

67 FLRA No. 8

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2096
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
20TH SPACE CONTROL
SQUADRON DETACHMENT 1
DAHLGREN NAVAL
SUPPORT FACILITY, VIRGINIA
(Agency)

0-AR-4863

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DECISION

October 31, 2012

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

The Union filed an exception to an award of Arbitrator Stephen B. Forman under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency did not file an opposition to the Union's exception.

The Arbitrator, in part, found that the grievant was precluded by § 7116(d) of the Statute from challenging the validity of an order upon which his five-day suspension was based. For the reasons set forth below, we find that the award is contrary to § 7116(d). Accordingly, we set aside the award and remand this matter to the parties for resubmission to the Arbitrator, absent settlement, for reconsideration of the merits of the grievant's suspension.

II. Background and Arbitrator's Award

The grievant is the president of the Union, which represents nonprofessional civilian employees in three Department of Defense bargaining units, including the Navy and the Air Force. Award at 2.

The grievant's supervisor issued a "[d]irect [s]upervisory [o]rder" (order) directing the grievant to cease conducting Union business for unit employees in the Department of the Navy (Navy employees) while in Air Force duty status. *Id.* at 3. The Union filed an unfair labor practice (ULP) charge alleging that the order violated § 7116(a) of the Statute. *Id.* The Authority's Office of General Counsel subsequently issued a letter approving the Union's voluntary withdrawal of the ULP. *Id.*

The Agency then proposed suspending the grievant for five days for violating the order. *Id.* After the Agency issued a decision to suspend the grievant for five days, the Union filed a grievance alleging, among other things, that the order violated Article 5.8 of the parties' agreement.¹ *Id.* The matter was not resolved and was submitted to arbitration.

Prior to the arbitration hearing, the Agency moved to bar the Union from raising the following issue: "Whether the [order] is a valid order issued by [the Agency]?" *Id.* The Agency argued that § 7116(d) barred that issue because of the earlier-filed ULP.² *Id.* The Arbitrator agreed, concluding that "[c]learly [he] is barred under [§] 7116(d) from considering the validity of the [o]rder in this arbitration." *Id.* at 4. However, because he found that the five-day suspension was not raised in the ULP, the Arbitrator determined that § 7116(d) did not bar the entire grievance. *Id.* He found that the Union may litigate whether the Agency had just cause to suspend the grievant on the theory that he did not commit the acts alleged. *Id.*

On the merits, the parties stipulated that the issue before the Arbitrator was: "Whether the [g]rievant's five-day suspension for violating the [order] was for just cause as will promote the efficiency of the service, and if not what is the appropriate remedy?" *Id.* at 5. The Arbitrator found that the grievant used Air

¹ Article 5.8 of the parties' agreement provides, in relevant part: "Officers and stewards of the Union may use for representational purposes the desk and nonemergency telephone facilities normally assigned to them incidental to their official duties." Exceptions, Ex. 2 at 8.

² Section 7116(d) of the Statute provides:

Issues which can properly be raised under an appeals procedure may not be raised as [ULPs] prohibited under this section. Except for matters wherein, under [§] 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as [a ULP] under this section, but not under both procedures.

Force resources for Navy employee emails, which he found to be a violation of the order. *Id.* at 6. He also concluded that the grievant conducted Union business regarding Navy employee matters on Air Force time, which also violated the order. *Id.* at 7. The Arbitrator determined that a five-day suspension was an appropriate penalty for the grievant's failure to follow the order. *Id.* at 9.

III. Union's Exception

The Union argues that the award is contrary to law because the Arbitrator erroneously concluded that § 7116(d) precluded the grievant from challenging the validity of the order. Exception at 4. According to the Union, the legal theories upon which the ULP and the grievance are based are "substantially different." *Id.* The Union contends that the ULP alleged that the order violated § 7116(a) of the Statute and the grievance alleged that the order violated the parties' agreement. *Id.* at 4-5.

IV. Analysis and Conclusion: The award is contrary to § 7116(d) of the Statute.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

In order for an issue raised in a grievance to be barred from consideration under § 7116(d) by an earlier-filed ULP charge: (1) the issue that is the subject matter of the grievance must be the same as the issue that is the subject matter of the ULP; (2) such issue must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedures must have been at the discretion of the aggrieved party. *See, e.g., U.S. Dep't of Veterans Affairs, Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 392 (1996). In determining whether a grievance and a ULP charge involve the same issue, the Authority examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. *See id.* at 392-93.

Here, the ULP charged that the Agency violated § 7116(a) of the Statute by issuing the order. *See Exceptions*, Ex. 4. The grievance, on the other hand, challenged the validity of the grievant's suspension, alleging in part that the suspension was not for just cause because the order on which the suspension was based violated Article 5.8 of the parties' agreement. *See Exceptions*, Ex. 2 at 8. Because the ULP alleged that issuance of the order violated the Statute and the grievance alleged that issuance of the order violated the parties' agreement, and because there is no claim that the pertinent agreement provision mirrors the Statute, we find that the legal theories underlying the ULP charge and the grievance are not substantially similar. *See U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003) (Member Armendariz dissenting) (Chairman Cabaniss concurring) (finding that § 7116(d) did not apply because the ULP charge alleged a statutory violation and the grievance alleged a contractual violation). Therefore, the award is contrary to § 7116(d), and we set it aside, because the Arbitrator incorrectly found that the issue of the validity of the order was barred by § 7116(d). *See U.S. Dep't of Health & Human Servs., Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000) (finding that the grievance was not barred by § 7116(d) because the ULP and the grievance were based on different legal theories). Because the Arbitrator addressed the merits of the grievant's suspension without considering the validity of the order, we remand this matter for resubmission to the Arbitrator, absent settlement, to reconsider the grievant's suspension in light of our decision that § 7116(d) does not preclude the Arbitrator from determining whether the order violates the parties' agreement.³ *See U.S. Dep't of the Army, Human Res. Command, St. Louis, Mo.*, 64 FLRA 140, 144 (2009).

V. Decision

The award is set aside, and this matter is remanded to the parties for resubmission to the Arbitrator, absent settlement, for reconsideration of the merits of the grievant's suspension.

³ We note that it is undisputed that the grievant's suspension was solely based on a violation of the order.