

72 FLRA No. 13

NATIONAL LABOR RELATIONS BOARD
(Agency)

and

NATIONAL LABOR RELATIONS BOARD UNION
(Union)

0-AR-5598

DECISION

February 5, 2021

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

I. Statement of the Case

Arbitrator Garvin Lee Oliver concluded that a grievance concerning the Union's 2019 information request for the Agency's fiscal year (FY) 2019 budget materials is not barred under § 7116(d) of the Federal Service Labor-Management Relations Statute (Statute)¹ by an earlier-filed unfair-labor-practice (ULP) charge concerning the Union's 2018 information request for the Agency's FY 2018 budget materials.

The Agency challenges the Arbitrator's conclusion on nonfact and contrary-to-law grounds. Because the Agency fails to identify clearly erroneous factual findings, it does not demonstrate that the award is based on a nonfact. And because the grievance and the earlier-filed ULP charge do not arise from the same factual circumstances, the charge does not bar the grievance under § 7116(d). Accordingly, we deny the exceptions.

II. Background and Arbitrator's Award

As provided under their collective-bargaining agreement, the Agency and the Union meet semiannually for the purpose of "establish[ing] and maintain[ing] better communications between the parties and to exchange information of mutual interest to settle disputes, and in general, to minimize areas of potential misunderstanding or disagreement."²

¹ 5 U.S.C. § 7116(d).

² Exceptions, Attach. 2, Agency Ex. 1, Collective-Bargaining Agreement at 183.

To prepare for the September 2018 semiannual meeting, the Union submitted an information request in August 2018 (the 2018 request) seeking "[t]he FY 2018 Spend Plan . . . or in lieu of that document, the totality of whatever . . . document(s) are currently in use to guide spending during FY 2018."³ On October 31, 2018, the Union filed a ULP charge against the Agency for failing to provide certain FY 2018 budgetary documents in response to the 2018 request.⁴

In preparation for the March 2019 semiannual meeting, the Union submitted an information request in February 2019 (the 2019 request) seeking "[t]he FY [2019] Spend Plan . . . or in lieu of that document, the totality of whatever . . . document(s) are currently in use to guide spending during FY 2019."⁵ On April 23, 2019, the Union filed a grievance alleging that the Agency failed to provide certain FY 2019 budgetary documents in response to the 2019 request.⁶ The Agency denied the grievance, and the Union invoked arbitration.

Before a hearing on the merits, the Agency filed a motion to dismiss the grievance (motion), alleging that it was barred by the earlier-filed ULP charge under § 7116(d). In a preliminary award on the motion, the Arbitrator denied the motion, finding that § 7116(d) did not apply because the grievance and the ULP arose from different factual circumstances.

On February 24, 2020, the Agency filed exceptions to the Arbitrator's denial of its motion. The Union filed an opposition to the Agency's exceptions on March 25, 2020.

III. Preliminary Matter: The Agency's exceptions are interlocutory; however, the Agency has demonstrated extraordinary circumstances warranting review.

In its opposition, the Union argues that the Agency's exceptions are interlocutory.⁷ The Authority ordinarily will not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all the issues submitted to arbitration.⁸ However, the Authority will review interlocutory exceptions when there are extraordinary circumstances warranting immediate review, such as when an exception raises a

³ Award at 1 (quoting the 2018 Request); *see also* Exceptions, Attach. 2, Agency Ex. 2, 2018 Request at 3.

⁴ *See* Exceptions, Attach. 2, Agency Ex. 3, 2018 ULP Charge at 1.

⁵ Award at 2 (quoting the 2019 Request); *see also* Exceptions, Attach. 2, Agency Ex. 4, 2019 Request at 3.

⁶ *See* Exceptions, Attach. 2, 6, Union's 2019 Grievance at 1-3.

⁷ Opp'n at 8.

⁸ 5 C.F.R. § 2429.11; *U.S. DHS, U.S. CBP*, 65 FLRA 603, 605 (2011).

plausible jurisdictional defect which, if resolved, will advance the ultimate disposition of the case.⁹

Here, the Agency asserts that the Arbitrator should have found that the grievance was barred by the earlier-filed ULP charge.¹⁰ Because the Agency's exceptions allege a plausible jurisdictional defect that, if resolved, will advance the ultimate disposition of the case, the exceptions warrant interlocutory review.

IV. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency contends that the award is based on nonfacts.¹¹ To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.¹² However, a challenge that fails to identify clearly erroneous *factual* findings does not demonstrate that an award is based on a nonfact.¹³

The Agency argues that the Arbitrator "relied on the Union's bare argument" in concluding that the grievance and the ULP charge are factually different.¹⁴ According to the Agency, it provided evidence showing how they are not different, and the Union either did not provide any "factual evidence"¹⁵ or provided "unsupported factual assertions."¹⁶ But the Agency merely disagrees with the Arbitrator's evaluation of the evidence and neither identifies a factual finding nor demonstrates how a factual finding is clearly erroneous. Therefore, the Agency's claim provides no basis for finding that the award is based on nonfacts, and we deny the exception.¹⁷

B. The award is not contrary to § 7116(d) of the Statute.

The Agency argues that the Arbitrator erred in finding that the "facts" of the grievance and the earlier-filed ULP charge "were not sufficiently similar to implicate the jurisdictional bar" under § 7116(d).¹⁸ More specifically, the Agency asserts that the award is inconsistent with the Authority's application of § 7116(d) in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy Mid-Atlantic)*¹⁹ because the ULP charge and grievance involved the same issues.²⁰

The Authority reviews questions of law de novo.²¹ In conducting a de novo review, the Authority determines whether the arbitrator's legal conclusions are consistent with the applicable standard of law.²² In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts.²³

Section 7116(d) provides, in relevant part, that "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] . . . but not under both procedures."²⁴ In applying § 7116(d), the Authority will find that a grievance and a ULP charge involve the same issue when they arise from the same set of factual circumstances *and* advance substantially similar legal theories.²⁵ And in *Navy Mid-Atlantic*, the Authority held that in determining whether the issues were the same for purposes of § 7116(d), it would look at whether the ULP charge and the grievance "arose from the same set of factual circumstances," and whether "the

⁹ *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012); *Library of Cong.*, 58 FLRA 486, 487-88 (2003) (Member Pope dissenting) (allegation that an arbitrator erred in finding that § 7116(d) did not apply raised a plausible jurisdictional defect that warranted interlocutory review).

¹⁰ Exceptions Br. at 5-6 (arguing that Arbitrator's § 7116(d) finding is contrary to law); *id.* at 7-8 (arguing that Arbitrator's § 7116(d) finding is based on nonfacts).

¹¹ Exceptions Br. at 7-9; *see* Exceptions Form at 7-8.

¹² *AFGE, Local 3254*, 70 FLRA 577, 580 (2018) (*Local 3254*); *NAGE, SEIU, Local 551*, 68 FLRA 285, 288 (2015).

¹³ *Local 3254, JESUP, Ga.*, 69 FLRA 197, 201 (2016) (*BOP*).

¹⁴ Exceptions Form at 7; *see also* Exceptions Br. at 7-8.

¹⁵ Exceptions Br. at 7 (emphasis omitted); *see id.* at 8; Exceptions Form at 7-8.

¹⁶ Exceptions Br. at 8.

¹⁷ *See Local 3254*, 70 FLRA at 580; *BOP*, 69 FLRA at 201.

¹⁸ Exceptions Br. at 5; *see also* Exceptions Form at 4.

¹⁹ 70 FLRA 512, 514-16 (2018) (then-Member DuBester dissenting), *recons. denied*, 70 FLRA 860 (2018) (then-Member DuBester dissenting).

²⁰ Exceptions Br. at 5 (citing *Navy Mid-Atlantic*, 70 FLRA at 516).

²¹ *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)).

²² *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

²³ *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

²⁴ 5 U.S.C. § 7116(d).

²⁵ *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 Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)). Additionally, in order for § 7116(d) to bar a grievance, the issue must have been earlier raised under the ULP procedures, and the selection of the ULP procedures must have been in the discretion of the aggrieved party. *Id.* Here, the Agency challenges only the Arbitrator's finding that the ULP charge and the grievance did not concern the same issue. *See DHS, U.S. CBP, Laredo, Tex.*, 71 FLRA 1069, 1071 (2020) (Member Abbott dissenting).

theories advanced in support of the ULP charge and the grievance were substantially similar.”²⁶

The Agency has failed to demonstrate how the Arbitrator’s application of § 7116(d) is inconsistent with *Navy Mid-Atlantic*. The Arbitrator concluded that the grievance was not barred by the earlier-filed ULP charge under § 7116(d) because they are factually distinct.²⁷ Specifically, he found that the ULP charge arose from the 2018 request for FY 2018 budgetary materials to prepare for the September 2018 semiannual meeting, while the grievance arose from the 2019 request for FY 2019 budgetary materials to prepare for the March 2019 semiannual meeting.

Because the Agency has not demonstrated that the Arbitrator’s finding that the grievance concerned “a different request, in a different year, for different information” is a nonfact, we defer to it.²⁸ And based upon this finding, we conclude that the Arbitrator did not err by finding that the grievance, which concerned the Agency’s denial of a request for documents that arose *after* the facts giving rise to the ULP charge, is not barred by the earlier-filed ULP charge under § 7116(d).

Accordingly, we deny this exception.

V. Order

We deny the Agency’s exceptions

²⁶ *Navy Mid-Atlantic*, 70 FLRA at 514 (citing *U.S. Dep’t of the Army, Army Fin. & Acct. Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991), *pet. for review denied sub nom. AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992)).

²⁷ Award at 3.

²⁸ *Id.*

Member Abbott, dissenting in part:

I agree with the majority that the Agency's interlocutory exceptions warrant review because the Agency has demonstrated extraordinary circumstances. I also agree that the award is not based on nonfacts. However, I disagree that the award is consistent with the Federal Service Labor-Management Relations Statute (Statute). I believe the Authority must further revise the standard for evaluating whether a grievance or unfair labor practice (ULP) is barred by § 7116(d) of the Statute to bring it in accord with its purpose, which is to prevent duplicative proceedings and forum shopping.¹

While *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia* (Navy *Mid-Atlantic*) revised the "legal theories" prong for determining whether the issues are the same for purposes of § 7116(d), it did not revise the "factual circumstances" prong.² Under the "factual circumstances" prong, the Authority required the *same* factual circumstances in order for § 7116(d) to apply, which, as evidenced by this case, leads to confounding results. Here, the Union submitted an information request for the FY 2018 Spend Plan,³ and then filed a ULP charge against the Agency for failing to provide the FY 2018 Spend Plan.⁴ In February 2019, the Union submitted another information request asking for the FY 2019 Spend Plan,⁵ and then subsequently filed the instant grievance concerning the Agency's denial of its February 2019 request for the FY 2019 Spend Plan.⁶ Yet, under the "factual circumstances" prong, as articulated in *Navy Mid-Atlantic*, the grievance is not barred because it did not arise from the *same* factual circumstances as the ULP charge – one occurred in 2018 and one occurred in 2019. Such a conclusion is inconsistent and at odds with the

purpose of § 7116(d).⁷ Litigating the same issue in multiple venues does not promote an effective or efficient government.

Based on the above, I believe the Authority should no longer require the *same* factual circumstances, but apply the *substantially similar* standard for both prongs.⁸ Therefore, the Authority should look to whether the ULP and the grievance arise from *substantially similar* factual circumstances, and advance *substantially similar* legal theories to determine whether a ULP or grievance is barred by § 7116(d) of the Statute.

Applying the *substantially similar* standard here, the ULP charge and grievance arose from *substantially similar* factual circumstances because *both* information requests *seek the same budgetary information*⁹—the Agency's spend plan for that fiscal year¹⁰—and would require the fact-finder to address the same underlying issue—whether the Union can obtain the Agency's budgetary information through an information request.¹¹ This conclusion is further supported by the fact that both the ULP charge and the grievance seek the same relief: that the Agency provide the Union with the requested

¹ 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) (noting "basic issues raised"); see also *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 451-52 (2014) (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) (finding that allowing a party to claim a different factual circumstance by merely repeating the same claim at a later time cannot be what Congress envisioned).

² 70 FLRA 512, 514 (2018) (then-Member DuBester dissenting).

³ Award at 1; see also Exceptions, Attach. 2, Agency Ex. 2, 2018 Request at 3.

⁴ See Exceptions, Attach. 2, Agency Ex. 3, 2018 ULP Charge at 1.

⁵ Award at 2; see also Exceptions, Attach. 2, Agency Ex. 4, 2019 Request at 3.

⁶ Award at 2; see also Exceptions, Attach. 2, Agency Ex. 6, Union's 2019 Grievance at 1-3.

⁷ *Supra* note 1.

⁸ *Navy Mid-Atlantic*, 70 FLRA at 514 (citing *U.S. Dep't of the Army, Army Fin. & Acct. Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991), *pet. for review denied sub nom. AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992)).

⁹ Moreover, many Agency budget plans do not change drastically from year-to-year. This fact further affirms that, despite requesting budget plans for different fiscal years, the Union was requesting *substantially the same* information.

¹⁰ Compare 2018 ULP Charge (claiming the Agency violated the Statute by failing to provide the requested budgetary information – the 2018 Spend Plan), with 2019 Grievance (claiming the Agency violated the Statute and the parties' agreement by failing to provide the requested budgetary information – the 2019 Spend Plan).

¹¹ See *U.S. Dep't of the Air Force, Warner Robins Air Force Logistics Ctr.*, 71 FLRA 758, 760 (2020) (then-Member DuBester dissenting) (finding that the earlier-filed EEO complaint barred the grievance because the litigation of EEO complaint and the grievance both required the fact-finder to address the same underlying factual issues – the allegations of harassment); see also *id.* at 759 n.12 (noting that § 7116(d) and § 7121(d) contain almost identical language, and therefore, should be interpreted consistently).

budgetary information.¹² Furthermore, it is undisputed that the ULP charge and the grievance advance substantially similar legal theories.¹³ As such, the earlier-filed ULP charge bars the grievance under § 7116(d).

Accordingly, I would grant the Agency's exception, and vacate the interim award.

¹² See *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 868 (2018) (then-Member DuBester dissenting), *recons. denied*, 71 FLRA 188 (2019) (then-Member DuBester dissenting) (finding that an earlier-filed ULP charge and a grievance arose from the same factual circumstances because both were based on the same Agency action and sought the same remedies). Compare 2018 ULP Charge (arguably seeking a remedy that requires the Agency to provide the requested budgetary information), with 2019 Grievance (seeking a remedy that requires the Agency to provide the requested budgetary information and "cease and desist refusing to provide requested, relevant information").

¹³ Award at 3 (finding that the ULP and the grievance advance similar legal theories, the failure to provide information).