70 FLRA No. 104

UNITED STATES
DEPARTMENT OF THE NAVY
NAVY REGION MID-ATLANTIC
NORFOLK, VIRGINIA
(Agency)

and

INTERNATIONAL BROTHERHOOD
OF POLICE OFFICERS
LOCAL 800
(Union)

0-AR-5291

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DECISION

May 2, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' collective-bargaining agreement (agreement). The Union argued that when the Agency implemented, in 2016, a 2012 Agency regulation (instruction) that included a physical agility test (PAT) for security police officers, it did not provide the Union with an opportunity to bargain over the implementation of the new instruction. Arbitrator Joseph R. Weeks found that the Agency violated Chapter 7 of the instruction because application of the instruction had imposed a new obligation for notice and opportunity to bargain that the Agency failed to fulfill. The Agency filed exceptions to the award, and the Union filed an opposition.

The main question before us is whether earlier-filed unfair-labor-practice (ULP) charges bar this later-filed grievance under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute).[1] We are taking this case as an opportunity to re-evaluate our interpretation of § 7116(d) and to return to the original intent of Congress. Because the earlier-filed ULP charges and grievance advance the same basic issues, we hold that the earlier-filed ULP charges bar the later-filed grievance. Consequently, we will set the award aside.

II. Background and Arbitrator's Award

In August 2011, the Union received notice of the proposed Commander, Navy Installations Command Ashore Protection Program Instruction 5530.14 (instruction) from the Agency, which contained numerous changes to conditions of employment, including a requirement for its security police officers (employees) to complete an annual PAT. The parties met several times over the next several months to discuss the instruction.

A. Earlier-filed ULP charges

In March 2012, the Agency notified the Union that it intended to implement the instruction the following month. In response, on April 17, 2012, the Union filed ***three*** ULP charges at the Sewells Point Police Precinct alleging that the Agency violated § 7116(a)(5) of the Statute when it refused to provide a list of changes to the employees' training requirement, failed to meet in-person to discuss the instruction, and continually refused to designate anyone with authority to bargain.[2]

The Federal Labor Relations Authority's Washington Regional Director (RD) dismissed two of the ULP charges on December 21, 2012,[3] and the Union withdrew the last charge. The RD found that the Union waived its right to bargain when it did not present a single bargaining proposal to the Agency. As a result, the Union's other allegations that the Agency's representatives refused to meet or had no authority to bargain were of no consequence. Further, the charges were filed seven months after the Union was first provided notice of the revised instruction.

In 2013, the Union filed two ULP charges against the Agency over the medical screening requirement for the PAT and the Agency's failure to notify the Union prior to implementation of the training and readiness requirements at another facility, the Commander, Navy Region Mid-Atlantic (CNRMA) Training Academy and CNRMA Little Creek-Fort Story.[4] In 2014, the Union filed a ULP charge against the Agency for failure to provide notice and opportunity to bargain of the same instruction at the Naval Station

[1] 5 U.S.C. § 7116(d).

[2] Exceptions, Ex. B, ULP Case Nos. WA-CA-12-0416, WA-CA-12-0417, WA-CA-12-0418, April 17-18, 2012 at 56-58.

[3] Exceptions, Ex. C, FLRA Washington RD Decision, December 21, 2012 at 62-64.

[4] Exceptions, Ex. E, ULP Case Nos. WA-CA-13-0606 & WA-CA-13-0607, July 16, 2013 at 67-68.

Norfolk. The RD again declined to issue complaints because the charges were not timely.[5]

In September 2015, the Agency notified the Union that it would implement the instruction at the Sewells Point Police Precinct and require the employees there to complete the PAT. On September 7, 2015, the Union once again filed a ULP charge against the Agency alleging that it violated 5 U.S.C. § 7116(a)(1), (5), and (8) by implementing the instruction without bargaining.[6]

On February 29, 2016, the RD reiterated that the Union had waived its right to bargain over the instruction prior to its implementation in 2012 because it had failed to present a single negotiable proposal. As a result, the RD found that the Agency's requirement that employees undergo the PAT at the Sewells Point Precinct in September 2015 did not require the Agency to bargain, because it was the "same instruction and PAT that the [RD] addressed in earlier [ULP] charges."[7] Because the instruction was implemented in 2012, the RD found the charge was untimely.

B. Grievance and arbitration

In January 2016, two employees at Naval Station Norfolk were informed that they were required to perform the PAT. In response, the Union filed a grievance and alleged that the Agency had violated the agreement when it failed to provide the Union an opportunity to bargain prior to requiring the employees to perform the PAT. The matter went to arbitration.

As relevant here, the parties stipulated the issues, in pertinent part, as whether the Agency violated the parties' agreement and any applicable laws, rules, or regulations, including the instruction, when it implemented the PAT, and whether the Agency failed to comply with the various requirements contained in Chapter 7 of the instruction.

Before the Arbitrator, the Agency argued that the December 2012 and February 2016 ULP dismissals demonstrated that it had provided sufficient notice of the instruction in 2011 and fulfilled any bargaining obligation prior to the implementation in 2012. The Union argued that § 7116(d) did not bar the grievance because, unlike the earlier-filed ULP charges, the grievance concerned a contractual claim.[8] The Arbitrator issued his award in May 2017.

Ultimately, the Arbitrator rejected the Union's argument that the ULP charges raised the legal theory of a statutory bargaining obligation, while the grievance raised a contractual obligation to bargain, and he found that the effect of applying the Union's argument would "largely eviscerat[e] . . . the bar against relitigation set out in § 7116(d)."[9] Instead, the Arbitrator found that the Union's grievance "asserts the identical refusal to bargain claim that was raised in the Union's unsuccessful ULP charge[s]."[10] Despite reaching the conclusion that § 7116(d) would bar the current grievance, the Arbitrator continued to consider the merits of the grievance because the Agency had not raised this argument as an affirmative defense.

Turning to the merits of the case, the Arbitrator noted that almost four years elapsed between the implementation of the instruction, including the PAT, and its actual administration to the police officers at Naval Station Norfolk. As a result, he found that Chapter 7 of the instruction provided "distinct bargaining language" specific to implementing the PAT.[11] The Arbitrator rejected the Agency's argument that the language in Chapter 7 restated the bargaining duties which were met in April 2012. Instead, the Arbitrator concluded that the Union had demonstrated a distinct contractual duty to bargain that "arose in the 2015-16 period when [the PAT] was finally actually implemented."[12] In light of those findings, the Arbitrator concluded that the Agency failed to satisfy an obligation to bargain with the Union prior to implementing the PAT in 2016 at Naval Station Norfolk. As a remedy for the contractual violation, he ordered the Agency to provide notice and an opportunity to bargain with the Union prior to any further implementation of the PAT.

The Agency filed an exception in June 2017, and the Union filed an opposition in July 2017.

III. Preliminary Matter: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's contrary-to-law exception and the exhibits of the earlier-filed ULP charges and dismissals.

The Union contends that, pursuant to § 2429.5 of the Authority's Regulations, the Authority should not consider the Agency's arguments that the grievance is barred by § 7116(d), as well as the exhibits now

[5] Exceptions, Ex. G, ULP Case No. WA-CA-15-0022, October 10, 2014 at 71-73; Exceptions, Ex. H, FLRA Washington RD Decision, April 6, 2015 at 75-76.
[6] Exceptions, Ex. J, ULP Case No. WA-CA-15-0481, September 7, 2015 at 79.
[7] Exceptions, Ex. K, FLRA Denver RD Decision, February 29, 2016 at 80.
[8] Award at 14 (citing *AFGE, Local 919*, 68 FLRA 573 (2015)).
[9] *Id.* at 15.
[10] *Id.* at 16.
[11] *Id.* at 21.
[12] *Id.* at 23.

presented to the Authority relating to such arguments, because the Agency did not present them before the Arbitrator.[13] The Agency attached to its exceptions complete photocopies of the 2012 ULP charges, the RD's dismissal of two of those charges, and the Office of General Counsel's affirmance of that dismissal, in addition to the ULP charges filed in 2013, 2014, and 2015 with their accompanying dismissals. It is well established that under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority will not consider any argument or evidence that could have been, but was not, presented to the Arbitrator.[14]

However, the Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar arguments regarding an arbitrator's statutory jurisdiction, regardless of whether the arguments were raised below.[15] Moreover, in *U.S. Department of VA, Veterans Canteen Service, Martinsburg, West Virginia*, the Authority had also declined to apply § 2429.5 to bar exhibits related to such arguments where the excepting party relied on that evidence to support its claim that the arbitrator lacked statutory jurisdiction over the grievance.[16]

Here, although the Agency presented the 2015 ULP charge as evidence that it had fulfilled any duty to bargain, it is undisputed that the Agency neither presented any arguments that specifically use the term "§ 7116(d)" nor presented the 2012, 2013, and 2014 ULP charges and dismissals to the Arbitrator.[17] Nonetheless, we will consider the Agency's arguments and exhibits because they challenge the Arbitrator's statutory jurisdiction.[18]

[13] Opp'n Br. at 8.

[14] 5 C.F.R. §§ 2425.4(c), 2429.5; *e.g.*, *AFGE, Local 3571*, 67 FLRA 218, 219 (2014).

[15] *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 380 (*DOD*) (2016) (citing *U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015) (although not addressed by judge, Authority considered whether earlier-filed grievance barred ULP charge because argument challenged Authority's jurisdiction under § 7116(d)).

[16] 66 FLRA 1032, 1035 (2012) (citing *U.S. Dep't of VA, Veterans Canteen Serv.*, 66 FLRA 944, 947-48 (2012) (refusing to bar an affidavit that the agency relied on as evidence to support its claim that the arbitrator lacked statutory jurisdiction over the grievance)).

[17] Exceptions at 12; Opp'n Br. at 12-13.

[18] *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (*Navy*) (citing *EEOC*, 48 FLRA 882, 827 (1993)); *see also* 5 C.F.R. § 2429.5 (Authority may take official notice of such matters, "as would be proper"); *U.S. DHS, U.S. Citizenship and Immigration Serv.*, 68 FLRA 772, 774 (2015) (Authority taking official notice of a ULP dismissal that arises from the same set of facts as those at arbitration).

IV. Analysis and Conclusion

The Agency argues that the award is contrary to law because the Union's earlier-filed ULP charges bar the grievance under § 7116(d) of the Statute.[19] Further, the Agency asks that we re-evaluate how this statutory choice-of-forum provision, § 7116(d), is applied. We agree that the facts and issues of this case present a well-timed opportunity to re-evaluate our interpretation of § 7116(d). We find that the application of § 7116(d) has strayed from Congress's original intent and that a return to the plain meaning of the Statute is warranted.

Under § 7116(d) of the Statute, issues may be raised under a negotiated grievance procedure or under the statutory ULP procedure, but not under both procedures.[20] For a grievance to be precluded under § 7116(d) by an earlier-filed ULP charge, (1) the issue which is the subject matter of the grievance must be the same as the issue which is the subject matter of the ULP; (2) such issue must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedure must have been in the discretion of the aggrieved party.[21]

In *United States Department of the Army, Army Finance &Accounting Center, Indianapolis, Indiana*, the Authority considered whether an earlier-filed ULP charge that concerned a proposed suspension barred a later-filed grievance that concerned the actual suspension.[22] The Authority found the difference between a "proposed or definite" suspension was irrelevant.[23] Rather, to decide whether the issues were the same, the Authority examined whether: (1) the ULP charge arose from the *same set of factual circumstances* as the grievance; and (2) the *theories* advanced in support of the ULP charge and the grievance were *substantially similar*.[24] The U.S. Court of Appeals for the District of Columbia Circuit upheld this approach.[25]

Yet, over several years the interpretation and application of this section has become an exercise in

[19] Exceptions at 14.

[20] 5 U.S.C. § 7116(d).

[21] *Navy*, 64 FLRA at 1111 (citing *U.S. Dep't of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)).

[22] 38 FLRA 1345, 1351 (1991) (*Army*), *pet. for review denied sub nom, AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992) (*Local 1411*).

[23] *Id.*

[24] *Id.*; *Local 1411*, 960 F.2d at 178.

[25] *Army*, 38 FLRA at 1351.

technical hair-splitting and artful pleading.[26] Indeed, choice-of-forum provisions are provided by Congress in Title V of the U.S. Code and Title VII of the Civil Rights Act of 1964 to preclude a grieving party from relitigating the same issues.[27] As evidenced by this case, § 7116(d) has been drained of all its utility. Therefore, we must return to the straight-forward interpretation of the Statute as given to us by Congress.[28]

We hold that the plain language of, and the policies behind, the Statute support a conclusion that § 7116(d) bars this grievance because the Union raised this issue in its 2014 and 2015 ULP charges.[29]

It is well established that the language of § 7116(d) is modeled after, though not mirroring, § 19(d) of the 1969 Executive Order 11491, which earlier provided for federal labor-management relations in federal service:

> When the issue in a complaint of an alleged violation of paragraph (a)(1), (2), or (4) of this section is subject to an established grievance or appeals procedure, that procedure is the exclusive procedure for resolving the complaint. All other complaints of alleged violations of this section initiated by an employee, an agency, or a labor organization, that cannot be resolved by the parties, shall be filed with the Assistant Secretary.[30]

With the enactment of the Statute, Congress made § 7116(d) even more pointed:

> Issues which can properly be raised under an appeals procedure may not be raised as [ULPs] prohibited under this section. Except for matters wherein, under [§] 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, 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] under this section, but not under both procedures.[31]

By the plain language of the Statute, Congress clearly intended to discourage forum shopping, or the classic "two bites at the apple."[32] The Authority's decision in *United States Department of Defense, Defense Commissary Agency* and its like are contrary to these principles.[33]

The case now before the Authority perfectly illustrates what Congress intended to avoid when it enacted § 7116(d). As discussed above, the Agency notified the exclusive representative in 2011 of its intent to implement a new Agency regulation, the instruction. Their discussions may not have been fruitful; however, the Agency did provide the Union an opportunity to bargain. But in October of 2012, the Union alleged violations of 5 U.S.C. § 7116(a)(5) for failing to properly negotiate over the instruction before implementation:

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[26] *DOD*, 69 FLRA at 385 (Dissenting Opinion of Member Pizzella); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 451 n.17 (2014) (*BOP*) (Dissenting Opinion of Member Pizzella); *see also U.S. Marshals Serv. v. FLRA*, 708 F.2d 1417, 1421 (9th Cir. 1983) (observing that parties should not be allowed to avoid Authority jurisdiction with "artful course of pleadings").

[27] *See* 5 U.S.C. § 7703(b)(1)-(2); 42 U.S.C. § 2000e; *Perry v. MSPB*, 137 S.Ct. 1975, 1979 (2017) (when federal employee brings mixed case, asserting civil service rights and discrimination claims, judicial review lies in district court over both claims).

[28] Our dissenting colleague is incorrect that the Union has "no choice" under the majority's framework but to pursue all of its claims under the negotiated grievance procedure. Dissent at 11. The Statute provides a clear and unmistakable *choice* between pursuing relief under the negotiated grievance procedure *or* under a statutory procedure (one or the other), *but not both*, not a choice between using one forum or both as the dissent suggests. For too long, that thinking has permitted parties to manipulate Title V as if it were a smorgasbord of unlimited options. Instead, we are returning to the plain meaning of the Statute, as it was enacted, and interpreting the language of the Statute to provide for one selection of forum. *See AFGE, Local 919*, 68 FLRA 573, 577-78 (2015) (Dissenting Opinion of Member Pizzella). A choice between one forum or the other should not be mistaken as providing "no choice."

[29] Exceptions, Ex. E, ULP Case Nos. WA-CA-13-0606 & WA-CA-13-0607, July 16, 2013 at 67-68; Exceptions, Ex. G, ULP Case No. WA-CA-15-0022, October 10, 2014 at 73; Exceptions, Ex. J, ULP Case No. WA-CA-15-0481, September 7, 2015 at 79.

[30] Exec. Order 11,491, 34 Fed. Reg. 17,605 (1969); *BOP*, 67 FLRA at 451; s*ee Norfolk Naval Shipyard, Norfolk, Va.*, 4 FLRA 686, 693-94 (1980) (ALJ decision).

[31] 5 U.S.C. § 7116(d)

[32] S. Rep. No. 95-969, at 2829 (1978) ("the use of either option will preclude the use of the unfair labor practice procedures"); *see Norfolk Naval Shipyard, Portsmouth, Va.*, 2 FLRA 816, 833-34 (1980) (ALJ decision) (noting "basic issues raised"); *see also BOP*, 67 FLRA at 451-52 (Dissenting Opinion of Member Pizzella) (discussing Congress's intent to provide aggrieved only one forum); *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 117-18 (2003) (Dissenting Opinion of Member Armendariz) (noting this cannot be what Congress envisioned).

[33] 69 FLRA 379, 381 (2016) (Member Pizzella dissenting).

> By letter to the Union, . . . the Employer, Commander Navy Region, Mid-Atlantic Directorate, . . . [i]nformed "[a]ll" that the bargaining obligation regarding [the] [i]mplementation of CNIC 5530.14 had been met and the Directorate *was going to implement* the entire instruction effective immediately. . . . There are a number of issues in the instruction including taking and passing a physical and PAT test that may result in termination if the employees in our bargaining unit fail, that are changes in the conditions of employment.[34]

The charges were dismissed. Additional ULP charges, citing the same statutory provisions and interpretations, were filed and dismissed in 2013, 2014, and 2015. The only difference was *where* the policy was implemented.[35] Then, in 2016, the Union tried something different. This time, the Union filed a grievance involving the same issue, stating:

> The [U]nion alleges that [the Agency] is in violation for implementing a change in working condition, a condition of employment, a [PAT] for all bargaining[-]unit employees of Commander, Navy Region Mid-Atlantic Region without bargaining. The implementation of this [PAT] is part of . . . CNIC 5530.14.[36]

It is obvious that the issues presented in both the earlier-filed ULP charges and the instant grievance are the same. Even the Arbitrator could find no distinction between the 2014 and 2015 ULP charges and the grievance, stating that the grievance concerned "the identical refusal to bargain claim that was raised in the Union's unsuccessful [2014 and 2015] ULP charge[s]."[37] The issue in all of these claims was that the Agency announced and then implemented an Agency regulation, which contained an agility test for its shore-bound security police officers.

The Union now argues that the issue here differs from those in the earlier-filed ULP charges because the grievance alleges that the Agency committed a contractual violation when it "required two . . . employees [at the Naval Station Norfolk] to complete the PAT without bargaining or the proper medical screening."[38] The Arbitrator found, and we agree, that this argument is no different in any meaningful respect than the arguments made in the earlier-filed ULP charges by the Union because the contractual claim is a derivative of the statutory claim.[39] Specifically, the 2015 ULP charge in Case No. WA-CA-15-0481 arose from the same announcement that the Agency was implementing the PAT at the Sewells Point Police Precinct.[40] While the Union's earlier-filed ULP charges make no mention of contractual bargaining rights, the issues are nonetheless substantially similar to the alleged violation of the parties' agreement.[41] We cannot simply turn a blind eye when parties, through carefully crafted pleadings, try to avoid the § 7116(d) bar in order to get two bites of the proverbial apple. Instead, we return to the plain language of the Statute and the intent of Congress, and hold that § 7116(d) bars a later-filed grievance when the grievance raises issues which are substantially similar to those raised in an earlier-filed ULP.[42]

The Union also argues that § 7116(d) does not apply where the contractual obligation in the agreement "[does] not mirror language within the Statute."[43] We disagree. In *Overseas Education Association v. FLRA*, the Court specifically noted that "Congress . . . left the route selection to the discretion of the aggrieved party, while at the same time mandating that selection of one route precluded the use of the other."[44] Furthermore, the Authority does not require that the theories advanced in

[34] Exceptions, Ex. B, ULP Case No. WA-CA-12-0417, April 17, 2012 at 57 (emphasis added).
[35] Exceptions, Ex. E, ULP Case Nos. WA-CA-13-0606 & WA-CA-13-0607, July 16, 2013 at 67-68; Exceptions, Ex. G, ULP Case No. WA-CA-15-0022, October 10, 2014 at 73; Exceptions, Ex. J, ULP Case No. WA-CA-15-0481, September 7, 2015 at 79.
[36] Exceptions, Ex. O, Union Grievance, February 22, 2016 at 90.
[37] Award at 16.
[38] Opp'n Br. at 17.
[39] Award at 12 ("th[e] statutory duty to provide notice and an opportunity to bargain is also a contractual duty"); *see also id.* at 18 ("any breach of the Agency's statutory duty to bargain would simultaneously violate both the statute and, *derivatively*, the agreement") (emphasis added).
[40] *Compare* Award at 9-10, *with* Exceptions, Ex. J, ULP Case No. WA-CA-15-0481, September 7, 2015 at 79.
[41] *Army*, 38 FLRA at 1351 (Authority looking at whether the theory advanced in support of the ULP charge and grievance are substantially similar).
[42] *Headquarters, Space Div., L.A. Air Force Station, Cal.*, 17 FLRA 969, 971 (1985) (Authority finding that the filing of a ULP charge constituted the election of procedures; and such finding is fully consonant with the language and purpose of the Statute in placing the election of procedures squarely "in the discretion of the aggrieved party").
[43] Opp'n Br. at 24 (citing *U. S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 545-46 (2014)).
[44] 824 F.2d 61, 64 (D.C. Cir. 1987).

the ULP charge and the grievance to be *identical*.[45] Instead, the Authority found that § 7116(d) bars the grievance when the theories advanced in the ULP charge and the grievance are *substantially similar*.[46] Here, the Arbitrator found that the Union's contractual claim was derived from its statutory claim raised in its unsuccessful ULP charges.[47] Thus, given the derivative nature of the contractual bargaining obligation from the statutory bargaining obligation, we find that § 7116(d) bars the grievance.

Finally, the Union argues that § 7116(d) does not apply because its collective-bargaining agreement with the Agency was not implemented until July 2013.[48] We agree that § 7116(d) would not apply where there is no negotiated grievance procedure.[49] However, this is not the case here because the Union filed substantially similar ULP charges after July 2013, in 2014 and 2015.

Because the Union made the choice to file the same basic issue in earlier-filed ULP charges, the grievance which was filed in 2016 is barred by § 7116(d) of the Statute.[50] Accordingly, we set aside the award because the Arbitrator erred as a matter of law in concluding that § 7116(d) does not bar the grievance in this case.

V. Decision

We set aside the award.

[45] *Army*, 38 FLRA at 1351.
[46] *Id.*
[47] Award at 16-18.
[48] Opp'n Br. at 27-28.
[49] *Fed. Emergency Mgmt. Agency*, 52 FLRA 486, 493 (1996) (election of procedures in § 7116(d) never applied because no collective-bargaining agreement existed during the relevant period).
[50] *Army*, 38 FLRA at 1354.

Member DuBester, dissenting:

Contrary to the majority, I do not think that the Authority's § 7116(d)[1] precedent warrants reconsideration. Nor would I set aside the Arbitrator's award. Because the Union's grievance and its earlier-filed unfair-labor-practice (ULP) charge do not raise the same issue, the Arbitrator is correct "that the statutory . . . bar imposed by § 7116(d) is not applicable."[2] Accordingly, applying the Authority's long-standing case law, I would deny the Agency's contrary-to-law exception, which relies on § 7116(d), and uphold the award.

The majority is correct in stating that under § 7116(d), a party that exercises its right to make a choice to raise an issue under either the statutory ULP or the parties' grievance procedure may not subsequently relitigate that same issue by using the procedure the party did not originally choose. However, the majority errs by not acknowledging the distinction between statutory ULP issues and contract-violation issues. Under the majority's approach, a party that wants to challenge an agency action both as a contract violation, and also as a statutory ULP arising out of the same general set of facts, will not be able to pursue its statutory ULP claim under the Authority's ULP procedures. Instead, that party would have *no choice*; that party would be limited to raising all of its claims under the negotiated-grievance procedure. The majority's approach therefore nullifies what Congress intended § 7116(d) to provide: a party's right to choose appropriate forums for distinct legal issues under the Statute.

The majority does not discuss the origins of, or the reasons for, the Authority's adoption of the distinction between statutory ULP issues and contract-violation issues. The Authority's § 7116(d) case law has its roots in fundamental distinctions that Congress wrote into the Statute when it was enacted. As the Authority found, "purely contractual violations are not ULPs and, thus, may not be litigated in the statutory-ULP process."[3] And judicial precedent also recognizes this distinction in the context of § 7116(d).[4] In a 1987 decision, the U.S. Court of Appeals for the D.C. Circuit found 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 parties'] agreement . . . present" the same issue.[5]

The majority also misconstrues the Statute's legislative history. The majority relies on the original 1969 version of § 19(d) in Executive Order (EO) 11491,[6] and compares it to § 7116(d).[7] What such a comparison reveals, and what the majority overlooks, is that between 1969 and the Statute's enactment in 1978, the original version of § 19(d)—which rigidly prescribed which forum a party was required to use for a particular issue—was transformed, through amendments to the EO and the enactment of the Statute, into a true choice-of-forum option for aggrieved parties. In fact, as the Authority has pointed out, the Authority's current "approach is so long-standing that it predates the Statute."[8] Specifically, in interpreting § 19(d) of EO 11491—on which Congress modeled § 7116(d)—the Assistant Secretary of Labor for Labor-Management Relations," who, under the EO, performed the functions of the Authority's General Counsel, "applied a similar approach."[9] This evolution of § 7116(d) underscores the importance Congress placed on enabling parties to choose forums adapted to resolving their particular disputes. The majority's approach, and its effective denial of parties' access to the Statute's ULP procedures for an important class of ULP claims, is a step back in time that I would not adopt.

Accordingly, I dissent.

[1] 5 U.S.C. § 7116(d).

[2] Award at 17.

[3] *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 447 (2014) (*BOP*) (citing *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)).

[4] *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987).

[5] *Id.*

[6] Majority at 6-7.

[7] *Id.* at 7.

[8] *BOP*, 67 FLRA at 446.

[9] *Id.* (citing *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)).