

67 FLRA No. 117

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN CORRECTIONAL CENTER
NEW YORK, NEW YORK
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS #33
LOCAL 3148
(Union)

0-AR-4894

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DECISION

June 19, 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

Arbitrator Janet M. Spencer found that the Agency violated the parties' collective-bargaining agreement when it eliminated unpaid, duty-free lunch breaks for day-shift correctional officers at a correctional center (the disputed employees). Accordingly, the Arbitrator directed the Agency to restore the lunch breaks. There are four substantive questions before the Authority.

The first question is whether the Arbitrator erred as a matter of law in finding that she had the authority to resolve the portion of the grievance submitted to her, even though the Union previously filed an unfair-labor-practice (ULP) charge involving the same facts. Because the ULP charge and the particular portion of the grievance that the Arbitrator resolved were based on different legal theories, the answer to the first question is no.

The second question is whether the Arbitrator's interpretation and enforcement of the parties' agreement is inconsistent with management's rights under § 7106(a) of the Federal Service Labor-Management Relations Statute (the Statute). As the Agency fails to demonstrate

that the pertinent contract provisions are unenforceable under § 7106(b) of the Statute, the award is consistent with § 7106(a).

The third question is whether the award fails to draw its essence from the parties' agreement. As the Arbitrator's interpretation of the agreement is not irrational, unfounded, implausible, or in manifest disregard of the agreement, the answer is no.

The fourth question is whether the award is based on a nonfact. Because the Agency does not support its contention that the award is deficient in this regard, the answer is no.

II. Background and Arbitrator's Award

For at least twelve years, the disputed employees worked an 8½-hour shift, which included thirty minutes for an unpaid, duty-free lunch break. Although management was responsible for documenting when the disputed employees went on lunch breaks, the Agency's supervisors "had not been carrying out this responsibility effectively."¹ The facility's warden thought that the Agency was vulnerable to overtime-compensation claims from employees asserting that they worked 8½ hours without breaking for lunch. So the Agency decided to change the day shift for the disputed employees from 8½ hours with a duty-free lunch break to eight hours without a duty-free lunch break.

When the Agency notified the Union of this decision, the Union requested bargaining and provided the Agency with proposals. The Agency responded that it had no obligation to bargain over the actual elimination of the lunch breaks, but that it would discuss the impact and implementation of the change in the day shift. On the following day, the Union filed a ULP charge alleging that the Agency unilaterally eliminated the disputed employees' lunch breaks in violation of its obligation to bargain in good faith under § 7116(a)(1), (5), and (8) of the Statute. The Federal Labor Relations Authority's (FLRA's) Boston Regional Office dismissed the ULP charge, finding that the procedures for changing hours of work were "covered by" Article 18 of the parties' collective-bargaining agreement and that, consequently, the Agency had no further statutory bargaining obligations to fulfill before changing the day shift for the disputed employees. Further, the dismissal letter stated that, in eliminating the lunch breaks for the disputed employees, the Agency "followed the rules in [Article 18 of the parties' agreement] for posting the new schedule,"² but the letter did not address whether the Agency

¹ Award at 5.

² Exceptions, Attach. F, ULP-Charge Dismissal Letter at 3.

complied with any other provisions of the parties' agreement.

After the Agency implemented the eight-hour day shift, the Union filed a grievance alleging that the elimination of the disputed employees' lunch breaks violated § 7116 of the Statute and the parties' collective-bargaining agreement. The Agency denied the grievance, and the parties proceeded to arbitration on the following stipulated issues: "Is the grievance arbitrable? If so, [d]id [m]anagement violate the [agreement] by taking lunch breaks from [the disputed employees]? If so, [w]hat shall be the appropriate remedy?"³

Regarding arbitrability, as relevant here, the Arbitrator examined whether § 7116(d) of the Statute precluded the Union from grieving the elimination of lunch breaks after filing a ULP charge involving the same facts. The Arbitrator noted that § 7116(d) states 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."⁴ In that regard, the Arbitrator recognized that the grievance originally alleged not only a violation of the agreement, but also a violation of the Statute (a ULP). But the Arbitrator found that a ULP issue was not before her. In so finding, she relied on: (1) the Union's explanation that it was not asking her to resolve a ULP; (2) the parties' joint stipulation that the issues for arbitration included whether management violated the parties' agreement, not the Statute; and (3) a comparison of the wording of the earlier-filed ULP charge (which alleged a unilateral-change ULP) with the portion of the grievance submitted for her resolution (which alleged purely contractual violations). Accordingly, the Arbitrator found that the ULP charge and the portion of the grievance advanced at arbitration involved different legal theories, and, thus, that § 7116(d) did not bar her from resolving that portion of the grievance.

Turning to the substance of the alleged contractual violations, as relevant here, the Arbitrator reviewed the parties' arguments regarding the interpretation of three provisions of their agreement. The Arbitrator first discussed Article 18, Section (a) (§ 18(a)), which: (1) states that the "standard workday" is an 8½-hour shift, including thirty minutes for an unpaid, duty-free lunch break; but also (2) provides that "there are shifts and posts for which the normal workday is eight . . . consecutive hours" without an unpaid, duty-free lunch break.⁵ The Arbitrator did "not disagree" with the Agency's contention that § 18(a) gives it discretion to

decide whether a particular shift or post will involve an eight- or 8½-hour workday.⁶ But the Arbitrator found that other provisions of the agreement – including Article 4, Section (b) (§ 4(b)) and Article 6, Section (b)(2) (§ 6(b)(2)) – limited that discretion.

Concerning § 4(b), the Arbitrator found that § 18(a) had to be "read together with" § 4(b)'s requirement⁷ that, unless covered by a local supplemental agreement, "all written benefits, or *practices* and understandings between the parties implementing this [a]greement, which are negotiable, *shall not be changed* unless agreed to in writing by the parties."⁸ On that point, she found that for at least twelve years, the Agency had exercised its § 18(a) scheduling discretion to provide the disputed employees with a duty-free lunch break, which ultimately developed into a "practice" under § 4(b).⁹ Thus, she concluded that § 4(b) "preclude[d] the elimination of the . . . lunch breaks," unless the Agency satisfied the contractual requirement to obtain the Union's agreement "in writing" before changing this § 4(b) "practice."¹⁰

Concerning § 6(b)(2), the Arbitrator found that it provided employees with the "right 'to be treated *fairly* and equitably in all aspects of personnel management.'"¹¹ In that regard, the Arbitrator considered that the warden terminated only the disputed employees' lunch breaks; all day-shift managers and employees in other bargaining units continued working 8½-hour shifts with duty-free lunch breaks. The Arbitrator also considered that the warden justified this differential treatment based on purely administrative difficulties, including the "failure of the management staff to effectively monitor" the disputed employees signing in and out for their lunch breaks.¹² In light of those considerations, the Arbitrator concluded that disparately burdening the disputed employees for the sake of administrative ease was "unfair treatment" that violated § 6(b)(2).¹³

As a remedy for the Agency's contractual violations, the Arbitrator directed the Agency to immediately return the disputed employees to 8½-hour shifts with a duty-free lunch break.

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

³ *Id.* at 2.

⁴ *Id.* at 7 (quoting 5 U.S.C. § 7116(d)).

⁵ *Id.* at 11 (quoting § 18(a)).

⁶ *Id.*

⁷ *Id.* at 12.

⁸ *Id.* (quoting § 4(b)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 13 (quoting § 6(b)(2)).

¹² *Id.*

¹³ *Id.* at 13-14.

III. Preliminary Matters: We deny the Union's request to waive an expired filing deadline, and we dismiss the Union's opposition.

When the Union filed its opposition to the Agency's exceptions, it did not provide the required number of copies. By certified mail on January 3, 2013, the Authority issued a deficiency order directing the Union to file the required copies by January 17. A U.S. Postal Service tracking report (tracking report) shows that the carrier left a notice for the Union's representative on January 7, alerting him that he had certified mail that needed picking up at the local post office. The Union did not file the requested copies until January 18.

Thereafter, the Authority issued an order directing the Union to show cause why its seemingly untimely response to the deficiency order (deficiency response) should be considered. In a timely filed response to the show-cause order (show-cause response), the Union requests that the Authority waive the expired time limit for its deficiency response. In support, the Union argues that various exigent circumstances, including work-related travel and taking sick leave, prevented its representative from responding to the deficiency order by the January 17 deadline. The Union does not provide the Agency's position on the matter.

Under § 2429.23(b) of the Authority's Regulations, a party's request to waive an expired time limit "shall state" the other parties' positions, and requests to waive expired time limits may be granted only in "extraordinary circumstances."¹⁴ Further, § 2429.23(c) provides that "time limits . . . may not be . . . waived in any manner other than that described" in the Regulations.¹⁵ As such, the Authority has denied waiver requests that did not state the positions of other parties,¹⁶ as well as requests that did not establish "extraordinary circumstances."¹⁷ As relevant here, the Authority has declined to find extraordinary circumstances based on a party representative's claim that he or she was absent from the office "because of work and illness."¹⁸

The Union's waiver request fails to state the Agency's position, as § 2429.23(b) requires. And although the Union argues that personal and other

circumstances prevented its representative from responding to the deficiency order by January 17, as mentioned above, the tracking report confirms delivery of a certified-mail notice at the representative's address of record on January 7 – ten days before the deadline. The representative states that he did not see the notice initially because he was in "travel status" from January 7 to January 11,¹⁹ but he does not explain why he did not request that someone else monitor the Union's mail in his absence. In addition, the representative admits that even after reading the notice on January 16, he did not pick up the certified mail containing the deficiency order for another two days, by which time the deadline for responding had passed.²⁰ Under these circumstances, and consistent with Authority precedent,²¹ we deny the Union's request to waive the expired time limit.

Where a party has failed to timely cure a procedural deficiency in its filing, the Authority has dismissed the deficient filing.²² As the Union failed to timely cure the procedural deficiency in its opposition filing, we dismiss the Union's opposition.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Agency argues that the award is contrary to law in various respects. We discuss the Agency's claims separately below.

1. Section 7116(d) of the Statute does not bar the portion of the grievance submitted to the Arbitrator.

The Agency contends that the Arbitrator erred in finding that § 7116(d) of the Statute did not bar the portion of the grievance that she resolved. As set forth above, § 7116(d) 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."²³ For almost thirty years, the Authority has held that this wording "precludes duplicate filings of an issue *actually raised* in the grievance and [ULP] forums [but] does not extend to an issue [that] the aggrieved party could have, but did not, raise in [an]

¹⁴ 5 C.F.R. § 2429.23(b).

¹⁵ *Id.* § 2429.23(c).

¹⁶ *See U.S. DHS, ICE*, 64 FLRA 908, 909 (2010) (*ICE I*) (on reconsideration, affirming denial of waiver request that did not state the position of opposing party); *cf. IRS, Phila. Serv. Ctr.*, 54 FLRA 674, 681 (1998) (requirement in § 2429.23(a) that time-extension requests state other parties' positions ensures that "all parties [are] on notice of any request").

¹⁷ *E.g., U.S. DHS, ICE*, 66 FLRA 880, 883 (2012) (*ICE II*).

¹⁸ *See id.*

¹⁹ Deficiency Resp. at 1.

²⁰ *Id.* (representative "did not see the certified mail notice until January 16").

²¹ *E.g., ICE II*, 66 FLRA at 883; *ICE I*, 64 FLRA at 909.

²² *E.g., U.S. Dep't of the Navy, Fleet Readiness Ctr. Se., Jacksonville, Fla.*, 64 FLRA 12, 13-14 (2009) (dismissing exceptions for failure to timely cure procedural deficiencies).

²³ 5 U.S.C. § 7116(d); *see also Award* at 7 (quoting 5 U.S.C. § 7116(d)).

earlier[-]selected forum.”²⁴ In particular, and as relevant here, in order for an earlier-filed ULP charge to bar a grievance under § 7116(d), 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.²⁵ Using a test that the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has upheld,²⁶ 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.²⁷

Of particular relevance to the latter requirement, the Authority has long 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.²⁸ Endorsing this distinction under § 7116(d), the D.C. Circuit has observed that it “would be strange indeed . . . to contend” that a ULP “charge concern[ing] a statutory violation” and a grievance alleging a “violation of [a] collective[-]bargaining agreement . . . present [an] identical issue.”²⁹

Here, the Arbitrator found that the earlier-filed ULP charge alleged violations of the Statute – but not the parties’ agreement – while the portion of the grievance submitted for arbitration alleged only violations of the agreement.³⁰ Although the Agency challenges the Arbitrator’s § 7116(d) analysis by asserting that “the issue raised in the grievance was raised . . . [in the] ULP” charge,³¹ the Agency does not identify any contractual violations asserted in the ULP charge. Moreover, the record supports the Arbitrator’s finding that the Union did not raise contractual violations in the ULP charge.³² That is significant because the determination of whether § 7116(d) applies to the portion of the grievance before the Arbitrator depends on the content of the Union’s earlier-filed ULP charge³³ – and *not* on any subsequent analysis of the charge by the FLRA’s Boston Regional Office, such as the dismissal letter’s statement that the Agency “followed the rules in [Article 18 of the parties’ agreement] for posting the new schedule.”³⁴ Indeed, the ULP charge does not mention the parties’ agreement at all.³⁵ Consistent with the standards set forth above, the Arbitrator correctly determined that the ULP charge and the portion of the grievance submitted to the Arbitrator involved different issues.³⁶ Therefore, the Agency has not shown that the Arbitrator erred in finding that § 7116(d) did not bar her from addressing the contractual violations alleged in the portion of the grievance submitted for her resolution.³⁷

In this regard, we note that when applying § 7116(d), the Authority looks at the individual issues raised by a grievance, not the grievance as a whole. For example, if a ULP charge alleges a statutory violation, and a later-filed grievance alleges the same statutory

²⁴ *INS, U.S. DOJ*, 18 FLRA 412, 414 n.3 (1985) (*INS*) (emphasis added); see *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 807 (1996) (stating that second sentence of § 7116(d) “plainly precludes only subsequent litigation of issues that . . . were raised earlier,” regardless “whether . . . [the filing party] could have raised [other] issues” in an earlier proceeding (emphasis added)); *Dep’t of the Army Headquarters, Presidio of S.F.*, 30 FLRA 50, 52 (1987) (citing *INS*, 18 FLRA at 414 n.3) (same).

²⁵ See, e.g., *U.S. Dep’t of the Navy, Naval Air Eng’g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (*Navy*) (citing *U.S. Dep’t of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)).

²⁶ *AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) (upholding Authority’s finding that § 7116(d) bar applies where the “ULP charge and the grievance . . . rest upon the same factual predicate . . . and allege the same statutory and contractual violations” (emphasis added)).

²⁷ *Navy*, 64 FLRA at 1111.

²⁸ *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).

²⁹ *Overseas Educ. Ass’n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987).

³⁰ Award at 8-9.

³¹ Exceptions at 5 n.3.

³² See *id.*, Attach. E (“Charge Against an Agency”) (“Management has a[n] obligation to negotiate [c]hanges in working [c]onditions . . . , and . . . management commits a ULP when it unilaterally makes these changes.”); Exceptions, Attach. F (ULP-Charge Dismissal Letter) at 1 (“The charge alleges that [the Agency] violated [§ 7116(a)(1), (5),] and (8) of . . . the Statute[.]”); Exceptions, Attach. G (“Formal Grievance Form”).

³³ See, e.g., *U.S. Dep’t of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 680 (2009) (agreeing with administrative law judge that the application of a § 7116(d) bar depends on how “the charge is . . . drawn”); see also *Navy*, 64 FLRA at 1111 (stating that § 7116(d) bar applies only to those issues raised through the statutory ULP procedure “at the discretion of the aggrieved party”).

³⁴ Exceptions, Attach. F, ULP-Charge Dismissal Letter at 3.

³⁵ See Exceptions, Attach. E (“Charge Against an Agency”).

³⁶ See *AFGE, Nat’l Council of EEOC Locals No. 216*, 49 FLRA 906, 914-17 (1994) (*EEOC Locals*) (denying contrary-to-law exception to arbitral finding that § 7116(d) did not bar the “portion of the grievance addressed” at arbitration).

³⁷ See *Navy*, 64 FLRA at 1111; *DOL*, 59 FLRA at 115; *ACT*, 55 FLRA at 475.

violation *and* a separate contractual violation, then § 7116(d) bars only the portion of the grievance alleging the statutory violation.³⁸ In other words, § 7116(d) does *not* bar the portion of the grievance alleging a purely contractual violation.³⁹ In fact, this approach is so longstanding that it predates the Statute. Specifically, in interpreting Section 19(d) of Executive Order 11,491 – on which Congress modeled § 7116(d)⁴⁰ – the Assistant Secretary of Labor for Labor-Management Relations applied a similar approach.⁴¹ Therefore, under well-settled law, even if the Arbitrator had resolved both the ULP allegation and the contractual allegations initially set forth in the grievance, § 7116(d) would warrant setting aside only the Arbitrator’s resolution of the ULP – not her resolution of the contractual allegations.⁴²

In concluding that the Arbitrator properly applied § 7116(d), we reject the dissent’s suggestion that we should treat the terms “matters” and “issues” as meaning the same thing.⁴³ In keeping with the U.S. Supreme Court’s guidance, we “refrain from concluding” that Congress intended different terms in § 7116(d) to have the “same meaning.”⁴⁴ Like the Court, we recognize the “well-established canon of statutory interpretation”⁴⁵ that “every word of a statute must be presumed to have been used for a purpose,”⁴⁶ so as not to “construe different terms within a statute to embody the

same meaning.”⁴⁷ Such a presumption has even greater force where, as here, distinct terms are used within the very same sentence.⁴⁸ The dissent provides no basis for abandoning these well-established legal principles and finding that two different terms in § 7116(d) – “issues” and “matters” – have precisely the same meaning.

In addition, we find unconvincing the dissent’s reliance on the term “matter” in § 7121(d) to define the word “issue” in § 7116(d). We note that both the Merit Systems Protection Board (MSPB) and the Equal Employment Opportunity Commission (EEOC) have issued regulations implementing § 7121(d) in a manner that preserves the Statute’s distinction between a “matter” (i.e., an underlying agency action)⁴⁹ and an “issue” (i.e., a particular legal allegation).⁵⁰ For example, the EEOC’s regulations prohibit an employee who has grieved a § 7121(d) “matter” from filing a “complaint on the same *matter* . . . irrespective . . . of whether the [earlier-filed] grievance . . . raised an *issue* of discrimination.”⁵¹ Applying that provision, federal district courts have dismissed federal employees’ civil complaints alleging equal-employment-opportunity violations after finding that the complaints involved the same agency actions (“matter[s]”) as earlier-filed grievances, even though the earlier-filed grievances did not include the same allegations of discrimination (“issue[s]”) as the court

³⁸ See *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268, 1271-76 (1990) (*DOD*) (holding arbitrator correctly found that § 7116(d) barred one issue raised in the underlying grievance, but incorrectly found that § 7116(d) barred a distinct issue raised in the same grievance).

³⁹ See *EEOC Locals*, 49 FLRA at 914-17 (denying contrary-to-law exception to arbitral finding that § 7116(d) did not bar the “portion of the grievance addressed” at arbitration, where ULP charge “concerned solely a statutory violation” and “relevant portion” of later-filed “grievance involved solely a question of contract interpretation and application”).

⁴⁰ See S. Rep. No. 95-969, at 107 (1978) (describing the wording later enacted as § 7116(d) as “similar to a provision contained in [S]ection 19(d) of Executive Order 11[.]491”).

⁴¹ See, e.g., *IRS, Ogden Serv. Ctr.*, A/SLMR No. 806 (1977), 7 A/SLMR 201, 203 (Assistant Secretary found that although Section 19(d) barred one allegation in a ULP complaint that respondents improperly attempted to deal directly with unit employees, it did not bar another allegation in the same complaint that respondents unilaterally eliminated portions of the parties’ agreement).

⁴² See *DOD*, 37 FLRA at 1275-76.

⁴³ Dissent at 15-16.

⁴⁴ *Russello v. United States*, 464 U.S. 16, 23 (1983); see also *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006); *Bailey v. United States*, 516 U.S. 137, 145-46 (1995).

⁴⁵ *Joffe v. Google, Inc.*, No. 11-17483, 2013 U.S. App. LEXIS 25824, at *22 (9th Cir. Dec. 27, 2013) (quoting *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003)).

⁴⁶ 2A Norman J. Singer, *Sutherland Statutory Construction* § 46:06, at 192 (6th ed., 2000 rev.).

⁴⁷ *Id.* at 193-94; see, e.g., *Joffe*, No. 11-17483, at *22-24 (applying the presumption against treating distinct terms as synonymous and interpreting “radio communication” to have a meaning distinct from “communication by radio”); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council, Inc.*, 968 F.2d 286, 293 (2d Cir. 1992) (where statute juxtaposes terms “person” and “corporation,” “person” should not be construed to include a corporation).

⁴⁸ See *United States v. Williams*, 340 F.3d 1231, 1236 (11th Cir. 2003) (“[D]eliberate variation in terminology within the same sentence of a statute suggests that Congress did not interpret the two terms as being equivalent.”).

⁴⁹ See *Rhodes v. MSPB*, 487 F.3d 1377, 1381-82 (Fed. Cir. 2007) (finding that “matter” in § 7121 means “underlying agency action” (citing *Bonner v. MSPB*, 781 F.2d 202, 204-05 (Fed. Cir. 1986))).

⁵⁰ E.g., 5 C.F.R. § 1201.154 (setting forth time limits for “appeals raising *issues* of prohibited discrimination in connection with a *matter* otherwise appealable to” the MSPB (emphases added)); 29 C.F.R. § 1614.301(a) (EEOC’s regulation implementing § 7121(d)).

⁵¹ 29 C.F.R. § 1614.301(a) (emphases added).

complaints.⁵² These regulations and the cases decided under them further demonstrate that, for purposes of §§ 7116(d) and 7121(d) of the Statute, “matter” and “issue” mean different things.

Moreover, the dissent’s interpretation of § 7116(d) would undercut one of the section’s primary aims: to provide most “federal employees [with] . . . the right to choose between bringing their employment-related complaints as ULP charges [before the Authority], or as grievances under the [parties’] negotiated[-]grievance procedure.”⁵³ The dissent proposes to apply the § 7116(d) bar in any case where the parties and factual circumstances align, as long as the issues involved “easily could have been consolidated into a single action.”⁵⁴ But applying that standard would deny aggrieved parties a choice of forums in certain circumstances. In that regard, it is well settled that purely contractual violations are not ULPs and, thus, may not be litigated in the statutory-ULP process.⁵⁵ Therefore, under the dissent’s standard, if a party wanted to allege that the same facts established both a ULP and a contractual violation, then the party would have only one route to get both issues resolved: the negotiated-grievance procedure. And that assumes, of course, that the parties’ negotiated-grievance procedure does not exclude grievances alleging ULPs⁵⁶ and that the opposing party stipulates, or the arbitrator frames, any disputes that reach arbitration to include both statutory and contractual issues.⁵⁷ That is

not a meaningful choice. In fact, in the circumstances just described, it is no choice at all.

For the foregoing reasons, the Authority’s longstanding approach is faithful to the wording and purposes of § 7116(d), while the dissent’s proposed standard – which eschews decades of court-endorsed Authority precedent – is not. Accordingly, we decline to adopt the dissent’s proposed standard.

2. The Arbitrator interpreted and enforced the agreement in a manner that is consistent with management’s rights under § 7106(a) the Statute.

The Agency argues that the award “d[oes] not provide any method which would allow the Agency to” terminate the disputed employees’ unpaid, day-shift lunch breaks,⁵⁸ and that the award “specifically precludes the Agency from ever switching” the disputed employees to a different shift.⁵⁹ The Agency also contends, as relevant here, that the Arbitrator’s interpretation of the agreement “abrogates” management’s rights to assign work and assign employees under § 7106(a)(2) of the Statute.⁶⁰

Where an exception alleges that an arbitrator’s award is inconsistent with management rights, the Authority first assesses whether the award affects the exercise of the asserted management right.⁶¹ If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).⁶² When an agency files management-rights exceptions to an award enforcing a contract provision, the agency must allege not only that the award affects management rights,⁶³ but also that the relevant contract provision is not enforceable under § 7106(b).⁶⁴ Management’s right to assign work includes, among

⁵² *E.g.*, *Ilgenfritz v. Gates*, Civ. Action No. 09-1502, 2010 U.S. Dist. LEXIS 74828 (W.D. Pa. July 26, 2010) (finding civil complaint barred as raising same matter, albeit not same issue, as earlier-filed grievance); *Delaney v. LaHood*, No. 07-CV-471 (JG) (WDW), 2009 U.S. Dist. LEXIS 91293, *35-41 (E.D.N.Y. Sept. 30, 2009) (same); *Savarese v. U.S. Dep’t of HUD*, No. 04 Civ. 3660 (DC), 2005 U.S. Dist. LEXIS 2281, *8-12 (S.D.N.Y. Feb. 16, 2005) (same); *Wright v. Snow*, No. 02 Civ. 7615 (TPG), 2004 U.S. Dist. LEXIS 17048, *11-16 (S.D.N.Y. Aug. 25, 2004) (same); *Rosell v. Wood*, 357 F. Supp. 2d 123, 128-31 (D.D.C. 2004) (same).

⁵³ *Dep’t of Commerce, Bureau of the Census v. FLRA*, 976 F.2d 882, 888 (4th Cir. 1992).

⁵⁴ Dissent at 17.

⁵⁵ *See Iowa Nat’l Guard & Nat’l Guard Bureau*, 8 FLRA 500, 500-01, 510-11 (1982) (except for cases in which a clear and patent contract breach effectively repudiates the parties’ collective-bargaining agreement, the Statute’s ULP machinery does not provide a mechanism for resolving disputes over contract interpretation or application).

⁵⁶ 5 U.S.C. § 7121(a)(2) (parties may agree to exclude issues from the scope of the negotiated-grievance procedure); *see AFGE, Local 3529*, 57 FLRA 464, 465 (2001) (arbitrators may resolve “ULP claims provided . . . the parties have not agreed to exclude ULPs from the scope of the negotiated[-]grievance procedure”).

⁵⁷ *See Ass’n of Civilian Technicians, N.Y. State Council*, 61 FLRA 664, 665-66 (2006), *denying mot. for recons.* of 60 FLRA 890 (2005) (rejecting argument that where grievance alleging ULPs and contractual violations went to arbitration, but

parties did not stipulate to issues, § 7116(d) required arbitrator to frame issues to include both the statutory and contractual claims).

⁵⁸ Exceptions at 5.

⁵⁹ *Id.* at 13.

⁶⁰ *Id.* at 5-6; *see also id.* at 9 n.4, 13-15, 18.

⁶¹ *E.g.*, *U.S. Dep’t of Transp., FAA*, 60 FLRA 159, 163 (2004).

⁶² *E.g.*, *id.*

⁶³ *E.g.*, *U.S. Dep’t of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 241 (2011) (*IRS*) (denying exception that alleged effects on management’s rights under § 7106(a) without identifying any particular right).

⁶⁴ *See, e.g., id.* at 242 (failure to allege that arbitrator enforced provisions that were not negotiated under § 7106(b) implicitly conceded that provisions were enforceable under § 7106(b)); *see also U.S. DHS, U.S. CBP*, 66 FLRA 634, 638 (2012) (without an allegation that contract provisions were not negotiated under § 7106(b), “management-rights exceptions fail as a matter of law”).

other things, the right to determine when work will be performed,⁶⁵ and management's right to assign employees is the right to assign employees to positions.⁶⁶ Even assuming that the award affects these rights,⁶⁷ for the reasons that follow, the Agency has failed to show that the Arbitrator was not enforcing a contract provision negotiated under § 7106(b) of the Statute.

The Authority has previously held that an arbitrator who interpreted the very same portion of § 18(a) at issue here to require an agency "to schedule employees to an [eight-]-hour work day with a half[-]hour, non-paid, duty-free lunch period" was enforcing a provision that involved the "number of employees to be assigned to a tour of duty,"⁶⁸ within the meaning of § 7106(b)(1).⁶⁹ Consequently, Authority precedent supports a conclusion that the Arbitrator was enforcing a § 7106(b)(1) provision in this case, and the Agency provides no basis for reaching a contrary conclusion. In this regard, the Agency argues that "Article 18 as a whole" encompasses procedures and appropriate arrangements negotiated under § 7106(b)(2) and (3), and that, as a result, Article 18 "was not negotiated pursuant to § 7106(b)(1)."⁷⁰ But a contract article may contain provisions negotiated under § 7106(b)(1) as well as others negotiated under § 7106(b)(2) or (3),⁷¹ so the Agency's argument lacks merit. Further, to the extent that the Agency is arguing that, as interpreted by the Arbitrator, Article 18 cannot be enforced under § 7106(b)(1) because doing so would abrogate

management's rights,⁷² that argument also lacks merit. The Authority has specifically rejected using an abrogation analysis to determine whether an award enforces a contract provision negotiated under § 7106(b)(1).⁷³ For these reasons, we find that the Agency has failed to demonstrate that the Arbitrator was not enforcing a provision negotiated under § 7106(b)(1).⁷⁴ And as the Arbitrator enforced a provision negotiated under § 7106(b), which is an exception to § 7106(a),⁷⁵ the award is consistent with management's rights under § 7106(a).

3. The award does not conflict with Authority precedent on "past practices."

The Arbitrator found that the disputed employees' duty-free lunch breaks developed into a "practice" within the meaning of § 4(b),⁷⁶ and the Agency argues that this finding is contrary to the Authority's precedent on "past practices."⁷⁷ But the Arbitrator based her finding on her interpretation of the particular wording in the parties' agreement, not the Authority's precedent regarding "past practices."⁷⁸ And the Agency does not claim that the Authority's past-practices precedent supports finding that § 4(b), as interpreted and applied by the Arbitrator, is unenforceable as a matter of law. Rather, the Agency essentially challenges the Arbitrator's interpretation of the word "practice" in § 4(b).⁷⁹ The Authority reviews challenges to an arbitrator's interpretation of a contract provision under the deferential "essence" standard, which is distinct from the Authority's precedent on "past practices" modifying a collective-bargaining agreement.⁸⁰ Our evaluation of the

⁶⁵ E.g., *AFGE, Local 3529*, 56 FLRA 1049, 1050 (2001).

⁶⁶ E.g., *U.S. Dep't of VA, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, 62 FLRA 508, 510 (2008).

⁶⁷ *IRS*, 66 FLRA at 242 (citing *SSA*, 65 FLRA 339, 341 (2010)) (assuming effect on asserted management rights when reviewing exceptions).

⁶⁸ *U.S. DOJ, Fed. BOP, Mgmt. & Specialty Training Ctr., Aurora, Colo.*, 56 FLRA 943, 943, 945 (2000) (*BOP*); see also *Nat'l Ass'n of Agric. Emps., Branch 11*, 57 FLRA 424, 426-27 (2001) (citing *BOP*, 56 FLRA at 945) (proposal requiring eight-hour shift without duty-free lunch break electively negotiable under § 7106(b)(1)).

⁶⁹ 5 U.S.C. § 7106(b)(1) (permitting any agency and any union to negotiate, "at the election of the agency, on the numbers . . . of employees . . . assigned to any . . . tour of duty").

⁷⁰ Exceptions at 12 n.7.

⁷¹ See *NTEU*, 47 FLRA 1038, 1045, 1049, 1052 (1993) (*NTEU*) (finding section D. of negotiated overtime-assignment policy enforceable under § 7106(b)(2), and based on assumption that policy's section B. affected management right, finding section B. enforceable under § 7106(b)(1)); *U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 46 FLRA 298, 310, 316-17 (1992) (finding negotiated provision concerning placement of employees without security clearances enforceable under § 7106(b)(1) and (3)); cf. *NAGE, Local R4-45*, 55 FLRA 995, 995 (1999) (assessing negotiability of five interrelated proposals; finding two negotiable as procedures under § 7106(b)(2), and three negotiable at agency's election under § 7106(b)(1)).

⁷² See Exceptions at 9 n.4 (stating that arguments provided against the Arbitrator's enforcement of one contract provision apply equally to Arbitrator's enforcement of other provisions).

⁷³ *NTEU*, 47 FLRA at 1048 (citing *NTEU, Chapter 97*, 45 FLRA 1242, 1250 (1992)).

⁷⁴ See, e.g., *BOP*, 56 FLRA at 945.

⁷⁵ See, e.g., *U.S. Dep't of Transp., FAA, Alaskan Region*, 62 FLRA 90, 92 (2007) ("Section 7106(b)(1) is an exception to § 7106(a) such that bargaining over matters encompassed by § 7106(b)(1) is permitted notwithstanding that those matters also affect rights under § 7106(a)." (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 393, 395 (2000))).

⁷⁶ Award at 12.

⁷⁷ Exceptions at 24-27.

⁷⁸ Award at 12.

⁷⁹ See Exceptions at 26 n.14 (arguing that where an agreement "provides for the [agency] actions being taken, it is contrary to law for [an] arbitrator to find that those same actions amount to a past practice").

⁸⁰ Cf. *AFGE, Local 701*, 55 FLRA 631, 632-34 (1999) (*Local 701*) (reviewing exceptions to arbitrator's enforcement of contract provision identical to § 4(b) in the current dispute, Authority distinguished between a challenge to arbitrator's interpretation of that contract provision and a challenge allegedly based on "past practice").

Agency's essence exceptions, including its challenge to the Arbitrator's interpretation of § 4(b), appears in part IV.B. below. As the Arbitrator did not base her award on past-practices precedent, we find that the Agency's past-practices arguments lack merit and, thus, do not establish that the award is deficient.

4. The award is not contrary to the "covered-by" doctrine.

The Agency asserts that the Authority should set aside the award based on the "covered[-]by" doctrine,⁸¹ which provides a defense to a claim that an agency violated its statutory obligation to bargain with a union over matters affecting conditions of employment.⁸² The covered-by doctrine excuses further bargaining on the ground that the parties have already bargained and reached agreement concerning the matter at issue.⁸³ Although the Agency acknowledges that "covered by" is a "defense to an allegation of a ULP for a failure to bargain," the Agency contends that the defense "is applicable in this case because the Agency is being told it cannot make a particular change that is a management right."⁸⁴

As the Agency concedes, the covered-by doctrine provides a defense to an alleged violation of the statutory duty to bargain.⁸⁵ And the Agency does not cite any authority that would support applying the doctrine in this situation, where the Union did not allege at arbitration, and the Arbitrator did not find, that the Agency violated its statutory duty to bargain. Moreover, although the Agency relies on the covered-by doctrine to argue that the award is deficient for "prevent[ing] the Agency from . . . making a change that is explicitly provided for . . . by that same agreement,"⁸⁶ this argument challenges the Arbitrator's interpretation of the agreement. As discussed further below, the "essence" standard applies to such challenges,⁸⁷ so the Agency's argument provides no basis for finding the award contrary to law. For these reasons, the Agency's reliance on the covered-by doctrine provides no basis for finding the award contrary to law.

- B. The award draws its essence from §§ 4(b), 6(b)(2), and 18(a) of the parties' agreement.

The Agency contends that the award fails to draw its essence from §§ 4(b), 6(b)(2), and 18(a).⁸⁸ 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.⁸⁹ 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 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.⁹⁰ The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."⁹¹

As mentioned earlier, § 18(a) states that the "standard workday" is an 8½-hour shift, including thirty minutes for a lunch break, but acknowledges that "there are shifts and posts for which the normal workday is eight . . . consecutive hours" without a lunch break.⁹² The Arbitrator did "not disagree" that, by itself, § 18(a) gives the Agency discretion to decide whether a particular shift or post warranted an eight- or 8½-hour workday.⁹³ But the Arbitrator found that §§ 4(b) and 6(b)(2) "bear on the Agency's exercise of its [§] 18(a) right."⁹⁴ Specifically, she found that § 4(b)'s prohibition on changing existing "practices" unless the parties agree "in writing" limits the Agency's § 18(a) discretion to change the well-developed "practice" of providing the disputed employees with duty-free lunch breaks.⁹⁵ In addition, she determined that § 6(b)(2) limits the Agency's § 18(a) scheduling discretion by requiring fair and equitable treatment, and that it was unfair for the Agency to terminate the duty-free lunch period only for the disputed employees and solely for administrative reasons.⁹⁶ Although the Agency asserts that the Arbitrator's interpretation of these provisions effectively nullifies § 18(a), including

⁸¹ Exceptions at 15, 18 (internal quotation marks omitted); *see id.* at 15-18, 26-27.

⁸² *U.S. Dep't of the Interior, Wash., D.C.*, 56 FLRA 45, 53 (2000).

⁸³ *See U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1015 (1993).

⁸⁴ Exceptions at 15.

⁸⁵ *See U.S. Dep't of HUD*, 66 FLRA 106, 109 (2011) (citing *U.S. DOD, Nat'l Guard Bureau, Adjutant Gen., Kan. Nat'l Guard*, 57 FLRA 934, 936-37 (2002)).

⁸⁶ Exceptions at 15.

⁸⁷ *E.g., Local 701*, 55 FLRA at 633.

⁸⁸ *E.g.*, Exceptions at 24 & n.13.

⁸⁹ 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).

⁹⁰ *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

⁹¹ *Id.* at 576.

⁹² Award at 11 (quoting § 18(a)).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 12.

⁹⁶ *Id.* at 13 (citing § 6(b)(2)).

the Agency's § 18(a) scheduling discretion,⁹⁷ it was not irrational, unfounded, implausible, or in manifest disregard of the agreement for the Arbitrator to find that §§ 4(b) and 6(b)(2) limit that discretion.

Further, with regard to § 4(b), the Agency argues that the dismissal of the Union's earlier-filed ULP charge by the FLRA's Boston Regional Office makes it "clear that [the] practice being changed here was not negotiable."⁹⁸ As § 4(b) concerns only those "practices and understandings . . . which are negotiable," the Agency argues that any reliance by the Arbitrator on § 4(b) fails to draw its essence from the agreement.⁹⁹ However, the Authority has held that "the decision not to issue a [ULP] complaint is a nonreviewable, *nonprecedential* exercise of the General Counsel's prosecutorial responsibility," and as such, "the dismissal of [a ULP] charge is not binding on [an] arbitrator or the Authority."¹⁰⁰ Consequently, the dismissal of the Union's ULP charge provides no basis for finding that the Arbitrator's interpretation of § 4(b) fails to draw its essence from the agreement.

For all the reasons mentioned above, we find that the Agency has not demonstrated that the award fails to draw its essence from § 4(b), § 6(b)(2), or § 18(a).

C. The award is not based on a nonfact.

The Agency asserts, without elaboration, that the Arbitrator's reliance on § 4(b) to resolve this dispute "causes her to rely on a nonfact."¹⁰¹ Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).¹⁰² Consistent with § 2425.6(e)(1), when a party fails to provide any arguments or authority to support its exceptions, the Authority will deny the exceptions.¹⁰³ As the Agency does not provide any arguments or authority to support its nonfact assertion, we deny it as unsupported under § 2425.6(e)(1).

V. Decision

We deny the Agency's exceptions.

⁹⁷ Exceptions at 20, 21, 22-23.

⁹⁸ *Id.* at 21 n.12.

⁹⁹ *Id.* (quoting § 4(b)).

¹⁰⁰ *DOD, Dependents Sch.*, 30 FLRA 1092, 1096 (1988) (emphasis added) (citing *Turgeon v. FLRA*, 677 F.2d 937 (D.C. Cir. 1982)); *cf. EEOC Locals*, 49 FLRA at 912 (rejecting argument that FLRA RD's decision not to issue a complaint on ULP charge alleging a statutory violation triggered § 7116(d) bar by "necessarily assess[ing] the merits" of a later-filed grievance alleging a contractual violation based on the same set of facts underlying ULP charge (internal quotation marks omitted)).

¹⁰¹ Exceptions at 21 n.12.

¹⁰² 5 C.F.R. § 2425.6(e)(1).

¹⁰³ *E.g., AFGE, Local 405*, 66 FLRA 437, 437 n.1 (2012) (applying § 2425.6(e)(1)).

Member Pizzella, dissenting:

Over thirty years ago, in *AFGE, Local 2782 v. FLRA*,¹ then-Judge Antonin Scalia, writing for a unanimous panel of the U.S. Court of Appeals for the D.C. Circuit, commented on the “confusing duplicity”² of otherwise “conventional”³ terms that are found throughout the Federal Service Labor-Management Relations Statute (our Statute).⁴ The court observed in that case that the prologue of § 7106(b)⁵ could “serve two distinct purposes, which are often difficult to distinguish.”⁶ Donald P. Moynihan, Professor of Public Affairs at the Robert M. LaFollette School of Public Affairs at the University of Wisconsin – Madison, similarly observed that Congressional committees drafting the provisions that would become our Statute purposely used “fuzzy” and “ambivalent statutory language” in order to gain the support of competing interests with “diverg[ent] views.”⁷

Since then, other similarly “fuzzy” terms contained in our Statute have continued to bedevil the Authority, and the Authority has been criticized for its “narrow” interpretations of those terms.⁸

My colleagues conclude that the grievance, filed by the Union, advanced a different legal theory than was presented in an earlier-filed unfair labor practice (ULP) charge and that, therefore, the grievance is not barred by § 7116(d). I disagree with the framework that the majority applies to reach that conclusion but, even if I were to apply the same framework, I would still conclude that § 7116(d) bars the grievance. Therefore, I dissent.

This case raises the question of when, and under what circumstances, a grievance will be barred by an

earlier-filed ULP charge. That question, however, turns on the interpretation of a ubiquitous word – “issues” – that is used in § 7116(d) to preclude a party from raising the same dispute as a grievance under the negotiated grievance procedure and also as a ULP charge – “issues which can be raised under a grievance procedure may . . . be raised under the grievance procedure or as [a ULP] . . . but not under both procedures.”⁹ Section 7121(d) uses a different, but similarly common term – “matter” – to preclude an employee (or a union) from filing a grievance on the same “matter” that was previously raised under a statutory appeals process (typically as an appeal to the Merit Systems Protection Board (MSPB) or the Equal Employment Opportunity Commission). Interestingly, Webster’s Dictionary¹⁰ and other esteemed reference resources, including the Oxford Dictionary, Roget’s Thesaurus, Webster’s Thesaurus, Dictionary.com, and Vocabulary.com, as well as Black’s Law Dictionary,¹¹ all recognize the terms as synonyms and include “matter” in the definition of “issue.”

A casual observer might then be shocked to learn that the meanings of these simple terms have been disputed more than 200 times in cases that have been brought before the Authority for resolution.

In establishing the Civil Service Reform Act (CSRA), Congress was well aware that it was creating new and additional review processes from which federal employees and unions could seek redress for workplace grievances and that overlap was bound to occur.¹² But in the debate that led to the passage of the CSRA, Congress made clear that it intended to prevent “*duplicative proceedings* by requiring an aggrieved party to make *an election of remedies*.”¹³ Sections 7116(d) and 7121(d) were included in our Statute to function as those checks.¹⁴

It is apparent, then, that by modeling § 7116(d) after the preclusionary language used in Section 19(d) of Executive Order 11,491,¹⁵ Congress intended to reinforce the idea that aggrieved employees and unions should have the opportunity to air workplace disputes before a fair and impartial tribunal. But only once, and in only one forum.

¹ 702 F.2d 1183 (D.C. Cir. 1983).

² *Id.* at 1186.

³ *Id.* at 1187.

⁴ 5 U.S.C. §§ 7101-7135.

⁵ (“Nothing in this section shall preclude . . .”).

⁶ *Local 2782*, 702 F.2d at 1186.

⁷ Donald P. Moynihan, *Protection Versus Flexibility: The Civil Service Reform Act, Competing Administrative Doctrines, and the Roots of Contemporary Public Management Debate*, *The Journal Of Policy History*, Vol. 16, No. 1 (2004) at 22 & n.34 (citing Alan “Scotty” Campbell, Chairman, Civil Service Commission – “we made some of the language somewhat more fuzzy than I had hoped it would be, and we’re now paying the price for that as these matters are negotiated out and the Federal Labor Relations Authority is going to have to make a lot of decisions on matters that aren’t clear”).

⁸ *See Fed. BOP v. FLRA*, 654 F.3d 91, 97 (D.C. Cir. 2011) (Authority embraced an “unreasonably narrow view” of when a matter is covered by a previously negotiated provision); *see also U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 737 F.3d 779, 787, 788 (D.C. Cir. 2013) (Authority asks “the wrong question” and its construction of proposal “defies reasoned decisionmaking” as it concerns the agency’s duty to bargain).

⁹ 5 U.S.C. § 7116(d) (emphases added).

¹⁰ *Webster’s New Collegiate Dictionary*, p.73 (1979).

¹¹ *Black’s Law Dictionary* 907 (Deluxe 9th ed. 2009) (quoting 35A C.J.S. Fed. Rule Civ. P. 357 at 541 (1960)).

¹² S. Rep. No. 95-969, at 2829 (1978); H.R. Rep. No. 95-1403, at 696-97 (1978).

¹³ *AFGE, Local 1411 & Helen Owens v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) (emphasis added) (*Local 1411*).

¹⁴ S. Rep. No. 95-969, at 2829; H.R. Rep. No. 95-1403, at 696-97.

¹⁵ Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Compilation), *as amended, reprinted in* 5 U.S.C. § 7101 at 258 (Supp. III 1979).

That is a simple and unremarkable proposition. But over time, the Authority has developed a complex framework that strays from this longstanding principle, and now rarely finds that an earlier-filed ULP charge and a later-filed grievance “involve the same issue,” even when it is clear that the grievance and the ULP charge arise “from the same set of factual circumstances.”¹⁶ Consequently, the Authority has permitted unions and grievants, time and again, to parse into separate grievances and ULP charges disputes that involve the same parties and that arise out of the same factual circumstances.¹⁷

¹⁶ *U.S. Dep’t of the Navy, Naval Air Eng’g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (*Naval Air Eng’g Station*) (citing *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 115 (2003) (*DOL*) (Chairman Cabaniss concurring and Member Armendariz dissenting)).

¹⁷ *DOL*, 59 FLRA at 115 (union’s ULP, alleging that agency repudiated agreement in violation of our Statute, and grievance, alleging that agency violated the parties’ agreement, by refusing to schedule arbitration, advance different legal theories) (citing *e.g., U.S. Dep’t of VA, VA Med. Ctr., Coatesville, Pa.*, 57 FLRA 663, 666-67 (2002) (no bar where grievance alleged agency violated agreement when it changed performance appraisal system, and ULP alleged respondent violated § 7116(a)(1) and (5) by implementing policy on employee recognition and awards without providing union notice and opportunity to bargain); *U.S. Dep’t of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000) (HHS) (no bar where grievance alleged union representatives were entitled to official time under the agreement, and ULP alleged agency’s failure to grant official time violated § 7116(a)(1), (5), and (8)); *U.S. DOD, U.S. Army Reserve Pers. Command, St. Louis, Mo.*, 55 FLRA 1309, 1313 (2000) (no bar where grievance alleged agency violated agreement by informing union it intended to censor electronic bulletin board, and ULP alleged respondent’s removal of postings from the bulletin board violated § 7116(a)(1)); *U.S. Dep’t of HUD, Denver, Colo.*, 53 FLRA 1301, 1316-18 (1998) (no bar where grievance alleged agency lacked just cause, under agreement, to suspend grievant, and ULP alleged supervisor’s instructions to employee constituted unlawful unilateral changes in conditions of employment under Statute); *EEOC*, 53 FLRA 465, 472-73 (1997) (no bar where ULP charge alleged that agency’s failure to participate in process of selecting arbitrators violated Statute by depriving unit employee of effective grievance procedure, and grievance alleged that the agency’s failure permitted union to select arbitrator unilaterally); *U.S. Dep’t of VA, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 392-93 (1996) (no bar where ULP charge alleged agency’s failure to give notice and opportunity to bargain, and grievance alleged denial of performance awards to grievants); *AFGE, Nat’l Council of EEOC Locals No. 216*, 49 FLRA 906, 914 (1994) (no bar where ULP charge alleged retaliation against grievant for her union activity, and grievance contended that there was not support for fourteen-day suspension of grievant); *U.S. DOD, Def. Contract Audit Agency, Ne., Region, Lexington, Mass.*, 47 FLRA 1314, 1320 (1993) (no bar where ULP charge alleged that agency’s conduct constituted unlawful discrimination and interference within the meaning of § 7116(a) the Statute, and grievance involved question of whether parties’

Over the past decade, however, several Members have questioned this approach.¹⁸ I share their concerns.

As I noted in my first opinion as a Member of the Authority,¹⁹ it is imperative that the Authority be mindful of those circumstances where workplace grievances “unwisely consume[] federal resources . . . and serve[] to undermine ‘the effective conduct of [government] business’”²⁰ and our responsibilities to the taxpayer who foot the bill for these grievances.²¹ I am not convinced that the framework applied by the majority is consistent with Congress’ original intent to avoid duplicative complaints and grievances. I am even less certain that it promotes the “effective conduct of government business”²² when a party is permitted to parse, into separate grievances and complaints, those issues or matters – that involve the same parties, the same collective-bargaining agreement (CBA), and involve issues or matters that easily could have been consolidated into a single action – simply because the party frames the underlying issue in a slightly different manner.

In this case, the Union argues that its ULP charge addressed only that the Agency violated our Statute when it “*failed to bargain in good faith*” concerning the Agency’s “unilateral elimination of the lunch break.”²³ But the Union also argues that the earlier-filed ULP charge does not preclude the later-filed grievance (that was filed while the ULP charge was still in process) because the grievance alleges “a violation of

agreement provided official time to prepare and investigate ULP cases)).

¹⁸ *U.S. Dep’t of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis-Monthan Air Force Base, Tucson, Ariz.*, 64 FLRA 355, 364 (2009) (Dissenting Opinion of Member Beck) (prior filing of MSPB appeal that challenges agency’s application of CBA provisions bars employee from seeking individual relief in later-filed ULP charge); *NATCA, AFL-CIO*, 62 FLRA 526, 528 (2008) (Concurring Opinion of Chairman Cabaniss) (Authority should reexamine how we address grievances that raise matters that have been addressed in previously filed ULP charges); *DOL*, 59 FLRA at 118 (Dissenting Opinion of Member Armendariz) (§ 7116(d) precludes a party from getting “two bites of the apple”; a ULP charge that alleges the agency violated the Statute when it would not schedule grievances for arbitration in violation of the parties’ collective-bargaining agreement (CBA) does not advance a sufficiently distinct legal theory from a grievance that alleges the agency violated the same provisions of the CBA when it would not schedule the same grievances for arbitration).

¹⁹ *U.S. DHS, CBP*, 67 FLRA 107, 112 (2013) (*CBP*) (Concurring Opinion of Member Pizzella).

²⁰ *Id.* at 113 (quoting 5 U.S.C. § 7101(a)(1)(B)).

²¹ *Id.* at 112.

²² *AFGE, Local 2595, Nat’l Border Patrol Council*, 67 FLRA 190, 192-93 (2014) (Concurring Opinion of Member Pizzella) (quoting *CBP*, 67 FLRA at 112-13 (Concurring Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(b))).

²³ Award at 6.

both [our Statute] and the [master] agreement.”²⁴ Even a cursory review of the underlying ULP demonstrates that the allegation of a statutory violation involves an application of the very same contract provisions that are alleged to constitute separate contract and statutory violations in the later-filed grievance. In this respect, the Union’s argument sounds a bit like “Bluto” Blutarsky in the movie *Animal House*: “Over? Did you say ‘over’? Nothing is over until we decide it is!”

Under these circumstances, I can only conclude that the Union’s grievance is barred by § 7116(d). But even if I were to apply the framework that is applied by the majority, I would still conclude that the Union’s grievance is barred.

The clear mandate of § 7116(d) is to avoid “duplicative proceedings.”²⁵ And as noted above, it states, quite simply, that “issues which *can* be raised under a grievance procedure *may . . . be raised* under the grievance procedure or as an [ULP], *but not under both* procedures.”²⁶ Before the Arbitrator, the Agency argued that “the grievance in the instant case contains *the same subject matter* as the ULP charge; the *issue raised in the grievance* was raised under the ULP procedures [a]ccordingly, § 7116(d) bars the instant grievance.”²⁷

My colleagues make the incredible assertion, however, that even “if a ULP charge alleges a statutory violation, and a later-filed grievance alleges *the same statutory violation*, and a *separate contractual violation*, then . . . § 7116(d) *does not bar* the portion of the grievance alleging a *contractual violation*,”²⁸ regardless of how intertwined, or foundationally similar, are the issues, so long as the union is clever enough to use different words to describe its grievance. That gives an entirely new meaning to § 7116(d). In other words, my colleagues now read § 7116(d) as though it states: *issues (which are inseparably bound up with the express language of the CBA) and have been raised as a statutory violation in a ULP may be raised again in a later-filed grievance so long as the union frames the grievance issues separately as contractual and statutory violations.*

The Arbitrator, and now the majority, ignore the plain fact that in addressing (and ultimately dismissing) the earlier-filed ULP charge, the Regional Director had already determined that the Agency had not violated its obligation to bargain because the “disputed matter” (eliminating the lunch schedule for certain employees) was “inseparably bound up with” “the express language

of the contract.”²⁹ Specifically, the Regional Director found that:

the CBA *expressly covers* the subject of hours of work, and it specifically provides that some shifts may be eight consecutive hours without *the paid lunch break*. The A[gency] followed the rules in the CBA . . . [t]herefore the issue was covered by the CBA and the A[gency] had *no further obligation to bargain* on this subject matter.³⁰

In this later-filed grievance, the Union again asserts that the Agency violated the Statute *and* the CBA when it eliminated the lunch schedules for certain employees without bargaining first with the Union.³¹

Despite its protestations to the contrary, the Union simply reframed the same issues in its later-filed grievance. As the Authority determined in *U.S. Department of the Navy, Naval Air Engineering Station, Lakehurst, New Jersey*,³² “there can be no doubt that the same facts and the same decision are involved.”³³ At the time the Union filed its grievance, it raised issues that were “substantially similar”³⁴ to those raised in its earlier-filed ULP charge.

It does not matter now that the Regional Director declined to issue a complaint. The Authority has long held that “an *issue is ‘raised’* within the meaning of [§] 7116(d) at the time of *the filing* of a grievance or a ULP charge.”³⁵ In advising teenagers about the consequence of their choices, author Sean Covey notes that while “[w]e are free to choose our paths . . . we can’t choose the consequences that come with them.”³⁶ And, under these circumstances, the Union should not be permitted to avoid the consequence of an earlier-filed ULP charge simply because it did not like the outcome.

I doubt that Congress intended the application of § 7116(d) to depend on how a union words its complaints and grievances.

I also question the manner in which the majority resolves the Agency’s management-rights and covered-by arguments. But it is not necessary for me to address

²⁴ *Id.* (emphases added).

²⁵ *IRS v. FLRA*, 963 F.2d 429, 437 (D.C. Cir. 1992).

²⁶ 5 U.S.C. § 7116(d) (emphases added).

²⁷ Exceptions at 5 n.3.

²⁸ Majority at 7-8 (emphases added) (citations omitted).

²⁹ Exceptions, Attach. F, Regional Director’s Dismissal at 2.

³⁰ *Id.* at 3 (emphases added).

³¹ Award at 6; *see also* Exceptions, Attach. G, Formal Grievance Form.

³² 64 FLRA at 1111.

³³ *AFGE, Local 1411*, 960 F.2d at 178 .

³⁴ *Naval Air Eng’g Station*, 64 FLRA at 1112.

³⁵ *Id.* (emphasis added) (quoting *HHS*, 56 FLRA at 538).

³⁶ Sean Covey, *The Seven Habits of Highly Effective Teens* (Simon & Schuster, Inc. 2008).

those concerns because I would conclude that the Union's grievance is barred by § 7116(d).

Thank you.