

72 FLRA No. 43

UNITED STATES
DEPARTMENT OF EDUCATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 252
(Union)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3899
(Union)

0-AR-5453
0-AR-5466

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DECISION

April 27, 2021
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Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and James T. Abbott, Members
(Chairman DuBester concurring)

I. Statement of the Case

The Union¹ filed two separate grievances concerning the loss of Agency-provided office space. The grievances proceeded to arbitration – one before Arbitrator Ruth M. Robinson and the other before Arbitrator Theodore H. O’Brien. In each proceeding, the Agency filed a motion to dismiss on procedural and substantive

¹ After the Agency filed its exceptions with the Authority, the American Federation of Government Employees (AFGE) dissolved Local 3899 – along with the nine other locals that made up Council 252 – into a new, nation-wide entity called Local 252. See AFGE, Local 252, <http://www.afge.org/local/10252/home/> (last visited Apr. 26, 2021) (“AFGE has chartered a new nationwide local, AFGE National Local 252, to serve all Department of Education employees across the country.”). Therefore, we take official notice of the fact that the two named Union entities are now the same party. See 5 C.F.R. § 2429.5 (allowing the Authority to “take official notice of such matters as would be proper”); see also *U.S. Agency for Glob. Media*, 70 FLRA 946, 946 n.1 (2018) (then-Member DuBester dissenting) (noting a party’s name change).

² 5 U.S.C. § 7116(d).

grounds. The Agency’s motions argued that, under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute),² each grievance was barred by an earlier, Union-filed unfair-labor-practice (ULP) charge. Rather than deciding the motions, the Arbitrators issued interim awards placing the grievances in abeyance pending resolution of the ULP charge.

The Agency filed exceptions to each award, arguing, in relevant part, that the Arbitrators erred by not barring the grievances under § 7116(d) of the Statute. As explained below, we deny these exceptions, and remand the matters to the parties for resubmission to the Arbitrators, absent settlement, for determinations in accordance with this decision.³

II. Background and Arbitrators’ Awards

These cases are part of a series of grievances concerning, in part, the applicability of two different collective-bargaining agreements. We set out an overview of the background here. However, certain aspects of the background are more fully explained in *U.S. Department of Education (Education)*.⁴

On March 12, 2018, the Agency unilaterally imposed a successor collective-bargaining agreement (the 2018 agreement). That same day, the Union filed a ULP charge⁵ with the Federal Labor Relations Authority (FLRA) alleging violations of § 7116(a)(1) and (5) of the Statute arising from the Agency’s failure to bargain in good faith over the 2018 agreement. This charge is still pending.⁶

In April 2018, the Union filed a grievance over the Agency requiring the Union to vacate Agency-provided offices in Washington, D.C., and Chicago, Illinois pursuant to the 2018 agreement (Chicago grievance). It filed a similar grievance concerning Agency-provided office space in San Francisco, California (San Francisco grievance). Both grievances alleged that the Agency violated the parties’ expired 2013 agreement

³ We have consolidated these cases because the Union’s grievances, Arbitrators’ awards, and Agency’s exceptions are substantially similar. Additionally, now that the Union has been reorganized, *supra*, note 1, the parties are identical. See *U.S. Dep’t of VA, Med. Ctr., Charleston, S.C.*, 58 FLRA 706, 706 n.2 (2003) (Chairman Cabaniss concurring) (consolidating cases that concerned the same parties and similar issues).

⁴ 71 FLRA 516, 516-17 (2020) (then-Member DuBester concurring).

⁵ The Union filed the ULP charge along with its parent organization, AFGE. AR-5453, Exceptions, Attach. 8, ULP Charge No. WA-CA-18-0173 (AFGE ULP) at 2.

⁶ The FLRA was without a General Counsel, the official authorized to prosecute ULP charges, from November 2017 to March 2021.

(the 2013 agreement), as extended through the “Past Practice Document,”⁷ and § 7114 and § 7121 of the Statute by interfering with the Union’s ability to represent employees. In addition, the Chicago grievance alleged that the Agency’s animus against the Union constituted a ULP under § 7116.

The disputes proceeded to arbitration, where the Agency filed a motion to dismiss in each case, arguing that (1) § 7116(d) of the Statute barred the grievance because it raised the same issue as the March 2018 ULP charge and (2) the Union failed to timely or properly file the grievance under the 2018 agreement.

Addressing the Chicago grievance, Arbitrator Robinson found that the parties did not submit to arbitration the issue of whether the 2013 or 2018 agreement was in effect. Therefore, she found that she was unable to decide the procedural arbitrability of the grievance “[a]bsent [a] determination in a proper forum of the validity and/or applicability of the 2013 [agreement].”⁸ The Arbitrator also found that it was “not clear” that § 7116(d) barred the grievance because “imposing the terms of the 2018 [agreement] and taking specific actions to carry out those terms are not one and the same.”⁹ Accordingly, she declined to decide the Agency’s motion to dismiss and placed the case in abeyance until a final ruling on the ULP charge determined whether the 2013 agreement or the 2018 agreement applied to the Chicago grievance.

On December 27, 2018, the Agency filed exceptions to this award; the Union filed its opposition on January 28, 2019.

In the San Francisco grievance, Arbitrator O’Brien found that § 7116(d) was not a bar because the grievance “allege[d] that the Agency evicted the Union from its office space in violation of the 2013 [agreement],” whereas “the ULP charged the Agency with bargaining in bad faith.”¹⁰ Nevertheless, like Arbitrator Robinson, he

determined that he was unable to resolve the Agency’s arbitrability challenges due to the parties’ disagreement over which agreement governed the proceedings. Accordingly, the Arbitrator found that his “authority to resolve [the] grievance[,]” or the other issues raised in the Agency’s motion to dismiss, “[wa]s in abeyance” until the FLRA resolved the ULP charge and determined which agreement was in effect.¹¹

On January 17, 2019, the Agency filed exceptions to this award and, on February 19, 2019, the Union filed its opposition.

III. Preliminary Matter: The Agency’s exceptions are interlocutory, but we find extraordinary circumstances warranting review.

The Union argues that the Agency’s exceptions should be dismissed as interlocutory under § 2429.11 of the Authority’s Regulations.¹² The Agency concedes that the exceptions are interlocutory, but argues that its challenges under § 7116(d) of the Statute constitute extraordinary circumstances warranting Authority review.¹³

The Authority does not ordinarily consider interlocutory appeals.¹⁴ However, the Authority will consider interlocutory appeals when there are extraordinary circumstances warranting immediate review, such as when they advance the ultimate disposition of the case by obviating the need for further arbitration.¹⁵ The Authority has previously found that exceptions raising challenges under § 7116(d), such as those raised by the Agency, present jurisdictional questions that could conclusively determine that further arbitral proceedings are not required.¹⁶ Accordingly, we grant interlocutory review and address the substance of those exceptions.¹⁷

⁷ See AR-5453, Exceptions at 8 (stating that after the 2013 agreement expired, “the parties’ bargaining relationship was based on a Past Practice Document, which . . . contained the provisions from the expired 2013 [agreement] representing only the mandatory conditions of employment”).

⁸ AR-5453, Award at 5.

⁹ *Id.* at 6.

¹⁰ AR-5466, Award at 5.

¹¹ *Id.* at 6.

¹² AR-5453, Opp’n Br. at 6; AR-5466, Opp’n Br. at 4.

¹³ AR-5453, Exceptions at 26; AR-5466, Exceptions at 3.

¹⁴ 5 C.F.R. § 2429.11.

¹⁵ *U.S. Dep’t of the Treasury, IRS*, 70 FLRA 806, 808 (2018) (then-Member DuBester dissenting); see also *U.S. Dep’t of the Army, Nat’l Training Ctr. & Fort Irwin, Cal.*, 71 FLRA 522, 523 (2020) (then-Member DuBester dissenting) (finding extraordinary circumstances when “exceptions could conclusively determine whether any further arbitral proceedings are required”).

¹⁶ See *NLRB*, 72 FLRA 80, 81 (2021) (*NLRB*) (Member Abbott dissenting on other grounds) (finding that § 7116(d) exception “allege[d] a plausible jurisdictional defect”); *Libr. of Cong.*, 58 FLRA 486, 487 (2003) (*Libr.*) (Member Pope dissenting) (noting that “there would be no need for the parties to proceed to a hearing on the merits of the grievance” if the Authority found that § 7116(d) barred it).

¹⁷ See *NLRB*, 72 FLRA at 81 (granting interlocutory review to consider claim that § 7116(d) barred the grievance); *Libr.*, 58 FLRA at 488 (same).

IV. Analysis and Conclusion: The grievances are not barred under § 7116(d) of the Statute.

The Agency argues that the awards are contrary to law¹⁸ because the grievances are barred under § 7116(d) of the Statute and should have been dismissed, instead of placed in abeyance, by the Arbitrators.¹⁹

Section 7116(d) of the Statute provides that disputes may be addressed under a negotiated grievance procedure or under the statutory ULP procedure, but not under both.²⁰ As relevant here, an earlier-filed ULP charge precludes a grievance when the ULP charge and the grievance concern the same issue.²¹ To determine whether the issues involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance were substantially similar.²²

The Agency argues that the Chicago grievance and the San Francisco grievance are based on the same legal theories as the ULP charge because each alleges that the Agency improperly implemented and applied the 2018 agreement.²³ The Union disputes this characterization of the grievances.²⁴ We note that the earlier-filed ULP charge

alleges that the Agency refused the Union's multiple requests to negotiate, failed to bargain in good faith, and unilaterally implemented the 2018 CBA, all in violation of § 7116(a)(1) and (5) of the Statute.²⁵ The grievances, on the other hand, allege that, by requiring the Union to vacate Agency-owned office space that had previously been designated to the Union, the Agency violated specific articles of the 2013 agreement and §§ 7114 and 7121 of the Statute.²⁶ While the Chicago grievance also contains a separate charge of union animus, in violation of § 7116, it does not concern a failure to bargain, as did the earlier-filed ULP charge.²⁷ Thus, in addition to being based on different factual circumstances,²⁸ the grievances and the ULP charge plainly allege violations of different sections of the Statute. They are not based on the same – or substantially similar – legal theories.²⁹ Accordingly, we deny these exceptions.³⁰

After correctly concluding that § 7116(d) did not bar the grievances, the Arbitrators erred by placing them in abeyance pending the outcome of the separate matter at issue in the ULP charge.³¹ Accordingly, consistent with our decision in *Education*, we remand these matters to the parties for resubmission to the Arbitrators, absent settlement, for a determination on the outstanding procedural issues presented in the Agency's motions to dismiss and any remaining substantive issues.³² If

¹⁸ When considering contrary-to-law claims, the Authority reviews the questions of law raised by the award and the party's exceptions de novo. *NTEU*, Chapter 24, 50 FLRA 330, 332 (1995). 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. *NFFE, Loc. 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings, unless the excepting party establishes that they are nonfacts. *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (Member Pizzella concurring).

¹⁹ AR-5453, Exceptions at 5; AR-5466, Exceptions at 3.

²⁰ 5 U.S.C. § 7116(d).

²¹ *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (then-Member DuBester dissenting).

²² *Id.* (citing *U.S. Dep't of the Army, Army Fin. & Acct. Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991)).

²³ See AR-5453, Exceptions at 9-10 (arguing that the ULP charge alleges improper implementation of the 2018 agreement, which includes office space provisions, and that the Chicago grievance alleges improper implementation of the office space provisions); AR-5466, Exceptions at 8 (arguing that the "grievance is not different in a meaningful way from [the] ULP charge, as its key argument revolves around the implementation, validity, and/or application of the current 2018 [agreement]").

²⁴ AR-5453, Opp'n Br. at 9-10 (arguing that the ULP charge concerns the imposition and implementation of the 2018 agreement while the Chicago grievance concerns how the eviction from office space "impedes on the Union's ability . . . to comply with its statutory obligations"); AR-5466, Opp'n Br. at 7 (arguing that the ULP charge concerns the imposition and implementation of the 2018 agreement while the San Francisco

grievance concerns denial of a "private place to comply with the [Union's] statutory obligations").

²⁵ AFGE ULP at 2.

²⁶ AR-5453, Exceptions, Attach. 3, Chicago Grievance at 3; AR-5466, Exceptions, Attach. 6, San Francisco Grievance (San Francisco Grievance) at 3.

²⁷ San Francisco Grievance at 3.

²⁸ *Compare AFGE, Loc. 420, Council of Prison Locs. C-33*, 70 FLRA 742, 743 (2018) (then-Member DuBester concurring) (§ 7116(d) bar applied where both ULP charge and grievance arose from implementation of changes without bargaining), *with Libr.*, 58 FLRA at 488 (§ 7116(d) bar did not apply when ULP charge and grievance involved different official time requests).

²⁹ See *Educ.*, 71 FLRA at 518 (finding that a grievance alleging violations of § 7114(c)(1) was not substantially similar to a ULP charge alleging violations of § 7116(a)(1) and (5)).

³⁰ See *id.* at 518-19. The Agency also argues that the Arbitrators' failure to dismiss the grievances under § 7116(d) was contrary to public policy, AR-5453, Exceptions at 23, and the Statute's "requirement of an effective and efficient government." AR-5466, Exceptions at 12. Because these public-policy exceptions are premised on the same arguments as contrary-to-law exceptions that we have already denied, we also deny these exceptions. See *AFGE, Loc. 1698*, 70 FLRA 96, 99 (2016) (denying public policy arguments based on previously denied contrary-to-law exception).

³¹ See *Educ.*, 71 FLRA at 519 (stating that, because the "grievance [wa]s not barred under § 7116(d)," the arbitrator was not required to "dismiss . . . the grievance pending the outcome of a separate matter").

³² *Id.* (remanding similar dispute to promote "prompt and efficient resolution").

necessary, the parties may request that the Arbitrators determine whether the 2013 or 2018 agreement govern the respective disputes.³³

V. Decision

We remand the cases to the parties for resubmission to the Arbitrators, absent settlement, for determinations in accordance with this decision.

Chairman DuBester, concurring:

I agree with the decision solely to the extent that the majority upholds the Arbitrator's finding that 5 U.S.C. § 7116(d) does not bar the grievances.

³³ See *id.* (stating that parties should request that the arbitrator determine “whether the 2013 or 2018 agreement is in effect”). The Agency raises nonfact, essence, and exceeded-authority exceptions challenging the Arbitrators’ failure to apply the provisions of the 2018 agreement to grant the motions to dismiss. See AR-5453, Exceptions at 29, 38, 61; AR-5466, Exceptions at 16, 21, 31. Because we are remanding the cases, in part, to

resolve the issue of which agreement applies to the conflict, we will not address these exceptions now. See *Educ.*, 71 FLRA at 519 n.39 (finding it “unnecessary to address” exceptions based on remanded issue); *AFGE, Nat’l Border Patrol Council, Loc. 1929*, 63 FLRA 465, 468 n.3 (2009) (declining to address exceptions based on contractual interpretation issues the arbitrator needed to resolve on remand).