OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEFENSE CONTRACT AUDIT AGENCY
NORTHEAST REGION

LEXINGTON, MASSACHUSETTS

Respondent

and Case No. BN-CA-20172

AMERICAN FEDERATION OF GOVERNMENT

BN-CA-20296

EMPLOYEES, AFL-CIO, COUNCIL 163

Charging Party BN-CA-20354

Paul N. Bley, Esquire For the Respondent
Linda Bauer, EsquireDaniel F. Sutton, Esquire For the General Counsel
George Lajoie For the Charging Party

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101, et seq.,(1) and the Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., concerns at the outset a question as to whether some portion of this proceeding is barred by § 16(d) of the Statute and/or whether, aside from § 16(d), unfair labor practice charges should be pursued in view of the completed arbitration of both the alleged unilateral change to require advance approval of official time in excess of one hour per day and the alleged denial of official time for investigation and preparation of unfair labor practice charges.

This case was initiated by a charge filed on November 13, 1991, in Case No. BN-CA-20172 which alleged violation of §§ 16(a)(1) and (4)(G.C. Exh. 1(A)), and, by a First Amended Charge filed on February 24, 1992, in Case No. BN-CA-20172 to allege violation of §§ 16(a)(1) and (5) (G.C. Exh. 1(c)); by a charge filed on December 16, 1991, in Case No. BN-CA-20296 which alleged violation of § 16(a)(1) (G.C. Exh. 1(E)); by a charge filed on December 30, 1991, in Case No. BN-CA-20354 which alleged violation of § 16(a)(1) (G.C. Exh. 1(G)), and by a First Amended Charge filed on February 18, 1992, in Case No. BN-CA-20354 to allege violation of §§ 16(a)(1) and (5) (G.C. Exh. 1(I)). The Consolidated Complaint and Notice of Hearing issued on May 20, 1992 (G.C. Exh. 1(K)), alleged violations of §§ 16(a)(1) and (5), and set the matter for Settlement Call on July 6, 1992. By Order dated July 28, 1992, the hearing was set for October 20, 1992 (G.C. Exh. 1(M)), pursuant to which a hearing was duly held on October 20, 1992, in Boston, Massachusetts, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral

argument. At the conclusion of the hearing, November 20, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of General Counsel on behalf of all parties, for good cause shown, to January 8, 1993. General Counsel and Respondent each timely mailed a brief, received on January 12, 1993, which have been carefully considered.

At the hearing, Respondent's motion to keep the record open for receipt of the arbitrator's decision was denied but without prejudice to future action (Tr. 201-202). With its Brief, Respondent filed a Motion to Reopen Record to make the arbitrator's decision a part of the record. As General Counsel does not object, Respondent's motion is granted and Arbitrator C.J.McAuliffe's Decision in F.M.C.S. Case No. 10168, "Issue: Denial of Union Time", and dated November 9, 1992, is hereby marked "Respondent Exhibit Appendix A", (already designated and attached to General Counsel's Brief as "Appendix A") and is hereby incorporated as part of the record as "Respondent Exhibit, Appendix A." On the basis of the entire record, I make the following findings and conclusions:

Background

Both Respondent and General Counsel have been seriously remiss in their statements of the proceedings which, neces-sarily, renders questionable their contentions.

At the outset, there were two charges filed on November 13, 1991, not one as stated (General Counsel's Brief, p.2; Respondent's Brief, pp. 6-7).

1. BN-CA-20172. Filed, November 13, 1991. This charge alleged violation of §§ 16(a)(1) and (4) and asserted, in part, as follows:

> ". . . On November 4, Ms. Garneau threatened an adverse action, i.e., denial of pay in November, if I did not adopt a new set of rules which clearly deviate from past practice and the contract, on advance approval of Union time. Ms. Garneau's insistence on elaborate details as a requirement to approve time interferes with the Unions right to conduct its business. Her threat to disapprove time of one hour or less on individual matter of grievance or potential grievance, resulting in denial of pay, is coercive and represents a change in working conditions without bargaining." (G.C. Exh. 1(A)).

It is important to note that, although a violation of § 16(a)(1) was alleged, § 16(a)(4) provides that it shall be an unfair labor practice for an agency, "(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter." § 16(a)(4) carries no connotation whatever of a refusal to bargain.

2. BN-CA-20173. Filed, November 13, 1991. This charge was not made part of the record but the arbitrator describes it as follows:

"The dispute in the arbitration case originally took the form of an unfair labor practice charge filed by union with the Federal Labor Relations Authority in a case numbered BN-CA-20173. That case complained of a change in working conditions without notice to the union; that is, a failure to bargain by the agency as required by law. The union also filed this grievance based on the same facts, but complaining of a violation of the written collective bargaining contract between the parties.

The ULP charge was filed on November 13th; and it was withdrawn by the union and closed by the F.L.R.A. the following January. . . . The charge itself alleged union discrimination and employer interference with union activity. . . ." (Res. Exh., Appendix A, pp. 4-5).

From the arbitrator's description, it is clear that BN-CA-20173, like BN-CA-20172, alleged violation of § 16(a)(1) and (4). The Arbitrator also stated that he was uncertain whether that charge would have permitted the Authority, ". . . to reach the question of unilateral change in working conditions or failure to bargain." Clearly, any question of unilateral change or failure to bargain as an independent unfair labor practice could not have been reached, although evidence of unilateral change or a failure to bargain may have been evidence of a derivative violation of 16(a)(1). Nevertheless, it is plain that the thrust, or theory, of the violation alleged in BN-CA-20173 was not a refusal to bargain. As the Arbitrator noted, BN-CA-20173, ". . . was dropped on January 14, 1992 and the case was closed by the F.L.R.A. on January 17. . . . " (Res. Exh. Appendix A, p. 11).

3. GRIEVANCE, filed November 27, 1991 (Tr. 12; G.C. Exh. 12, final attachment; Res. Exh., Appendix A, p. 13).

The Arbitrator stated the issue as follows:

ISSUE

"The parties could not agree to the precise wording of the issue to be decided by the arbitrator. After hearing all of the evidence and arguments, the issue on the merits is found to be:

'Did the agency violate the contract when it denied the requests made on 11/5 or 11/6, 1991 for time for union activities for the union president and the chief steward? If so, what should the remedy be?'" (Res. Exh. Appendix A, p.3).

As noted above, the Arbitrator, in describing BN-CA-20173, also states,

"The dispute in this arbitration case orig-inally took the form of an unfair labor practice charge . . . in a case numbered BN-CA-20173. That case complained of a change in working conditions without notice to the union; that is, a failure to bargain by the agency as required by law. The union also filed the grievance based on the same facts, but complaining of a violation of the written collective bargaining contract between the parties." (Res. Exh., Appendix A, pp. 4-5).

However, the Arbitrator made it clear that past practice was considered in interpretating and applying the written document. Thus, he stated,

". . . even if the arbitrator cannot decide whether there has been an unlawful change in working conditions, there is no prohibition on the arbitrator from hearing of the existence or non-existence of a past practice and considering it solely as evidence of the correct interpretation or application of a written clause of the contract. . . ." (Res. Exh., Appendix A, pp. 5-6).

4. First Amended Charge BN-CA-20172. Filed, February 24, 1992. The amendment was to change paragraph 5 to allege violation of §§ 16(a)(1) and (5). The addition of 16(a)(5) added a new and different theory, namely, a refusal to negotiate in good faith with a labor organization, rather than interference, restraint, or coercion of an employee (16(a)(1)) or discrimination against an employee (16(a)(4)). Clearly the grievance, as to whether Respondent violated the contract, interpreted and applied in light of past practice, when it denied requests for official time, involved the same allegations as the First Amended change, namely that Respondent failed to bargain about a "new set of rules which clearly deviate from past practice and the contract . . . and represents a change in working conditions without bargaining." (G.C. Exh. 1(C)), which, in turn, became paragraph 22 of the Complaint,

"22. . . .Respondent . . . implemented [unilat-erally, as alleged in paragraph 24 of the Complaint] a new procedure requiring Union officials to obtain advance approval for all official time in excess of one hour per day." (G.C. Exh. 1(K)).

The new cause of action, or theory of the charge, namely the 16(a)(5) allegation was filed after the grievance and, accordingly, was barred by § 16(d). The 16(a)(1) allegation having been filed before the grievance is not barred.

5. BN-CA-20296. Filed December 16, 1991. This charge alleged a violation of § 16(a)(1), and asserted, in part, as follows:

"On 6 December 1991 I [Evan A. McLynch, Chief Steward] requested official Union time . . . The time was requested in order to file an Unfair Labor Practice . . . The request was denied . . . Refusal to grant time interferes and restrains me from exercising my rights as a Union Officer. Further, the denial represents implementation of a change in working conditions without bargaining because previously such time was granted. . . ." (G.C. Exh. 1(E)

BN-CA-20354. Filed December 30, 1991. The charge alleged a violation of § 16(a)(1), and asserted, in part, as follows:

"This Unfair Labor Practice is filed for and in behalf of Mr. George Lajoie, President of DCAA Council 163, AFGE. On 20 December 1991, Mr. Lajoie requested official Union time . . . The time was requested to investigate, fact find, and research . . . alleged Unfair Labor Practices . . . The request was denied . . . Refusal to grant time interferes and restrains Mr. Lajoie from exercising rights as a Union officer. Further, the denial requests implementation of a change in working conditions without bargaining because previously such time was granted. . . ." (G.C. Exh. 1(G))

First Amended Charge BN-CA-20354. Filed February 18, 1992. This amended the original charge to allege violation of §§ 16(a)(1) and (5) (G.C. Exh. 1(I)).

The BN-CA-20296 and BN-CA-20354 charges are reflected as Paragraph 23 of the Complaint. Although the charges alleged December dates, the Complaint states,

"23. On or about November 6, 1991, the Respondent . . . implemented a policy of no longer granting official time for the preparation and research of unfair labor practice charges."

(G.C. Exh. 1(K)).

It is true, of course, that the grievance of November 27, 1991, could not have involved acts in December, 1991, that had not yet occurred; but the grievance most certainly did involve the implementation on, or about, November 6, 1991, of no longer granting official time for preparation and research of unfair labor practice charges, which is the allegation of paragraph 23 of the Complaint. Because the grievance which raised this issue was filed before the charges in BN-CA-20296 and 20354 raising, as made clear by Paragraph 23 of the Complaint, the same issue, paragraph 23 of the Complaint is barred by § 16(d) of the Statute.

CONCLUSIONS

§ 16(d) of the Statute, in relevant part, provides as follows:

"(d). . . 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 an unfair labor practice under this section, but not under both procedures." (5 U.S.C. § 7116(d)).

The issue in the present unfair labor practice cases is whether Respondent changed, ". . . working conditions without notice to the union; that is, a failure to bargain . . ." (Respondent Exhibit, Appendix A, p. 5)[2] is substantially the same as the issue in the arbitration case and, of course, arises from precisely the same facts, i.e. a change of working conditions by Respondent's, ". . . violation of the written collective bargaining contract . . ." (id.) as applied or interpreted as shown by, ". . . the existence or non-existence of a past practice. . . ." (id., at 6).

In determining whether a grievance and an unfair labor practice charge involve the same issue,

". . . the Authority will look at whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the theories advanced in support of the ULP charge and the

grievance are substantially similar." U.S. Department of Defense, Marine Corps Logistics Base, Albany, Georgia, 37 FLRA 1268, 1272 (1990). See, U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana, 38 FLRA 1345, 1352-1353, upheld sub nom [petition for review denied] American Federation of Government Employees, AFL-CIO, Local 1411, et al. v. FLRA, 960 F.2d 176(D.C. Cir. 1992).

The Authority has made clear that,

"An issue is 'raised' within the meaning of section 7116(d) at the time of the filing of a grievance or an unfair labor practice charge even if the griev-ance or charge is not adjudicated on the merits." Lowry Air Force Base, Denver Colorado, 32 FLRA 792, 794(1988)(Emphasis supplied); U.S. Department of Veterans Affairs, Veterans Administration Medical Center, Newington, Connecticut, 36 FLRA 441, 446 (1990); U.S. Department of Interior, Bureau of Indian Affairs, Chemawa Indian Boarding School, 39 FLRA 1322, 1324 (1991).

Moreover, § 16(d) is jurisdictional in nature and is not subject to waiver by the parties. U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 27 FLRA 268, 272 (1987); Lowry Air Force Base, Denver, Colorado, supra, 32 FLRA at 802.

It is true that charges in Case No. BN-CA-20172 and BN-CA-20173[(3)], each filed on November 13, 1991, predated the grievance; but those charges did not allege a refusal to bargain, i.e. a change in working conditions. The grievance, filed on November 27, 1991, did allege a change in working conditions by Respondent's violation of the written collective bargaining contract as applied or interpreted by past practice. This was a wholly different alleged violation than the violation alleged in the charges. c.f., Overseas Education Association v. FLRA, et al., 824 F.2d 61, 72 (D.C. Cir. 1987) on remand, 29 FLRA 1225 (1987). Because the grievance asserted a different cause of action, or theory, it was not barred by the earlier filed unfair labor practice charges. The amended charge in Case No. BN-CA-20172, filed on February 24, 1992, alleged, for the first time as an unfair labor practice, a change in working conditions, i.e. an unilateral change, a failure to bargain[(4)]; but the same issue, namely a change in working conditions by violation of the collective bargaining agreement as applied or interpreted by past practice, had earlier been raised by the grievance. Because the issue of change in working conditions had been raised by an earlier filed grievance, the amended change was barred by § 16(d).

The charge in Case No. BN-CA-20296, filed on December 16, 1991, and Case No. BN-CA-20354, filed on December 30, 1991, and amended on February 18, 1992, all post dated the grievance and the amended charge in Case No. BN-CA-20354 which for the first time alleged an unilateral change in working conditions with respect to official time for unfair labor practice activity, ". . . the denial represents implementation of a change

in working conditions without bargaining because previously such time was granted. . ." (G.C. Exh. 1(I)). The same issue having earlier been raised by the grievance, the amended charge in Case No. BN-CA-20354 (the charge in Case No. B-CA-20296 was never amended to allege a violation of 16(a)(5)) and Paragraph 23 of the Complaint,[5] and related allegations of Paragraphs 24 and 25 of the Complaint, are barred by § 16(d) of the Statute. It is true that the charge in Case No. BN-CA-20354 asserts a December date, i.e. an event occurring after the grievance; but Paragraph 23 of the Complaint states that, "On or about November 6, 1991, the Respondent . . . implemented a policy [as to ULP charge activity]. . . .", which, of course, was precisely an issue raised by the earlier filed grievance.

While, for reasons set forth above, the grievance first raised the issue of a change in working conditions and therefore is a bar, pursuant to § 16(d) of the Statute, to Paragraphs 22 and 23 of the Complaint, and the related Paragraphs 24 and 25, alleging an unilateral change of working conditions, application of § 16(d) in this case is complicated by the fact that unfair labor practice charges were filed first in Case Nos. BN-CA-20172 and Case No. BN-CA-20173 alleging: interference with an employee (§ 16(a)(1)) and discrimination against an employee (§ 16(a)(4)); nevertheless, because it is beyond question that the single issue in the unfair labor practice charges and in the grievance was the asserted unilateral change in conditions of employment with respect to advance approval of official time and with respect to the allowance of official time to investigate and prepare unfair labor practice charges, the Complaint herein should be dismissed because the arbitration decision has resolved all issues raised by the Complaint, no exception was taken to the arbitration decision; and it is inappropriate to relitigate a matter already litigated. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia, 13 FLRA 571, 576, 577 (1984); Veterans Administration (Washington, D.C.) and Veterans Administration Hospital (Brockton, Massachusetts), 35 FLRA 188, 193, 195 (1990); c.f., Spielberg Manufacturing Company, 112 NLRB 1080, 1081-1082 (1955).

Having found that the allegation of Paragraphs 22 and 23 of the Complaint are barred by an earlier filed grievance which raised the same issue; and/or that, because all issues raised by the Complaint have been resolved by arbitration, it would not effectuate the purposes of the Statute to permit the relitigation of an issue already litigated by the parties, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case Nos. BN-CA-20172, BN-CA-20296 and BN-CA-20354 be, and the same is hereby, dismissed.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: August 20, 1993

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(d) will be referred to, simply, as "§ 16(d)".

2. BN-CA-20172 as to advance approval of official [Union] time; BN-CA-20296 and 20354 as to denial of official [Union] time for preparation and research of unfair labor practice charges.

3. The withdrawal of the charge in Case No. BN-CA-20173 in January, 1992, is immaterial for the purpose of § 16(d).

4. The charge as amended now alleged that Respondent refused to negotiate with a labor organization concerning, ". . . a new set of rules which clearly deviate from past practice andthe contract, on advance approval of Union time. . . . Her threat to disapprove time . . . represents a change in working conditions without bargaining." (G.C. Exh. 1(C)). (Emphasis supplied). The amended charge is reflected in the Complaint as follows:

"22. . . . Respondent . . . implemented a new procedure requiring Union officials to obtain advance approval . . . .

"24. . . . Respondent implemented the changes described in paragraphs 22 . . . without providing . . . [the Union] notice and an opportunity to negotiate. . . ." (G.C. Exh. 1(K)).

5. "23. . . Respondent . . . implemented a policy of no longer granting official time for the preparation and research of unfair labor practice charges.

"24. . . Respondent implemented the changes described in paragraphs . . . 23 without providing . . . [the Union] notice and an opportunity to negotiate. . . ." (G.C. Exh. 1(K)).