

71 FLRA No. 146

UNITED STATES
DEPARTMENT OF THE AIR FORCE
WARNER ROBINS AIR LOGISTICS CENTER
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 987
(Union)

0-AR-5434

DECISION

May 21, 2020

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

I. Statement of the Case

We remind the federal labor-relations community that the Authority must apply a statutory bar to a grievance that implicates an arbitrator's jurisdiction whether or not the jurisdictional issue is raised by the parties. In this case, § 7121(d) of the Federal Service Labor-Management Relations Statute (Statute)¹ bars the grievance because an earlier filed equal employment opportunity (EEO) complaint concerns the same matter as the grievance.

This case involves a grievance alleging that the Agency's imposition of a fourteen-day suspension for the grievant's "lack of candor" in her EEO complaint was not for just and sufficient cause, was untimely, and was reprisal for engaging in protected EEO activity. Arbitrator Daniel M. Winograd found that the Agency's fourteen-day suspension of the grievant was not for just and sufficient cause as mandated by the parties' agreement because the Agency failed to prove the charge of lack of candor, the discipline was based on reprisal, and the discipline was untimely.

¹ 5 U.S.C. § 7121(d) ("[a]n aggrieved employee affected by a prohibited personnel practice . . . may raise the matter under a statutory procedure or the negotiated grievance procedure, but not both.").

Because the grievance concerns the same matter as the earlier-filed EEO complaint, it is barred by § 7121(d). Accordingly, we vacate the award.

II. Background and Arbitrator's Award

As relevant here, the grievant sent a memorandum to the Agency EEO specialist on February 23, 2016, alleging that her supervisor was creating a hostile work environment by stalking and harassing her. The Agency initiated the investigation into the allegations in March 2016. According to the record, the grievant subsequently filed a formal complaint with the Equal Employment Opportunity Commission (EEOC) based on the same allegations sometime before November 2016. In May 2017, the Agency concluded the investigation.²

Subsequently, on June 22, 2017, based on information obtained during the EEO investigation, the Agency issued a notice of proposed suspension for fourteen days based on a charge of lack of candor. Thereafter, the deciding official determined that the grievant lacked candor when "accusing [her supervisor] of stalking her, harassing her and discriminating against her because [the investigator] could find no corroboration for grievant's allegations."³ After returning from the fourteen-day suspension, the grievant filed the instant grievance on October 4, 2017, alleging that the Agency did not have just and sufficient cause for the suspension because it did not prove that she knew the statements to be false, the discipline was untimely, and the discipline was in retaliation for engaging in EEO activity.

The Arbitrator found that the Agency failed to prove that the grievant lacked candor when reporting her concerns about her supervisor, that the Agency failed to comply with the time requirements for effecting disciplinary action set forth by the parties' agreement, and that the suspension constituted unlawful reprisal for the grievant's EEO complaint.⁴

² Although the record indicates that the grievant filed a formal EEO complaint in November 2016, the record does not provide if that complaint has been processed further at the time of this filing. Award at 3-7.

³ Award at 7.

⁴ Member Abbott notes that the Arbitrator was correct in finding there was retaliation; however, the Arbitrator did not have jurisdiction to hear the grievance because § 7121(d) prevents him—and the Authority—from hearing a grievance when an earlier-filed EEO complaint concerns the same matter. As such, the grievant must pursue legal action through the forum she elected—the EEOC.

On November 9, 2018, the Agency filed exceptions to the Arbitrator's award.⁵ On December 3, 2018, the Union filed its opposition to the Agency's exceptions.

III. Analysis and Conclusion: The grievance is barred by Section 7121(d).

The Agency did not challenge the arbitrability of the grievance in its exceptions;⁶ however, an award cannot stand if the arbitrator lacked jurisdiction to resolve the grievance in the first place.⁷ Furthermore, the Authority can consider jurisdictional issues *sua sponte*.⁸ Therefore, we consider whether the grievance is barred by the earlier-filed EEO complaint in accordance with § 7121(d).

Section 7121(d) provides that an employee affected by a prohibited personnel practice may raise a “matter under a statutory procedure or the negotiated procedure, but not both.”⁹ For the purposes of § 7121(d), the term “matter” refers “‘not to the issue or claim of prohibited discrimination,’ but rather, to the personnel

action involved.”¹⁰ As such, § 7121(d) bars a grievance concerning a personnel action, or matter, if the matter was the subject of an earlier-filed EEO complaint.¹¹

The Authority has emphasized that election-of-forum provisions “were intended to prevent unnecessary or redundant filings on related, similar, or same matters.”¹² Further, discriminatory harassment is a “personnel action” for purposes of applying § 7121(d) when it results in a “significant change in duties, responsibilities, or working conditions.”¹³ Here, the grievant's formal EEO complaint sought relief for allegations that her *supervisor was stalking and*

⁵ Although we did not reach the Agency's exceptions, we note that it submitted affidavits in support of its arguments that were clearly not presented to the Arbitrator because they are dated after the award was issued. Exceptions, Attach., Supplement at 1-3. Consistent with 5 C.F.R. § 2429.5, the Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the arbitrator. See *U.S. DHS, U.S. CBP, JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008) (citing *U.S. Dep't of the Air Force, Air Force Material Command, Robins Air Force Base, Ga.*, 59 FLRA 542, 544 (2003)).

⁶ Exceptions Br. at 6 (arguing that the award is contrary to law because the Arbitrator applied the wrong standard of proof); *id.* at 8 (arguing that the Arbitrator's finding that the discipline was untimely failed to draw its essence from the parties' agreement); *id.* at 10 (arguing that the award is contrary to law because the Arbitrator incorrectly applied EEOC law).

⁷ *SSA*, 71 FLRA 205, 205-06 (2019) (Member Abbott concurring; Member DuBester dissenting) (citing *U.S. DOL*, 70 FLRA 903, 904 (2018) (Member DuBester dissenting) (citation omitted)).

⁸ *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891 (2018) (Member DuBester dissenting) (stating that jurisdictional issues can be considered *sua sponte* (citation omitted)); *U.S. Dep't of HUD*, 70 FLRA 605, 607 (2018) (Member DuBester dissenting) (stating that a “statutory exclusion ‘appl[ies] irrespective of whether a party makes such a claim before the Authority’” (citation omitted)); *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 423 n.9 (1995).

⁹ 5 U.S.C. § 7121(d).

¹⁰ *SSA, Office of Hearings Operations*, 71 FLRA 123, 124 (2019) (*SSA*) (Member DuBester dissenting) (citation omitted); *U.S. Dep't of VA, Waco Reg'l Office, Waco, Tex.*, 70 FLRA 92, 93-94 (2016) (Member Pizzella concurring) (finding that a grievance alleging that the Agency violated the parties' agreement when it denied the grievant's request for 100% official time was barred by an earlier-filed EEO complaint alleging the Agency's denial of 100% official time was based on race because they involved the same matter—the denial of 100% official time); *AFGE, Local 2145*, 61 FLRA 571, 573-74 (2006) (finding that a grievance was barred by an earlier-filed EEO complaint because both involved the same matter—the grievant's detail to the emergency room); *U.S. Dep't of the Treasury, IRS, Oxon Hill, Md.*, 56 FLRA 292, 296 (2000) (quoting *U.S. DOJ, U.S. Marshals Serv.*, 23 FLRA 564, 567 (1986) (*Marshals Serv.*)); *Marshals Serv.*, 23 FLRA at 567 (finding that a grievance alleging a suspension was not for just cause was barred by an earlier-filed EEO complaint alleging that the same suspension was discriminatory because they were based on the same matter—the suspension action).

¹¹ *U.S. Dep't of HUD*, 42 FLRA 813, 818 (1991) (*HUD*).

¹² *SSA*, 71 FLRA at 124 (citations omitted); see also *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 515 (2018) (*Navy Mid-Atlantic*) (Member DuBester dissenting) (“[C]hoice-of-forum provisions [were] provided by Congress in Title V of the U.S. Code and Title VII of the Civil Rights Act of 1964 to preclude a grieving party from relitigating the same issues.”) (citing 5 U.S.C. § 7703(b)(1)-(2); 42 U.S.C. § 2000e; *Perry v. MSPB*, 137 S.Ct. 1975, 1979 (2017)). Member Abbott notes that while *Navy Mid-Atlantic* concerns § 7116(d), the language is almost identical to the language of § 7121(d); therefore, the provisions should be interpreted in the same context. Compare 5 U.S.C. § 7116(d) (“[I]ssues which can be raised under a grievance procedure may . . . be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.”), with 5 U.S.C. § 7121(d) (“An aggrieved employee affected by a prohibited personnel practice . . . may raise the matter under a statutory procedure or the negotiated grievance procedure, but not both.”).

¹³ 5 U.S.C. § 2302(a)(2)(A)(xii); see *Leber v. Buzbee-Stiles*, No. 19-CV-412-JPG-GCS, 2019 WL 6173815, at *1 (S.D. Ill. Nov. 20, 2019) (“Adverse personnel actions include a change in working conditions by, say, a *supervisor's harassment*.” (emphasis added) (citing 5 U.S.C. § 2302(a)(2)(A)(xii); *Dekeyser v. Zimmermann*, No. 16-CV-422-WMC, 2017 WL 3484963, at *5 (W.D. Wis. Aug. 14, 2017))).

harassing her.¹⁴ The instant grievance alleged that the suspension—for her “lack of candor” in “*accusing [her supervisor] of stalking her, harassing her, and discriminating against her*”—was in retaliation for the grievant’s EEO complaint against her supervisor.¹⁵ Therefore, the litigation of the EEO complaint and the grievance would both require the factfinder to address the same underlying personnel action—the allegations of discriminatory harassment. The grievant filed the formal EEO complaint *before* she pursued the matter through the negotiated grievance procedure. As such, § 7121(d) bars the grievance, and the allegations raised in the barred grievance must be addressed in the forum that the grievant previously selected—the EEO-complaint process.¹⁶

This determination is well established in our caselaw. In *U.S. Department of HUD*, the Authority found that a grievance concerning the denial of a July 1990 request for a three-day workweek was barred by an earlier-filed EEO complaint concerning the denial of a July 1989 request for a three-day workweek because they involved nearly identical facts, or matters.¹⁷ Similarly, the instant grievance concerning a suspension based on the grievant’s allegations that her supervisor was stalking and harassing her is barred by the earlier-filed EEO complaint alleging that her supervisor was stalking and harassing her because they involve the same matter—allegations of stalking and harassment.¹⁸ Furthermore, the Authority has held that an investigation merged with a disciplinary action because the investigation and the discipline both involved the grievant’s/claimant’s actions; therefore, the earlier filed EEO complaint barred the later-filed grievance.¹⁹ Therefore, allowing the grievance involving the same

matter as the earlier-filed EEO complaint is in clear conflict with the bar established by § 7121(d).²⁰ As such, we vacate the award.

IV. Order

We vacate the award as contrary to law.

¹⁴ Award at 4-5.

¹⁵ *Id.* at 7, 14-15 (emphasis added). As mentioned above, the grievance also alleged that the discipline was not for just and sufficient cause because the Agency did not prove the grievant knew the statements to be incorrect and the discipline was untimely. *Id.* at 11-14.

¹⁶ Member Abbott notes that the same allegations raised in the barred grievance may be, and are most appropriately and efficiently, addressed as a retaliation claim in the grievant’s earlier filed EEO complaint. 5 U.S.C. § 7101(b) (“The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.”).

¹⁷ *HUD*, 42 FLRA at 817-18; *see also Heimrich v. U.S. Dep’t of the Army*, 947 F.3d 574, 580 (9th Cir. 2020) (finding that the term “matter” in 5 U.S.C. § 7121(d) refers to the “factual basis of the employee’s adverse action”).

¹⁸ *See U.S. Dep’t of the Air Force Headquarters, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 43 FLRA 290, 298 (1991) (finding differences between the EEO complaint and the grievance did not change the fact that both involved the same matter).

¹⁹ *SSA*, 71 FLRA at 124.

²⁰ Member Abbott believes that the majority should go a step further and overrule *AFGE, Local 3230, AFL-CIO*, 22 FLRA 448 (1986), to the extent it interprets § 7121(d) to apply only when the EEO complaint and grievance mention the specific disciplinary action.¹ 5 U.S.C. § 7121(d).

Member DuBester dissenting:

I disagree with the majority's decision to vacate the Arbitrator's award on grounds that the grievance is barred by § 7121(d) of the Federal Service Labor-Management Relations Statute (the Statute).¹ As in its decision in *SSA, Office of Hearings Operations (SSA)*,² the majority's application of this jurisdictional bar "belies any plausible interpretation of Authority precedent or the meaning of the term 'matter' in § 7121(d)."³

At the outset, it bears mentioning that neither the Union, the Agency, nor the Arbitrator addressed the question of whether the Union's grievance was barred by the grievant's earlier-filed equal employment opportunity (EEO) complaint. Moreover, the Authority did not raise this issue through a show-cause order, thereby depriving the Union of any opportunity to respond to the majority's jurisdictional concerns. It is therefore not surprising that the EEO complaint upon which the majority rests its conclusion is not part of the record. Consequently, it is not clear precisely what the grievant actually alleged in her complaint.

Nevertheless, the majority concludes that the Union's grievance is barred because the grievance and the EEO complaint "involve the same matter – allegations of stalking and harassment."⁴ But this conclusion entirely disregards our well-established standard for applying § 7121(d).

Section 7121(d) states that an employee affected by a prohibited personnel practice may raise a "matter under a statutory procedure or the negotiated procedure, but not both."⁵ As the majority itself acknowledges, the term "matter" refers "'not to the issue or claim of prohibited discrimination,' but rather, to the personnel action involved."⁶ Thus, to determine whether a grievance is barred by a previously-filed EEO complaint, "we must assess which personnel actions were at issue in the EEO complaint and the grievance."⁷

Even adopting the majority's characterization of the contents of the grievant's EEO complaint, and its conclusion that the discriminatory harassment alleged in

her complaint is a "personnel action" for the purposes of applying § 7121(d),⁸ there is simply no basis for concluding that it barred the Union's grievance. According to the majority, "the grievant's formal EEO complaint sought relief for allegations that her supervisor was stalking and harassing her."⁹ In contrast, the grievance challenged the Agency's suspension of the grievant for fourteen days,¹⁰ which is an entirely distinct "personnel action." That should be the end of the analysis.¹¹

Ignoring these basic principles, the majority nevertheless concludes that the grievance is barred by the EEO complaint because "litigation of the EEO complaint and the grievance would both require the factfinder to address the same underlying personnel action – the allegations of discriminatory harassment."¹² But this broad application of § 7121(d)'s jurisdictional bar is wholly unsupported by the cases upon which the majority relies for this conclusion.¹³

For instance, in *U.S. Department of HUD*,¹⁴ the Authority concluded that the grievance was barred because it concerned the same agency action as the EEO complaint – namely, the agency's denial of the grievant's submission, and resubmission, of his request

⁸ Majority at 4 & n.13.

⁹ *Id.* at 4.

¹⁰ Award at 15.

¹¹ See, e.g., *VA Waco*, 70 FLRA at 94 (EEO complaint barred the grievance because "it is clear from the record that the only underlying personnel action at issue in the EEO complaint, and in the grievance, was the [a]gency's denial of the grievant's request to work 100 [percent] official time"); *Keyport*, 69 FLRA at 294 (EEO complaint barred grievance because the grievant's "reprimand was the personnel action – or 'matter' – at issue in both the EEO complaint and the grievance"); *U.S. DOJ, U.S. Marshals Serv.*, 23 FLRA 564, 567 (1986) (EEO complaint barred the grievance because "the matter raised both by the grievance and the formal complaint of discrimination was the suspension, either proposed or final, of the grievant"); see also *AFGE Local 2145*, 61 FLRA 571, 574 (2006) (grievance concerning detail is barred by previously-filed EEO complaint challenging the same agency action, but portion of amended grievance challenging grievant's permanent reassignment, which included an allegation that the reassignment was in reprisal for the EEO complaint, was not barred by the complaint, which had been filed several months before the agency permanently reassigned the grievant and therefore did not address the reassignment).

¹² Majority at 4.

¹³ See *id.* at 4 n.17 (citing *U.S. Dep't of HUD*, 42 FLRA 813 (1991); *Heimrich v. U.S. Dep't of the Army*, 947 F.3d 574 (9th Cir. 2020)); see also *id.* at 5 n.18 (citing *U.S. Dep't of the Air Force Headquarters, Okla. City, Air Logistics Ctr., Tinker Air Force Base, Okla.*, 43 FLRA 290 (1991)).

¹⁴ 42 FLRA 813.

¹ 5 U.S.C. § 7121(d).

² 71 FLRA 123 (2019) (*SSA*) (Member DuBester dissenting).

³ *Id.* at 126 (Dissenting Opinion of Member DuBester).

⁴ Majority at 5.

⁵ 5 U.S.C. § 7121(d).

⁶ Majority at 3 (quoting *SSA*, 71 FLRA at 124).

⁷ *U.S. Dep't of VA, Waco Reg'l Office, Waco, Tex.*, 70 FLRA 92, 94 (2016) (Member Pizzella concurring) (*VA Waco*); *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 294 (2016) (*Keyport*).

for a three-day workweek.¹⁵ In *Heimrich v. U.S. Department of the Army*,¹⁶ the court specifically determined that it was required to consider “whether [the plaintiff] has challenged the *same underlying government action* in both his . . . grievance and in his EEO complaint.”¹⁷ Applying that standard, the court affirmed the dismissal of the plaintiff’s EEO complaint under § 7121(d) because both his grievance and EEO complaint challenged the agency’s termination of his employment.¹⁸ And in *U.S. Department of the Air Force Headquarters, Oklahoma City, Air Logistics Center, Tinker Air Force Base, Oklahoma*,¹⁹ the Authority found that the grievance was barred by the earlier-filed EEO complaint because they both involved the same matter – namely, “the alleged prohibited personnel practice of failing to promote the grievant.”²⁰

In the face of this well-established precedent, the majority’s reliance upon *SSA*,²¹ a decision from which I dissented, does not salvage its gross misapplication of § 7121(d) in the case before us today. If anything, the majority’s articulation of that standard – that the grievance is barred “because the investigation and the discipline both involved the grievant’s/claimant’s actions”²² – only confirms my observation that the majority has “stretche[d] the meaning of the term ‘matter’ in § 7121(d) beyond plausible recognition.”²³

Accordingly, I dissent.

¹⁵ *Id.* at 817 (“Both the EEO complaint and the grievance resulted from the [a]gency’s denials of requests by the grievant that his weekly work schedule be reduced from [four] days to [three].”).

¹⁶ 947 F.3d 574.

¹⁷ *Id.* at 580 (emphasis added).

¹⁸ *Id.*

¹⁹ 43 FLRA 290.

²⁰ *Id.* at 298.

²¹ 71 FLRA 123.

²² Majority at 5.

²³ *SSA*, 71 FLRA at 125 (Dissenting Opinion of Member DuBester).