64 FLRA No. 57

UNITED STATES
DEPARTMENT OF THE AIR FORCE
AEROSPACE MAINTENANCE AND
REGENERATION CENTER
DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2924
(Charging Party/Union)

DE-CA-02-0172

DECISION AND ORDER
ON REMAND

December 31, 2009

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

I. Statement of the Case

This matter is before the Authority on remand from the United States Court of Appeals for the District of Columbia Circuit (the court) in *AFGE, Local 2924 v. FLRA*, 470 F.3d 375 (D.C. Cir. 2006) (*Local 2924)*.

As relevant here, the unfair labor practice (ULP) complaint filed by the General Counsel (GC) alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by repudiating negotiated agreements related to drug testing and rehabilitation. In *United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona*, 60 FLRA 895 (2005) (Member Pope dissenting) (*Davis-Monthan*), the Authority dismissed the complaint on the ground that the Respondent did not commit clear and patent breaches of the parties' agreements. In *Local 2924*, the court found that the Respondent had committed clear and patent breaches of the agreements and remanded to the Authority to determine whether the breaches constituted a unfair labor practice (ULP).

Accordingly, the Authority now considers the second prong in the repudiation test and the original exceptions raised by both parties, which were not addressed in *Davis-Monthan*. Upon consideration of the Administrative Law Judge's (Judge's) decision and the entire record, we deny the Respondents exceptions in part and dismiss them in part; we grant the GC's cross-exception.

II. History of the Case

A. Facts

The facts in this case are set forth fully in *Davis-Monthan*, 60 FLRA 895, and decision of the Judge, 60 FLRA at 907-916, and are only briefly summarized here. In accordance with Executive Order 12564, "Drug-Free Federal Workplace," the parties executed the "Air Force Civilian Drug Testing Agreement Between Davis-Monthan Air Force Base and AFGE Local 2924" (Local Drug Agreement). *Davis-Monthan*, 60 FLRA at 895, 896. Section 9(a) of the Local Drug Agreement, which addresses employees who have positive drug tests and who have been referred for rehabilitation, provides: "The Employer will retain employees in a duty or approved leave status while undergoing rehabilitation. If placed in a non-duty status, the employee will normally be returned to duty after successful completion of rehabilitation." *Id.* The Local Drug Agreement was incorporated by the parties into their collective bargaining agreement (the parties' agreement). Article 27 of the parties' agreement provides that rehabilitation is the "ultimate objective of the drug and alcohol abuse program" and that "[r]eferral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities." *Id.*

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

After the Respondent terminated Employees C, H and N, the Charging Party filed a charge, which was subsequently amended. [2] The GC filed a complaint alleging that the Respondent violated § 7116(a)(1) and (5) of the Statute by terminating the employees in repudiation of several contractual provisions, including § 9 of the Local Drug Agreement and Article 27 of the parties' agreement. [3] Prior to the filing of the amended charge, each of the employees filed independent appeals of their terminations either through the negotiated grievance procedure or with the Merit Systems Protection Board (MSPB).

B. Judge's Decision

As a preliminary matter, in response to the Respondent's motion for summary judgment, the Judge found that § 7116(d) of the Statute did not bar litigation of the repudiation complaint because it was separate from the individual appeals filed by the terminated employees. However, the Judge also found that § 7116(d) did bar consideration of remedies for the individual employees, because their claims had already been raised in the appeals. *Id.* at 908.

The Judge resolved the repudiation claim using the two-prong test set forth by the Authority in *Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858 (1996) (*Scott AFB*). *Davis-Monthan*, 60 FLRA at 919-20. Under *Scott AFB*, repudiation is: (1) a clear and patent breach of a provision; that (2) goes to the heart of the parties' agreement. *Id.* at 862.

With respect to the first element of *Scott AFB*, the Judge found that the language in § 9 of the Local Drug Agreement was "clear and wholly unambiguous" in mandating that the Respondent "retain employees in a duty or approv[ed] leave status while undergoing rehabilitation." *Davis-Monthan*, 60 FLRA at 917, 918 (emphasis omitted). The Judge further found that Article 27 of the parties' agreement was based on the "concept of rehabilitation" and provided for employee job security following rehabilitation. *Id.* at 919. The Judge concluded that the Respondent committed a clear and patent breach of § 9 of the Local Drug Agreement and Article 27 of the parties' agreement by terminating Employee C and proposing termination for Employee N when they were in rehabilitation. *Id.* at 918-19. In this regard, the Judge found that, by its words and actions, the Respondent had "wholly rejected the concept of rehabilitation of the employee to return him, or her, to duty" following successful completion of rehabilitation. *Id.* at 19.

With respect to the second element of *Scott AFB*, the Judge determined that § 9 went "to the very heart of the Local Drug Agreement and Respondent's refusal to comply . . . negate[d] the primary purpose of the [a]greement[.]" *Id.* The Judge further found that Article 27 was "a critical adjunct to the Local Drug Agreement and a very important part of the [parties' agreement]." *Id.* at 919-20. Based on these findings regarding the nature of the breached provisions, the Judge found that the Respondent's "continuous" and "intentional" actions repudiated § 9 of the Local Drug Agreement and Article 27 of the parties' agreement, in violation of § 7116(a)(1) and (5) of the Statute. [4] *Id.*

As a remedy, the Judge ordered the respondent to cease from failing to abide by the various requirements of § 9 of the Local Drug Agreement and Article 27 of the parties' agreement and to take "affirmative action" to comply with those provisions. *Id.* at 920.

C. The Authority's Decision in *Davis-Monthan*

The Respondent filed with the Authority several exceptions to the Judge's decision. Specifically, the Respondent claimed that: (1) the Judge erroneously used the "plain meaning rule" to interpret ambiguous contract provisions and misapplied Authority precedent concerning repudiation; (2) the provisions allegedly repudiated were unenforceable because they were con-

2. The three employees who were terminated are identified by the first initial of their last name (i.e., Employees C, H and N). The record established that Employee C was fired during rehabilitation; Employee H was fired prior to being offered rehabilitation; and Employee N was issued a notice of proposed termination while in rehabilitation and was fired immediately after completing rehabilitation. *See Davis-Monthan*, 60 FLRA at 915-16.

3. The relevant portions of Article 27 of the parties' agreement and § 9 of the Local Drug Agreement are set forth fully in the appendix to this decision.

4. The Judge also found repudiations of two other sections of the Local Drug Agreement: § 12, relating to the availability of rehabilitation; and § 13, relating to medical verification and appeal procedures, an issue he raised *sua sponte* in his decision based on evidence related to the termination of Employee H. *See Davis-Monthan*, 60 FLRA at 919. The Authority reversed both of these findings, and they will not be further addressed in this decision because the court in *Local 2924* upheld the Authority's ruling on § 12 and the Charging Party did not challenge the Authority's ruling on § 13. *See Local 2924*, 370 F.3d at 380-81; Petitioner's Brief at 11 n.2.

trary to management's right to discipline under § 7106 of the Statute and violated Executive Order 12564; and (3) the Judge erred in failing to allow the introduction of evidence regarding an alleged waiver of the Charging Party's right to file ULP charges under Article 30, §§ 2 and 3 of the parties' agreement. [5] The GC opposed the Respondent's exceptions and filed a cross-exception to the Judge's refusal to grant reinstatement and back pay to the affected employees. In an opposition to the GC's cross-exception, the Respondent argued that the Judge should have dismissed the ULP complaint because it is barred by § 7116(d) of the Statute.

In resolving the exceptions and cross-exception, the Authority noted that, under the first element of *Scott AFB*, if a contractual provision is unclear, then "acting in accordance with a reasonable interpretation of that term, even if it is not the only reasonable interpretation, does not constitute a clear and patent breach of th[ose] terms of the agreement." *Id.* at 900 (quoting *Scott AFB*, 51 FLRA at 862-63). The Authority majority then found that the Respondent had not repudiated § 9 of the Local Drug Agreement and Article 27 of the parties' agreement because the meaning of those provisions was ambiguous and the Respondent had "acted under a reasonable interpretation of the parties' agreements." *Id.* Accordingly, the Authority dismissed the ULP complaint and declined to consider the second prong of the repudiation test or the remaining exceptions and cross-exception.

D. The Court's Decision in *Local 2924*

On appeal, the court held that the Authority's interpretation of the parties' agreements could not be "squared with the plain language of those agreements[, which is] indisputably clear in establishing a temporary safe harbor for employees who are properly engaged in rehabilitation and not otherwise unsuitable for employment." *Local 2924*, 470 F.3d at 377. In particular, the court found that there was no ambiguity in § 9 of the Local Drug Agreement or Article 27 of the parties' agreement and that the Authority erred in its reliance on the testimony of Respondent officials to interpret the provisions. *Id.* at 382-83. The court stated: "Section 9 and Article 27 create a safe harbor that protects a narrow class of employees for a limited period of time so that they may focus on treatment and rehabilitation." *Id.* at 383. Finding that the Authority erred in concluding that the Respondent did not clearly and patently breach the agreements, the court set aside the Authority's dismissal of the complaint and remanded the case to the Authority "to give effect to the plain meaning of the agreements and apply the second prong of [the] repudiation test[.]" *Id.* at 384.

III. Analysis and Conclusions

A. The provisions breached by the Respondent go to the heart of the parties' agreements.

In evaluating the second element of repudiation, the Authority focuses on the importance of the provision that was breached, or allegedly breached, relative to the agreement in which it is contained. *See, e.g., U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau of Customs & Border Prot., Wash., D.C.*, 60 FLRA 943, 952 (2005) (then-Member Pope dissenting on other grounds) (*Bureau of Customs*) (provisions setting forth bargaining obligation on issue of firearm policy were sole purpose for, and therefore went to the heart of, a memorandum between parties); *24th Combat Support Group, Howard Air Force Base, Rep. of Pan.*, 55 FLRA 273, 282 (1999) (*Howard AFB*) (provisions relating to availability of negotiated grievance procedure went to heart of parties' agreement); *Dep't of the Air Force, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 52 FLRA 225, 231-32 (1996), (provision related to indoor smoking went to heart of smoking policy agreement); *U.S. Dep't of the Interior, Bureau of Reclamation, Wash., D.C. & Mid-Pacific Reg'l Office, Sacramento, Cal.*, 46 FLRA 9, 28 (1992) (provision related to positions included in bargaining unit went to heart of parties' agreement); *Pan. Canal Comm'n, Balboa, Rep. of Pan.*, 43 FLRA 1483, 1508-09 (1992) (*Pan. Canal*) (provisions allowing certain employees to appeal adverse decisions through the administrative grievance procedure went to the heart of the parties' agreement); *Dep't of Def., Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 40 FLRA 1211, 1219-20 (1991) (provision related to shift scheduling and official time for union representatives went to the heart of the parties' negotiation ground rules agreement).

5. Article 30 of the parties' agreement provides, in relevant part:

> Section 2.a. Scope: A grievance is defined to be any complaint by any employee, the Union, or the Employer concerning: . . . (2) Any claimed violation, misinterpretation, or misapplication of this Agreement, or any supplement to this Agreement, or any, law, rule, or regulation affecting conditions of employment. . . .
>
> Section 3. This negotiated procedure shall be the exclusive procedure available to the Union and the employees in the bargaining unit for resolving such grievances except as provided in Section 4 of this Article [addressing statutory appellate procedures for employees affected by prohibited personnel practices].

Davis-Monthan, 60 FLRA at 903.

As discussed above, the Judge found that § 9 went "to the very heart of the Local Drug Agreement" and that the Respondent's refusal to comply with it negated "the primary purpose of the agreement[,] which is to provide for the rehabilitation of employees and their return to prior positions." *Davis-Monthan*, 60 FLRA at 919. Although the Respondent challenged the Judge's interpretation of § 9, it filed no exception to his finding that this provision went to the heart of the Local Drug Agreement. Therefore, we find that § 9, which deals solely with the drug rehabilitation process, goes to the heart of the Local Drug Agreement and its negotiated protections for employees. *See, e.g., Bureau of Customs*, 60 FLRA at 952 (provision related to sole purpose of agreement goes to the heart of the agreement).

Similarly, the Judge found that Article 27 was "a critical adjunct to the Local Drug Agreement and a very important part of the [parties' agreement]." *Id.* at 919-20. As with the Judge's interpretation of § 9 of the Local Drug Agreement, the Respondent filed no exception to the Judge's finding regarding Article 27. In previous repudiation cases, the Authority has found that provisions related to employee disciplinary protections go to the heart of the agreements in which they are contained. *See, e.g., Howard AFB*, 55 FLRA at 282 (availability of negotiated grievance procedure); *Pan. Canal*, 43 FLRA at 1508-09 (availability of administrative grievance procedure). In accordance with this precedent, and in the absence of an exception to the Judge's conclusion regarding Article 27, we find that Article 27, which provides protection against some disciplinary action, goes to the heart of the parties' agreement.

Accordingly, we find that the second prong of the repudiation test has been met. We therefore consider the remainder of the exceptions raised by the parties.

B. The Agency did not timely raise its argument regarding § 7116(d) of the Statute.

In its opposition to the GC's cross-exception, the Respondent argued that the Judge erred in failing to dismiss the ULP complaint on the grounds that it was barred by § 7116(d) of the Statute. This claim relates to the validity of the underlying decision and, as such, we construe it as an exception to that decision. *See Soc. Sec. Admin., Office of Labor Mgmt. Relations*, 60 FLRA 66, 67 (2004) (Authority construed as exceptions arguments raised in union's opposition to agency exceptions). Under the Authority's Regulations, exceptions to a Judge's decision must be filed within twenty-five days after service of that decision. 5 C.F.R. § 2423.40. The Respondent did not raise the § 7116(d) argument until its opposition, which was filed well after the twenty-five-day filing limit.[6] As the exception was not timely filed, we dismiss it.[7] *See Fort McClellan Educ. Ass'n*, 56 FLRA 644, 645 n.3 (2000) (dismissing argument raised by the agency for the first time in opposition to union exceptions).

C. The relevant provisions of the parties' agreements are not contrary to management's right to discipline under § 7106 of the Statute.

The Respondent argues that the relevant provisions, as interpreted by the Judge, impermissibly affect management's right to discipline and, therefore, that failure to comply with them does not constitute repudiation. The GC argues that the provisions are enforceable as appropriate arrangements for employees affected by the exercise of management's right to discipline. As there is no dispute that § 9 of the Local Drug Agreement and Article 27 of the parties' agreement affect the right to discipline, *see* G.C. Opposition at 18, we address whether they constitute appropriate arrangements for the exercise of that right, under § 7106(b)(3) of the Statute. *See Nat'l Air Traffic Controllers Assoc., AFL-CIO*, 62 FLRA 174, 180 (2007).

In determining whether a provision constitutes an appropriate arrangement within the meaning of § 7106(b)(3), the Authority applies the analytical frame-

6. We note that the Authority has resolved jurisdictional issues raised in exceptions under § 7116(d) even though the issues were not properly raised before the judge. *See U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Coatesville, Pa.*, 57 FLRA 663, 666 (2002) (*Coatesville VA*). This is similar to the Authority's treatment of the jurisdictional issue of sovereign immunity. *See United States Small Bus. Admin., Wash, D.C.*, 51 FLRA 413, 423 n.9 (1995). *See also Dep't of the Army, United States Army Commissary, Fort Benjamin Harrison, Indianapolis, Ind. v. FLRA*, 56 F.3d 273, 275 (D.C. Cir. 1995). This precedent provides that jurisdictional arguments may be raised without regard to whether they were raised below. That is, the arguments may be raised without regard to *exhaustion* requirements. *See Coatesville VA*, 57 FLRA at 663. However, this precedent provides no basis for concluding that such arguments may be raised without regard to *procedural* requirements.

7. Even if we were to raise the issue of jurisdiction under § 7116(d) of the Statute *sua sponte*, we would reject the Agency's argument. In this regard, we note that the record establishes that the Charging Party's institutional charges were raised independently of, and for different purposes than, the various appeals filed by Employees C, H, and N. *See Davis-Monthan*, 60 FLRA at 908. The Authority has held that a union is not precluded, "in its institutional capacity as an aggrieved party[,] from filing an unfair labor practice charge to enforce its own independent rights merely because an employee has initiated an appeal or grievance procedure, based on the same factual situation, to enforce his individual rights." *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 801 (1996) (quoting *Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985)).

work set forth in *Nat'l Assoc. of Gov't Employees, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under this framework, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *See id.* at 31. A provision constitutes an arrangement if it is intended to ameliorate the adverse effects flowing from the exercise of a management right. *Fed. Aviation Admin., Wash., D.C.*, 55 FLRA 1233, 1236-37 (2000). If the proposal is determined to be an arrangement, then the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights. *See KANG*, 21 FLRA at 31-33. In doing so, the Authority weighs the benefits afforded employees under the arrangement against the intrusion on the exercise of management's rights. *See id.*

The Respondent concedes that the provisions are arrangements under § 7106(b) of the Statute, as they "tend to ameliorate the adverse effects flowing from the [Respondent's] decision to discipline employees who are found to test positive for illegal drugs." Exceptions at 27. Therefore, we find that § 9 of the Local Drug Agreement and Article 27 of the parties' agreement constitute arrangements for employees who are adversely affected by management's right to discipline employees because they restrict the Respondent's ability to remove employees from employment while they are engaged in rehabilitation.

Turning to whether the arrangements are "appropriate" within the meaning of § 7106(b)(3), an arrangement excessively interferes with management's rights — and is therefore not appropriate — if the benefits afforded employees under the provision are outweighed by the intrusion on the exercise of those rights. *U.S. Dep't of Veterans Affairs, Bd. of Veterans Appeals*, 61 FLRA 422, 425 (2005). As noted by the court in *Local 2924*, § 9 of the Local Drug Agreement and Article 27 of the parties' agreement protect from removal "a narrow class of employees for a limited period of time so that they may focus on treatment and rehabilitation." *Local 2924*, 470 F.3d at 383. The court found that the provisions create a "safe harbor" that not only limits removal, but also provides protection for job security and promotional opportunities. *Id.* at 382. However, the court also found that the relevant provisions do not: protect employees who refuse or fail to complete rehabilitation or who are subject to removal for reasons apart from their drug problem; foreclose any other kind of discipline short of dismissal during this period of time; or prohibit removal indefinitely. *Id.*; *see also Davis-Monthan*, 60 FLRA at 918 (judge's finding that provisions only affected right of removal during rehabilitation). Thus, the benefits afforded to employees under § 9 of the Local Drug Agreement and Article 27 of the parties' agreement are significant, and the burdens on the Respondent are relatively limited.

In addition, Section 9 of the Local Drug Agreement and Article 27 of the parties' agreement, as interpreted by the Judge and the court, are similar to a proposal that the Authority found to be an appropriate arrangement in *National Treasury Employees Union*, 43 FLRA 1279, 1303-08 (1992) (*NTEU).* The proposal at issue in *NTEU* required a stay of disciplinary or adverse action against an employee found to have used illegal drugs until 90 days had passed or a negotiated grievance or statutory appeals procedure was completed, whichever came first. The Authority found that the proposal did not excessively interfere with management's right to discipline employees because the agency was not restricted from disciplinary action for misconduct beyond illegal drug use. *Id.* at 1307-08. *Cf. Int'l Org. of Masters, Mates & Pilots, Pan. Canal Pilots Branch*, 32 FLRA 269, 275 (1988) (*Pan. Canal Pilots*) (proposal precluding all discipline for employees during and after successful rehabilitation excessively interfered with management rights); *NFFE, Local 2058*, 31 FLRA 241, 248-49 (1988) (proposal prohibiting removal of employees participating in rehabilitation "would be negotiable" if it were revised "to concern only removal on grounds of the initial finding of drug abuse"). Consistent with the foregoing, as the relevant disciplinary provisions in this case are limited to removals for drug abuse for a finite period of time, we find that they do not excessively interfere with management's rights to discipline.

We note that all of the arguments raised by the Respondent assume that the disciplinary limitations found in § 9 of the Local Drug Agreement and Article 27 of the parties' agreement have a much broader application than that found by the Judge and the court. *See* Respondent's Exceptions at 23-30. As such, these arguments do not support a finding that the relevant provisions, which are narrowly tailored to a specific group of employees for a limited period of time, excessively interfere with management's rights. Accordingly, we find that the Respondent has not established that the Judge's decision is contrary to management's rights under § 7106 of the Statute and we deny the exception.

D. The relevant provisions of the parties' agreements are not contrary to Executive Order 12564.

The Respondent argues that § 9 of the Local Drug Agreement and Article 27 of the parties' agreement, as

interpreted by the Judge, are unenforceable because they are contrary to § 5(d) of Executive Order 12564. In this regard, the Respondent contends that, under these agreement provisions, it would be unable to remove employees who do not refrain from using illegal drugs. Respondent's Exceptions at 31-32.

Proposals that are contrary to Executive Order 12564 are contrary to law and therefore, unenforceable under § 7117 of the Statute. *NFFE, Local 1655*, 49 FLRA 874, 889 (1994). The Authority has found that § 5(d) of the Executive Order requires agencies to initiate removal actions against any employee who, after being found to use illegal drugs, refuses to obtain counseling or rehabilitation, or does not refrain from using illegal drugs. *NFFE, Local 1665*, 49 FLRA at 889. The Authority has also found that proposals permitting agencies to initiate adverse actions against employees who continue using drugs following rehabilitation are not contrary to § 5(d) of the Executive Order. *AFGE, Local 738*, 38 FLRA 1203, 1213-14 (1990) (Member Talkin dissenting as to other matters).

Section 9 of the Local Drug Agreement is consistent with § 5(d) of the Executive Order in that it does not bar the removal of an employee who fails to remain drug-free. Article 27 of the parties' agreement, which requires the discipline of employees who do not "*successfully* complete a rehabilitation program," is consistent with § 5(d) of the Executive Order for the same reason. *Davis-Monthan*, 60 FLRA at 903 (emphasis added). *See Pan. Canal Pilots Branch*, 32 FLRA at 276 (proposal not contrary to § 5(d) of the Executive Order because it would not bar the agency from removing an employee who failed to complete rehabilitation). Further, the Respondent cites nothing in the relevant provisions of the parties' agreements that would bar the Respondent from implementing § 5(d) of the Executive Order. For these reasons, we find that Article 27 of the parties' agreement and § 9 of the Local Drug Agreement are not contrary to Executive Order 12564 and we deny the exception.

E. The Judge did not err in failing to consider the Respondent's waiver argument.

The Respondent asserts that the Judge "failed to allow the Respondent to present any evidence" related to its argument that Article 30 of the parties' agreement contains a "waiver of the [Charging Party's] right to file unfair labor practice charges over the Respondent's application of the [parties' agreement]." Respondent's Exceptions at 33. However, the Respondent provides no support for this claim. In this regard, the Respondent does not cite the hearing transcript or other document to show that the Judge (1) refused an attempt to present evidence relating to Article 30 or waiver; or (2) stated that such evidence would not be permitted. Therefore, we deny this portion of the exception as bare assertion. *See, e.g., United States Dep't of the Interior, Nat'l Park Serv., Women's Rights Nat'l Historical Park, Ne. Region, Seneca Falls, N.Y.*, 62 FLRA 378, 381 (2008) (*Nat'l Park Serv.*) (agency exception denied where claim was unsupported by evidence or argument).

The Respondent also argues that the Judge erred in failing to determine the meaning of Article 30 in his decision. Exceptions at 35. However, the Respondent has not established that the Judge was required to determine the meaning of Article 30. In this regard, the record indicates that, at the hearing, the Respondent stated only that Article 30, which sets forth the parties' negotiated grievance procedure, *could be* a bar to the ULP complaint. [8] Exceptions at 34-35 (quoting Tr. at 156-57). The Respondent's brief statement was made in connection with its oral motion to dismiss the complaint on the grounds that it acted in accordance with Executive Order 12564. The Judge orally denied the motion to dismiss without reference to Article 30. Tr. at 160. The Respondent made no further reference to the meaning of Article 30 at the hearing and, as noted above, introduced no evidence as to its meaning or proper interpretation. In addition, the Respondent made no arguments related to the interpretation of Article 30

8. The relevant portion of the transcript provides:

> Judge: . . .You entered into an agreement. I see nothing illegal about either one of the agreements. And I don't think you can ignore them. That's all I'm telling you.
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> [Respondent's Counsel]: Well, I understand, sir, I understand your position. And I've got to respectfully disagree. . . . [W]e will take a position on that. You know, taken to the next level . . . our grievance procedure requires that all issues of contract interpretation and — if I may, yes. "[Article 30,] Section 3. The negotiated grievance procedure shall be the exclusive procedure available to the union and employees in the bargaining unit for resolving such grievances except as provided in Section 4 of the article." And the grievances . . . are defined once again as claimed violation, misinterpretation, misapplication of this agreement or supplement to the agreement. If we take the argument of strict reading to the next level, then we have a complete bar to this whole procedure as it should have gone through the grievance procedure.
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> [GC's Counsel]: Your Honor, this case is a repudiation case. It involves a rejection of these agreement provisions. . . . This is an appropriate arena and forum to address that allegation. Could the union have filed a grievance over it? Certainly[,] the grievance procedure is broad enough. They chose to bring it to the ULP arena, and we're in the proper forum."

Tr. at 155-57.

in its pre-hearing motions to dismiss the complaint or its post-hearing brief to the Judge. For these reasons, we deny the Respondent's claim that the Judge erred by failing to determine the meaning of Article 30. *See Nat'l Park Serv.*, 62 FLRA at 381.

Accordingly, we deny the exception.

F. The Judge erred in not considering remedies for individual employees.

The Judge declined to consider the claims of, or remedies for, the individual employees named in the ULP complaint on the ground that their claims had already been addressed in the negotiated grievance procedure and the MSPB appeals process. *Davis-Monthan*, 60 FLRA at 909. The Judge stated that he considered evidence of the employee terminations only in relation to the Charging Party's institutional claims because "jurisdiction of removals from federal service is vested exclusively in the MSPB or negotiated grievance procedure and may not be brought as unfair labor practices." *Davis-Monthan*, 60 FLRA at 909.

The Authority has stated that "when an issue is properly raised as [a ULP] under section 7116, nothing therein would prevent the Authority from remedying any violation found." *Dep't of the Air Force, Air Force Sys. Command, Elec. Sys. Div.*, 14 FLRA 390, 392 (1984) (*Elec. Sys.*) (finding that a prior MSPB ruling did not bar a remedy of back pay in ULP case). In the course of rendering his decision on the repudiation issue raised by the Charging Party, the Judge found that the termination of Employees C and N constituted a clear and patent violation of § 9 of the Local Drug Agreement and Article 27 of the parties' agreement. [9] *Davis-Monthan*, 60 FLRA at 918-19.

In these circumstances, the Judge was not barred by § 7116 of the Statute from considering a remedy for Employees C and N. *See Elec. Sys.*, 14 FLRA at 392. In this regard, the purpose of ULP remedies is to restore, "as far as possible, the *status quo* that would have obtained if the violation had not been committed." *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Danbury, Danbury, Conn.*, 55 FLRA 201, 205 (1999) (citations omitted). As applied here, restoring the "*status quo* that would have obtained" if the Agency had not repudiated the parties' agreement by terminating two employees requires consideration of the impact of the repudiation on those individuals. [10] *Id.* Moreover, in considering the remedy for this ULP, it is appropriate to take into account the remedies awarded in other appeals processes. *See e.g., Elec. Sys.*, 14 FLRA at 392 (taking MSPB decision into account in assessing remedy). As the record does not reflect the changes that have occurred since the outset of this proceeding, we leave for compliance proceedings the determination of any specific losses and other appropriate relief for Employees C and N. *See Dep't of Def. Dependents Sch.*, 54 FLRA 259, 270 (1998) (Authority left for compliance proceedings specifics of remedy to compliance proceedings when it reversed judge's finding that remedy was not warranted and appropriate remedy could not be determined due to passage of time).

Accordingly, we find that the Judge's decision is deficient as to its denial of a remedy for Employees C and N, and we grant Employee C and N a "make whole" remedy.

IV. Order

Pursuant to § 2423.41 of our Regulations and § 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Failing to abide by Article 27 of the parties' Collective Bargaining Agreement and § 9.a of the parties' Local Drug Agreement.

(b) Failing and refusing to honor the provisions of Section 3 of Article 27 of the Collective Bargaining Agreement.

(c) Failing and refusing to honor all provisions of the parties' Local Drug Agreement and in particular:

(i) Failing and refusing to retain employees in a duty or approved leave status while undergoing rehabilitation, as provided in Section 9.a. of the Local Drug Agreement.

(ii) Failing and refusing to return employees to duty after successful completion of rehabilitation, as provided by Section 9.a. of the Local Drug Agreement.

9. The termination of Employee H, who was not offered rehabilitation prior to termination, was found to be a violation of § 13 of the Local Drug Agreement. As noted above, this claim is no longer before us.

10. As the remedy ordered flows from the institutional claim of contract repudiation — and not from the employees' individual claims — there is no inconsistency with § 7116 of the Statute.

(d) Failing and refusing to genuinely and realistically consider the return of employees to Testing Designated Positions after successfully completing rehabilitation.

(e) Failing and refusing to recognize and honor the seniority and grant successfully rehabilitated employees the right to bump into occupied positions.

(f) Issuing notices of proposed removal while an employee is actively and successfully enrolled in an approved drug rehabilitation program.

(g) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Statute:

(a) Comply with Article 27 of the parties' Collective Bargaining Agreement and with the parties' Local Drug Agreement.

(b) Offer to reinstate employees C and N to their positions at the Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, and make them whole, consistent with applicable law and regulation, to the extent they have suffered any reduction of pay and/or benefits as a result of the repudiation of the parties' agreements.

(c) Post at its facilities at Davis-Monthan Air Force Base, Tucson, Arizona, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, and they shall be posted at the Aerospace Maintenance and Regeneration Center, and shall be maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Denver Regional Office, in writing within 30 days of the date of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify bargaining unit employees that:

WE WILL NOT fail or refuse to abide by Article 27 of the parties' Collective Bargaining Agreement, and the parties' Local Drug Agreement and in particular with Section 9.a. thereof.

WE WILL NOT fail or refuse to retain employees in a duty or approved leave status while undergoing rehabilitation.

WE WILL NOT fail or refuse to return employees to duty after successful completion of rehabilitation.

WE WILL NOT fail or refuse to genuinely and realistically consider the return of employees to Testing Designated Positions after successfully completing rehabilitation.

WE WILL NOT fail or refuse to recognize and honor employee seniority rights.

WE WILL NOT issue notices of proposed removal for drug or alcohol use while the employee is actively and successfully enrolled in an approved drug rehabilitation program.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL grant successfully rehabilitated employees the right to bump into occupied positions.

WE WILL offer to reinstate employees C and N to their positions at the Aerospace Maintenance and Regeneration Center, Davis-Monthan Air Force Base, and make them whole, consistent with applicable law and regulation, to the extent they have suffered any reduction of pay and/or benefits as a result of the repudiation of the parties' agreements.

_____
(Agency)

Date:_____ By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado 80204-3581, and whose telephone number is: 303-844-5224.

Appendix

Article 27: Alcoholism and Drug Abuse Programs

Section 1. For the purposes of this Article, alcoholism and drug abuse are defined as illnesses in which the employee's job performance is impaired as a direct consequence of the abuse of alcohol or drugs.

Section 2. The Union and the Employer jointly recognize alcoholism and drug abuse as treatable illnesses; therefore, employees having these illnesses will receive the same careful consideration and offer of assistance that is extended to employees having any other illness or health problem. Employees participating in drug or alcohol abuse rehabilitation programs may request sick, annual, or leave without pay the same as they would for medical purposes. If a professional from a rehabilitation program makes a request, in writing, on behalf of the employee for leave, such leave should be granted. Failure to successfully complete a rehabilitation program which results in acceptable work performance, after a reasonable period of time, will result in disciplinary procedures.

Section 3. The ultimate objective of the drug and alcohol abuse program will be to rehabilitate the employee through counseling, referral for medical assistance, and other such means as may be available to aid in the recovery of the employee. Referral for diagnosis and acceptance of treatment should in no way jeopardize an employee's job security or promotional opportunities. Participation in the Drug and Alcohol Abuse Prevention and Control Program, and any information resulting from such participation, including medical records, will be kept in strict confidence in accordance with applicable laws and regulations.

Section 4. The Union shall be entitled to one representative on the Base Drug and Alcohol Abuse Control Committee. A designated Union representative will be invited to attend seminars, workshops, conferences, or training sessions designed to acquaint supervisors, managers, and employees with the Program and [its] operation.

Section 5. Drug testing will be accomplished in accordance with the Air Force Civilian Drug Testing Agreement between Davis-Monthan Air Force Base and AFGE Local 2924.

Local Drug Agreement, Section 9 – Counseling and Rehabilitation

Employees whose tests have been verified positive will be notified in writing to report to Social Actions for evaluation and appropriate referral for counseling and/or rehabilitation. Employees will be informed of the consequences should they refuse counseling or rehabilitation.

a. The Employer will retain employees in a duty or approved leave status while undergoing rehabilitation. If placed in a non-duty status, the employee will normally be returned to duty after successful completion of rehabilitation. At the discretion of the activity commander, an employee may return to duty in a TDP, including the TDP formerly occupied by the employee, if the employee's return would not endanger public health, safety or national security.

Member Beck, Concurring in part and Dissenting in part:

I join with the Majority in concluding that the Agency failed to meet its obligations under § 9 of the Local Drug Agreement and Article 27 of the parties' collective bargaining agreement. In this respect, I agree that the Agency's breach went to the heart of each agreement and that neither agreement is contrary to management's right to discipline under § 7106(b)(3) of the Statute nor otherwise contrary to law.

I also agree that § 7116(d) does not bar the Union from obtaining appropriate institutional relief for the unfair labor practice arising from the Agency's repudiation.

Whether § 7116(d) operates as a bar to individual relief goes directly to our subject matter jurisdiction. *Wildberger v. FLRA*, 132 F.3d 784, 790-2 (D.C. Cir. 1998) (§ 7116(d) acts as a bar to FLRA jurisdiction when an individual raises the same issues in both an unfair labor practice charge and MSPB appeal). Consequently, it must be resolved on the merits — even if we must do so *sua sponte* — and not simply as a procedural technicality.

Section 7116(d) of our Statute barred individual relief once the employees filed individual appeals to the Merit Systems Protection Board or under the negotiated grievance procedure. *Wildberger*, 132 F.3d at 793 (§ 7116(d) bars Authority from exercising jurisdiction over employee's proposed removal); *Dept of Commerce, Bureau of the Census v. FLRA*, 976 F.2d 882, 890 (4th Cir. 1992) (when initial disciplinary action ripens into a "full-blown 'adverse employment action'" sole jurisdiction vests in the MSPB under § 7116(d)). It is inconsistent to conclude that the Union's repudiation charge is permitted under § 7116(d) only because it addresses the "institutional" interests of the Union, yet at the same time conclude that individual relief could be appropriate under § 7116(d).