64 FLRA No. 21

UNITED STATES
DEPARTMENT OF THE ARMY
HUMAN RESOURCES COMMAND
ST. LOUIS, MISSOURI
and
UNITED STATES
DEPARTMENT OF THE ARMY
INFORMATION SUPPORT ACTIVITY
ST. LOUIS, MISSOURI
(Respondents)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 900, AFL-CIO
(Charging Party)

DE-CA-04-0219
DE-CA-04-0220

DECISION

September 30, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge filed by the Charging Party. The Respondents Human Resources Command (HRC) and Information Support Activity (ISA) filed an opposition.

The consolidated, amended complaints allege that Respondent ISA issued proposed removals of the Charging Party's president and chief steward that were motivated by their protected activities. The complaints also allege that both Respondents directed that the employees' tours of duty be fixed at 7:30 a.m. to 4:00 p.m., that they be barred from their official duty locations, that they report daily to the union office, and that they be accompanied by military escorts at all times while in the Respondents' facilities. The complaints allege that, by this conduct, the Respondents violated § 7116(a)(1), (2), and (4) of the Federal Service Labor-Management Relations Statute (the Statute). The Judge recommended that the Authority dismiss the complaints.

For the reasons that follow, we conclude that the Judge erred in determining that the § 7116(a)(2) and (4) allegations are barred by § 7116(d) of the Statute, and we remand for a decision on the merits. We defer resolution of the independent § 7116(a)(1) allegation pending that decision.

II. Background and Judge's Decision

Respondent ISA proposed to remove the chief steward on the basis of four charges: (1) fraudulently receiving pay for work not performed; (2) absence without leave (AWOL); (3) falsifying official time sheets; and (4) lying during an investigation. Respondent ISA proposed to remove the president on the basis of five charges: (1) fraudulently obtaining entitlements; (2) failing to request leave properly; (3) AWOL; (4) falsifying official time sheets; and (5) lying during an investigation. Judge's Decision at 6. The Charging Party filed unfair labor practice (ULP) charges, which alleged that the proposed removals were motivated by the employees' protected activities. The charges also alleged that both Respondents unlawfully directed that the employees' tours of duty be fixed at 7:30 a.m. to 4:00 p.m., that they be barred from their official duty locations, that they report daily to the union office, and that they be accompanied by military escorts at all times while in the Respondents' facilities. The General Counsel issued amended complaints, which were consolidated, and alleged that, by this conduct, the Respondents violated § 7116(a)(1), (2), and (4). Both complaints also alleged that, by this conduct, Respondents independently violated § 7116(a)(1). *Id.* at 2-4.

Subsequently, Respondent ISA removed both employees on the basis of all of the charges against them, and each employee filed a grievance, which was denied by Respondent ISA. The removal grievances were consolidated and submitted to arbitration. An arbitrator issued separate awards that sustained the grievances, in part. As to the chief steward, the arbitrator found that Respondent ISA had failed to prove the charges of falsifying official time sheets, fraudulently receiving pay, and lying during an investigation. The arbitrator mitigated the removal to a 30-day suspension. As to the president, the arbitrator found that Respondent ISA had failed to prove the charges of falsifying official time sheets, fraudulently receiving pay, failing to request leave properly, and being AWOL. The arbitrator mitigated the removal to a 15-day suspension. The arbitrator also ordered Respondent ISA to immediately ter-

1. Member Beck's opinion, dissenting in part, is set forth at the end of this decision.

minate the military escort and confinement policy. *Id.* at 8 n.2.

The Judge first considered whether any issues raised in the complaints were barred by § 7116(d) as issues that could properly be raised under an appeals procedure. The Judge concluded that the § 7116(a)(2) and (4) allegations ((a)(2) and (4) allegations) were barred, but that the independent § 7116(a)(1) allegation (independent (a)(1) allegation) was not barred. *Id.* at 17.

In examining the (a)(2) and (4) allegations, the Judge noted that, once the Respondent ISA issued the removal decisions, the Authority no longer had jurisdiction over the proposed removals, and the General Counsel had amended the complaint to reflect the lack of jurisdiction. However, the Judge examined whether the security measures and restrictions that were placed on the employees at the time of their proposed removals were matters separable from their removals. According to the Judge, if the security measures and restrictions were not separable from the removals, then the (a)(2) and (4) allegations were barred. *Id.* at 16.

The Judge concluded that the security measures and restrictions were inseparable from the removals because they were "clearly bound up with the [removal] actions." *Id.* at 17. In so concluding, the Judge relied on the Authority's decision in *United States Department of the Navy, Naval Resale Activity, Guam*, 40 FLRA 30 (1991) (*Naval Resale Activity*). The Judge stated that, although the grievances did not specifically raise the matter of the security measures and restrictions, the measures and restrictions were part of the factual matters presented to the arbitrator. In addition, the Judge viewed the security measures to be "the direct result of the [removal] actions and any discussion of those measures returns to the basis of the [removal] actions themselves." Judge's Decision at 17. Finally, the Judge addressed whether the Authority has jurisdiction because the ULP focused on the Charging Party's institutional interests rather than on the rights of the employees. The Judge found that the Authority did not have jurisdiction on this basis because the (a)(2) and (4) allegations did not focus on the Charging Party's institutional interests. *Id.* Consequently, the Judge concluded that the (a)(2) and (4) allegations were barred as issues that could properly be raised under an appeals procedure. *Id.*

As to the independent (a)(1) allegation, the Judge found that the allegation was not barred by § 7116(d). In contrast to the focus of the (a)(2) and (4) allegations, the Judge found that the focus of the independent (a)(1) allegation was on the Charging Party's institutional interests. *Id.* Addressing the merits of the independent (a)(1) allegation, the Judge concluded that the security measures and restrictions did not interfere with, restrain, or coerce employees in the exercise of their rights under the Statute. *Id.* at 22-23. The Judge recognized that the standard for determining interference with, or restraint or coercion of, employees in the pursuit of protected rights is an objective one: "[W]hether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement [or conduct]." *Id.* at 21.

In finding no violation, the Judge stated that, once the chief steward and the president lost their security badges, they no longer had free access to the facilities. The Judge noted that both the General Counsel and the Charging Party claimed that the usual practice was to use civilian escorts. However, the Judge found that the General Counsel and the Charging Party did not address the testimony of the commanding officer of Respondent HRC that she used military personnel because of the logistical problems of using civilian personnel to be escorts and guards on a daily basis. The Judge found this testimony to be "unrefuted and compelling." *Id.* at 22. The Judge also stated that there was no indication that civilian escorts would have been satisfactory to the General Counsel or the Charging Party. *Id.* In addition, she found no evidence that: (1) unit employees were aware of the presence of the military escorts when they were stationed in the Union office; (2) employees were unable to seek the assistance of the Union; or (3) the chief steward or the president expressed any specific concern to the Respondents (other than initial filing the ULP charges). *Id.* The Judge further found that "the escort policy is clearly a security issue reserved to management under [§] 7106(a)." *Id.*

Under all of these circumstances, the Judge concluded that the security measures and restrictions during the notice period of proposed removals did not have a chilling effect on unit employees so as to constitute an independent violation of (a)(1). In so concluding, the Judge noted that unit employees work with the military on a regular basis and found that the use of military escorts was not a substantial departure from the use of civilian escorts. *Id.* at 22-23.

Accordingly, the Judge recommended that the Authority dismiss the complaints. *Id.* at 23.

III. Positions of the Parties

A. Charging Party's Exceptions

As relevant here, the Charging Party excepts to the Judge's conclusion that the Authority lacked jurisdiction over the (a)(2) and (4) allegations and the Judge's conclusion that the security measures and restrictions did not constitute an independent violation of (a)(1). [2] Exceptions at 1-3.

The Charging Party argues that, under § 7116(d), the Authority lacks jurisdiction only if the propriety of the security measures and restrictions is an issue that can properly be raised before the Merit Systems Protection Board (MSPB). The Charging Party claims that it is indisputable that the propriety of the security measures and restrictions is not subject to the jurisdiction of the MSPB. *Id.* at 20-21. The Charging Party also argues that the propriety of the security measures and restrictions is separable from the removals because the basis for the removals was different from the basis for the imposition of the security measures and restrictions, which was past volatile behavior of both of the employees. *Id.* at 25. The Charging Party maintains that, even if the removals were warranted, union animus played a role in the security measures and restrictions because the chief steward and the president were the only employees who were ever required to be escorted by uniformed military personnel during a period of proposed removal and were ever confined to one office. *Id.* at 23-24.

The Charging Party also argues that the Judge erred in finding no independent violation of (a)(1). According to the Charging Party, any reasonable unit employee observing the escorting of the chief steward and the president would have experienced coercion, interference, or restraint in their exercise of union rights. *Id.* at 31. The Charging Party further argues that the fact that unit employees continued to seek the assistance of union representatives after the imposition of the security measures and restrictions does not address whether other reasonable employees declined to seek assistance and declined to become active in the Union. *Id.* at 34-35. The Charging Party claims that the violation is also established by the chilling effect of the security measures and restrictions on the chief steward and the president. *Id.* at 41.

B. Respondents' Opposition

The Respondents contend that the Judge correctly concluded that the Authority has no jurisdiction over the (a)(2) and (4) allegations and that the security measures did not violate (a)(1). Opp'n at 2. The Respondents assert that the security measures and restrictions could not have been implemented but for the proposed removals and that, to determine whether an unfair labor practice was committed, the Authority must consider whether there was a legitimate reason for the security measures and restrictions, which requires the Authority to consider the removal actions. In the Respondents' view, the relevant inquiry is whether the subject "could properly be raised[,]" and the Respondents argue that the Judge correctly ruled that the security measures and restrictions could properly have been raised in the grievances over the removals. *Id.* at 9 (citing *United States Small Business Admin., Wash., D.C.,* 51 FLRA 413 (1995) (*SBA*), *aff'd in part, rev'd in part sub nom. Wildberger v. FLRA,* 132 F.3d 784 (D.C. Cir. 1998) (*Wildberger*)). In this regard, the Respondents argue that it is not necessary to find that the issue is within the jurisdiction of the MSPB to be barred as a ULP. *Id.* at 10-11. However, in any event, the Respondents argue that the issue of the security measures and restrictions could have been raised under the MSPB procedure. *Id.* at 11.

As to the (a)(1) allegation, the Respondents argue that testimony supports the Judge's conclusion that unit employees were not chilled by the security measures and that the chief steward and the president were able to effectively represent the interests of the unit. *Id.* at 12. The Respondents also dispute the Charging Party's claim that military escorts were intimidating, asserting that the vast majority of civilian employees work and interact with uniformed military personnel on a daily basis. *Id.* at 13.

IV. Analysis and Conclusions

A. The Judge erred in concluding that the (a)(2) and (4) allegations are barred by § 7116(d) of the Statute.

1. Interpretation and Application of § 7116(d)

Section 7116(d) provides, in the first sentence, that "[i]ssues which can properly be raised under an appeals procedure may not be raised as unfair labor practices[.]" In determining whether an issue is barred by this provision, the Authority examines whether the ULP charge arose from the same set of factual circumstances as the MSPB appeal or grievance and whether the legal theories advanced in support of the ULP charge and the MSPB appeal or grievance are substantially similar.

2. The Charging Party also excepts to other aspects of the Judge's decision. However, in view of our decision, it is not necessary to address the other exceptions further.

When they are, the Authority concludes that the ULP allegation is barred. *E.g.*, *Bureau of the Census*, 41 FLRA 436, 446-47 (1991), *rev'd sub nom. Dep't of Commerce, Bureau of the Census v. FLRA,* 976 F.2d 882 (4th Cir. 1992) (*Dep't of Commerce*).

In *Bureau of the Census*, the Authority concluded that a ULP allegation was not barred by the first sentence of § 7116(d). *Id.* at 437. The employee in that case had filed a ULP charge, and the General Counsel had issued a complaint, over a record of infraction and a letter of proposed removal. When the respondent removed the employee, the employee filed a grievance over the removal. The Authority ruled that, because the record of infraction and letter of proposed removal could not be appealed to the MSPB, the complaint was not barred by § 7116(d). *Id.* at 446-47. The court in *Dep't of Commerce* reversed the Authority, ruling that the challenge to the record of infraction and letter of proposed removal and the challenge to the removal were inseparable and that the complaint was barred. 976 F.2d at 888. In this regard, the court emphasized that, although the MSPB cannot adjudicate ULP complaints, facts underlying ULP charges can be challenged in the MSPB process as prohibited personnel practices under 5 U.S.C. § 2302. *Id.* at 890.

Subsequently, in *SBA*, *aff'd in part, rev'd in part sub nom. Wildberger*, the Authority clarified that, when the factual predicate of the ULP allegation and the grievance or MSPB appeal is the same and the legal theory of the ULP allegation is within the jurisdiction of the MSPB, the Authority will determine that there is no jurisdiction over the ULP allegation on the basis of § 7116(d). 51 FLRA at 421-22. The Authority emphasized that it would apply this approach only in cases when the matter raised as a ULP ripens into, or is inseparable from, a matter appealable to the MSPB. In addition, the Authority stated that it would continue to assert jurisdiction when the ULP allegation focuses on a union's institutional interests rather than on the rights of employees. *Id.* at 422. Applying this clarified approach, the Authority determined that all three complaints in *SBA* were barred by § 7116(d). *Id.* at 422-25.

On appeal of *SBA*, the court in *Wildberger* affirmed that a ULP allegation is barred by § 7116(d) when the following circumstances are present: (1) the employee has raised all of the issues that underlie the ULP in a grievance or MSPB appeal; (2) these issues are within the MSPB's jurisdiction; and (3) the arbitrator or the MSPB has not declined jurisdiction over any of these issues. 132 F.3d at 790. The court held that the Authority had correctly applied § 7116(d) to two of the three complaints, but that, because the MSPB never addressed the theory raised in the remaining complaint, which alleged disparate treatment, the Authority had erroneously determined that this complaint was barred. *Id.* at 794. The court emphasized that § 7116(d) bars Authority jurisdiction over ULP charges only if the same issues were considered by the MSPB or arbitrator as affirmative defenses. *Id.* at 792. The court also emphasized that its holding was narrowly tailored and did not address the proper application of § 7116(d) when the specified circumstances were not present. *Id.* at 790-91.

More specifically, the court in *Wildberger* stated that its decision should not be interpreted to mean that all ULP charges involving an employee who subsequently appeals an adverse action to arbitration or the MSPB "should necessarily be subsumed" in the grievance or MSPB appeal. *Id.* at 795. The court stated that, in such a case, the Authority must resolve whether the ULP charge "could be or should be subsumed" into the grievance or MSPB appeal or whether, instead, the charge and the grievance or MSPB appeal are sufficiently separate that the Authority has jurisdiction over the charge notwithstanding the grievance or MSPB appeal. *Id.* The court also stated that its decision was "not intended as either an endorsement or a rejection of the Fourth Circuit's holding in [*Dep't of Commerce*]." *Id.*

B. Application of § 7116(d) to the (a)(2) and (4) allegations

Consistent with *Wildberger* and *Dep't of Commerce*, the Authority's analytical framework for determining jurisdiction under § 7116(d) is to examine whether the factual predicate of the ULP charge is the same as the factual predicate of the MSPB appeal or grievance and whether the legal theory advanced to support the ULP and the grievance or MSPB appeal is substantially similar. Applying this analytical framework, we conclude that the factual predicate of the grievances over the removal actions and the factual predicate of the ULP charge over the imposition of the security measures and restrictions are different and that, therefore, the (a)(2) and (4) allegations are not barred.

The factual predicate of the grievances before the arbitrator was the removal of the chief steward and the president on the basis of the specified charges. In imposing the security measures and restrictions, Respondent ISA did not rely on any of the specified charges for removal. Instead, the expressed basis of the security measures and restrictions was a need to protect government property and the past volatile behavior of

both of the employees. General Counsel's Ex. 4 at 5-6; Ex. 7 at 15. In addition, the evidence presented to the Judge confirmed that no other employees who received a notice of proposed removal were required to be escorted by military personnel and to be confined to one office. Tr. at 43, 46-62. Consequently, proposed removals do not directly result in the imposition of security measures and restrictions. This demonstrates that, contrary to the finding of the Judge, the removals and the security measures and restrictions are separable and that the complaints are not barred by § 7116(d). *See Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987) (factual predicates were different because the situations and corresponding actions confronting the aggrieved party were different); *Equal Employment Opportunity Comm'n,* 48 FLRA 822, 829 (1993) (factual situation underlying the grievance was different from the factual situation underlying the ULP). Moreover, because Respondent ISA did not rely specifically on any of the specified charges for removal in imposing the security measures, consideration of the security measures does not "return[] to the basis of the [removal] actions themselves[,]" as found by the Judge. Judge's Decision at 17. Furthermore, although the (a)(2) and (4) allegations focus on the president and chief steward, as found by the Judge, the allegations also implicate the Union's institutional interests that are conceptually separate and distinct from the individual interests raised by the removal grievances. *See 305th Air Mobility Wing, McGuire Air Force Base, N.J.*, 54 FLRA 1243, 1261-62 (1998) (ALJ decision) (every § 7116(a)(2) violation implicates an institutional interest of a labor organization). Therefore, we conclude that the (a)(2) and (a)(4) allegations are not barred by § 7116(d).

In concluding that the (a)(2) and (4) allegations are not barred, we have applied the decisions in both *Wildberger* and *Dep't of Commerce*. Consistent with *Wildberger*, the allegations are not barred because, although the security measures and restrictions were mentioned in the grievances and the arbitrator's awards, similar to the disparate treatment complaint remanded by the court in *Wildberger*, the security measures and restrictions were not addressed by the arbitrator, and these issues were not necessary to the arbitrator's resolution of the removal grievances. Moreover, for the reasons already discussed, we find no basis for concluding that the allegations should have been subsumed into the removal grievances. Consistent with *Dep't of Commerce*, the allegations are not barred because the challenge to the security measures and restrictions and the challenge to the removals are not inseparable. In addition, unlike *Dep't of Commerce*, it is not clear that the facts underlying the (a)(2) and (4) allegations can be challenged in the MSPB process as prohibited personnel practices. In this regard, the security measures and restrictions do not appear to be appealable personnel actions, the legality of which can properly be challenged before the MSPB. *See Barnes v. Small*, 840 F.2d 972, 981 (D.C. Cir. 1988) (MSPB's jurisdiction to reverse agency actions that are not in accordance with law does not "give the MSPB authority to administer a body of law entrusted . . . to the exclusive jurisdiction of the FLRA.").

Finally, we note that, in concluding that the security measures and restrictions were "clearly bound up" with the removal grievances, the Judge relied on *Naval Resale Activity.* Judge's Decision at 17. However, *Naval Resale Activity* interpreted and applied the jurisdictional bar of § 7122(a), not § 7116(d), and the Authority addressed the question of whether the award "relat[ed] to a matter described in [§] 7121(f)[.]" [3] 5 U.S.C. § 7122(a). As the Authority advised in *Bureau of the Census*, which rejected reliance on case law under § 7122(a), a ULP complaint under § 7116(d) is not barred "simply because it 'relates to' a matter that is the subject of an appeals procedure." 41 FLRA at 448. Consequently, the Judge's reliance on *Naval Resale Activity* was misplaced.

Accordingly, we conclude that the (a)(2) and (4) allegations are not barred by the first sentence of § 7116(d). We remand these allegations for a decision on the merits because the record is insufficient to resolve whether the Respondents violated § 7116(a)(2) and (4) of the Statute.

C. Consideration of (a)(1) allegation is deferred.

We find that the resolution of the (a)(2) and (4) allegations is germane to the resolution of the independent (a)(1) allegation. Consequently, we defer resolution of the Charging Party's exception to the Judge's recommended dismissal of the independent (a)(1) allegation until adjudication of the merits of (a)(2) and (4) allegations.

V. Decision

The (a)(2) and (4) allegations are remanded to the Judge for a determination on the merits, and the resolution of the exception to the recommended dismissal of the independent (a)(1) allegation is deferred pending that adjudication.

3. Section 7122(a) provides that exceptions may not be filed to an arbitration award "relating to a matter described in [§] 7121(f)[.]"

Member Beck, Dissenting in Part:

I disagree with my colleagues in one respect. I would not defer resolution of the Charging Party's exception to the Judge's recommended dismissal of the independent § 7116(a)(1) charge. This charge is, as the Majority repeatedly characterizes it, "independent" of the other charges that the Judge erroneously found to be barred.

Without further explanation, the Majority finds that the resolution of the other ULP charges is "germane" to the resolution of the independent § 7116(a)(1) charge. Majority at 9. The Majority does not indicate how the Judge's consideration of the other charges could alter the Judge's recommended decision with respect to the independent § 7116(a)(1) charge — a recommended decision that is self-contained, supported by substantial evidence in the record, and well-reasoned. It is not evident to me how the Judge's consideration of the other charges would or could alter the outcome with respect to the independent § 7116(a)(1) charge. Accordingly, I would deny the Charging Party's exception with respect to the independent § 7116(a)(1) charge.