UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

LOWRY AIR FORCE BASE DENVER, COLORADO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1974 Charging Party	Case No. 7-CA-60431 (29 FLRA No. 51)

DECISION AND ORDER ON REMAND

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 28, 1986, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado, a hearing was held on October 21, 1986, by the undersigned Administrative Law Judge for purposes of determining whether Lowry Air Force Base, Denver, Colorado, (hereinafter called the Respondent), had violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by allegedly failing to bargain in good faith with Local 1974, American Federation of Government Employees, AFL-CIO, (hereinafter called the Union) over its decision to remove Class A1A telephone service, including Autovon, from the Union Office at Respondent's facility in Denver, Colorado.

On February 12, 1987, the undersigned Administrative Law Judge issued a decision wherein it was recommended that the Authority dismiss the Complaint on the ground that the evidence failed to establish the existence of a past practice with respect to the Union's access to Class A1A telephone service, including Autovon, in its office located at Respondent's facility in Denver, Colorado.

Thereafter, based upon timely filed exceptions by Counsel for the General Counsel, the Federal Labor Relations Authority concluded, contrary to the undersigned Administrative Law Judge, that the record did support a finding that an established practice existed under which Respondent did provide the Union with Class A1A telephone service, including Autovon.

Upon the basis of the above finding with respect to the existence of a past practice, the Authority, noting that the record evidence also disclosed that the Union had, subsequent to the Respondent's action in removing the Class A1A telephone service, including Autovon, from the Union's Office, filed a grievance over the matter, remanded the case to the undersigned Administrative Law Judge for purposes of (1) developing a full record on the grievance, (2) determining whether in view of the filing of the grievance further proceedings on the instant unfair labor practice complaint were barred by Section 7116(d) of the Statute, and (3), if not, whether Respondent had bargained in good faith within the meaning of the Statute prior to removing the Class A1A telephone service, including Autovon, from the Union's office.

In accordance with the Authority's remand the undersigned Administrative Law Judge issued a Notice of Hearing on October 16, 1987, wherein a hearing on the matter of the grievance was set for November 10, 1987. Thereafter, following a number of telephone conference calls with the Parties, the scheduled hearing was cancelled upon agreement by the Parties that all pertinent information on the grievance could best be presented by a Stipulation of Facts. On December 1, 1987, the parties submitted a Stipulation of Facts which has been duly received into the record by the undersigned. Subsequently, the parties submitted "Post Stipulation Briefs" which have been duly considered.

FACTS

As noted in my original decision on February 12, 1987, on the same day, April 15, 1986, that the Respondent removed the Class A1A telephone service, including Autovon, from the Union's office at Lowry Air Force Base the Union filed a grievance which reads as follows:

AMERICAN FEDERATION of GOVERNMENT EMPLOYEES

AFFILIATED WITH THE AFL-CIO

Local 1974, Lowry A.F. Base

15 May 1986

TO: Eugene O Westback, Colonel, USAF
Vice Commander

SUBJ: Union Office Space, Telephone Service Grievance

FROM: Dariel S. Case, Pres.
AFGE Local 1974

The union and management had a meeting on or about 1 May 1986 requesting that the union relinquish the office space negotiated and granted by Col. Ellis previous Dpty Commdr. It was agreed that for giving up half the present office space we would be granted Room B-108, the present classroom for disaster preparedness training. The class room was to be moved into the remainder of space not used to install new radio equipment. We were to coordinate with Sgt. Brown for the move which was hoped could be accomplished by 19 May 1986. We are unable to make any move until the classes are completed. Sgt. Brown has indicated that he will complete his classes by 13 May 1986.

It was agreed that the space of the classroom is about equal to the space being relinquished by the union. We would of course expect that we would have a key for control of our office in the new space. There will be minor changes that will be necessary as was in our move in Nov. 85. We would expect to be able to accomplish these changes, as we have in the past with job orders to the shops.

The Local was granted telephone service in 1970 with use of autovon this service was renewed in 1977 when we moved to Room B-3 (old credit union) We continued this service when we moved to Room B-106. We submitted proposals to negotiate added services. The regulations authorize use of phones at no charge for Government Employee Labor Unions.

The Local certainly after at least 13 years of past practice, of equal space on management requested moves, must be able to

expect the same today. Likewise, the local expects that the service continue at the level prior the letter discontinuing service. We expect that honesty and sincerity are a part of the bargaining process. The unilateral implementation of both the office move and disconnecting of Class A phone service is improper.

We request equal space and restoration of our phone service.

/s/
Dariel S. Case, President
AFGE Local 1974
Rm B-106, Bld 349
Lowry A.F. Base Colo.

On May 19, 1986, Respondent responded as follows to the Union's grievance of May 15, 1986.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS LOWRY TECHNICAL TRAINING CENTER (ATC)
LOWRY AIR FORCE BASE, CO 80230

19 MAY 1986

REPLY TO
ATTN OF: LTTC/CV

SUBJECT: Union Office Space, Telephone Service Grievance

TO: Dariel S. Case, President
AFGE Local 1974

1. Your grievance letter, 15 May 1986 is being returned without action since it does not follow the proper procedures in Article 24 Section F,2,b. of the current negotiated agreement. Specifically, a written union grievance should be filed with the 3415 Air Base Group Commander.

2. If you have questions about this matter, contact Lou Rottman at extension 4457.

/s/
EUGENE O. WESTBACK, Colonel, USAF
Vice Commander

According to the Stipulation of the Parties the Union has not, at any time, since May 19, 1986, taken any action to pursue the grievance . . . . . concerning removal of the Class A1A telephone line from its Union office on or about May 15, 1986.

The unfair labor practice charge underlying the Complaint involved herein which was filed on June 2, 1986 by Local 1974, American Federation of Government Employees, AFL-CIO, reads as follows:

> On or about May 15, 1986, Management unilaterally terminated telephone service to the Union office. The Union asserts this is in violation of established practice and an agreement with Management.

The ensuing complaint expressed the Statutory violation as follows:

> 7(a). On or about May 15, 1986, Respondent, through Huber, changed the telephone service in the Union office at Lowry Air Force Base, Colorado, from Class A service, including Autovon, to Class C service.
>
> (b). Respondent's action described in paragraph 7(a), above, was a change in an established condition of employment.
>
> (c). Respondent implemented the change described in paragraph 7(a), above, without bargaining with the Union over the substance, impact and implementation of said change.

Discussion and Conclusions

The General Counsel, relying on Federal Aviation Administration, Muskegon Air Traffic Control Tower, 5 A/SLMR 458 (1975), takes the position that Section 7116(d) is not a bar to the processing of the instant unfair labor practice complaint since the grievance filed at an earlier date by the Union was not considered on its merits and "there is no danger of relitigation of conflicting resolutions or of a waste of resources." Additionally, the General Counsel contends that Section 7116(d) is not bar to the instant proceeding since the grievance and the unfair labor practice complaint do not raise the same issue. Having concluded that the processing of the instant complaint is not barred by Section 7116(d), the General Counsel, on the basis of the record, would find that the Respondent did not bargain in good faith with the Union prior to its actions in removing the A1A telephone service, including Autovon, from the Union's office.

The Respondent, on the other hand, takes the position that Section 7116(d) is a bar to the processing of the instant complaint since the record indicates that the Union filed at a prior date a grievance involving the same subject matter that is the basis of the instant unfair labor practice complaint. In support of its position Respondent cites a number of decisions of the Authority wherein the Authority made it clear that as long as the subject matter is the same and the selection of a particular procedure, i.e., grievance or unfair labor practice, was under the discretion of the Charging Party, the earliest date of filing, if more than one forum is selected, will be determinative of which proceeding is barred from being processed by Section 7116(d) of the Statute. Further, according to Respondent, inasmuch as the record evidence establishes that the grievance was filed first, involved the same subject matter and was filed at the Charging Party's discretion, processing of the instant unfair labor practice complaint is barred by Section 7116(d). Additionally, while the Respondent concedes that it did not raise Section 7116(d) as a defense prior to the Authority's action in remanding the case to the undersigned Administrative Law Judge, Respondent notes that the Authority has concluded that Section 7116(d) is jurisdictional in nature, and as such, may be raised at any time.

Finally, it is Respondent's position that, in any event, it did bargain in good faith with the Union prior to removing the Class A1A telephone service, including Autovon, from the Union's office.

The Authority has made it clear that it considers Section 7116(d) of the Statute to be jurisdictional in nature and not an affirmative defense subject to waiver by the parties. According to the Authority, if a Section 7116(d) issue is raised by the evidence, it must be addressed prior to the consideration of the merits of the unfair labor practice. Thus, in U.S. Department of Energy, Western Area Power Administration, Golden, Colorado, 27 FLRA No. 38, the Authority stated as follows:

> We conclude that the paragraphs in the complaint concerning Respondent's alleged violation in establishing the task force study without notifying and bargaining with the Union are barred by Section 7116(d) of the Statute.
>
> Section 7116(d) effectively provides that when in the discretion of the aggrieved party, an issue has been raised under the negotiated grievance procedure, the issue may not subsequently be raised as an unfair labor practice. See Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.), 23 FLRA No. 68 (1986). In this case, on January 20, 1983, the Union filed a grievance under the parties' negotiated grievance procedures which alleged that Respondent violated the parties' collective bargaining agreement and Authority decisions by establishing a procedure to grade and classify supervisory craftsmen without notice to and participation by the Union. We find that the paragraphs in the complaint alleging that Respondent violated the Statute by establishing the task force study, which are based on the Union's charges, raise substantially the same issue as the earlier filed grievance. Consequently, this allegation is precluded by section 7116(d) from being raised under the unfair labor practice procedure. We reject the General Counsel's contention that we should not address this issue because it was not raised by Respondent. Because the issue is presented by the stipulation and the issue concerns the Authority's jurisdiction, it must be addressed. See Portsmouth Naval Shipyard, 23 FLRA No. 68.

The Authority has also made it clear that in order for Section 7116(d) to bar a particular proceeding, i.e. grievance or unfair labor practice as the case may be, the subject matter of the grievance and the unfair labor practice must be the same, the procedure, i.e. grievance or unfair labor practice, relied upon as a bar must have been filed at an earlier date, and the selection of the procedure relied upon as a bar must have been under the discretion of the Charging Party. Federal Bureau of Prisons, 18 FLRA No. 48.

Analyzing the facts of the instant case in light of the Authority's above cited criteria for determining whether the grievance filed on May 15, 1986 is a bar to the instant unfair labor practice complaint which is based on a charge filed on June 2, 1986, I find that the grievance was filed prior to the unfair labor practice charge and that such filing was at the discretion of the Charging Party. Neither the General Counsel nor the Respondent disputes these findings.

However, there is a dispute as to whether the subject matter of the grievance and the subject matter of the unfair labor practice are the same and, if so, whether the grievance serves as a bar to the instant unfair labor practice complaint since the Charging Party opted not to pursue it on the merits.

The charge stated that the Respondent unilaterally terminated the telephone service to the Union's office in violation of "established practice and an agreement with Management." The complaint reiterates the foregoing and adds "without bargaining with the Union over substance, impact and implementation of the said change."

The grievance states as follows:

> The Local was granted telephone service in 1970 with use of autovon this service was renewed in 1977 when we moved to Room B-3 (old credit union) We continued this service when we moved to Room B-106. We submitted proposals to negotiate added services. The regulations authorize use of phones at no charge for Government Employee Labor Unions.
>
> The Local certainly after at least 13 years of past practice, of equal space on management requested moves, must be able to expect the same today. Likewise, the local expects that the service continue at

the level prior to the letter discontinuing service. We expect that honesty and sincerity are a part of the bargaining process. The unilateral implementation of both the office move and disconnecting of Class A phone service is improper.

We request equal space and restoration of our phone service.

Comparing the grievance with the unfair labor practice complaint I find the subject matter to be the same. Thus, they both allege that there was a unilateral change in the past practice of allowing the Union the use of telephone service with Autovon. While the unfair labor practice complaint specifically states that the change occurred without bargaining and the grievance states that it "expects honesty and sincerity to be a part of the bargaining process," it is clear that both charge the Respondent with failing to bargain in good faith, albeit in different words. Finally, both the grievance and the unfair labor practice complaint seek restoration of the telephone service existing in the Union office prior to the change by Respondent.

To the extent that the General Counsel relies on the Assistant Secretary's decision in Federal Aviation Administration, Muskegon Air Traffic Control Tower, A/SLMR No. 534, 5 A/SLMR 458 for the proposition that an earlier filed grievance containing the same subject matter is not a bar to a later filed unfair labor practice since it did not trigger a disposition of the merits, I find the cited case to be distinquishable. In the cited case the grievance was rejected by management for being untimely. In such circumstances the Union did not have the option of choosing one of two procedures for the resolution of its problem. While here the grievance was rejected because it was filed with the wrong person, there is no showing that the grievance could not have been perfected if the Union so desired.

Accordingly, in view of the foregoing, I find that having filed at an earlier date a grievance containing the same subject matter as the instant unfair labor practice complaint, that Section 7116(d) of the Statute serves as a bar to the instant proceeding.

In such circumstances it is recommended that the Authority adopt the following order dismissing the Complaint in its entirety.

ORDER

IT IS HEREBY ORDERED, that the Complaint should be, and hereby is, dismissed in its entirety.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: February 9, 1988
Washington, D.C.