

71 FLRA No. 23

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS OPERATIONS
(Agency)

and

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND
TECHNICAL ENGINEERS
ASSOCIATION OF
ADMINISTRATIVE LAW JUDGES
(Union)

0-AR-5346

DECISION

May 16, 2019

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

I. Statement of the Case

In an award dated December 20, 2017, Arbitrator Martin Henner found that an earlier equal employment opportunity (EEO) complaint concerned a different matter than the grievance before him, and that the Agency did not have just cause to discipline the grievant. We consider one of the Agency’s exceptions.

The Agency argues that § 7121(d) of the Federal Service Labor-Management Relations Statute (Statute) bars the grievance from arbitration.¹ Because the earlier filed, formal EEO complaint concerns the same matter as the grievance, we grant this exception and set aside the award.

II. Background and Arbitrator’s Decision

On December 14, 2016, the grievant received a favorable settlement on an EEO complaint she filed against the Agency. Two days later, the Agency informed the grievant that it was investigating her for conduct that had occurred in May 2016.

In March, 2017, the grievant filed a formal complaint with the EEO (second complaint) against the

Agency alleging retaliation for the grievant’s first EEO complaint.

Following the conclusion of the investigation, the Agency issued a written reprimand to the grievant in May 2017. In response, the Union filed a grievance on June 29, 2017 on her behalf, alleging that the Agency violated the parties’ agreement and did not have just cause to issue a written reprimand. The parties were unable to resolve the grievance, and it proceeded to arbitration.

The Arbitrator framed two issues: first, whether the second EEO complaint barred the grievance from arbitration; and second, whether there was just cause for the reprimand.

As to the question of arbitrability, the Agency argued that, under § 7121(d) of the Statute, the grievant’s formal EEO complaint barred the grievance from arbitration because the grievance and the EEO complaint concern the same matters. The Union contended that the Agency’s allegedly retaliatory investigation and the written reprimand were separate matters under § 7121(d).

As relevant here, the Arbitrator found that the EEO complaint and the grievance alleged separate violations and “concern[ed] different subjects with no overlap.”² Further, the Arbitrator found that, because the discipline had not been imposed at the time the grievant filed the formal complaint, the grievant never had the election of remedies provided in § 7121(d) for the letter of reprimand. Ultimately, the Arbitrator found that there was no just cause for the written reprimand and sustained the grievance.

On January 18, 2018, the Agency filed exceptions to the award.

III. Analysis and Conclusions: Section 7121(d) bars the grievance.

The Agency argues³ that the award is contrary to § 7121(d).⁴ We review this

¹ 5 U.S.C. § 7121(d).

² Award at 6.

³ Exceptions Br. at 4.

⁴ We also reject the Arbitrator’s position that the Agency waived these § 7121(d) arguments. This section of the Statute presents a question of subject matter jurisdiction. *U.S. Dep’t of VA, Waco Reg’l Office, Waco, Tex.*, 70 FLRA 92, 93 (2016) (Member Pizzella concurring) (“The Authority has recognized that § 7121(d) limits an arbitrator’s jurisdiction to resolve a grievance.”). Such jurisdictional questions cannot be waived. *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891 n.11 (2018) (Member DuBester dissenting).

exception de novo.⁵ Section 7121(d) provides that an employee may raise a “matter under a statutory [EEO] procedure or the negotiated procedure, but not both.”⁶ For purposes of § 7121(d), the term “matter” refers “not to the issue or claim of prohibited discrimination,” but, rather, to the personnel action involved.”⁷ In this context, personnel actions are “personnel practices” as defined in 5 U.S.C. § 2302(a).⁸

In *United States DOJ, United States Marshals Service (Marshals Service)*, the Authority found that an earlier filed EEO complaint concerning a proposed personnel action (a suspension) barred a later filed grievance concerning the imposed personnel action.⁹ By filing an EEO complaint concerning the proposed personnel action, the grievant in *Marshals Service* elected that procedure and § 7121(d) foreclosed the grievant from later filing a grievance on the implementation of that action.

As to the current case, the grievant’s formal EEO complaint, filed in March 2017, alleged that the Agency had initiated an investigation “in retaliation for her protected activity of filing” an EEO complaint.¹⁰ The grievance, filed in May 2017, alleged that, after the Agency completed that investigation, the Agency instituted a disciplinary action without just cause.¹¹

Just as in *Marshals Service*, by filing a formal EEO complaint concerning the investigation, the grievant elected that procedure and § 7121(d) foreclosed the grievant from later filing a grievance on the reprimand letter resulting from that investigation.¹² In short, the

investigation merged with the discipline as a single *matter* under § 7121(d).¹³ The dissent relies on a flawed rationale which forces us to make a clear distinction. Past majorities relied on interpretations of § 7121(d) and “matter” that, for all practical purposes, permitted grievants and unions to parse the fundamentally same matter into separate complaints for no other purpose than to get two bites of the proverbial apple. We do not believe that Congress intended for the application of the election-of-forum provisions – §§ 7116(d) and 7121(d) – to be based on “technical hair-splitting and artful pleading.”¹⁴ Instead, these statutory provisions were intended to prevent unnecessary or redundant filings on related, similar, or same matters.¹⁵

Because § 7121(d) barred the later filed grievance, the Arbitrator did not have the authority to hear the grievance.¹⁶ Consequently, we grant the Agency’s exception, and we set aside the award.¹⁷

The similarity of these circumstances is plain to all but the dissent.

¹³ See VA, 70 FLRA at 94 (finding the denial of official time requests to be a personnel action); see also *Guerra v. Cuomo*, 176 F.3d 547, 549-50 (D.C. Cir. 1999) (discussing “congressional intent” and precedent finding “matter” to mean “topic”); *Bonner v. MSPB*, 781 F.2d 202, 204-05 (Fed. Cir. 1986) (citing to legislative history and noting “matter” was any underlying action that an agency could do).

¹⁴ *U.S. Dep’t of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 515 (2018) (Member DuBester dissenting). In this regard, the grievant in this case has been an Administrative Law Judge with the Agency for almost ten years. Exceptions, Ex. 15, Grievant’s Aff. at 2. As such, she is charged with, in her own words, “review[ing] records, rul[ing] on motions, conduct[ing] hearings, review[ing] legal briefs, and prepar[ing] . . . decisions.” *Id.* In other words, she knows how to frame legal arguments and navigate legal nuances. And this case is all about fine distinctions and legal nuance.

¹⁵ See *AFGE, Local 919*, 68 FLRA 573, 578 (2015) (Dissenting Opinion of Member Pizzella) (discussing 5 U.S.C. § 7116(d) and noting that the various options of redress that are set forth in the Statute are not an “all-you-can-eat smorgasbord of unlimited choices” but rather “a menu from which one must select a single entrée” and that limiting parties to one choice is not contrary to the purpose and intent of the Statute); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 452-53 (2014) (Dissenting Opinion of Member Pizzella) (Congress’s original intent was to avoid duplicative complaints and grievances.).

¹⁶ In order to ensure clarity, Member Abbott notes that this case is distinguishable from *United States EPA, Region 5*, 70 FLRA 1033 (2018) (*EPA*) (Member DuBester dissenting). In *EPA*, the Authority looked to federal courts to interpret the *McDonnell Douglas* framework, a framework originating in the federal courts. Here, on the other hand, we are applying our own Statute.

¹⁷ Because we set aside the award, we do not need to address the Agency’s remaining exception alleging that the award is contrary to an Agency policy. *EPA*, 70 FLRA at 1037 n.32.

⁵ *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying a de novo standard of review, the Authority assesses whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. See *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

⁶ 5 U.S.C. § 7121(d).

⁷ *U.S. Dep’t of VA, Waco Reg’l Office, Waco, Tex.*, 70 FLRA 92, 93 (2016) (VA) (Member Pizzella concurring); *AFGE, Local 2145*, 61 FLRA 571, 573 (2006) (*Local 2145*); *U.S. Dep’t of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 296 (2000) (quoting *U.S. DOJ, U.S. Marshals Serv.*, 23 FLRA 564, 567 (1986) (*Marshals Serv.*)); *U.S. DOJ, INS, El Paso, Tex.*, 40 FLRA 43, 52 (1991) (*INS*).

⁸ *Local 2145*, 61 FLRA at 573; *INS*, 40 FLRA at 53.

⁹ *Marshals Serv.*, 23 FLRA at 568.

¹⁰ Award at 5.

¹¹ *Id.* at 7 (“A written reprimand constitutes a disciplinary action” under the parties’ agreement).

¹² The dissent attempts to make our application of *Marshals Service* appear unreasonable, but *Marshals Service* is directly relevant here. In that case, an EEO complaint about a *proposal* for discipline barred a grievance over the *imposition* of discipline. And here, an EEO complaint about an *investigation* for discipline bars a grievance over the *imposition* of discipline.

IV. Decision

We grant the Agency's exception and set aside the award.

Member DuBester, dissenting:

The facts of this case are simple. On December 16, 2016 – two days after receiving a favorable settlement regarding an earlier-filed equal employment opportunity (EEO) complaint – the grievant received notice that she was being investigated for conduct that had occurred in May 2016.¹ In March 2017, the grievant filed an EEO complaint alleging that the Agency initiated this investigation in retaliation for having filed her initial EEO complaint.² In May 2017, following the conclusion of the investigation, the Agency issued the grievant a written reprimand, which the Union challenged through a grievance.³

The Agency argued before the Arbitrator that the Union was barred from filing the grievance under Section 7121(d) of the Statute. Finding that “[t]he basis of [the grievant’s EEO] complaint was limited to a charge of retaliation,”⁵ and that the grievance “did not allege any retaliation for protected activity,”⁵ the Arbitrator rejected the Agency’s argument because the “two filings concern different subjects with no overlap.”⁶ The Arbitrator also reasoned that it would have been “impossible” for the grievant to have made “the election of remedies provided for in the [S]tatute when the subject matter being contested, the imposition of discipline, had not occurred.”⁷ Addressing the merits of the grievance, the Arbitrator concluded that there was no just cause for the reprimand.⁸

Analogizing to our decision in *United States DOJ, United States Marshals Service (Marshals Service)*,⁹ the majority sets aside the Arbitrator’s award because “the investigation merged with the discipline as a single matter under § 7121(d).”¹⁰ This conclusion is based upon a fundamental misreading of *Marshals Service* and stretches the meaning of the term “matter” in § 7121(d) beyond plausible recognition.

In *Marshals Service*, the Authority concluded that a grievance challenging a final decision to suspend the grievant for five days was barred under § 7121(d) by the grievant’s earlier-filed EEO complaint challenging the grievant’s proposed suspension.¹¹ The Authority

¹ Award at 5.

² *Id.*

³ *Id.* at 6.

⁵ *Id.* at 5.

⁵ *Id.* at 6.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 9.

⁹ 23 FLRA 564 (1986).

¹⁰ Majority at 3.

¹¹ *Marshals Service*, 23 FLRA at 568.

began its analysis by noting the term “matter” as used in § 7121(d) pertains to prohibited personnel practices under 5 U.S.C. § 2302(b).¹² This provision, in turn, describes prohibited personnel practices in terms of “any personnel action,” which includes suspensions of fourteen days or less.¹³ The Authority then noted that § 2302(b)(1) prohibits “any employee who has authority to take, direct others to take, recommend, or approve any personnel action from discriminating with respect to such personnel action authority.”¹⁴ Interpreting these statutory provisions to mean that a “personnel action . . . specifically encompasses *recommended and approved* personnel actions,” the Authority concluded that, in the case before it, “the matter raised both by the grievance and the formal complaint of discrimination was the suspension, *either proposed or final*, of the grievant.”¹⁵

The outcome in *Marshals Service* has no bearing to the facts of the instant case. The “matter” that was the subject of the grievant’s EEO complaint was not a proposed or recommended action of any sort, but rather was a decision to investigate the grievant for misconduct.¹⁶ The “matter” that was the subject of the Union’s grievance was the Agency’s decision to reprimand the grievant.¹⁷ As found by the Arbitrator, the grievant’s EEO complaint made no reference to the reprimand, either in proposed or final form. Nor could it, because the Agency took no action whatsoever with respect to the reprimand until two months *after* the grievant filed her EEO complaint. In short, there is no plausible basis for concluding that the grievant’s EEO complaint encompassed the matter raised in the Union’s grievance.¹⁸

Indeed, the Authority *specifically premised* its decision in *Marshals Service* upon findings that the EEO complaint at issue “expressly referenced the suspension action and the grievant in the complaint expressly requested as corrective action that he not be suspended as proposed.”¹⁹ It then contrasted these circumstances from those presented in *AFGE, Local 3230*,²⁰ in which the Authority found that an earlier-filed EEO complaint did *not* bar a subsequent grievance because “there was no express reference in the

EEO complaint to the suspension action over which the grievance was filed.”²¹ Thus, the decision in *Marshals Service* is – *on its face* – distinguishable from the circumstances presented by the instant case. The majority’s conclusion that the “investigation [of the grievant] merged with [her] discipline as a single matter under § 7121(d)”²² is similarly unsupported by the other cases upon which it relies for this proposition.²³

In sum, the majority’s attempt to expand the narrow holding of *Marshals Service* to the facts of this case belies any plausible interpretation of Authority precedent or the meaning of the term “matter” in § 7121(d). Contrary to the majority’s assertion, we do not need to engage in “technical hair-splitting and artful pleading”²⁴ to sustain the Arbitrator’s conclusion that these were separate matters; we need only to apply existing precedent. I therefore dissent from the conclusion that the grievance was barred by § 7121(d), and would address the Agency’s remaining exception.

¹² *Id.* at 567.

¹³ *Id.* (citing 5 U.S.C. § 2302(a)(2)(A)(iii)).

¹⁴ *Id.*

¹⁵ *Id.* (emphasis added).

¹⁶ Award at 5.

¹⁷ *Id.*

¹⁸ *See, e.g., AFGE, Local 2145*, 61 FLRA 571, 574 (2006) (EEO complaint concerning grievant’s detail did not bar subsequently filed grievance challenging grievant’s permanent reassignment).

¹⁹ *Marshals Service*, 23 FLRA at 567.

²⁰ 22 FLRA 448 (1986).

²¹ *Marshals Service*, 23 FLRA at 567.

²² Majority at 3.

²³ *See, e.g., U.S. Dep’t of VA, Waco Reg’l Office, Waco, Tex.*, 70 FLRA 92, 94 (2016) (Member Pizzella concurring) (finding that “the *only* underlying personnel action at issue in the EEO complaint, and in the grievance, was the Agency’s denial of the grievant’s request to work 100% official time” (emphasis added)); *Guerra v. Cuomo*, 176 F.3d 547, 549 (D.C. Cir. 1999) (noting that the appellant “does not contend that something other than a failure to accommodate her respiratory condition was the underlying employment action at issue in both the grievance and the [EEO] complaint”); *Bonner v. MSPB*, 781 F.2d 202, 205 (Fed. Cir. 1986) (concluding that the agency’s “[reduction-in-force] action is a ‘matter’” within the meaning of § 7121).

²⁴ Majority at 3-4.