

72 FLRA No. 11

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
HEADQUARTERS XVII
AIRBORNE CORPS AND FORT BRAGG
CIVILIAN EMPLOYEES
PERSONNEL ADVISORY CENTER
FORT BRAGG, NORTH CAROLINA
(Agency)

0-AR-5655

DECISION

January 29, 2021

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we remind the federal labor-management relations community of the first-in-time requirement for choice-of-forum provisions.¹ Arbitrator J. Maxwell Williams found a Union-filed grievance was not arbitrable under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)² due to a later-filed unfair-labor-practice (ULP) charge. Because the grievance was filed first, it is not barred by the later-filed ULP under § 7116(d) of the Statute. Therefore, we vacate the award as contrary to law and remand the matter to the parties for resubmission to arbitration before a mutually agreed upon arbitrator for a decision on the merits of the grievance.

¹ See *SPORT Air Traffic Controllers Org.*, 71 FLRA 626, 626 (2020) (*SPORT*) (then-Member DuBester dissenting) (citing *AFGE, Local 420, Council of Prison Locals, C-33*, 70 FLRA 742, 743 (2018) (*Local 420*) (then-Member DuBester concurring)).

² 5 U.S.C. § 7116(d).

II. Background and Arbitrator's Award

The Agency notified the Union of anticipated changes to the parties' agreement pursuant to various Executive Orders. On November 29, 2019, the Union responded to the Agency that it would engage in bargaining over the matter and submitted an information request. Subsequently, the Agency informed the Union that it considered negotiations regarding anticipated changes to the parties' agreement closed and then responded to the information request, asserting that the Union failed to articulate a particularized need for some of the requested information.

The Union filed a grievance on December 18, 2019, concerning the Agency's decision to close impact and implementation negotiations. Two days later, the Union sent the Agency a draft ULP charge asserting the Agency's response to the information request was inadequate. The parties met but failed to resolve the ULP issue informally. Thereafter, the Union formally filed the ULP charge on January 3, 2020 with the Authority.

As to the grievance, the Union invoked arbitration on January 6, 2020. The Agency responded stating that it had declined to process the grievance because the matters raised in the grievance and the ULP were the same and thus contrary to § 7116(d) of the Statute.³ The matter proceeded to arbitration. The Arbitrator framed the issue as whether "the filing of a ULP before the [Authority] constitute[d] an election of remedies by [the Union] under 5 U.S.C. § 7116(d) to pursue relief from the [Authority] and not to proceed under the arbitration process of the [parties' agreement]."⁴

The Agency argued that the grievance was not arbitrable under § 7116(d) of the Statute because the Union "attempted to improperly file a grievance, while simultaneously filing a ULP over the same matter."⁵ The Union argued that § 7116(d) did not bar the grievance because the grievance was filed before the ULP charge, and as "first in time, first in right,"⁶ the later-filed ULP charge could not bar the earlier-filed grievance, and that the grievance and the ULP charge concerned separate issues. Having noted only that "[b]oth proceedings involve[d] changes"⁷ to the parties' agreement, the Arbitrator ordered that the grievance was not arbitrable under the parties' agreement and that the grievance should be adjudicated by the Authority in the ULP proceeding. The Union filed exceptions to the award on

³ *Id.*

⁴ Award at 3.

⁵ Exceptions, Attach. 8 at 1.

⁶ Exceptions, Attach. 10 at 5.

⁷ Award at 3.

July 15, 2020. The Agency filed an opposition to the Union's exceptions on August 13, 2020.

III. Analysis and Conclusion: The grievance is not barred under § 7116(d) of the Statute.

The Union argues that the award is contrary to law⁸ because the Arbitrator erroneously applied § 7116(d) to find the grievance was not arbitrable. Specifically, the Union contends that the award is contrary to law because the "grievance was filed before the ULP charge," and that even if that was not the case, "the grievance and the ULP charge contain different claims that are not substantially similar."⁹

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.¹⁰ In order for a ULP charge to bar a grievance under § 7116(d), (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.¹¹ 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.¹² As relevant here, the Authority has also held that where a grievance is filed before a ULP charge, § 7116(d) does not bar resolution of the grievance, and an award finding the grievance barred is contrary to law.¹³

Here, the Arbitrator considered whether the Union's *earlier-filed* grievance was barred under § 7116(d) due to the *later-filed* ULP charge.¹⁴ The Arbitrator found, and the record clearly indicates, that the grievance was filed on December 18, 2019, and that the ULP charge was filed on January 3, 2020.¹⁵ The Arbitrator also noted that the grievance and the ULP charge related to the bargaining process that "involve[d] changes" to the parties' agreement, and without further discussion or explanation, the Arbitrator applied § 7116(d) of the Statute.¹⁶ Because the grievance was filed *before* the ULP charge, a fact that both the Arbitrator and the Agency did not address,¹⁷ the grievance is not barred from consideration under § 7116(d) of the Statute by the later-filed ULP charge.¹⁸

⁸ The Authority reviews questions of law de novo. *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 conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

⁹ Exceptions Br. at 6.

¹⁰ 5 U.S.C. § 7116(d); *see U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 516 (2018) (*Navy Mid-Atlantic*) (then-Member DuBester dissenting) (holding that an earlier-filed ULP "bars a later-filed grievance when the grievance raises issues which are substantially similar to those raised in an earlier-filed ULP"); *e.g., U.S. Dep't. of VA*, 71 FLRA 785 (2020) (*VA*) (then-Member DuBester dissenting) (considering whether earlier-filed ULP charge barred later-filed grievance); *SPORT*, 71 FLRA at 627 (considering whether earlier-filed ULP charge barred later-filed grievance); *U.S. Dep't of Educ.*, 71 FLRA 516 (2020) (then-Member DuBester concurring) (considering whether earlier-filed ULP bars later-filed grievance); *Local 420*, 70 FLRA at 742 (considering whether earlier-filed ULP charge barred a later-filed grievance over the same issue); *U.S. DHS, ICE, L.A., Cal.*, 68 FLRA 302 (2015) (examining whether an earlier-filed grievance bars a subsequent ULP charge); *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (considering whether earlier-filed ULP charge barred later-filed grievance where both raised same legal theory).

¹¹ *Navy Mid-Atlantic*, 70 FLRA at 514.

¹² *VA*, 71 FLRA at 786.

¹³ *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 58 FLRA 154, 155 (2002) (citing *U.S. Dep't of Interior, Bureau of Indian Affairs, Chemawa Indian Boarding Sch.*, 39 FLRA 1322, 1324 (1991) (*Dep't of Interior*)).

¹⁴ Award at 3-4.

¹⁵ *Id.* at 2; *see also* Exceptions, Attach. 3, Grievance at 1-2; Exceptions, Attach. 4, ULP Charge.

¹⁶ Award at 3-4.

¹⁷ Neither the Arbitrator nor the Agency discussed the timing of the grievance with regard to whether § 7116(d) of the Statute applied in this case. *See* Award at 3-4; Opp'n at 3-4. Although the Agency states generally that "both the ULP and the grievance were initiated at the same time," the Agency never directly addresses the fact that the grievance was *filed* before the ULP charge. Opp'n at 4.

¹⁸ *E.g., U.S. Dep't of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 545 (2014) (Member Pizzella dissenting) ("Because the Union filed the grievance . . . before it filed the . . . ULP charge, the grievance is not barred from consideration under § 7116(d) by the . . . ULP charge.").

Therefore, the Arbitrator's conclusion that the later-filed ULP charge was a bar under § 7116(d) of the Statute to arbitration of the earlier-filed grievance on the merits is contrary to law.¹⁹ As the grievance was filed before the ULP charge, it is unnecessary to address whether the issues raised in the grievance and the charge are the same.²⁰

IV. Decision

The award is set aside, and this matter is remanded to the parties for resubmission to arbitration before a mutually agreed upon arbitrator, for a decision on the merits of the grievance.²¹

Chairman DuBester, concurring:

I agree with the Decision to set aside the award and remand the matter to the parties for resubmission to a mutually agreed upon arbitrator for a decision on the grievance's merits.

¹⁹ *Dep't of Interior*, 39 FLRA at 1324.

²⁰ *Id.* Because we vacate the award, we do not address either parties' remaining arguments. *See, e.g., U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 573 n.18 (2018) (then-Member DuBester dissenting on other grounds) (finding it unnecessary to address the remaining arguments when an award has been set aside); *AFGE, Local 1034*, 68 FLRA 718, 720 (2015) (then-Member DuBester dissenting in part) (declining to address remaining exceptions after finding award contrary to law).

²¹ Member Kiko joins in this decision because the Arbitrator erred in his application of § 7116(d) of the Statute. However, she questions the efficacy of further arbitral proceedings considering that the parties' settlement of the ULP appears to have resolved both the information request *and* the bargaining-obligation dispute. Opp'n, Attach. 1, ULP Settlement at 1 (requiring the Agency to respond to the information request *and* to schedule "[i]mpact and [i]mplementation bargaining").