agency’s Post-Hr’g Br. at 1.

<sup>7</sup> Award at 2.

<sup>8</sup> 5 C.F.R. §§ 2425.4(c), 2429.5; see, e.g., *Broad. Bd. of Governors*, 66 FLRA 380, 384 (2011) (*Governors*).

<sup>9</sup> See *Governors*, 66 FLRA at 384.

<sup>2</sup> Exceptions, Attach., Ex. 2 (Agency’s Post-Hr’g Br.) at 1.

Moreover, the Agency contends that the award is contrary to § 7121(c)(5) because the grievance concerned a classification action that the Agency took when it replaced the non-supervisory-firefighter PDs with the joint PD and, thus, was not arbitrable.<sup>10</sup> Although the Union argues that the Agency did not raise this issue before the Arbitrator,<sup>11</sup> the record shows otherwise.<sup>12</sup> Specifically, in the interim award discussed above, the Arbitrator stated that “the Agency raises the threshold claim[] that . . . the grievance protests an Agency classification action that is not arbitrable pursuant to 5 U.S.C. § 7121(c)(5)” – a claim that the Arbitrator explicitly rejected in the interim award.<sup>13</sup> As the Agency raised this issue at arbitration, we find that the Agency’s exception regarding § 7121(c)(5) is not barred by §§ 2425.4(c) and 2429.5.

#### IV. Analysis and Conclusions

##### A. The award is not contrary to law.

The Agency asserts that the award is contrary to law in several respects. To assess these claims, the Authority reviews questions of law de novo.<sup>14</sup> In applying the standard of de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law.<sup>15</sup> In making that determination, the Authority defers to the arbitrator’s underlying factual findings.<sup>16</sup>

##### 1. The award is not contrary to § 7121(c)(5) of the Statute.

As stated previously, the Agency contends that the award is contrary to § 7121(c)(5) because the grievance concerned a classification action that the Agency took when it replaced the non-supervisory-firefighter PDs with the joint PD and, thus, was not arbitrable.<sup>17</sup>

Under § 7121(c)(5) of the Statute, a grievance concerning “the classification of any position which does not result in the reduction in grade or pay of an employee” is removed from the scope of the negotiated grievance procedure.<sup>18</sup> The Authority interprets “classification” under § 7121(c)(5) in the context of 5 C.F.R. chapter 511, which defines classification of a position as “the analysis

and identification of a position and placing it in a class under the position-classification plan established by [the Office of Personnel Management (OPM)] under chapter 51 of title 5, United States Code.”<sup>19</sup> Thus, the Authority has held that classification entails the identification of the appropriate title, series, grade, and pay system of a position,<sup>20</sup> and classification matters are implicated “when the essential nature of a grievance is integrally related to the accuracy of the classification of the grievant’s position, e.g., where the substance of the dispute concerns the grade level of the duties assigned to and performed by the grievant.”<sup>21</sup>

Consistent with the foregoing, the Authority has distinguished grievances regarding classification from those seeking impact-and-implementation bargaining over a change in classification.<sup>22</sup> In particular, the Authority has held that grievances concerning the duty to bargain over the impact and implementation of the reclassification of positions do not concern classification within the meaning of § 7121(c)(5).<sup>23</sup>

Here, there is no contention that the Union either grieved or sought to bargain over the title, series, grade, or pay systems of affected employees. Rather, the grievance concerns only whether the Agency should have engaged in impact-and-implementation bargaining with the Union before implementing the joint PD and eliminating the lead-firefighter benefits.<sup>24</sup> Thus, consistent with the principles set forth above, we find that the grievance did not involve classification within the meaning of § 7121(c)(5) of the Statute.<sup>25</sup>

The Agency also claims that the award is contrary to Article 11, Section 2 of the parties’ agreement, which contains wording identical to § 7121(c)(5) of the Statute. As we find that the grievance did not involve classification within the meaning of § 7121(c)(5), we also find that the grievance did not involve classification within the meaning of Article 11, Section 2. Therefore, we find that § 7121(c)(5) and Article 11, Section 2 did not bar the grievance.

<sup>10</sup> Exceptions at 6-7.

<sup>11</sup> Opp’n at 10 (citing 5 C.F.R. § 2429.5).

<sup>12</sup> Agency’s Post-Hr’g Br. at 15; Exceptions, Attach. 4 (Interim Award) at 2.

<sup>13</sup> Interim Award at 2-3.

<sup>14</sup> See *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

<sup>15</sup> *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

<sup>16</sup> See *id.*

<sup>17</sup> Exceptions at 6-7.

<sup>18</sup> 5 U.S.C. § 7121(c)(5).

<sup>19</sup> 5 C.F.R. § 511.101(c).

<sup>20</sup> *U.S. Dep’t of the Army, U.S. Army Corps of Eng’rs, Nw. Div., Portland, Or.*, 59 FLRA 443, 445 (2003) (citing 5 C.F.R. § 511.701(a)).

<sup>21</sup> *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 57 FLRA 275, 277 (2001).

<sup>22</sup> E.g., *NTEU*, 64 FLRA 281, 282-83 (2009).

<sup>23</sup> *Id.*

<sup>24</sup> Award at 2-3.

<sup>25</sup> *U.S. Dep’t of the Army, Womack Army Med. Ctr., Fort Bragg, N.C.*, 65 FLRA 1017, 1020 (2011); *U.S. EPA, Region 2*, 59 FLRA 520, 525 (2003).

2. The award is not contrary to § 7116(d) of the Statute.

The Agency contends that the Arbitrator erred in finding that § 7116(d) does not bar the grievance.<sup>26</sup> Specifically, the Agency argues that the Union filed two ULP charges based on subjects that are the same as or similar to subjects contained in the grievance, particularly the grievants' driving assignments.<sup>27</sup>

Section 7116(d) of the Statute provides, in pertinent part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as [a ULP] . . . , but not under both procedures."<sup>28</sup> In order for a ULP charge to bar a grievance under § 7116(d): (1) the issue that is the subject matter of the grievance must be the same as the issue that is the subject matter of the ULP charge; (2) the issue raised in the grievance must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedures must have been at the discretion of the aggrieved party.<sup>29</sup>

The Authority will find that a grievance and a ULP charge involve the same issue when they arise from the same set of factual circumstances *and* advance substantially similar legal theories.<sup>30</sup> Of particular relevance to the latter requirement, the Authority has held that an alleged statutory violation relies on a different legal theory than an alleged contract violation, and, as a result, a ULP charge alleging a violation of the Statute does not result in a § 7116(d) bar on a subsequent grievance alleging a breach of the parties' agreement.<sup>31</sup>

Here, with regard to whether the grievance is barred by the 2011 ULP charge, the Arbitrator found,<sup>32</sup> and

the Agency acknowledges,<sup>33</sup> that the Union filed the grievance on July 3, 2011, and that the Union filed the 2011 ULP charge on July 5, 2011. The copy of the 2011 ULP charge in the record, recording the "[d]ate [f]iled" as "7/5/11," confirms the 2011 ULP charge's filing date.<sup>34</sup> Because the Union filed the grievance two days *before* it filed the 2011 ULP charge, the grievance is not barred from consideration under § 7116(d) by the 2011 ULP charge.

Notwithstanding the evidence in the record, the Arbitrator's findings, and the Agency's acknowledgement, the dissent suggests that the Union filed the 2011 ULP on July 3, 2011, the same day that the grievance was filed.<sup>35</sup> In support, the dissent relies on the date the Union official who submitted the 2011 ULP charge signed the charge.<sup>36</sup> But the dissent cites no legal authority for the proposition that the date a filing is signed is the document's filing date with the tribunal concerned. And common sense supports the notion that a filer may prepare and sign a document but not "file" it until later. More importantly, the Agency does not except to the Arbitrator's factual finding as to the date of the 2011 ULP charge's filing. Consequently, the dissent's suggestion concerning the 2011 ULP charge's filing date lacks merit.

With regard to whether the grievance is barred by the 2010 ULP charge, there is no dispute that the Union filed the 2010 ULP charge before it filed the grievance. But the Arbitrator characterized the grievance as alleging that the Agency violated its *contractual* duty to bargain by eliminating the lead-firefighter PD without giving the Union an opportunity to bargain over the impact and implementation of the change.<sup>37</sup> The Arbitrator's conclusion that the Agency violated this contractual duty was consistent with this characterization. The Arbitrator's conclusion also gives no indication that the Union raised, or that the Arbitrator intended to resolve, an issue regarding a statutory duty to bargain.

Conversely, the record shows that the 2010 ULP charge alleged that the Agency violated various provisions of the Statute, including its statutory duty to bargain.<sup>38</sup> The 2010 ULP charge did not allege a contractual duty to bargain or mention the parties' agreement at all.<sup>39</sup>

The legal analyses required to resolve statutory duty-to-bargain issues differ from the analyses required to resolve contractual duty-to-bargain issues. For example,

<sup>26</sup> Exceptions at 7-10.

<sup>27</sup> *Id.*

<sup>28</sup> 5 U.S.C. § 7116(d).

<sup>29</sup> *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444-45 (2014) (*DOJ*) (Member Pizzella dissenting); *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (citing *U.S. Dep't of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)).

<sup>30</sup> *DOJ*, 67 FLRA at 445.

<sup>31</sup> *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 115 (2003) (*DOL*) (citing *U.S. Dep't of VA, VA Med. Ctr., Coatesville, Pa.*, 57 FLRA 663, 666-67 (2002)); *Ass'n of Civilian Technicians*, 55 FLRA 474, 475 (1999) (*ACT*) (under § 7116(d), ULP charge alleging violation of statutory duty to bargain does not bar subsequent grievance alleging violation of contractual duty to bargain); see also *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 680 (2009) (earlier-filed grievance alleging contractual violation did not trigger § 7116(d) bar on later-filed ULP charge alleging violation of the Statute).

<sup>32</sup> Interim Award at 3-4.

<sup>33</sup> Exceptions at 4.

<sup>34</sup> Exceptions, Ex. 5, Attach. 9 (2011 ULP).

<sup>35</sup> Dissent at 15.

<sup>36</sup> *Id.* at 15 n.9.

<sup>37</sup> Interim Award at 1-2.

<sup>38</sup> Exceptions, Ex. 5, Attach. 4 (2010 ULP).

<sup>39</sup> *Id.*

arbitrators are required to apply statutory burdens of proof when resolving an alleged ULP.<sup>40</sup> In contrast, and unless a contract provision mirrors the Statute – not the case here – in contractual duty to bargain cases, “the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the [a]rbitrator.”<sup>41</sup> In those circumstances, the Authority applies the deferential essence standard to the arbitrator’s contract interpretation.<sup>42</sup>

Because the record supports the conclusion that the 2010 ULP charge involved statutory duty-to-bargain issues, but the later-filed grievance involved contractual duty to bargain issues, we find that the Agency fails to establish that the grievance is barred by § 7116(d).

The dissent’s contrary conclusion – that the 2010 ULP charge bars the grievance – is without support. In this regard, the dissent finds that, in various ways, the Union “concedes” that the grievance and the 2010 ULP charge raise the same issues.<sup>43</sup> But there is no Union “concession” either in proceedings below or now before the Authority. Quite to the contrary, the Union argues vigorously before the Authority that the grievance and the 2010 ULP raise different issues. And the Agency makes no claim, implicit or explicit, that a concession was ever made.

Moreover, the Union’s actions on which the dissent relies neither reflect a “concession” nor prove that the grievance is barred by § 7116(d). The dissent finds significance in the Union’s agreement to withdraw its 2011 ULP charge.<sup>44</sup> But the Union apparently thought better of the matter and never withdrew the charge – which remained pending with the FLRA’s Regional Office for months until it was finally dismissed.<sup>45</sup> And the Union’s description of its 2010 ULP charge in its 2011 ULP charge, cited by the dissent,<sup>46</sup> does not alter the fact that the issues the 2010 ULP charge actually raised are different from the issues raised in the grievance. As for the dissent’s assertion that the Union does not argue before the Authority that the 2010 ULP charge “raised a *different issue or theory*” than the grievance,<sup>47</sup> the dissent is simply wrong. The Union expressly argues that “the triggering

events, factual circumstances, [and] *legal theories*” of the grievance and the 2010 ULP charge “differed.”<sup>48</sup> Finally, the dissent’s reliance on the Union’s request for a status quo ante remedy in the grievance – as proof that the grievance raised ULP issues – ignores Authority precedent finding status quo ante relief an appropriate remedy for contract violations.<sup>49</sup> Put simply, the dissent’s claim that the grievance is barred by § 7116(d), advancing arguments that even the Agency does not make, is unfounded.

Consequently, we find that the Agency has failed to establish that the grievance is barred by § 7116(d), and we deny this exception.

B. The award does not fail to draw its essence from the parties’ agreement.

The Agency asserts that the award fails to draw its essence from the parties’ agreement because the subject matter of the grievance is “covered by” Article 17 of the parties’ agreement and is, therefore, not subject to bargaining.<sup>50</sup>

The “covered-by” doctrine applies as a defense to an alleged failure to satisfy a statutory bargaining obligation.<sup>51</sup> Where a grievance involves only a dispute as to whether a contractual – as opposed to a statutory – bargaining obligation has been violated, “the issue of whether the parties have complied with the agreement becomes a matter of contract interpretation for the arbitrator.”<sup>52</sup>

The Arbitrator discussed only a contractual, not a statutory, bargaining obligation. Although the Union’s post-hearing brief to the Arbitrator made a passing reference to “relevant labor law,”<sup>53</sup> the rest of its brief, as well as the grievance, involved only a claim that the Agency failed to meet its bargaining obligation under the parties’ agreement.<sup>54</sup> Thus, there is no basis for concluding that a statutory duty to bargain was at issue here, and the Agency’s reliance on the “covered-by” doctrine is misplaced.<sup>55</sup>

<sup>40</sup> See, e.g., *U.S. GSA, Ne. & Caribbean Region, N.Y.C., N.Y.*, 60 FLRA 864, 866 (2005).

<sup>41</sup> *U.S. DHS, U.S. ICE*, 65 FLRA 792, 795 (2011) (quoting *Broad. Bd. of Governors, Office of Cuba Broad.*, 64 FLRA 888, 891 (2010) (*Cuba Broad.*) (internal citation and quotation marks omitted)).

<sup>42</sup> *Id.*

<sup>43</sup> Dissent at 15-16.

<sup>44</sup> *Id.* at 15.

<sup>45</sup> Exceptions, Ex. 5, Attach. 13 (dismissal of 2011 ULP charge).

<sup>46</sup> Dissent at 15-16.

<sup>47</sup> *Id.* at 16.

<sup>48</sup> Opp’n at 11 (emphasis added).

<sup>49</sup> See, e.g., *NTEU*, 66 FLRA 577, 581 (2012) (finding that “the undisturbed contractual violation could support the [u]nion’s requested status-quo-ante remedy.”).

<sup>50</sup> Exceptions at 12-14.

<sup>51</sup> See *SSA, Balt., Md.*, 66 FLRA 569, 573 n.6 (2012) (*SSA, Balt.*) (Member DuBester dissenting); *SSA Headquarters, Balt., Md.*, 57 FLRA 459, 460 (2001).

<sup>52</sup> *Cuba Broad.*, 64 FLRA at 891 (quoting *SSA, Balt., Md.*, 55 FLRA 1063, 1068 (1999) (internal quotation marks omitted)).

<sup>53</sup> Union’s Post-Hr’g Br. at 4.

<sup>54</sup> See Union’s Grievance at 1; Agency’s Post-Hr’g Br. at 1.

<sup>55</sup> See *SSA, Balt.*, 66 FLRA at 573 n.6.

The Agency also argues that the award fails to draw its essence from the parties' agreement because the Arbitrator's interpretation of Article 17 is implausible and evidences a manifest disregard of the agreement.<sup>56</sup> According to the Agency, Article 17, Section 2 requires the Agency to give the Union notice and an opportunity to bargain over changes to a PD where there is a change in position classification, but Article 17, Section 1 contains no such requirement where changes to a PD do not result in reclassification.<sup>57</sup> The Agency contends that the Arbitrator should have applied Article 17, Section 1 because the change to the PD did not result in reclassification of the firefighters' positions.<sup>58</sup>

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.<sup>59</sup> Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective-bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.<sup>60</sup>

Applying the foregoing, the Agency's assertions provide no basis for finding the award deficient. As an initial matter, the Arbitrator based his finding of a contractual obligation to bargain on Article 4, Section 2, not Article 17.<sup>61</sup> In addition, the Arbitrator's determination that Article 17, Section 1 of the parties' agreement does not address elimination of PDs is not an implausible interpretation of this provision's language. The provision addresses a "[PD that] is revised to reflect significant changes,"<sup>62</sup> not a PD that is eliminated. Further, nothing in the language of Article 17 prohibits the Agency from bargaining with or providing notice to the Union over any changes to a PD. Thus, in these circumstances, we find that the Agency has failed to demonstrate that the Arbitrator's interpretation of Article 17 is implausible or evidences a manifest disregard of the agreement. Accordingly, we deny the Agency's essence exception.

C. The Arbitrator did not exceed his authority.

The Agency also argues that the Arbitrator exceeded his authority by: (1) failing to resolve an issue submitted to arbitration – namely, whether the changes made to the grievants' PDs were "de minimis";<sup>63</sup> and (2) finding a past practice based on matters that the Agency alleges are excluded from the grievance-arbitration procedure – namely, the priority in driving complex fire vehicles, the title of sergeant, and wearing the sergeant insignia.<sup>64</sup>

Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those who are not encompassed within the grievance.<sup>65</sup> When an arbitrator fails to frame any issues, but the award is directly responsive to the parties' submitted issue(s), the Authority denies exceptions contending that arbitrators exceeded their authority by failing to resolve an issue submitted to arbitration.<sup>66</sup>

Regarding whether the Arbitrator failed to resolve an issue submitted to arbitration, as addressed above, the only issue before the Arbitrator was whether the Agency met its contractual obligation to bargain.<sup>67</sup> An analysis of whether a change in conditions of employment is greater than de minimis is required in cases involving the duty to bargain under the Statute.<sup>68</sup> As the issue before the Arbitrator did not involve the duty to bargain under the Statute, he was not obligated to address and resolve the de-minimis issue, and we reject the Agency's argument regarding that issue.<sup>69</sup>

The Agency also claims that the Arbitrator disregarded a specific limitation on his authority by relying on certain evidence.<sup>70</sup> Specifically, the Agency argues that the evidence pertaining to the driving assignments is barred under § 7116(d) because this matter was the subject of one of the ULP charges filed by the Union, and that the evidence pertaining to the sergeant title and insignia is barred under § 7121(c)(5) because it concerns classification matters.<sup>71</sup> Both arguments are premised on the Agency's

<sup>56</sup> Exceptions at 12.

<sup>57</sup> *Id.* at 15-16.

<sup>58</sup> *Id.* at 15, 21.

<sup>59</sup> See 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

<sup>60</sup> See *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

<sup>61</sup> Award at 7-8.

<sup>62</sup> *Id.* at 6-7.

<sup>63</sup> Exceptions at 23.

<sup>64</sup> *Id.*

<sup>65</sup> See *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

<sup>66</sup> See *U.S. DOJ, Fed. BOP, Med. Facility for Fed. Prisons*, 51 FLRA 1126, 1139 (1996).

<sup>67</sup> See Union's Grievance at 1; Union's Post-Hr'g Br. at 4; Agency's Post-Hr'g Br. at 1.

<sup>68</sup> See *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999).

<sup>69</sup> See *NTEU*, 63 FLRA 198, 200 (2009).

<sup>70</sup> Exceptions at 23.

<sup>71</sup> *Id.*

claims that §§ 7116(d) and § 7121(c)(5) bar the grievance. Because we have rejected those claims, we reject this one as well.

**V. Decision**

We dismiss one of the Agency's contrary-to-law exceptions under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, and we deny the Agency's remaining exceptions.

## APPENDIX

Article 2 of the parties' agreement provides, in relevant part:

Article 2: Definitions

Section 18. *Past Practice.* Existing practices sanctioned by use and acceptance, which amount to terms and conditions of employment even though not specifically included in this MLA. In order to constitute a binding past practice, it must be established that (1) the practice must involve a condition of employment; and (2) that practice must be consistently exercised for an extended period of time and followed by both parties, or followed by one party and not challenged by the other over a substantially long duration. It should be noted that if a matter is not a condition of employment, it does not become a condition of employment either through practice or agreement.<sup>72</sup>

Article 4 of the parties' agreement provides, in relevant part:

Article 4: *Bargaining During the Term of the Agreement and Labor-Management Committees.*

Section 2. Past practices pertaining to personnel policies, practices, and working conditions in operation on the effective date of this Agreement will continue if they comply with applicable law and regulations, and they have not otherwise been altered or addressed by this MLA.<sup>73</sup>

Article 17 of the parties' agreement provides, in relevant part:

Article 17: *Position Management and Classification.*

Section 1. Each position covered by this Agreement must be current and accurately described, in writing, and classified as to the proper occupational title, series, grade, and pay system, in

accordance with OPM and applicable regulations.

a. The description must clearly and concisely state the major duties, responsibilities and supervisory relationships of the position. Position descriptions do not control work assignment. Supervisors may direct and assign specific tasks that are not reflected in the job/position description. Should such tasks become major duties or grade controlling, the job/position description shall be modified to reflect these tasks so that the job/position description will be kept current and accurate.

b. Employees will be furnished a copy of the job/position description to which assigned. In the event the job/position description is officially revised to reflect significant changes, employees will be furnished a copy of the update.<sup>74</sup>

Section 2. a. Activities will apply newly issued OPM classification and job grading standards within a reasonable time in accordance with applicable regulations. The local union will be notified reasonably in advance when any changes in position classification or job grading standards will impact on unit employees at the activity. When an encumbered position is reclassified downward, the employee will receive grade/pay retention and priority consideration entitlements in accordance with applicable regulations and [the parties' agreement.]<sup>75</sup>

<sup>72</sup> Award at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 5-6.

<sup>75</sup> Exceptions at 15.

**Member Pizzella, dissenting:**

As I explained in my dissent in *U.S. DOJ, Federal BOP, Metropolitan Correctional Center, New York, New York (BOP)*,<sup>1</sup> I am concerned with the framework by which the majority disposes of § 7116(d) exceptions and would conclude in this case that the Union's grievance is barred. But, as in *BOP*, it is unnecessary for me to repeat those concerns or to resolve the question of whether that framework is consistent with Congress' original intent to avoid duplicative complaints and grievances.<sup>2</sup> Instead, even if I apply the framework that is applied by the majority to the circumstances of this case, I arrive at a different conclusion and would conclude that the 2011 grievance is barred by § 7116(d).

In a 2010 unfair labor practice (ULP) charge, the Union alleged that the Agency violated various provisions of the Federal Service Labor-Management Relations Statute (the Statute), *the parties' memorandum of understanding (MOU)*, and a *past practice* that had been in effect for twenty years by eliminating the lead firefighter position description and assigning those employees to perform duties contained in a firefighter position description "*without official Union notification*."<sup>3</sup> Then, in a 2011 grievance, the Union advanced essentially the same arguments arguing that the Agency violated *the parties' agreement* and the same twenty-year *past practice*, by eliminating the lead firefighter position description and assigning those employees to perform firefighter duties "*without proper notification*" to the Union.<sup>4</sup>

My colleagues conclude, nonetheless, that the 2011 grievance is not barred under § 7116(d) because the 2010 ULP charge and the 2011 grievance are based on different legal theories<sup>5</sup> even though the Union concedes, implicitly and explicitly, not once, but *four times* that the grievance and the earlier-filed ULP charge raised the same issues.

First, when the Union filed its grievance, the Agency responded to the Union that it "cannot have two grievances, on the same matter, with two different authorities" and asked the Union's chief steward to clarify whether she wished to proceed with that ULP (which resurrected the same issues as had been raised in the 2010 ULP) or the grievance.<sup>6</sup> In response, the chief steward opted to "proceed with the [grievance]"<sup>7</sup> instead of the ULP and instructed another Union

representative to "withdraw" the ULP.<sup>8</sup> Second, the Union's 2011 ULP charge<sup>9</sup> asserts that the 2010 ULP alleged that the Agency violated "the [m]aster [l]abor [a]greement in their failure to notify the Union and their failure to bargain in good faith the impact and implementation of their proposal."<sup>10</sup> Third, in its response to the Agency's exceptions, the Union asserts that only *the 2011 ULP, not the 2010 ULP*, raises a *different issue* (retaliation) from that raised in the grievance.<sup>11</sup> Instead, the Union argues that the grievance is not barred under § 7116(d) by the earlier-filed ULP only *because* it "*was withdrawn* prior to adjudication,"<sup>12</sup> *not because* it raised a *different issue or theory*. And, finally, the Union requested a status quo ante remedy in the grievance – a remedy that is typically requested as a remedy for a statutory violation, such as the violation that was alleged in the 2010 ULP.

From my perspective, these facts are central to our determination in this case and demonstrate that the Union was attempting to cleverly craft its grievance and ULPs in such a manner so as to purposely avoid the proscription of § 7116(d). But the majority simply dismisses them as "unfounded."<sup>13</sup> I can understand why my colleagues may find these facts "inconvenient," but the U.S. Court of Appeals for the District of Columbia Circuit has cautioned the Authority that it may not ignore such facts and may not simply "defer[]" to an arbitrator's award that is wrong.<sup>14</sup> Throughout its exceptions, the Agency argues that "[t]he Union filed a ULP charge on December 29, 2010, concerning [the] same matter [raised in the 2011 grievance];"<sup>15</sup> that "the Union withdrew [the 2010] ULP . . . and in July 2011, the same issue became the subject of both a ULP . . . and the current [grievance];"<sup>16</sup> and that "the language in the ULP[s] might have varied [but] the substance of the ULPs[] was the same matter as the grievance filed by the Union on July 3, 2011."<sup>17</sup> Therefore, it is simply not accurate that the Agency did not "advance [these] arguments."

<sup>8</sup> Exceptions, Ex. 5, Attach. 11 at 1.

<sup>9</sup> The grievance was dated, July 3, 2011. See Exceptions, Ex. 5, Attach. 8. The 2011 ULP charge was also dated July 3, 2011, but receipt was not acknowledged by the Washington Regional Office of the FLRA until July 5, 2011. See Exceptions, Ex. 5, Attach. 9.

<sup>10</sup> Exceptions, Ex. 5, Attach. 9 (emphasis added).

<sup>11</sup> Opp'n. at 3.

<sup>12</sup> *Id.* But see *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1112 (2010) (*Navy*) (an issue is "raised" within the meaning of § 7116(d) at the time of the filing of a grievance or a ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits) (emphasis added).

<sup>13</sup> Majority at 9.

<sup>14</sup> *Fed. BOP v. FLRA*, 654 F.3d 91, 97 (D.C. Cir. 2011) ("Ignoring this inconvenient history (as had the arbitrator), the Authority simply deferred to the findings in the award.")

<sup>15</sup> Exceptions at 7 (citing Ex. 5, Attach. 5) (emphases added).

<sup>16</sup> *Id.* at 7-8 (citing Ex. 5, Attach. 8-9) (emphases added).

<sup>17</sup> *Id.* at 9.

<sup>1</sup> 67 FLRA 442, 451-54 (2014) (Dissenting Opinion of Member Pizzella).

<sup>2</sup> *Id.*

<sup>3</sup> Exceptions, Ex. 5, Attach. 4 (emphasis added).

<sup>4</sup> Exceptions, Ex. 5, Attach. 8 (emphasis added).

<sup>5</sup> Majority at 7-8.

<sup>6</sup> Exceptions, Ex. 5, Attach. 10 at 1.

<sup>7</sup> *Id.*

But, even if the Agency had not raised these arguments, as the majority incorrectly asserts, we may not simply ignore these important facts. The 2010 ULP, the 2011 grievance, and the 2011 ULP are all part of the documentary record and are available for my colleagues to review. Both parties referred to them in their arguments to the Arbitrator, as well as in their submissions to the Authority. Furthermore, because the Agency directly challenges the award's consistency with law, the Authority is obligated to conduct a *de novo* review to "assess[] whether [the] arbitrator's legal conclusion are consistent with the applicable standard of law."<sup>18</sup> It is well established that *de novo* review includes a thorough "review of the administrative record plus any additional evidence the parties present."<sup>19</sup> Therefore, I am surprised that my colleagues would dismiss these facts as "unfounded."<sup>20</sup>

As I noted in my dissent in *BOP*, "I doubt that Congress intended the application of § 7116(d) to depend on how a union words [and, in this case, dates] its complaints and grievances."<sup>21</sup> It is apparent to me, therefore, that the grievance raises "substantially similar"<sup>22</sup> issues and theories that were raised previously by the Union in its 2010 ULP charge and "there can be no doubt that the same facts and the same decision are involved."<sup>23</sup> I would conclude, therefore, that the Union's grievance is barred by § 7116(d).

Thank you.

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<sup>18</sup> *AFGE, Local 2096*, 67 FLRA 30, 31 (2012) (citing *U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998); see also Majority at 5; *AFGE, Local 2382*, 64 FLRA 123, 124 (2009) (Chairman Pope dissenting on other grounds).

<sup>19</sup> *Black's Law Dictionary*, 864 (8th ed. 2004) (emphasis added); see also *Doe v. United States*, 781 F.2d 907, 913 (D.C. Cir. 1986) ("De novo review specifies not only a *standard* of review, but also connotes again, for a second time.") (emphasis in original).

<sup>20</sup> Majority at 9.

<sup>21</sup> *BOP*, 67 FLRA at 453 (Dissenting Opinion of Member Pizzella).

<sup>22</sup> *Navy*, 64 FLRA at 1112.

<sup>23</sup> *AFGE, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992).