

70 FLRA No. 168

UNITED STATES
DEPARTMENT OF THE AIR FORCE
MINOT AIR FORCE BASE
NORTH DAKOTA
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4046
(Union)

0-AR-5323

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DECISION

September 25, 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

In this case, we reaffirm that § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)¹ precludes the filing of a grievance which presents issues that are substantially similar to those raised in an earlier-filed unfair-labor-practice (ULP) charge. This is no less true when the earlier-filed ULP charge was dismissed because it was not filed by the Union in a timely manner.

Arbitrator Micheal J. Falvo issued an award finding that the Union's earlier-filed ULP charge did not bar a later-filed grievance under § 7116(d). The main question before us is whether that finding is contrary to law. Because the ULP charge and the grievance advance substantially similar issues, we conclude that the ULP charge bars the grievance, and we set aside the award.

II. Background and Arbitrator's Award

Since 2011, the Agency had relied on Air Force Form 683 (Form 683) to justify paying certain employees (the grievants) hazardous-duty pay (hazard pay). In February 2016, the Agency investigated the grievants' pay records and found that it should not have previously

approved the grievants to receive hazard pay because their job duties do not meet the statutory requirements for such pay. Then, in March 2016, the Agency informed the grievants that Form 683 "[was] no longer valid and [could not] be used as the justification" for claiming hazard pay.² Soon thereafter, the grievants informed the Agency that they would no longer request hazard pay.

In May 2016, the Union filed a ULP charge, alleging that the Agency violated the Statute when it unlawfully changed the grievants' working conditions, "resulting in the loss of pay and premiums."³ Specifically, the Union alleged that the Agency unlawfully: (1) changed overtime practices for the grievants without bargaining with the Union; (2) revoked an agreement that allowed the grievants to teach a certain class; (3) retaliated against the grievants by investigating their use of hazard pay; (4) arbitrarily determined that previous hazard-pay approval was "no longer valid and declared [that] prior approval was void"; and (5) "[d]irected the [grievants] to change time[-]card documentation on [hazard pay] and change the way [that they] enter coding for payment."⁴

The FLRA's Chicago Regional Office investigated the Union's overtime and retaliation claims and, on November 23, 2016, Regional Director Sandra J. LeBold dismissed the ULP charge.

On November 22, 2016, the grievants informed the Agency that they would resume claiming hazard pay and would also be requesting hazard pay back to March 2016. The next day, the Agency informed the grievants that they were not entitled to hazard pay. In response, on December 15, 2016, the Union filed a grievance alleging that the Agency improperly: (1) terminated its practice of paying the grievants hazard pay without bargaining with the Union; and (2) bypassed the Union by dealing directly with the grievants concerning their entitlement to hazard pay. The grievance referred to "[v]iolations of the agreement" and § 7114(a)(1) and (a)(2)(A) of the Statute.⁵ As a remedy, the grievants requested retroactive hazard pay – specifically, "from [March 6,] 2016 [until the] [p]resent."⁶

The parties submitted the grievance to arbitration. The parties did not agree to a stipulated issue, so the Arbitrator framed the issues as whether the Agency violated the parties' collective-bargaining agreement and federal law by: (1) "unilaterally changing working conditions, specifically the payment of [hazard] pay, without conducting the appropriate bargaining"; and (2)

² Award at 9 (quoting Exceptions, Attach. 15 at 1).

³ Exceptions, Attach. 8 (ULP Charge) at 1.

⁴ *Id.*

⁵ Exceptions, Attach. 2 (Grievance) at 1.

⁶ *Id.*

¹ 5 U.S.C. § 7116(d).

“dealing directly with bargaining[-]unit [employees] on matters affecting their conditions of employment and[,] in so doing[,] bypass[ing] the [Union].”⁷

As relevant here, the Agency argued that, under § 7116(d) of the Statute, the Union’s earlier-filed ULP charge barred the grievance because the ULP charge and the grievance raised the same issues. The Arbitrator rejected this argument, finding that the subject matter of the ULP charge and the grievance were not the same. Specifically, he determined that the earlier-filed ULP charge challenged the Agency’s “purported voiding of [Form 683],” whereas the grievance challenged the Agency’s decision to stop paying the grievants hazard pay.⁸ On the merits, the Arbitrator sustained the grievance.

On October 19, 2017, the Agency filed exceptions to the Arbitrator’s award, and on November 7, 2017, the Union filed an opposition.

III. Analysis and Conclusion: The earlier-filed ULP charge bars the grievance under § 7116(d) of the Statute.

The Agency argues that the award is contrary to § 7116(d) of the Statute because the Union’s earlier-filed ULP charge bars the grievance.⁹ As relevant here, an earlier-filed ULP charge bars a grievance under § 7116(d) of the Statute if the ULP charge and a grievance involve the same issue.¹⁰

The Authority has held that a ULP charge and a grievance involve the same issue where they: (1) arise from the same set of factual circumstances, and (2) advance *substantially similar* legal theories.¹¹ In *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Va. (Navy)*,¹² the Authority recently clarified that the legal theories in the ULP charge and the grievance need not “be *identical*” in order for the ULP charge to bar the grievance.¹³

Here, the Union’s earlier-filed ULP charge alleged, in relevant part, that: (1) the Agency violated the Statute when, in March 2016, it arbitrarily determined that the grievants’ previous hazard-pay approval “was no longer valid,” and (2) such change “result[ed] in the [grievants’] loss of pay.”¹⁴ The Union’s later-filed grievance alleged, as relevant here, that the Agency violated the Statute by terminating its practice of paying the grievants hazard pay without bargaining with the Union and, as a remedy, requested retroactive hazard pay beginning in March 2016.¹⁵ Thus, the ULP charge and the grievance arise from the same set of factual circumstances: the Agency’s decision to change its hazard-pay practices. Further, the ULP charge and the grievance allege statutory violations based on that change and seek pay remedies back to March 2016 – the time of the initial change.¹⁶ As the Authority noted in *Navy*, “[w]e 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.”¹⁷ In our view, that is what the Union’s grievance attempts to do here. Therefore, we find that the Union’s earlier-filed ULP charge and the grievance raise substantially similar issues, and that the Arbitrator erred as a matter of law in concluding that § 7116(d) does not bar the grievance.¹⁸ Accordingly, we set aside the award.¹⁹

IV. Decision

We set aside the award.

⁷ Award at 2.

⁸ *Id.* at 17-18.

⁹ Exceptions Br. at 6.

¹⁰ In addition, for an earlier-filed ULP charge to bar a grievance under § 7116(d) of the Statute, the issue that the grievance raises must have been previously raised under the ULP procedure, and the selection of the ULP procedure must have been at the discretion of the aggrieved party. *See, e.g., U.S. Dep’t of the Navy, Naval Air Eng’g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (citing *U.S. Dep’t of HHS, Indian Health Serv., Alaska Area Native Health Serv., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)).

¹¹ *See, e.g., U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015).

¹² 70 FLRA 512 (2018).

¹³ *Id.* at 516-17.

¹⁴ *See* ULP Charge at 1.

¹⁵ *See* Grievance at 1.

¹⁶ *See* ULP Charge at 1 (alleging that the Agency violated changes to the grievants’ working conditions “resulting in [the] loss of pay and premiums” from “October 2015 until [the] present.”); Grievance at 1 (requesting that the grievants be “authorized to go back and claim their [hazard pay] from [March 6,] 2016 [until the] [p]resent”).

¹⁷ 70 FLRA at 516.

¹⁸ *Id.* at 516-17.

¹⁹ Because we set aside the award as contrary to law, we find it unnecessary to resolve the Agency’s remaining exception.

Member DuBester, dissenting:

I disagree with the majority's decision to set aside the award. In the majority's mistaken view, the grievance and Union's earlier-filed unfair-labor-practice (ULP) charge "raise substantially similar issues."¹ Finding that the ULP charge and the grievance both concern "the Agency's decision to change its hazard-pay practices,"² the majority concludes, contrary to the Arbitrator, that the grievance is barred by § 7116(d).

The majority's superficial analysis is not supported by the case's facts. Although there is a commonality at some elevated level between the grievance and the earlier-filed ULP, the Arbitrator's undisputed, detailed factual findings,³ to which the majority should defer,⁴ show clearly that § 7116(d) does not bar the grievance in this case.

The Arbitrator finds that the earlier-filed ULP charge challenged the Agency's decision, in March 2016, "that [the grievants] could not use [a particular Agency form] as the sole justification for hazard pay," and "that the [g]rievants had been in effect told that they were eligible for hazardous duty pay as long as the justification comported with OPM criteria and not any authorization derived from [the Agency form]."⁵

In contrast, the Arbitrator finds that "[t]he act challenged in the grievance occurred on November 29[, 2016,] when the grievants were informed that [the Agency] would not authorize *any* payment for hazardous duty differential—period."⁶ The Arbitrator concludes: "[T]he subject matter of the ULP is not the same as the subject matter of the grievance. The issue raised in the ULP was the purported voiding of [the Agency form]. The issue raised in the grievance was the complete prohibition of any hazardous duty pay."⁷ I agree. And, I also agree that § 7116(d) does not bar the Union's grievance.

The majority's decision is yet another example of the attempt to deny parties access to the Statute's procedures for settling labor-management disputes. As I explained in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia*, the majority's decision, applying an unjustifiably expansive interpretation of § 7116(d)'s bar, lacks any discussion or analysis of § 7116(d)'s origins, legislative history, or purpose, and rejects without reason established court and Authority precedent.⁸

Finally, I note the majority's comment that it "cannot simply turn a blind eye when parties, through carefully crafted pleadings, try . . . to get two bites of the proverbial apple."⁹ The majority's preoccupation with the character of the parties or their motives, rather than focusing on the merits of their cases, "has no part in Authority decision-making."¹⁰

¹ Majority at 4.

² *Id.*

³ See Award at 8-10.

⁴ *U.S. DHS, CBP*, 69 FLRA 579, 581 (2016) ("In applying the standard of *de novo* review, . . . the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts."); *U.S. DOJ, Fed. BOP, Wash., D.C.*, 64 FLRA 1148, 1150 (2010) (same).

⁵ Award at 17.

⁶ *Id.*

⁷ *Id.* at 17-18. The Arbitrator also notes, as further support for his conclusion, that the ULP charge was interpreted by the Authority's Regional Director as involving only overtime pay and retaliation claims, not changes to the Agency hazardous duty pay practices. See *id.* at 18-19 (quoting the Regional Director's letter dismissing the Union's ULP charge).

⁸ 70 FLRA 512, 518 (2018) (Dissenting Opinion of Member DuBester).

⁹ Majority at 4.

¹⁰ *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 686 (2018) (Dissenting Opinion of Member DuBester).