

71 FLRA No. 154

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1594
(Union)

0-AR-5389

DECISION

June 5, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we remind the federal labor-relations community that § 7116(d) of the Federal Service Labor-Management Relations Statute (Statute) prohibits parties from litigating the same issue as both an unfair-labor-practice (ULP) charge and a grievance.¹ After concluding that the grievance was not barred by an earlier-filed ULP charge, Arbitrator John G. Kennedy found that the Agency violated the parties’ agreement when it unilaterally removed the Local President of the Union from 100 percent official time without providing the Union notice and an opportunity to bargain. The Agency argues that the award is contrary to law because the grievance is barred by the Union’s earlier-filed ULP charge. We find that the earlier-filed ULP charge and the grievance involve the same issue, and therefore, the earlier-filed ULP charge bars the grievance.² Accordingly, we vacate the award as contrary to law.

¹ 5 U.S.C. § 7116(d); *U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 516 (2018) (Member DuBester dissenting) (*Navy*) (finding § 7116(d) bars a later-filed grievance when the grievance raises issues which are substantially similar to those raised in an earlier-filed ULP).

² *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 868 (2018) (Member DuBester dissenting) (*Minot AFB*), *recons. denied*, 71 FLRA 188, 191 (2019) (Member DuBester dissenting).

II. Background and Arbitrator’s Award

On October 28, 2016, the Agency removed the Local President from 100 percent official time, directed her to return to her normal assigned duties, and informed her that she would need to request official time, “which would be granted or denied by the Agency based on the type of Union activity.”³

The Union filed a charge against the Agency on November 1, 2016, alleging that the Agency violated 5 U.S.C. § 7116(a)(1), and (5) when it “unilaterally removed [the Local President’s] official time” without notice and bargaining.⁴ While the Union alleged that the act was retaliatory in nature, it also claimed that the act “violates a long-term past practice . . . allowing [the Local President] to work full-time . . . performing representational duties . . . which could only be changed through negotiations.”⁵ In the charge, the Union sought a “temporary restraining order against removing official time [from the Local President],” a “status quo ante remedy order [requiring the Agency] to bargain,” and a posting.⁶

On November 28, 2016, the Union, filed a grievance that alleged the Agency violated provisions of the parties’ agreement, 5 U.S.C. § 7116(a), and 5 U.S.C. § 7131 when it removed the Local President from 100 percent official time. The Union requested as remedies that the Agency “return to the status quo,” “cease and desist engaging in anti-union animus against [the Local President],” and “allow [the Local President] to return to her duties . . . on 100 percent official time.”⁷

The ULP charge was withdrawn on March 2, 2017.⁸

³ Award at 3.

⁴ Agency’s Exceptions, Ex. D, Union’s 2016 ULP Charge in AT-CA-17-0071 (Union’s 2016 ULP) at 1.

⁵ *Id.* Member Abbott notes that pursuant to Executive Order 13,837, agencies are required to ensure that “taxpayer-funded union time is used efficiently and authorized in amounts that are reasonable, necessary, and in the public interest.” Executive Order 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335, 25,335 (May 28, 2018) (E.O. 13,837). Furthermore, E.O. 13,837 requires agencies to “strive for a negotiated union time rate of 1 hour or less [of official time per bargaining unit employee per year], and to fulfill their obligation to bargain in good faith.” *Id.* at 25,336. E.O. 13,837 also emphasizes that “[n]othing in this order shall abrogate any collective[-]bargaining agreement in effect on the date of this order.” *Id.* at 25,340.

⁶ Union’s 2016 ULP at 1.

⁷ Union’s Exceptions, Ex. E, Nov. 2016 Grievance at 4.

⁸ Award at 24.

The Agency denied the grievance, and the Union invoked arbitration.

Throughout the arbitration proceedings, and in its response to the grievance, the Agency argued that the earlier-filed ULP charge barred the grievance pursuant to § 7116(d) of the Statute.⁹ On the jurisdictional issue, the Arbitrator found that the Union's earlier-filed charge was "claiming retaliation against the Union by removing [the Local President] from her 100 [percent official time]," and the grievance "concerned the revocation and removal of the [Local President's official time], as well as, related violations of [the parties' agreement]."¹⁰ The Arbitrator concluded that the grievance was not barred because the ULP and the grievance were "representative of different factual theories."¹¹ The Arbitrator sustained the grievance on the merits.

On June 8, 2018, the Agency and the Union both filed exceptions to the award.¹²

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) because the Union's earlier-filed ULP charge

bars the grievance.¹³ An earlier-filed ULP charge bars a grievance under § 7116(d) of the Statute if the ULP charge and the grievance involve the same issue.¹⁴ In this regard, the Authority has held that an issue is raised for the purposes of § 7116(d) when a ULP charge is filed, even if it is withdrawn before adjudication on the merits.¹⁵ Therefore, the Union's November 2016 ULP charge is considered for the purposes of § 7116(d) even though it was withdrawn.¹⁶

The Authority will find 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.¹⁷ Legal theories do not need to be identical—just substantially similar—in order for the § 7116(d) bar to apply.¹⁸ Here, both criteria are fulfilled. First, the earlier-filed charge and the grievance both arise from, reference, and argue the same set of factual circumstances—the Agency's removal of the Local President from 100 percent official time.¹⁹

Second, the earlier-filed ULP and the grievance also both advance substantially similar legal theories. In fact, the Union concedes that the only distinction between the ULP and the grievance is that the ULP alleged statutory violations and the grievance alleges contractual violations.²⁰ As the Authority stated in *Navy*, "[w]e cannot simply turn a blind eye when parties, through carefully crafted pleadings, try to avoid the § 7116(d) bar

⁹ Agency's Exceptions, Ex. G, Agency's Closing Br. at 5 (the grievance "is barred by 5 U.S.C. § 7116(d) because the Union advanced the same set of factual circumstances and the theories in support of both the [ULP] and the grievance"); Agency's Exceptions, Ex. F, Agency Resp. to Grievance ("Because [the Local President] chose to file an [ULP] charge instead of a grievance, the grievance is barred by law.").

¹⁰ Award at 24.

¹¹ *Id.*

¹² On July 9, 2018, the case was placed into abeyance. On March 15, 2019, the case was removed from abeyance and the parties were notified that they each had until March 29, 2019 to file an opposition to the other's exceptions. The Union filed its opposition to the Agency's exceptions on March 29, 2019. The Agency filed its opposition to the Union's exceptions on April 18, 2019. Section 2429.23(b) of the Authority's Regulations permits the Authority to waive an expired time limit in "extraordinary circumstances." 5 C.F.R. § 2429.23(b). In response to an order directing the Agency to show cause why its opposition should not be dismissed as untimely, the Agency asks the Authority to find that extraordinary circumstances warrant considering the Agency's untimely opposition. In support, the Agency argues that: (1) its counsel had been travelling; (2) it misunderstood the deadline; and (3) the Union was not harmed by the lateness of the Agency's opposition. The Authority has previously held that such arguments do not demonstrate extraordinary circumstances. Accordingly, we do not consider the Agency's untimely opposition. *See, e.g., U.S. Dep't of the Army, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 70 FLRA 172, 173 (2017); *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012).

¹³ Agency's Exceptions Br. at 3-6.

¹⁴ *Minot AFB*, 70 FLRA at 868.

¹⁵ *AFGE, Local 420, Council of Prison Locals, C-33*, 70 FLRA 742, 743 (2018) (Member DuBester concurring) (*Local 420*) (citing *U.S. Dep't of Transp., FAA*, 62 FLRA 54, 56 (2007)).

¹⁶ Award at 24.

¹⁷ *Minot AFB*, 70 FLRA at 868 (citing *U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015)); *Local 420*, 70 FLRA at 743; *AFGE, Local 919*, 68 FLRA 573, 575 (2015) (Member Pizzella dissenting).

¹⁸ *Navy*, 70 FLRA at 516-517 (citing *U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991)).

¹⁹ Union's 2016 ULP at 1 (the Agency violated the Statute when it "unilaterally removed [the Local President's] official time" without notice and bargaining (emphasis added)); Union's Exceptions, Ex. 12, Nov. 2016 Grievance at 1 (the Agency violated provisions of the parties' agreement and the Statute when it removed the *AFGE Local 1594 President from 100 percent official time*).

²⁰ Union's Exceptions, Attach., Hr'g Tr. at 6-7 ("[A] ULP was filed based on the Statute . . . I cannot file a grievance on that same basis . . . [w]hat I can and what we are doing is submitting the issue that you identified pursuant to the contract only. We are not submitting any statutory bases to you for analysis here, only the contractual issues."); Union's Exceptions, Attach., Union's Closing Br. at 19 ("Here, the ULP alleges a violation of [the Statute]. The . . . grievance submitted for arbitration involved only violations of the [parties' agreement].").

in order to get two bites of the proverbial apple.”²¹ Furthermore, the Authority has found that an earlier-filed ULP charge barred a grievance where substantially similar legal theories were based on the same Agency action and sought the same remedies.²²

Here, the earlier-filed ULP charge and the grievance both challenge the removal of the Local President’s 100 percent official time and seek restoration of the Local President’s 100 percent official time and a status quo ante as remedies.²³ Therefore, we find that the Arbitrator erred as a matter of law in finding that the grievance was not barred by § 7116(d), because the earlier-filed ULP and the grievance involve substantially similar issues. Accordingly, we vacate the award.²⁴

IV. Order

We grant the Agency’s contrary-to-law exception, and we vacate the award.

²¹ 70 FLRA at 516.

²² *Minot AFB*, 70 FLRA at 868.

²³ Union’s 2016 ULP at 1; Union’s Exceptions, Ex. 12, Nov. 2016 Grievance.

²⁴ Because we vacate the award, we do not address either parties’ remaining arguments. *U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 n.18 (2018) (Member DuBester dissenting on other grounds) (finding it unnecessary to address the remaining arguments when an award has been set aside); *see also NFFE, Local 1450, IAMAW*, 70 FLRA 975, 977 (2018); *U.S. DOD, Def. Logistics Agency Aviation, Richmond, Va.*, 70 FLRA 206, 207 (2017) (setting aside award on exceeded-authority ground made it unnecessary to review remaining exceptions); Union’s Exceptions at 5 (award contrary to law because Arbitrator did not award backpay); Union’s Exceptions at 6 (award contrary to law because Arbitrator did not award attorney fees); Agency’s Exceptions Br. at 6-8 (award based on a nonfact); Agency’s Exceptions Br. at 8-10 (award fails to draw its essence from the parties’ agreement because the Arbitrator disregarded the requirements established in the official time provision of the parties’ agreement). We observe that our colleague’s dissent only serves to highlight the seminal opinion by Member Pizzella in 2015. There he presciently observed: “Far too often, unions and grievants treat the various *options* of redress that are set forth in the Statute as though they are an all-you-can-eat smorgasbord of unlimited choices, rather than a menu from which one must select a single entree. Limiting a party to one choice is not contrary to the purpose and intent of the Statute.” *AFGE, Local 919*, 68 FLRA 573, 578 (2015) (Dissenting Opinion of Member Pizzella).

Member DuBester, dissenting:

For reasons set forth in my dissenting opinion in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy)*¹ and subsequent decisions,² I disagree with the majority’s application of its “unjustifiably expansive interpretation” of 5 U.S.C. § 7116(d) to conclude that the Union’s grievance is barred by an earlier-filed unfair labor practice (ULP) charge. Applying long-established Authority precedent pre-dating the majority’s revised standard, I would conclude that the Union’s grievance was not barred under § 7116(d) because it alleged different legal theories from the ULP charge.

The Union’s earlier-filed ULP charge alleged that the Agency violated 5 U.S.C. § 7116(a)(1) and (5) by removing the Union president from 100% official time in retaliation for her representational activity, and by failing to bargain with the Union before removing her from 100% official time.³ In contrast, the Union’s grievance – in relevant part – alleged that the Agency violated Article 48 of the parties’ agreement by failing to provide the required official-time allotments to the Union president.

Article 48 entitles each local union to a specific allotment of official time. In its grievance, the Union alleged that, under this provision, “AFGE Locals have the authority to decide how to use their bank of official time,” and that the Union had “rightfully” utilized its official time bank to allow its President to function on 100% official time.⁴ After finding that the grievance was not barred by the earlier-filed ULP charge,⁵ the Arbitrator concluded that the Agency violated Article 48 “by depriving the [g]rievant of her 100% [official time].”⁶

With nary a mention of the actual legal theories upon which the Union based its grievance, or the legal grounds upon which the Arbitrator relied in sustaining the grievance, the majority summarily

¹ 70 FLRA 512, 518 (2018) (Dissenting Opinion of Member DuBester), *recons. denied*, 70 FLRA 860, 862 (2018) (Dissenting Opinion of Member DuBester).

² *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 869 (2018) (*Minot I*) (Dissenting Opinion of Member DuBester), *recons. denied*, 71 FLRA 188, 191 (2019) (*Minot II*) (Dissenting Opinion of Member DuBester).

³ Award at 24; *see* Agency’s Exceptions, Ex. D, ULP Charge at 1.

⁴ Union’s Opp’n, Attach. 2 at 124, Ex. 12 (Grievance) at 3.

⁵ Award at 24.

⁶ *Id.* at 30. The Arbitrator also found that the Agency violated Article 47 of the parties’ agreement by failing to give prior notice to the Union before changing the official time allocation. *Id.* at 29.

concludes that the grievance is barred by the earlier-filed ULP charge because “both challenge the removal of the Local President’s 100 percent official time and seek restoration of the . . . official time and a status quo ante as remedies.”⁷ And in support of this conclusion, the majority cites the Union’s “conce[ssion] that the only distinction between the ULP and the grievance is that the ULP alleged statutory violations and the grievance alleges contractual violations.”⁸

This is hardly a “concession” that the grievance is barred. For decades preceding the majority’s decision in *Navy*, the Authority drew a clear distinction between allegations of contract violations and allegations of statutory violations, finding that the legal theories underlying these allegations are not substantially similar for purposes of § 7116(d).⁹ Applying this principle, the Authority consistently held that a ULP charge alleging a violation of the Statute did not bar a subsequent grievance alleging a breach of the parties’ agreement, even where both claims arose from the same set of facts.¹⁰ And even where a Union’s grievance alleged statutory claims that *were* contained in an earlier-filed ULP charge – in addition to contractual claims that were not contained in the charge – the Authority would apply § 7116(d) to bar only those statutory claims, and would not otherwise apply this jurisdictional bar to the contractual claims.¹¹

⁷ Majority at 4.

⁸ *Id.*

⁹ *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 381-82 (2016) (*Commissary*) (Member Pizzella dissenting) (earlier-filed ULP charge alleging violation of Statute did not trigger § 7116(d) bar on later-filed grievance charge alleging violation of parties’ agreement); *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 445 (2014) (*DOJ*) (Member Pizzella dissenting) (same); *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 115 (2003) (*DOL*) (Chairman Cabaniss concurring; Member Armendariz dissenting) (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)) (same); see also *U.S. Dep’t of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 680 (2009) (*Air Force*) (earlier-filed grievance alleging contractual violation did not trigger § 7116(d) bar on later-filed ULP charge alleging violation of Statute).

¹⁰ *DOL*, 59 FLRA at 114-117; see also *Air Force*, 63 FLRA at 680.

¹¹ *Commissary*, 69 FLRA at 382 (holding that § 7116(d) bars only portion of later-filed grievance alleging statutory violation, but does not bar contractual allegation); see also *DOJ*, 67 FLRA at 445-46 (holding that, when applying § 7116(d) of the Statute, the Authority considers the individual issues raised by a grievance, and not the grievance as a whole); *AFGE, Nat’l Council of EEOC Locals No. 216*, 49 FLRA 906, 914-16 (1994) (*AFGE*); *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268, 1271-76 (1990).

This analytical approach to § 7116(d) is so longstanding that it predates the Statute.¹² Moreover, these distinctions have been recognized by judicial precedent.¹³

And, as I explained in *Navy*, the majority’s approach effectively requires a party seeking to challenge an agency action as both a contractual violation and as a statutory ULP to forego the Authority’s ULP procedures, and instead bring all of its claims under the parties’ negotiated-grievance procedure.¹⁴ This follows because, under Authority precedent “purely contractual violations are not ULPs and, thus, may not be litigated in the statutory-ULP process.”¹⁵ Thus, in addition to depriving parties of their right to seek redress through the ULP procedures, this approach nullifies what Congress intended § 7116(d) to provide – namely, a party’s right to choose the appropriate forum for asserting distinct legal issues under the Statute. Restating this in the majority’s terms, the Union is not seeking an “all-you-can-eat smorgasbord.”¹⁶ It is simply utilizing the procedures specifically provided by Congress in our Statute to enforce its rights.¹⁷

¹² *DOJ*, 67 FLRA at 446 (citing 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]”); *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)).

¹³ See *Overseas Educ. Ass’n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987) (noting 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).

¹⁴ *Navy*, 70 FLRA at 518.

¹⁵ *DOJ*, 67 FLRA at 447 (citing *Iowa Nat’l Guard & Nat’l Guard Bureau*, 8 FLRA 500, 500-01, 510-11 (1982)).

¹⁶ Majority at 5 n.24.

¹⁷ My colleague’s apparent preference that such ULP claims be resolved solely by arbitrators through the parties’ grievance procedure, rather than by FLRA administrative law judges through the ULP process, is particularly puzzling in light of his oft-repeated criticism regarding the standard of review applied to their respective decisions. See, e.g., *AFGE Nat’l Joint Council of Food Inspection Locals*, 71 FLRA 69, 73 (2019) (Concurring Opinion of Member Abbott) (criticizing Authority decisions for “giv[ing] substantial deference to arbitrators on any number of matters, including interpretations of our Statute, on which they often have little or no experience,” and for not affording similar deference to “highly-experienced administrative law judges who have extensive experience in, and adjudicate only, unfair-labor-practice complaints”); see also *Dep’t of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 432 n.55 (2019) (same).

Here, even though the Union's grievance alleged both statutory and contractual violations, the Arbitrator concluded that the contractual claims were not barred by § 7116(d), and therefore addressed only those claims in his award.¹⁸ Applying the well-settled principles that governed this issue before our decision in *Navy*, I would deny the Agency's contrary-to-law exception and consider the parties' remaining arguments.

¹⁸ See Grievance at 3-4; Award at 2.