

72 FLRA No. 81

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES
(Agency)

0-AR-5506
0-AR-5549
0-AR-5560
0-AR-5567

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DECISION

July 12, 2021

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

I. Statement of the Case

In this case, we hold that § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)¹ prohibits the Union from litigating the same issue as both an unfair-labor-practice (ULP) charge and through the negotiated grievance procedure.

In 2017, the Union filed a ULP charge alleging, as relevant here, that the Agency bargained in bad faith while negotiating a new collective-bargaining agreement (term agreement). While the ULP charge was pending, the Union and Agency continued negotiating the term agreement. But, the parties could not reach agreement, and, in 2018, the Union filed four grievances, each alleging that the Agency committed a ULP by bargaining in bad faith in violation of § 7116(a)(1), (5), and (8) of the Statute.²

The main question before us is whether the Union's ULP charge bars the later-filed grievances. We find that because the ULP charge and the four grievances arose while the parties were bargaining the same agreement, and the ULP and the grievances advance

substantially similar legal theories, § 7116(d) of the Statute bars the grievances. Accordingly, we vacate the awards resolving the four grievances.

II. Background

In 2015, the parties began negotiating a new term agreement. To facilitate bargaining, the parties started negotiating a ground-rules agreement. After a year, the parties reached impasse on the ground rules and requested assistance from the Federal Service Impasses Panel (the Panel). In 2016, the Panel issued an order imposing ground rules on the parties (the 2016 Panel order).³ However, on Agency-head review, the Agency disapproved that order.

On June 23, 2017, the Union filed a ULP charge challenging the Agency head's disapproval. Specifically, the Union alleged that the Agency "engaged in bad[-]faith bargaining" in violation of § 7116(a)(1), (5), and (8) of the Statute, and the Agency's "refusal to comply with the [2016 Panel order] . . . [wa]s a deliberate attempt to delay bargaining the term agreement."⁴ This ULP charge is currently pending with the Federal Labor Relations Authority's (FLRA's) Office of General Counsel.⁵

Almost a year later, in May 2018, the Agency reconsidered its position on the 2016 Panel order and informed the Union that it would resume negotiations. The Agency wanted to continue with the bargaining schedule imposed in the 2016 Panel order, but the Union wanted to arrange a new timeline. The Union filed its first grievance on June 8, 2018. In the grievance, the Union alleged that the Agency committed a ULP "by unilaterally imposing [the 2016 Panel] ground-rules agreement that was disapproved on Agency[-]head [r]eview and by engaging in bad[-]faith bargaining"⁶ in violation of § 7116(a)(1), (5), and (8) of the Statute. As a remedy, the Union requested an "order that no term bargaining . . . occur until the FLRA issues a complaint and . . . a disposition on the pending ULP[,] or order the parties to commence bargaining ground rules."⁷

While the grievance was pending, the Union agreed to continue negotiations for the new term agreement "under protest."⁸ The parties exchanged initial proposals and opened thirty-four separate contract articles for negotiations. Additionally, the Union submitted

³ *In re Dep't of HHS, Wash., D.C.*, 16 FSIP 113 (2016).

⁴ AR-5506, Opp'n, Attach. 2, Union ULP Charge in WA-CA-17-0432 (ULP Charge) at 6.

⁵ *Id.* at 1.

⁶ AR-5506, Exceptions, Attach. 5, Grievance (AR-5506, Grievance) at 1.

⁷ *Id.* at 2.

⁸ AR-5506, Award at 1.

¹ 5 U.S.C. § 7116(d).

² *Id.* § 7116(a)(1), (5), and (8).

information requests to the Agency on July 10, 2018, requesting, as relevant here, copies of past collective-bargaining agreements and memorandums of understanding; existing ground-rules agreements for term bargaining; and Agency-head review approvals and disapprovals.

After the parties disagreed on multiple articles, the Agency contacted the Federal Mediation and Conciliation Service (FMCS) for assistance. The parties met with a FMCS mediator, and on July 31, 2018, the Agency declared impasse, submitted its last best offer to the Union, and ended negotiations. A few days later, on August 2, 2018, the Union requested information “to better understand the Agency’s proposals, to inform the bargaining process, and enable [the Union] to respond to the Agency’s proposals.”⁹

On August 7, 2018, the Union filed its second grievance and alleged that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by bargaining in bad faith, refusing to discuss proposals, and unilaterally declaring impasse. Additionally, the Union alleged that the Agency “repeatedly violated the same ground rules that it unilaterally implemented . . . to compel [the Union] to the term bargaining table,” and the Agency “had no intention of complying with the terms set forth in the ground rules or bargaining in good faith.”¹⁰ As a remedy, the Union requested that the Agency “comply with the [eighteen]-week bargaining schedule” in the 2016 Panel order.¹¹

After the Union filed its second grievance, the Agency requested the Panel’s assistance on thirty-four articles. Around this time, on August 10, 2018, the Agency provided a partial response to the Union’s July 2018 information request but did not provide any information in response to the August 2018 information request. Consequently, the Union filed a third grievance on September 12, 2018, alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by “engaging in bad[-]faith bargaining during term bargaining” and not fully responding to the Union’s information requests.¹² As a remedy, the Union again requested, among other things, that the Agency “comply with [the eighteen]-week bargaining schedule” in the 2016 Panel order.¹³

In November 2018, the Panel asserted jurisdiction over twenty-eight of the thirty-four articles

submitted. The Panel directed the parties to resume bargaining for thirty days with the assistance of a FMCS mediator. The parties met with a mediator for two weeks but were unable to reach agreement on twenty-two articles. During this time, the Union submitted additional information requests to the Agency, in November and December 2018, requesting certain information from previous collective-bargaining agreements.¹⁴ The Agency responded to the information requests, “claim[ing] that the information requested was not maintained in the normal course of business and[] was overly burdensome” to retrieve.¹⁵

On December 21, 2018, the Union filed its fourth grievance, alleging that the Agency bargained in bad faith and violated § 7116(a)(1), (5), and (8) of the Statute. The grievance stated, “As alleged in previous grievances, [the Agency] has refused to engage in meaningful bargaining with a sincere resolve to reach an agreement.”¹⁶ Additionally, the Union claimed that the Agency failed to provide all the information that the Union requested in its November and December 2018 information requests.

The parties could not resolve the four grievances, and each of the grievances proceeded to arbitration.

III. Arbitrators’ Awards

A. Disposition of the June 8, 2018 Grievance (AR-5506)

Arbitrator David P. Clark framed the issues, in relevant part, as “[w]hether the Union’s grievance [wa]s arbitrable”; “[w]hether the Agency committed a ULP in violation of 5 U.S.C. § 7116(a)(1), (5), and[] (8) of the Statute[] when . . . it refused to bargain over ground rules”; and “[w]hether the Agency failed to bargain in good faith over ground rules?”¹⁷

The Arbitrator found that § 7116(d) did not bar the Union’s June 2018 grievance because the earlier-filed ULP charge alleged that the Agency’s disapproval of the 2016 Panel order was illegal,¹⁸ whereas the grievance alleged that the Agency “violated the [S]tatute by unilaterally imposing” the 2016 Panel order.¹⁹ On the merits, he determined that, because the 2016 Panel order already established ground rules, the Agency did not

⁹ AR-5567, Award at 10.

¹⁰ AR-5560, Opp’n, Attach. 1, Joint Ex. 2, Grievance (AR-5560, Grievance) at 4.

¹¹ *Id.* at 5.

¹² AR-5567, Exceptions, Attach. 6, Joint Ex. 6, Grievance (AR-5567, Grievance) at 1.

¹³ *Id.* at 3.

¹⁴ Specifically, the Union requested information regarding annual and sick leave. AR-5549, Award at 16-17.

¹⁵ *Id.* at 18.

¹⁶ AR-5549, Exceptions, Attach. 5, Joint Ex. 2, Grievance (AR-5549, Grievance) at 1.

¹⁷ AR-5506, Award at 2.

¹⁸ *Id.* at 16.

¹⁹ AR-5506, Grievance at 1.

commit a ULP by refusing to renegotiate those rules. He also found that the Agency did not violate the Statute when, in 2018, it insisted on the bargaining schedule imposed in the 2016 Panel ground-rules order it had previously disapproved.

On April 30, 2019, the Union filed exceptions to the award. On May 30, 2019, the Agency filed its opposition to the Union's exceptions.

B. Disposition of the August 7, 2018 Grievance (AR-5560)

Arbitrator Robert A. Creo²⁰ framed the issue as, "Did the Agency engage in bad[-]faith bargaining resulting in a violation of 5 U.S.C. § 7116(a)?"²¹ He first noted that the Union presented evidence from the first grievance – that the Agency bargained in bad faith by unilaterally implementing the 2016 Panel-imposed ground-rules order.²² Arbitrator Creo declined to consider any alleged misconduct by the Agency on this issue. On the merits, he determined that, under the totality of the circumstances, the Agency engaged in bad-faith bargaining by "end[ing] negotiations [in July 2018] without even discussing the overwhelming majority of [a]rticles at issue," and by submitting its last best offers without conducting "robust, good faith discussion."²³

On October 30, 2019, the Agency filed exceptions to Arbitrator Creo's award. On December 5, 2019, the Union filed an opposition to the Agency's exceptions.

C. Disposition of the September 12, 2018 Grievance (AR-5567)

Arbitrator Creo framed the issues as, "Did the Agency commit a[ULP] by its response to the Union[']s i[n]formation [r]equests" made in July and August 2018, and "Did the Agency bargain in bad faith?"²⁴ He recalled that the Union requested information in July and August 2018 to "understand the

parties' history of ground[-]rules agreements and how [the parties] have applied them to term negotiations."²⁵ Additionally, Arbitrator Creo noted that the Union stated that "the information was necessary to enable [the Union] to prepare counter-proposals and bargain with the Agency."²⁶ However, he found that the Agency did not commit a ULP or act in bad faith with its response to the Union's July and August 2018 information requests because the Agency provided the documents it had readily available.²⁷

On November 4, 2019, the Union filed exceptions to Arbitrator Creo's award. The Agency did not file an opposition.

D. Disposition of the December 21, 2018 Grievance (AR-5549)

Arbitrator Roger P. Kaplan framed the issues, as "Whether the Agency engaged in bad[-]faith bargaining [and] failed to provide requested information . . . during the parties' negotiations over a successor term agreement between September 13, 2018[,] and December 21, 2018[?]"²⁸ He noted that, at arbitration, the Union introduced evidence that had been previously litigated by the parties to determine if the Agency engaged in bad-faith bargaining.²⁹ Arbitrator Kaplan concluded that the Union did not prove the Agency acted in bad faith from September 13, 2018, to December 21, 2018, because the Agency actively participated in the FMCS mediation sessions. He also found that the Agency did not act in bad faith with its response to the Union's November and December 2018 information

²⁵ *Id.* at 39 (internal quotation marks omitted).

²⁶ *Id.*

²⁷ Additionally, Arbitrator Creo found that the Union's allegations "of other Agency actions that may have occurred before, or after the filing of the August 7, 2018 [grievance] are moot." *Id.* at 55; see AR-5567, Exceptions, Attach. 4, Union Post-Hr'g Br. for the Second and Third Grievances (AR-5567, Union Post-Hr'g Br.) at 30 ("The evidence . . . concerning the Agency's actions from the inception of bargaining through the Panel-imposed impasse proceedings overwhelmingly demonstrate that [the Agency] repeatedly acted in bad faith . . .").

²⁸ AR-5549, Award at 4.

²⁹ *Id.* at 5-6 (The Union introduced evidence starting in 2015 "to establish the 'totality of the circumstances as to whether bad[-]faith bargaining occurred in the context of [the fourth] grievance"; see AR-5549, Exceptions, Attach. 3, Union Post-Hr'g Br. (AR-5549, Union Post-Hr'g Br.) at 8 (The Agency "engaged in bad[-]faith bargaining throughout the bargaining of the parties' successor term agreement, including unilaterally implementing a ground[-]rules agreement it previously disapproved on [A]gency[-]head review"). Arbitrator Kaplan decided not to consider facts prior to the filing of this grievance – September 13, 2018 – because the Union already argued those facts before other arbitrators. AR-5549, Award at 21-22.

²⁰ Arbitrator Creo decided the second (August 7, 2018) and third (September 12, 2018) grievances, and the Union filed the same post-hearing brief for both of those grievances.

²¹ AR-5560, Award at 87.

²² *Id.*; see AR-5560, Exceptions, Attach. D, Union Post-Hr'g Br. for the Second and Third Grievances (AR-5560, Union Post-Hr'g Br.) at 33 ("[I]rrespective of the outcome of the [ULP charge], those actions are still factually relevant to determine whether the 'totality of the circumstances' from the inception of the parties' bargaining demonstrates that the Agency violated its statutory duty to bargain in good faith . . .").

²³ AR-5560, Award at 92.

²⁴ AR-5567, Award at 52, 55.

requests because the Union shared fault by sending requests with no “realistic expectation that the [Agency] could comply.”³⁰

On October 7, 2019, the Union filed exceptions to Arbitrator Kaplan’s award. On November 4, 2019, the Agency filed an opposition to the Union’s exceptions.

IV. Analysis and Conclusion: Under § 7116(d) of the Statute, the Union’s ULP charge bars its later-filed grievances.

This case³¹ concerns a jurisdictional question under the Statute that we consider *sua sponte*.³² Under § 7116(d) of the Statute, a ULP charge bars a later-filed grievance if the ULP charge and the grievance involve the same issue.³³ The Authority has held 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.³⁴ In *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy)*, the Authority clarified that the legal theories in a ULP charge and grievance need not “be identical” for the § 7116(d) bar to apply.³⁵

First, the Union’s ULP charge and grievances arise from the same set of factual circumstances – specifically, the parties’ attempt to negotiate a new term agreement. The Union filed the ULP charge when the Agency disapproved the 2016 Panel order establishing ground rules for the term agreement,³⁶ and

the Union filed its four grievances during substantive negotiations of that term agreement.³⁷

Although the Union’s subsequent grievances concerned ongoing negotiations, including events that had not yet occurred at the time that the Union filed the ULP, § 7116(d) does not require precise factual parity. The Authority has repeatedly stated that a ULP and later-filed grievance need arise only “from the same *set* of factual circumstances.”³⁸ Generally, negotiations over a collective-bargaining agreement constitute a single *set*

³⁷ See AR-5506, Grievance at 1 (the Union “allege[d] that the [A]gency’s implementation of a ground[-]rules agreement . . . constitutes a unilateral implementation and a failure to bargain in good faith as required by the [Statute]”); AR-5549, Grievance at 1 (the Union alleged that the Agency “refused to engage in meaningful bargaining with a sincere resolve to reach an agreement”); AR-5560, Grievance at 4 (the Agency “repeatedly violated the same ground rules that it unilaterally implemented in order to compel [the Union] to the term bargaining table”); AR-5567, Grievance at 1 (alleging the Agency violated the Statute “by engaging in bad[-]faith bargaining during term bargaining”).

³⁸ VA, 71 FLRA at 786 (emphasis added); see *U.S. Dep’t of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 868 (2018) (*Minot Air Force Base*) (then-Member DuBester dissenting); *AFGE, Loc. 420, Council of Prison Locs., C-33*, 70 FLRA 742, 743 (2018) (*AFGE*) (then-Member DuBester concurring); *Navy*, 70 FLRA at 514. Member Kiko notes that the word “set” means, “A group or collection of things that belong together or resemble one another or are usually found together.” Oxford Univ. Press, *Definition of set*, Lexico.com, <https://www.lexico.com/definition/set> (last visited June 30, 2021). Two events do not necessarily arise from different “set[s] of factual circumstances,” for purposes of § 7116(d), simply because one event occurred after the other. See Restatement (Second) of Judgments § 24(2) cmt. b (1982) (“Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes.”). As an example, the filing of a grievance should normally be treated as one “set” of factual circumstances, even though it consists of several discrete acts, such as submitting a formal written complaint; an agency official reviewing the complaint; the grievance proceeding to step two; a higher-level agency official reviewing the complaint; a meeting; the grievance proceeding to step three; and so on. Although each of those individual actions occur separately, they do not, generally speaking, constitute separate *sets* of factual circumstances.

³⁰ AR-5549, Award at 31.

³¹ We consolidate the four cases given the similarities in the facts and arguments. See *NFFE, Loc. 951, IAMAW*, 59 FLRA 951, 951 (2004) (Chairman Cabaniss concurring; Member Pope dissenting) (“Given the similarities in the cases, and noting that the parties’ arguments are the same in both cases, we have consolidated them for decision.”).

³² See *U.S. Dep’t of HUD*, 70 FLRA 605, 607 (2018) (then-Member DuBester dissenting) (raising, *sua sponte*, whether arbitrator lacked jurisdiction as a matter of law); *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 423 n.9 (1995) (“[T]he Authority may question, *sua sponte*, whether it has subject matter jurisdiction to consider the merits of a dispute.”). The Agency raised the § 7116(d) bar in its post-hearing brief for the first grievance (June 8, 2018) but not in its opposition. See AR-5506, Exceptions, Attach. 4, Agency Post-Hr’g Br. at 2.

³³ 5 U.S.C. § 7116(d).

³⁴ *U.S. Dep’t of VA*, 71 FLRA 785, 786 (2020) (*VA*) (then-Member DuBester dissenting).

³⁵ 70 FLRA 512, 517 (2018) (then-Member DuBester dissenting).

³⁶ ULP Charge at 6.

of factual circumstances.³⁹ This is particularly relevant here, where with each grievance, the Union presented evidence from a previous filing to allege, under the totality of the circumstances, that the Agency bargained in bad faith.⁴⁰

³⁹ Cf. *AFGE, Council 236, Region 2*, 61 FLRA 1, 4 (2005) (finding that “[t]he facts underlying both the ULP and the grievance involve[d] the [a]gency’s actions surrounding the negotiations on the 2002 [Linking Budget to Performance] awards”). Member Kiko notes that the dissent would have the Authority treat each action that occurs during the course of a negotiation as inherently independent. The dissent’s reasoning would render § 7116(d) meaningless as no two actions could ever constitute a “set of factual circumstances” by virtue of the passage of time—that is, one event having occurred after the other. See Dissent at 14-16. To the extent that either the concurrence or dissent rely on the Authority’s decision in *NLRB*, 72 FLRA 80, 82 (2021) (*NLRB*) (Member Abbott dissenting), that case is distinguishable as it presented two *sets* of factual circumstances: one set involved the union’s 2018 request for fiscal year 2018 budgetary materials to prepare for a September 2018 meeting; the other set involved a *different* request, in a *different* year, for *different* budgetary information, to prepare for a *different* meeting. *NLRB*, 72 FLRA at 82. *NLRB* did not involve a course of alleged bad-faith bargaining during a single collective-bargaining negotiation. Moreover, unlike here, the resolution of the earlier-filed ULP charge in *NLRB* could not have rendered the subsequent grievance effectively moot, because the ULP charge and grievance were entirely independent. See 5 U.S.C. § 7118(a)(7)(B) (stating that if an agency has engaged in a ULP, then the Authority may issue an order “requiring the parties to *renegotiate* a collective[-]bargaining agreement . . . and requiring that the agreement, as amended, be given *retroactive* effect” (emphasis added)). Member Abbott’s claim that *NLRB* is indistinguishable from *Navy* is confounding given that his *NLRB* dissent did not even purport to apply *Navy*. Instead, he advocated *changing* the test announced in *Navy* from “the same set of factual circumstances” to “substantially similar” factual circumstances. *NLRB*, 72 FLRA at 83 (Dissenting Opinion of Member Abbott) (“I believe the Authority should no longer require the *same* factual circumstances, but apply the *substantially similar* standard for both prongs.”). Then, applying his new standard—not the Authority’s long-standing “same set” standard that was reaffirmed in *Navy*—Member Abbott would have found that the two different information requests at issue in *NLRB* constituted “substantially similar” factual circumstances. See *id.* (“Applying the *substantially similar* standard here, the ULP charge and grievance arose from substantially similar factual circumstances . . .” (emphasis added)). Member Abbott tacitly acknowledged in *NLRB* that the two information requests sought involved different information, but he urged (based on his own experience, not anything in the record) that “many Agency budget plans do not change drastically from year-to-year.” *Id.* at 83 n.37. The concurrence’s claim that *NLRB* inexplicably deviated from *Navy* is nothing more than revisionist history.

⁴⁰ Member Kiko notes that the evidence plainly shows that the Union continuously relied on facts occurring *throughout* the negotiations to argue that the Agency acted in bad faith. See AR-5506, Attach. 3, Union Post-Hr’g Br. at 25 (The

The Union’s frequent reliance on facts that occurred throughout the bargaining process shows that each grievance was dependent on the circumstances that came before it.⁴¹ Even in the Union’s final grievance and its related exceptions, it recapped the entire “[h]istory of the [p]arties’ [t]erm [c]ontract [n]egotiations,” starting with the opening of ground-rules negotiations and including the 2016 Panel order.⁴² Additionally, the Union acknowledged in its very first grievance that the resolution of the ULP charge would affect substantive term bargaining.⁴³ This establishes that *all* of the Union’s grievance claims – whether related to ground rules, substantive bargaining, or information requests – emanate from the Agency’s alleged refusal to comply with the

Agency “acted in bad faith by *repeatedly* and unlawfully refusing to bargain over new dates for the exchange of initial bargaining proposals [and] by insisting on implementing the terms of the [2016] Panel [o]rder . . .” (emphasis added)); AR-5549, Union Post-Hr’g Br. at 8 (“The evidence in the record demonstrates that [the Agency] engaged in bad[-]faith bargaining *throughout* the bargaining of the parties’ successor term agreement . . .” (emphasis added)); AR-5560, Union Post-Hr’g Br. at 33 (“[I]rrespective of the outcome of [the ULP charge], those actions are still factually relevant to determine whether the ‘totality of the circumstances’ from the *inception* of the parties’ bargaining demonstrates that the Agency violated its statutory duty to bargain in good faith . . .” (emphasis added)); AR-5567, Union Post-Hr’g Br. at 30 (“[T]he Agency’s actions from the *inception* of bargaining through the Panel-imposed impasse proceedings overwhelmingly demonstrate that [the Agency] repeatedly acted in bad faith . . .” (emphasis added)).

⁴¹ See *supra* note 40.

⁴² AR-5549, Union Post-Hr’g Br. at 2; see AR-5549, Exceptions Br. at 2-5.

⁴³ AR-5506, Grievance at 2 (The Union requested an “order that no term bargaining . . . occur until the FLRA issues a complaint and . . . a disposition on the pending ULP[,] or order the parties to commence bargaining ground rules”).

2016 Panel order concerning ground rules.⁴⁴ For these reasons, we find that the ULP charge and grievances arise from the same set of factual circumstances.⁴⁵

Second, the ULP charge and later-filed grievances advance substantially similar legal theories. All of the Union's filings allege that the Agency engaged in bad-faith bargaining in violation of § 7116(a)(1), (5), and (8).⁴⁶ The ULP charge alleged the Agency "engaged in bad[-]faith bargaining by . . . refusing to comply" with the 2016 Panel order establishing ground rules for the new term agreement.⁴⁷ And the Union alleged in all of its grievances that the Agency engaged in bad-faith bargaining while negotiating the new term agreement.⁴⁸

⁴⁴ Member Kiko is persuaded that all the Union's filings arise from the same set of factual circumstances because resolution of the Union's ULP could, conceivably, moot the subsequent grievances. See 5 U.S.C. § 7118(a)(7)(B). Viewing collective-bargaining negotiations as always involving a series of individual and discrete facts, as the dissent does, leads to the type of absurd results that brought this series of disputes to the Authority: one party splitting several related ULP claims between the FLRA forum and the grievance forum, and within the grievance forum, between three different arbitrators. By claim splitting, the Union has circumvented the procedures put in place that would have permitted it to amend its ULP charge. See 5 C.F.R. § 2423.9 ("Before the issuance of a complaint, the Charging Party may amend the charge under the requirements set forth in § 2423.6."); *U.S. Dep't of Educ.*, 72 FLRA 203, 203 n.6 (2021) ("The FLRA was without a General Counsel, the official authorized to prosecute ULP charges, from November 2017 to March 2021."). In Member Kiko's opinion, the Union's actions evidence an attempt to avoid the consequence of one decisionmaker finding against it. The Authority should not permit any party to employ such a claim-splitting tactic as it undermines the requirement of an effective and efficient government. 5 U.S.C. § 7101(b); see also *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017) ("By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste scarce judicial resources and undermine the efficient and comprehensive disposition of cases." (citation omitted)).

⁴⁵ See *Minot Air Force Base*, 70 FLRA at 868 (finding § 7116(d) barred the grievance, in part, because the "ULP charge and the grievance ar[o]se from the same set of factual circumstances: the [a]gency's decision to change its hazard pay practices").

⁴⁶ ULP Charge at 6; see AR-5506, Grievance at 2; AR-5549, Grievance at 1; AR-5560, Grievance at 1; AR-5567, Grievance at 1.

⁴⁷ ULP Charge at 6.

⁴⁸ See AR-5506, Grievance at 1 (alleging the Agency "violated the [S]tatute by unilaterally imposing [the 2016] ground[-]rules agreement that was disapproved on Agency[-]head [r]eview and by engaging in bad[-]faith bargaining"); AR-5549, Grievance at 1 (contending that the Agency violated the Statute "by engaging in bad[-]faith bargaining during term bargaining"); AR-5560, Grievance at 1 (arguing the Agency violated the Statute "by engaging in bad[-]faith bargaining during term bargaining over the parties' successor agreement"); AR-5567,

Moreover, the Union requested, in its second and third grievance, that the Agency "comply with [the eighteen]-week bargaining schedule" in the 2016 Panel order.⁴⁹ Additionally the Union, in its last grievance, claimed that the Agency consistently delayed term bargaining⁵⁰ – an allegation the Union also raised in its ULP charge.⁵¹ Therefore, the Union's grievance allegations involving bad-faith negotiations are substantially similar to its ULP-charge allegations.⁵²

Because the ULP charge and the grievances arise from the same set of factual circumstances and advance substantially similar legal theories, the grievances are barred under § 7116(d).⁵³ Accordingly, we set aside the Arbitrators' awards.⁵⁴

V. Decision

We vacate the awards.

Grievance at 1 (alleging the Agency violated the Statute "by engaging in bad[-]faith bargaining during term bargaining").

⁴⁹ AR-5560, Grievance at 5; AR-5567, Grievance at 3; see also VA, 71 FLRA at 786 (finding that § 7116(d) barred the grievance because the "earlier-filed ULP charge and the grievance both . . . s[ought] restoration of the [l]ocal [p]resident's 100 percent official time").

⁵⁰ AR-5549, Grievance at 1 ("As alleged in previous grievances, [the Agency] refused to engage in meaningful bargaining with a sincere resolve to reach an agreement."); see also AR-5560, Grievance at 4 (the Agency "had no intention of complying with the terms set forth in the ground rules or bargaining in good faith").

⁵¹ ULP Charge at 6 (the Agency's "refusal to comply with the [2016] Panel [order] . . . [wa]s a deliberate attempt to delay bargaining the term agreement").

⁵² See *AFGE*, 70 FLRA at 743 (finding § 7116(d) barred the grievance because the ULP charge and the grievance "arose from the [a]gency's decision to implement the augmentation policy without bargaining"). The dissent asserts that "even if one of the grievances had alleged the same legal claim set forth in the ULP, § 7116(d) would properly apply to bar only that claim from the arbitrator's consideration." Dissent at 16-17. But that is how this decision applies § 7116(d); we have found that each issue raised by the Union in a later-filed grievance, and considered by an Arbitrator, involved the same issue from the earlier-filed ULP. To the extent that the dissent suggests that we should remand all four awards in order to allow the Arbitrators to decide claims from the grievances that the Arbitrators already elected *not* to address, the dissent provides no support for such a result.

⁵³ See *AFGE*, 70 FLRA at 743; *Navy*, 70 FLRA at 516 (finding § 7116(d) barred the grievance "because the contractual claim [wa]s a derivative of the statutory claim").

⁵⁴ Because we vacate the awards, we do not address either party's remaining exceptions. VA, 71 FLRA at 787 n.24.

Member Abbott, concurring:

I am relieved that the Authority returns to its tepid, but inconsistent, embrace of *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy Mid-Atlantic)*¹ after the confusion wrought by *NLRB*² and my colleagues' failure to explain the distinction between those cases. Therefore, I agree that the Union's grievances are barred under 5 U.S.C. § 7116(d)³ and that the awards properly are vacated.

The dissent claims that our application of § 7116(d) is too expansive and is not supported by the legislative history of the Federal Service Labor-Management Relations Statute (Statute).⁴ To the contrary, the legislative history of § 7116(d) calls for and supports a bar,⁵ but has nothing at all to say about whether the bar should be applied expansively or narrowly.⁶ I respect that my dissenting colleague believes that the § 7116(d) bar should be applied more narrowly. However, in *Navy Mid-Atlantic* the Authority adopted an application of the bar that is clear and entirely consistent with the legislative history of § 7116(d). The dissent also asserts erroneously that the Authority has "refused . . . to apply [§ 7116(d)] to bar a grievance based on a previously-filed [unfair labor practice (ULP) charge] where the specific actions challenged by the grievance

had *not yet been taken* when the ULP was filed."⁷ However, all of the cases cited by the dissent turned on the fact that the grievance and the ULP did not concern the same issue, not on whether the events occurred after the earlier-filed ULP.⁸

However, I share my dissenting colleague's confusion⁹ about how this case is distinguishable from *NLRB*. That case involved a continuing dispute over the union's right to agency budgetary information.¹⁰ In *NLRB*, the majority found that § 7116(d) did not apply because the factual circumstances underlying the grievance "arose *after* the facts giving rise to the ULP charge."¹¹ In my dissent, I stressed that the

⁷ Dissent at 14-15.

⁸ See *Dep't of the Air Force*, 61 FLRA 797, 799 (2006) (finding that § 7116(d) did not apply because "the ULP charge allege[d] that the [a]gency violated the Statute by not providing the [u]nion with certain information, by not bargaining over . . . buyouts, and by not consulting with the [u]nion before changing conditions of employment," while the grievance "allege[d] that the [Reduction in Force (RIF)] was a sham and that the [a]gency made numerous errors implementing the RIF in connection with job placements"); *EEOC*, 53 FLRA 465, 472-73 (1997) (finding that § 7116(d) did not apply because the "ULP arose from the [a]gency's refusal to participate in the process of selecting National Arbitrators . . . [while the arbitration] arose from the [u]nion's unilateral striking of arbitrator names from the [Federal Mediation and Conciliation Service] list, the [u]nion's notification to the [a]rbitrator of his purported appointment as National Arbitrator, and the [u]nion's referral of at least one pending grievance . . . to the [a]rbitrator to arbitrate"); *EEOC*, 48 FLRA 822, 829 (1993) (finding that § 7116(d) did not apply because the grievances concerned "whether or not the [a]gency breached Article 22 of the [parties' agreement] and the memorandum of understanding [MOU] by terminating negotiations . . . and by implementing the performance appraisal plan," while the earlier-filed ULP concerned "whether the [a]gency had committed a ULP by violating Article 22 of the parties' . . . agreement and the [MOU] . . . when it failed 'to meet and confer . . . to collaboratively develop a new performance appraisal system'"); *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987) (finding § 7116(d) did not apply because the ULP concerned the elimination of a particular position at one high school, while the grievance concerned the termination of an employee occupying that position); *id.* (finding the ULP charge and the grievance did not involve the same issue because "the grievance presented an alleged violation of the [parties' agreement], while the [ULP] charge concerned a statutory violation").

⁹ Dissent at 15.

¹⁰ See *NLRB*, 72 FLRA at 80 ("On October 31, 2018, the [u]nion filed a ULP charge against the [a]gency for failing to provide certain [fiscal year (FY)] 2018 budgetary documents in response to [its August] 2018 [information] request."); *id.* ("On April 23, 2019, the [u]nion filed a grievance alleging that the [a]gency failed to provide certain FY 2019 budgetary documents in response to [its February] 2019 [information] request.").

¹¹ *Id.* at 82.

¹ 70 FLRA 512 (2018) (then-Member DuBester dissenting).

² 72 FLRA 80 (2021) (Member Abbott dissenting).

³ 5 U.S.C. § 7116(d).

⁴ Dissent at 13. The dissent also alleges that the majority concluded the claims arose from the same set of factual circumstances because the claims sought the same remedies. Dissent at 16. However, the majority does not look at the remedies sought in its analysis. Rather, the majority concludes that the claims arise from the same set of factual circumstances because all of the claims involved the negotiation of a new collective-bargaining agreement and "emanate[d] from the Agency's alleged refusal to comply with the 2016 Panel order concerning ground rules." Majority at 7-9. Accordingly, I fail to see how the dissent's allegation is relevant to this case.

⁵ Compare Federal Service Labor-Management Act of 1977, H.R. 13, 95th Cong. § 7115(d) (1st Sess. 1977) ("Issues . . . may, in the discretion of the aggrieved party, be raised either (A) under the appropriate appeal or grievance procedure, or (B) if applicable, under the procedure for resolving complaints of unfair labor practices. . . ."), with 5 U.S.C. § 7116(d) ("[I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, *but not under both procedures.*" (emphasis added)); see also S. Rep. No. 95-969, at 2829 (1978) ("the use of either option will preclude the use of the unfair labor practice procedures").

⁶ See H.R. Rep. No. 95-1403 at 50-51 (1978) (explaining that 7116(d) would allow a removal action to be pursued through an unfair labor practice or the grievance proceeding, but not both).

Authority should further revise the standard for evaluating whether a grievance or ULP was barred by § 7116(d) to bring our analysis into accord with the purpose of preventing duplicative proceedings and forum shopping.¹²

I cannot explain the distinction between *NLRB* and this case in the application of *Navy Mid-Atlantic*. Only my majority colleague here can explain that distinction. Therefore, while I agree with the outcome of this matter, I cannot reconcile it with the majority's holding in *NLRB*.

¹² *Id.* at 83 (Dissenting Opinion of Member Abbott).

Chairman DuBester, dissenting:

In *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy)*,¹ the majority abandoned decades of Authority precedent by applying an unjustifiably expansive interpretation of § 7116(d) of the Federal Service Labor-Management Relations Act (Statute). As I have previously observed, the majority's decision in *Navy* "lack[ed] any discussion or analysis of § 7116(d)'s origins, legislative history, or purpose," and "reject[ed] without reason established court and Authority precedent."²

Today's decision takes *Navy's* reckless interpretation of § 7116(d) to a new level. Applying *Navy*, the majority vacates awards resolving four grievances filed by the Union during the course of the parties' negotiation of a term collective-bargaining agreement. Each grievance alleged that the Agency took specific and discrete actions that violated its duty to bargain in good faith under § 7116(a)(5) of the Statute. In one fell swoop, the majority vacates each award because, at the onset of the parties' negotiations, the Union filed an unfair labor practice (ULP) charge alleging that an entirely separate Agency action violated its duty to bargain in good faith.

To understand the full implications of the majority's decision, it is important to understand precisely what actions the Union challenged through the four grievances. In the grievance at issue in AR-5506, filed on June 8, 2018,³ the Union alleged that the Agency violated its statutory duty to bargain in good faith by unilaterally imposing a ground-rules agreement that it had previously disapproved through agency-head review, and by refusing to bargain over any aspect of the ground rules.⁴

In the grievance at issue in AR-5560, filed on August 7, the Union alleged that the Agency violated its good-faith bargaining obligation during the month of July by, among other things, refusing to explain or answer questions regarding its proposals for the term agreement; demanding that the Union submit counter-proposals sooner than the time allowed by the ground rules; invoking intervention by the Federal Mediation and Conciliation Service (FMCS) after only one day of

bargaining; and submitting last best offers and unilaterally ending bargaining after only two days.⁵

In the grievance at issue in AR-5567, filed on September 12, the Union alleged that the Agency violated its statutory duty to bargain by, among other things, insisting on bargaining to impasse over a number of permissive subjects; attempting to force to impasse proposals that violated the Work Schedules Act; failing or refusing to respond to information requests regarding the Union's proposals on July 10 and August 2; and requesting assistance from the Federal Service Impasses Panel (Panel) on August 13 after only two days of bargaining, during which the parties had discussed only two of the thirty-four articles that were open for negotiation.⁶

And in the grievance at issue in AR-5549, filed on December 21, the Union alleged that the Agency violated its statutory duty to bargain by, among other things, refusing to bargain during the week of December 3-7, despite a November 15 Panel order explicitly directing the parties to resume bargaining for thirty days with FMCS assistance; refusing to meet face-to-face with the Union during the bargaining sessions; and refusing to respond to the Union's additional information requests.⁷

Each grievance was fully litigated, and resulted in comprehensive awards both in favor of, and adverse to, the Union. Nevertheless, today's decision vacates all four awards solely because the Union filed a ULP charge in 2017 alleging that the Agency's disapproval of a 2016 Panel order imposing ground rules for the parties' negotiations *also* violated its duty to bargain in good faith.

In the majority's view, the Union was barred by § 7116(d) of the Statute from filing the four grievances. According to the majority, the ULP charge and grievances "arise from the same set of factual circumstances – specifically, the parties' attempt to negotiate a new term agreement."⁸ And the ULP charge and the grievances "advance substantially similar legal theories"⁹ – namely, allegations that the Agency engaged in bad faith bargaining while negotiating the term agreement.

More plainly stated, the majority concludes that because the Union filed a ULP charge alleging that the Agency took an action at the outset of the parties'

¹ 70 FLRA 512 (2018) (then-Member DuBester dissenting).

² *Dep't of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 869 (2018) (Dissenting Opinion of then-Member DuBester).

³ Unless otherwise noted, all dates referenced hereafter occurred in 2018.

⁴ AR-5506, Exceptions, Attach. 5, Grievance at 1-2.

⁵ AR-5560, Opp'n, Attach. 1, Joint Ex. 2, Grievance at 2-4.

⁶ AR-5567, Exceptions, Attach. 6, Joint Ex. 6 at 1-2.

⁷ AR-5549, Exceptions, Attach. 5, Joint Ex. 2, Grievance at 1.

⁸ Majority at 6.

⁹ *Id.* at 10.

negotiations that was inconsistent with its duty to bargain, the Union was precluded from alleging, through the parties' negotiated grievance procedure, that *any* subsequent Agency action taken during the entirety of the parties' term negotiations was inconsistent with its statutory bargaining obligation. This radical outcome does not survive scrutiny even under *Navy's* erroneously expansive interpretation of § 7116(d).

First, the majority has failed to establish that the ULP and the grievances arose from the "same set of factual circumstances."¹⁰ As the majority itself notes, the Union's grievances challenged discrete actions taken by the Agency during the course of the parties' negotiations "that had not yet occurred at the time that the Union filed the ULP."¹¹ While it is true that the Authority has never required "precise factual parity"¹² in applying § 7116(d), it has also refused – as a matter of common sense – to apply this provision to bar a grievance based on a previously-filed ULP where the specific actions challenged by the grievance had *not yet been taken* when the ULP was filed.¹³ Indeed, the Authority – applying *Navy* – has recently acknowledged that a grievance challenging an agency's action that occurred after the facts giving rise to a previously-filed ULP would not be barred by § 7116(d).¹⁴

¹⁰ *Id.* at 6.

¹¹ *Id.* at 7.

¹² *Id.*

¹³ See, e.g., *Dep't of the Air Force*, 61 FLRA 797, 799 (2006) (rejecting argument that grievance and earlier-filed ULP regarding a reduction-in-force (RIF) arose from the same set of factual circumstances where the ULP charge "concerns actions that occurred prior to the RIF, while the grievance concerns the [a]gency's actions in implementing the RIF"); *EEOC*, 53 FLRA 465,473 (1997) (concluding that the union's grievance was not based on the same set of factual circumstances as its previously-filed ULP because the grievance challenged agency actions that "occurred *after* the time the [u]nion filed [the ULP], and thus could not have been part of its factual underpinnings") (emphasis in original); *EEOC*, 48 FLRA 822, 829 (1993) (concluding that grievances and a ULP challenging the agency's actions related to its refusal to bargain over, and subsequent implementation of, a performance appraisal system were not based on the same factual circumstances where the "factual situation facing the [u]nion at the time the grievances were filed was different from the situation facing the [u]nion at the time the ULP charges were filed"). This principle has also been recognized by the U.S. Court of Appeals for the D.C. Circuit. See *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987) (concluding that a grievance was not barred by a previously-filed ULP charge where "the situation facing [the grievant], and the corresponding actions being taken against him, were quite different when he filed the grievance than was the case when the [ULP] charge was filed").

¹⁴ *NLRB*, 72 FLRA 80, 82 (2021) (Member Abbott dissenting) ("we conclude that the [a]rbitrator did not err by finding that the grievance, which concerned the [a]gency's denial of a request for documents that arose *after* the facts giving rise to the

The majority's finding on this point is not salvaged by its observation that "with each grievance the Union presented evidence from a previous filing to allege, under the totality of the circumstances, that the Agency bargained in good faith."¹⁵ As an initial matter, to the extent that the Union generally referenced its earlier-filed grievances in post-hearing briefs related to the four grievances,¹⁶ the arbitrators easily recognized that the Union did so only to provide background and context for allegations concerning the specific Agency actions actually challenged in each grievance. And based on this recognition, the arbitrators uniformly declined to rule on these issues.¹⁷

But more importantly, that the Union referenced these earlier allegations in its post-hearing briefs for the subsequent grievances does not establish – as the majority contends – that its *ULP charge* arose from the same set of factual circumstances as the grievances. As noted, none of the grievances relied upon the Agency's disapproval of the 2016 Panel order as a basis for alleging that the Agency had engaged in bad faith bargaining with respect to the specific acts challenged in the grievances. Nor has the majority pointed to anything in the record demonstrating that the arbitrators relied upon such an allegation in resolving the four grievances.

Nevertheless, the majority claims that "all of the Union's grievance claims . . . emanate from the Agency's alleged refusal to comply with the 2016 Panel order"¹⁸ because the Union "acknowledged in its very first grievance that the resolution of the ULP charge

ULP charge, is not barred by the earlier-filed ULP charge under § 7116(d)") (emphasis in original).

¹⁵ Majority at 8.

¹⁶ *Id.* at 8 n.40.

¹⁷ See, e.g., AR-5560, Award at 87 ("The [a]rbitrator does not address any alleged violations or events which occurred after the August 7, 2018 date of [the grievance]"); *id.* at 90 (declining to address "any alleged misconduct by the Agency" regarding its adherence to the ground rules or its "alleged failure to revisit and revise the ground rules" because "[t]his issue was addressed in other forums"); *id.* at 93 (finding that the Agency violated its duty to bargain based upon specific actions it took during July, 2018); AR-5567, Award at 55 (deciding only whether the Agency committed a ULP with respect to the Union's July and August information requests, and declining to rule on the "allegations and issue of other Agency actions that may have occurred before, or after, the filing of the August 7, 2018 [grievance]"); AR-5549, Award at 20, 22 (while noting that the Union had "introduced evidence of what occurred during the parties' negotiations starting in 2015," the Arbitrator also notes that the Union "was not asking me to make a 'specific finding on the issues litigated before the other arbitrators,'" and therefore rules that his "conclusions shall be based on the events that occurred starting on September 13, 2018").

¹⁸ Majority at 9.

would affect substantive term bargaining.”¹⁹ But this assertion does not demonstrate that the claims all arose from the same set of factual circumstances as the ULP charge, nor has the majority cited a single Authority decision that would support such a conclusion.²⁰

The majority is equally mistaken in concluding that the ULP and the grievances advance substantially similar legal theories. The majority bases this conclusion upon the fact that “[a]ll of the Union’s filings allege that the Agency engaged in bad-faith bargaining in violation of § 7116(a)(1), (5) and (8).”²¹ But in making this assertion, the majority either fails to realize, or willfully ignores, that a party can violate its statutory duty to bargain in good faith in a variety of ways. Indeed, this is amply illustrated by the Union’s grievances, which challenge, on this basis, a multitude of separate and discrete actions, including the Agency’s unilateral imposition of ground rules, its refusal to provide information related to the negotiations, its conduct at the bargaining table on specific dates, and its premature termination of bargaining.

The majority has certainly not demonstrated that any of the grievances required the arbitrator to rule upon the legal claim the Union alleged in its ULP. Indeed, in the only case where this issue was even raised as a potential obstacle, the Arbitrator easily distinguished the ULP claim from the grievance’s allegations, which included whether the Agency violated § 7114(c) of the Statute by withdrawing its Agency-head approval of the Panel order.²² And *even if* one of the grievances had

alleged the same legal claim set forth in the ULP, § 7116(d) would properly apply to bar only that claim from the arbitrator’s consideration.²³ Accordingly, the majority’s sweeping application of § 7116(d) to vacate the Union’s grievances is squarely incompatible with its purpose, which, after all, is to “prevent relitigation of the same issue in a different forum.”²⁴

Moreover, there is no question that the Union was entitled to challenge each of these actions as ULPs through the parties’ negotiated grievance procedure.²⁵ Yet, as a result of the majority’s application of § 7116(d), the Union’s 2017 ULP charge barred it from alleging, through the parties’ grievance procedure, that *any subsequent action* taken by the Agency during the course of the parties’ negotiations violated the statutory duty to bargain in good faith.

¹⁹ *Id.*

²⁰ My colleague further asserts that the Union’s filings arise from the same set of factual circumstances because “resolution of the Union’s ULP could, conceivably, moot the subsequent grievances.” *Id.* at 10 n.44. But she has similarly failed to cite any Authority precedent supporting this assertion. Moreover, the Authority has specifically *rejected* the proposition that “actions seeking the same remedy present the same issue” under § 7116(d). *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 804-05 & n.12 (1996) (rejecting the agency’s argument “that section 7116(d) bars the ULP because both the grievance and the ULP requested bargaining as remedies” because “[i]t is axiomatic that the same remedy may be awarded as a result of pursuing a myriad of legal theories”).

²¹ Majority at 8 (emphasis in original).

²² AR-5506, Award at 16 (finding that the “question of proper [a]gency[-]head [r]eview is different from the question of reinstating the terms of a [Panel] order on ground rules”). To the extent the majority concludes that this finding is inconstant with § 7116(d) because the Union’s ULP alleged a violation of bad faith bargaining, it need only refer to our recent decision in *U.S. Department of Education*, 71 FLRA 516, 518 (2020) (then-Member DuBester concurring). In that decision, the majority – applying *Navy* – concluded that a grievance “concern[ing] . . . § 7114(c)(1)” was not barred by an

earlier-filed ULP alleging violations of § 7116(a)(1) and (5). *Id.* (emphasis omitted).

²³ *U.S. DOD, Def. Commissary Agency*, 69 FLRA 379, 382 (2016) (Member Pizzella dissenting); *see also U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 445-46 (2014) (Member Pizzella dissenting) (holding that, because the Authority, “when applying § 7116(d) . . . looks at the individual issues raised by a grievance, not the grievance as a whole,” it would bar only the portion of the grievance alleging the violation raised in the ULP); *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268, 1276 (1990) (*Marine Corps*) (holding that § 7116(d) did not “prevent [the] arbitrator from considering the remainder of the grievance” not raised in the previously-filed ULP charge). Oddly, the majority interprets my observation of this well-recognized principle as a “suggest[ion] that we should remand all four awards in order to allow the Arbitrators to decide claims from the grievances that the Arbitrators already elected *not* to address.” Majority at 10 (emphasis in original). To the extent that I have “suggested” anything based on this principle, it is that the majority should apply § 7116(d) in a manner consistent with its legislative purpose.

²⁴ *Marine Corps*, 37 FLRA at 1274.

²⁵ *See, e.g., AFGE, Council of Prison Locs. 33, Locs. 1007 & 3957*, 64 FLRA 288, 290 (2009). Given that the Authority lacked a General Counsel to prosecute ULP charges during the entire time period in which the Union was filing its grievances, it is hardly surprising that the Union would pursue its ULP claims through this procedure.

It is abundantly clear that the majority's application of § 7116(d) to vacate the Union's grievances finds no support in either the plain language or the legislative purpose of this provision. Indeed, by divesting the Union of its statutory right to challenge the Agency's actions through the parties' negotiated grievance procedure, the majority, once again, "nullifies what Congress intended § 7116(d) to provide – namely, a party's right to choose the appropriate forum for asserting distinct legal issues under the Statute."²⁶

Accordingly, I dissent.

²⁶ *U.S. Dep't of VA*, 71 FLRA 785, 788 (2020) (Dissenting Opinion of then-Member DuBester).