69 FLRA No. 54

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE COMMISSARY AGENCY
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0063
(Union)

0-AR-5140

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DECISION

May 20, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

The Agency relocated the Union's office from the commissary on a particular Agency base to a temporary location. When the Union learned it could no longer stay in the temporary location, it filed a grievance alleging that the Agency violated the parties' agreement. The parties agreed to utilize mediation-arbitration to resolve the dispute, but failed to reach settlement through mediation. Arbitrator Kathy Fragnoli then issued an award, finding that the Agency violated Article 9 of the parties' agreement, which addresses Union facilities and office space. She ordered the Agency to provide the Union with an office in or near the commissary, and to reimburse certain Union costs. She also instructed the parties to bargain over the location and size of the office space. This case presents us with four substantive questions.

The first question is whether the award is contrary to law because an earlier-filed unfair-labor-practice (ULP) charge bars the grievance under § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Because the grievance and the earlier-filed ULP charge are not based on the same factual circumstances or legal theories, the answer is no.

The second question is whether the Arbitrator exceeded her authority. Because the Agency's exceeds-authority exception is premised on its argument that the earlier-filed ULP charge barred the grievance – and we reject that argument – the answer is no.

The third question is whether the Arbitrator denied the Agency a fair hearing. Because the Agency fails to demonstrate that the Union's submission of documents to the Arbitrator affected the Agency's ability to present its case so as to prejudice the fairness of the hearing as a whole, the answer is no.

The fourth question is whether the award fails to draw its essence from the parties' agreement. Because the Agency argues that the matter is covered by the parties' agreement, and the covered-by doctrine does not provide a basis for setting aside an award on essence grounds, the answer is no.

II. Background and Arbitrator's Award

For over forty years, the Agency provided the Union with office space in the base's commissary. In 2009, the Union's office space flooded, resulting in unsafe office air quality. The Agency moved the Union office to a temporary location in another building so that the Agency could make repairs to the space.

Following the move to its temporary office, the Union requested permanent office space in the commissary. The Agency failed to respond to the Union's request. In response, the Union filed a ULP charge alleging that the Agency improperly failed to bargain under Article 41 of the parties' agreement and repudiated Article 9 regarding Union office space. Additionally, the Union requested reimbursement for installation and maintenance of telephone lines under Article 9. As relevant here, Article 9, Section 4 states that "[w]here the Union now has office space/office furnishings in [the commissary] facilities, such use will continue;" and Section 5 states that the Agency will provide the Union access to existing telephone services.[2] The Union, however, later withdrew the ULP charge.

As the Arbitrator found, approximately fourteen months later, the Union filed a grievance. The Union filed the grievance when it "learned in a phone call that the [Agency] would no longer allow [the Union] to stay in the temporary space" to which the Agency had moved the Union's office from the commissary.[3] The grievance alleged a violation of Article 9, Sections 1,[4] 4, and 5 of the parties' agreement and requested

[1] 5 U.S.C. § 7116(d).

[2] Exceptions, Attach. 5 at 31.

[3] Award at 2.

[4] Art. 9, § 1 requires the Agency to furnish the telephone numbers of Union officials to bargaining-unit employees.

reimbursement for costs associated with its office-space moves. Unable to resolve the grievance, the parties agreed to utilize mediation-arbitration to resolve the dispute with the assistance of the Arbitrator. The parties were unable to reach a settlement agreement, and shortly thereafter, the Arbitrator issued a one-page bench decision "grant[ing the grievance] in part."[5]

The Arbitrator found that the "mandates" of Article 9 were in place when the Agency terminated the Union's use of its temporary office space.[6] Specifically, she found that Article 9 "clearly states that the use of office space is to continue where already in place."[7] Further, the Arbitrator found that "[t]he [U]nion had office space in [the commissary] for over [forty] years."[8] Recognizing that "it would be impractical to ask that [the cAgency] utilize the former location,"[9] because following the flooding it had been converted to a fish market, she ordered the Agency to provide the Union with office space "in or near the commissary."[10] The Arbitrator also instructed the parties to bargain in good faith as to the location and size of the office. Finally, the Arbitrator granted, in part, the Union's request "to be reimbursed . . . for the cost of [its] moves."[11]

The Agency filed exceptions, and the Union filed an opposition to the Agency's exceptions.

III. Preliminary Matters: Sections 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's essence or contrary-to-law exceptions.

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations,[12] the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.[13] However, where an issue arises from the issuance of the award and could not have been presented to the arbitrator, it is not precluded by §§ 2425.4(c) and 2429.5 of the Authority's Regulations.[14]

The Agency argues that the award is contrary to law because the earlier-filed ULP charge bars the grievance under § 7116(d) of the Statute.[15] Although the Arbitrator did not address this argument in her decision, and the Union claims it was not raised before her,[16] we consider it because this argument challenges the Arbitrator's statutory jurisdiction.[17] And the Authority has declined to apply §§ 2425.4(c) and 2429.5 to bar exceptions regarding arbitrators' statutory jurisdiction, regardless of whether the exception was raised during the arbitration.[18]

Additionally, the Agency asserts that the award fails to draw its essence from the parties' agreement because the bargaining-order remedy is covered by the parties' agreement.[19] The Union contends that the Agency did not raise this argument before the Arbitrator.[20] But this argument arose from the award itself and, thus, the Agency would have had no basis for raising it before issuance of the award. In this regard, the remedies requested by the Union – office space in the commissary and reimbursement of moving-related costs – did not include a bargaining order.[21] Moreover, nothing in the record indicates that the Union sought a bargaining order as part of the remedy it requested at arbitration. Because the issue arose only with the award's issuance, §§ 2425.4(c) and 2429.5 of the Authority's Regulations do not bar the Agency's essence exception.[22] Accordingly, we consider it below.

IV. Analysis and Conclusions

A. The award is not contrary to law, because the earlier-filed ULP charge does not bar the grievance under § 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.[23]

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[5] Award at 1.
[6] *Id.* at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 5 C.F.R. §§ 2425.4(c), 2429.5.
[13] *E.g.*, *U.S. DHS, CBP*, 68 FLRA 157, 159 (2015) (Member Pizzella dissenting).
[14] *U.S. Dep't of the Navy, Supervisor of Shipbldg. Conversion & Repair, Pascagoula, Miss.*, 57 FLRA 744, 745 (2002) (*Pascagoula*).
[15] Exceptions at 3, 6.
[16] Opp'n at 2.
[17] *E.g.*, *U.S., Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (*Lakehurst*) (citing *EEOC*, 48 FLRA 822, 827-28 (1993)).
[18] *E.g.*, *id. Cf. U.S., DHS, ICE, L.A., Cal.*, 68 FLRA 302, 304 (2015) (*ICE*) (although not addressed by judge, Authority considered whether earlier-filed grievance barred ULP charge because argument challenged Authority's jurisdiction under § 7116(d)).
[19] Exceptions at 37-38.
[20] Opp'n at 3.
[21] Exceptions, Attach. 7 (Grievance) at 3.
[22] *Pascagoula*, 57 FLRA at 745.
[23] *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 making that assessment, the Authority defers to the arbitrator's underlying factual findings.[24]

Section 7116(d) of the Statute provides, in relevant part, that "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] . . . *but not under both procedures*."[25] The legal framework to determine whether an earlier-filed ULP charge bars a grievance has been well-established for over thirty years.[26] Authority case law holds that "in order for an earlier-filed ULP charge to bar a grievance under § 7116(d), 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 charge."[27] Adopting a test that the U.S. Court of Appeals for the District of Columbia Circuit has upheld,[28] the Authority will find that "a grievance and a ULP charge involve the same issue when they arise from the same set of factual circumstances *and* advance substantially similar legal theories."[29] Only if both requirements are satisfied does an earlier-filed ULP charge bar a subsequent grievance.[30]

As we begin our analysis, we note our dissenting colleague's implication that we rely on "distort[ed]"[31] facts, as well as his statement that we are "*clearly* wrong"[32] in finding that the ULP charge and the grievance involve different factual circumstances. Of course, getting the facts right is important. Getting the law right is important too. Applying years of Authority and judicial caselaw, and decades of our combined experience as decision makers on labor-management-relations issues, we admittedly see both the facts and the law in this case differently than our dissenting colleague – because based on the record and applicable legal precedent they *are* different. We discuss both below.

Here, the factual circumstances giving rise to the grievance and the ULP charge are not the same. The grievance alleged that the Agency violated Article 9 of the parties' agreement. The Arbitrator expressly found that the grievance, filed in early September 2014, was "filed as soon as the [U]nion learned . . . that the [Agency] would no longer allow [it] to stay in the temporary space," and was "timely because it was filed after the [U]nion discovered that [it] would no longer be able to stay in [its] temporary office space."[33] And the Agency does not challenge this arbitral finding as a nonfact.[34] Further, in late June 2014, shortly before the Union filed its grievance, the Union wrote the Agency – in a memorandum attached to the grievance – saying that it was requesting permanent office space "*[b]ecause of the recent development*."[35] Thus, the record makes it reasonably clear that the grievance alleged a violation of Article 9 based on a new factual circumstance occurring in 2014: the Union's impending eviction from its temporary office space and the Agency's refusal, which the Agency acknowledges,[36] to provide the Union with any new space.

As for the ULP charge, the charge was filed in early July 2013, more than a year before the grievance was filed. It thus appears to have preceded the new factual circumstances discussed above, about which the grievance was filed. Therefore, because the grievance and the ULP charge do not arise from the same set of factual circumstances, one of the requirements of the statutory-bar test is not met.[37]

The other requirement of the statutory-bar test is also not met. The grievance and the ULP charge do not advance substantially similar legal theories. The grievance alleged that the Agency violated Article 9 of the parties' agreement. In contrast, the ULP charge alleged that the Agency violated *the Statute* by "repudiating" Article 9 and by failing to bargain.[38] The Authority has drawn a clear distinction between legal theories supporting allegations of contract violations and allegations of statutory violations, finding that the theories are not substantially similar for purposes of § 7116(d).[39] And as particularly relevant here, the Authority has specifically held that a grievance alleging a

[24] *U.S. DOD, Dep'ts of the Army & Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[25] 5 U.S.C. § 7116(d) (emphasis added).
[26] *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444-45 (2014) (*BOP NY*) (Member Pizzella dissenting).
[27] *Id.* at 445 (citing *Lakehurst*, 64 FLRA at 1111).
[28] *AFGE, AFL-CIO, Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) (upholding Authority's finding that § 7116(d) bar applies where the "ULP charge and the grievance . . . rest upon the same factual predicate . . . *and* allege the same statutory and contractual violations" (emphasis added)).
[29] *U.S. Dep't of the Navy, Marine Corps, Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 545 (2014) (*Navy*) (Member Pizzella dissenting) (reaffirming test to determine whether earlier-filed ULP charge bars grievance under § 7116(d)); *BOP NY*, 67 FLRA at 445 (same).
[30] *ICE*, 68 FLRA at 304.
[31] Dissent at 12; *accord id.* at 10.
[32] *Id.* at 11.
[33] Award at 2.
[34] *See* Exceptions at 32.
[35] Grievance at 6 (emphasis added).
[36] Exceptions at 38 ("While the Union previously had office space, the space the [U]nion had was not habitable . . . . The Agency has no other viable office space, thus office space is not available.").
[37] *ICE*, 68 FLRA at 304; *Navy*, 67 FLRA at 545.
[38] Exceptions, Attach. 6 at 2.
[39] *E.g., U.S. DOL, Wash., D.C.*, 59 FLRA 112, 115 (2003) (*DOL*) (Chairman Cabaniss concurring & Member Armendariz dissenting).

breach of a contract provision raises a distinct legal theory from a ULP charge alleging a contract repudiation in violation of the Statute, for purposes of § 7116(d), even when both matters arise from the same set of facts.[40]

Further, to the extent that there is allegedly any overlap between the ULP charge and any *other* issues possibly raised in the grievance, that is immaterial; the ULP charge would not bar the *portion* of the grievance that challenges on contractual grounds the Agency's refusal to provide the Union with any new office space in connection with the Union's permanent eviction from its temporary space in 2014.[41] Accordingly, because neither of § 7116(d)'s statutory-bar requirements is met, we find that the earlier-filed ULP charge does not bar the grievance,[42] and we deny this Agency exception.

B. The Arbitrator did not exceed her authority.

The Agency argues that the Arbitrator exceeded her authority by not resolving the issue of whether the earlier-filed ULP charge barred the grievance.[43] Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration.[44] But when the Authority denies a contrary-to-law exception, and an exceeds-authority exception reiterates the same arguments as the contrary-to-law exception, the Authority denies the exceeds-authority exception.[45]

The Agency's exceeds-authority exception is premised on the Agency's claim that the earlier-filed ULP charge bars the grievance under § 7116(d) of the Statute.[46] Consistent with our denial of the Agency's contrary-to-law exception based on this same argument, we also deny the Agency's exceeds-authority exception.[47]

C. The Agency fails to demonstrate that the Arbitrator denied it a fair hearing.

The Agency claims that the Arbitrator denied it a fair hearing because it did not receive copies of the documents that the Union submitted to the Arbitrator.[48] The Authority will find that an arbitrator denied a fair hearing when the excepting party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence or conducted the proceedings in a manner that so prejudiced a party as to affect the fairness of the proceedings as a whole.[49]

The Agency claims that it did not receive copies of the Union's documentary submissions, even though the Union advised the Agency that it would receive them after the mediation-arbitration.[50] Consequently, the Agency contends, it did not have an opportunity to review and respond to the documents that the Union submitted.[51] The Union, however, disputes this claim.[52] The Union explains that the arbitration was "an informal mediation with no record of evidence," and it asserts that it gave to the Agency all documentary submissions that it gave to the Arbitrator.[53]

Assuming, without deciding, that the Union did not provide its documentary submissions to the Agency, the Agency fails to demonstrate that the Arbitrator denied it a fair hearing. The Agency neither identifies the submissions, nor demonstrates how not receiving them prejudiced the Agency so as to affect the fairness of the proceedings as a whole.[54] Additionally, there is no evidence that the Agency attempted to obtain copies of the Union's submissions when it did not receive them after the mediation-arbitration. Nor is there any evidence in the record that the Arbitrator precluded the Agency from doing so. The Agency's belief that it may have been prejudiced, without more, does not demonstrate that the Arbitrator denied the Agency a fair hearing.[55]

Accordingly, we deny the Agency's fair-hearing exception.

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[40] *E.g.*, *Lakehurst*, 64 FLRA at 1111 (citing *DOL*, 59 FLRA at 115-16).
[41] *See BOP NY*, 67 FLRA at 445-46 (when applying § 7116(d), the Authority looks at individual issues raised by a grievance, not the grievance as a whole).
[42] *ICE*, 68 FLRA at 304 (finding that earlier-filed grievance did not bar ULP charge because it did not arise from same set of facts).
[43] Exceptions at 42.
[44] *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 58 (2011); *see also U.S. Dep't of the Navy, Naval Base, Norfolk, Va.*, 51 FLRA 305, 307-08 (1995).
[45] *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 692 (2014) (*CBP*); *U.S. Dep't of the Army, White Sands Missile Range, White Sands Missile Range, N.M.*, 67 FLRA 619, 621-623 (2014).
[46] Exceptions at 7.
[47] *See, e.g.*, *CBP*, 67 FLRA at 692.
[48] Exceptions at 28.
[49] *U.S. Dep't of Transp., FAA*, 65 FLRA 806, 807 (2011) (*FAA*) (citations omitted).
[50] Exceptions at 28.
[51] *Id.*
[52] Opp'n at 2-3.
[53] *Id.* at 2.
[54] *See, e.g.*, *FAA*, 65 FLRA at 808 (finding that arbitrator did not deny agency fair hearing where agency did not receive union's post-hearing brief).
[55] *Id.*

D. The Agency's covered-by argument does not provide a basis for finding that the award fails to draw its essence from the parties' agreement.

The Agency argues that the award fails to draw its essence from the parties' agreement because the award requires bargaining over Union office space, which is a matter "already covered by" the agreement.[56]

In reviewing an arbitrator's interpretation of a collective-bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector.[57] Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective-bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement.[58] The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained."[59]

The award orders the parties to bargain over the location and size of the Union's office space.[60] The Agency argues that the parties are precluded from bargaining over matters "covered by" the agreement.[61] And, the Agency argues, the award fails to draw its essence from the agreement because office space "is clearly a covered matter."[62]

Under § 2425.6(e)(1) of the Authority's Regulations, an exception "may be subject to . . . denial if . . . [t]he excepting party fails to . . . support a ground" listed in § 2425.6(a)-(c), "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[63] Although an award's failure to draw its essence from the parties' agreement is a recognized private-sector ground,[64] a misapplication of the "covered-by" doctrine is not such a ground, and does not provide a basis for finding an award deficient under the essence standard set forth above.[65] Rather, the "covered-by" doctrine provides a basis for finding an arbitrator's finding of a statutory failure to bargain, under § 7116(a)(1) and (5) of the Statute, deficient on contrary-to-law grounds.[66] Here, the Agency premises its essence exception exclusively on an argument that Union office space is a matter covered by the parties' agreement. In doing so, the Agency misapplies the covered-by doctrine.[67] As the covered-by doctrine does not provide a basis for finding the award deficient under the essence standard, the Agency fails to support its essence exception.[68]

Accordingly, we deny the Agency's essence exception.

V. Decision

We deny the Agency's exceptions.

[56] Exceptions at 38.
[57] 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998).
[58] *U.S. DOL* (*OSHA*), 34 FLRA 573, 575 (1990).
[59] *Id.* at 576 (citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Dep't of HHS, SSA, Louisville, Ky. Dist.*, 10 FLRA 436, 437 (1982)).
[60] Award at 2.
[61] Exceptions at 38.
[62] *Id.*
[63] 5 C.F.R. § 2425.6(e)(1).
[64] *Id.* § 2425.6(b)(2)(i).
[65] *U.S. Dep't of the Treasury, IRS*, 68 FLRA 329, 333 (2015).
[66] *Id.* (citing *Navy*, 67 FLRA at 546).
[67] Exceptions at 38.
[68] *Id.*

Member Pizzella, dissenting:

The renowned nineteenth-century author, Mark Twain, once intoned, "Get your facts first . . . then you can distort 'em as much as you please."[1]

The facts of this case are not complex. The Agency operates a defense commissary (grocery store) for the uniformed and retired military community[2] in San Diego, California[3] on San Diego Naval Base.[4] Approximately 140 employees run the commissary. American Federation of Government Employees, Local 63 (AFGE, Local 63) represents employees who are part of the bargaining unit.

For thirty years, the Union had been provided cost-free office space in the commissary.[5] In May 2009, the president of AFGE, Local 63, complained that its office had a bad smell.[6] Therefore, the Agency conducted air-quality tests and decided that repairs to parts of the commissary were required. The Agency, therefore, moved the Union's office to a temporary location in another building on the naval base on which the commissary is located.[7]

While the repairs were being made, the Agency decided that it needed to "[m]odernize" its commissaries throughout the country in order to ensure that they would be comparable to commercial grocery stores in the surrounding community.[8] As part of that effort, the Agency decided that the space in the commissary, where the Union's office had been located, could be utilized more productively as a fish market in order to provide better services to the military community on the naval base and surrounding area.[9]

Therefore, the Agency provided the Union with new, permanent office space in the building where the temporary office was located. AFGE, Local 63 president Anthony Howard never asserted that the new office space was not adequate or comparable to its old office space but that did not stop him from asking the Agency, over and over again, to move the Union's office back into the commissary[10] even though that space had now been transformed into a fish market.

In ***June 2013***, Howard first filed an unfair-labor-practice (ULP) charge which alleged:

- that the Agency repudiated ***Article 9, Sections 1, 4, and 5*** of the parties' agreement;[11]
- when the Agency would not agree to move AFGE, Local 63's office ***from*** *the* ***temporary*** *location* ***to*** an office ***in the commissary***;[12]
- and, as part of the remedy, asked for ***reimbursement*** for the cost of telephone lines at the temporary location.[13]

In ***September 2014*** (a year later), Howard filed this grievance which alleged:

- that the Agency violated ***Article 9, Sections 1, 4, and 5*** of the parties' agreement;[14]
- when the Agency refused to provide AFGE, Local 63 office space ***in the commissary***;[15]
- and, as part of the remedy, asked for ***reimbursement*** for the cost of telephone lines at the temporary location.[16]

I agree wholeheartedly with the majority that "getting the facts right [and] . . . [g]etting the law right" are equally important.[17] And though my colleagues see "the facts and the law in this case differently," it is *obvious* to me that the earlier-filed ULP and the later-filed grievance involve the same facts and issues.[18] But to the majority, it is "*reasonably clear*" that the grievance alleges a violation "based on a *new* factual circumstance occurring in 2014."[19] Unfortunately, their assumption is *clearly* wrong.

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[1] Rudyard Kipling, *An Interview with Mark Twain,* in *The Mark Twain Anthology: Great Writers on His Life and Works* 76 (Shelley Fisher Fishkin ed., 2010).

[2] http://www.commissaries.com/about_us.cfm.

[3] http://www.buzzfile.com/business/San-Diego-Nb-Commissary-619-556-8657.

[4] https://foursquare.com/v/san-diego-nb-commissary/4b81d370f964a5200dc030e3.

[5] Exceptions, Attach. 7 (Grievance) at 7.

[6] *Id.*, Attach. 6 (ULP) at 2.

[7] *Id*.

[8] Defense Commissary Agency Strategic Outlook FY 2016-2020, http://www.commissaries.com/documenhttp://www.commissaries.com/stores/html/store.cfm?dodaac=HQCKL8ts/insidedeca/strategic-outlook.pdf.

[9] Award at 2; *see also* http://www.commissaries.com/about_us.cfm.

[10] Award at 2.

[11] ULP at 2.

[12] *Id.*

[13] *Id*.

[14] Grievance at 3.

[15] *Id*.

[16] *Id.*

[17] Majority at 5.

[18] *Id.*

[19] *Id.* (emphasis added).

Contrary to the majority's selective description of the events and timeline at issue in this case, *nothing* "*new*" happened ***in 2014***.[20] In the ULP filed on June 28, 2013, Howard acknowledged that the Union became aware, *as early as January 18, **2013***,[21] but no later than May 30, ***2013***, that the Agency *was moving its office "upstairs"* from its temporary location, *not back to the commissary*.[22] Nonetheless, Howard continued to insist throughout June ***2013*** (specifically June 5 and 18, 2013) that he wanted the Agency to move the Union's office *back to the commissary*.[23]

In other words, Howard filed the ULP (on June 28, 2013) because he wanted "office space *within the* . . . [*c*]*ommissary*."[24] Then, Howard filed this grievance (on September 3, 2014 after he withdrew the ULP charge in December 2013)[25] because the Agency would not "provid[e] permanent office space for AFGE[,] Local 63 within . . . [the c]ommissary."[26] In both complaints, Howard wanted the Agency to give him *office space in the commissary* and argued that the Agency violated *Article 9, Sections 1, 4, and 5* by not doing so.

The facts and issues are clearly the same.

In this respect, although it is the Union which distorts the facts and strains all credulity by asserting that the facts and issues in the ULP and grievance are different, it is the majority's extraordinarily indulgent view of § 7116(d) which permits the Union to undermine the intent of that jurisdictional bar.

As I noted in *U.S. DOJ, Federal BOP, Metropolitan Correctional Center, New York, New York*, Congress never "intended"[27] for the "question of when, and under what circumstances, a grievance will be barred by an earlier-filed ULP charge"[28] "to depend on how a union words its complaint[] and grievance[]."[29]

I would conclude, therefore, that § 7116(d) bars this grievance.[30]

In conclusion, I note that this case once again raises the "question" of "whether, and to what extent, collective bargaining is appropriate, or statutorily mandated, when it directly impacts" the ability of the military and its components to fulfill the mission for which those components exist.[31] Here, the Agency exists for just one purpose – to provide a place for military members, retirees, and their families to shop for groceries in a setting which offers the same products and services provided in the surrounding community, but at a savings, in order to enhance the recruitment and retention of qualified enlistees.[32] However, the Union's unbending insistence that the Agency provide space for its office in the commissary (and nowhere else), directly impacts the amount of space that the Agency needs to provide competitive, state-of-the-art service to the military community. I doubt that Congress intended for the former to take priority over the latter.

Thank you.

[20] *Id*. (emphasis added).
[21] ULP at 2.
[22] *Id*. (emphasis added).
[23] *Id*.
[24] *Id*. (emphasis added).
[25] *Id.* at 1.
[26] Grievance at 3.
[27] 67 FLRA 442, 453 (2014) (Dissenting Opinion of Member Pizzella).
[28] *Id*. at 451.
[29] *Id*. at 453.
[30] 5 U.S.C. § 7116(d).

[31] *AFGE, Local 1547*, 68 FLRA 557, 563 (2015) (Dissenting Opinion of Member Pizzella) ("Today's case does not address the question that may need to be resolved sometime in the future – whether, and to what extent, collective bargaining is appropriate, or statutorily mandated, when it directly impacts military and federal law-enforcement authority and, in turn, implicates mission readiness, national security, and the specific authorities granted by federal statute exclusively to the military and/or [the Department of Homeland Security].").
[32] http://www.commissaries.com/about_us.cfm.