

73 FLRA No. 110

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 547
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES A. HALEY
VETERANS HOSPITAL AND CLINICS
(Agency)

0-AR-5802

DECISION

June 15, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Roberta J. Bahakel issued an award finding § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)¹ barred a grievance because the grievance involved the same issue as a previously filed unfair-labor-practice (ULP) charge. The Union filed exceptions, arguing the award is contrary to § 7116(d) because the grievance and the ULP charge were brought on behalf of different aggrieved parties. We agree, so we set aside the award and remand the matter to the parties for submission to an arbitrator of their choice, absent settlement.

II. Background and Arbitrator's Award

The Agency conducted group interviews for promotions to a particular position (the position). The Union filed a ULP charge alleging that this violated § 7116(a)(1) and (5) of the Statute because it changed a "past practice of a required Agency interview

method/practice known as performing performance-based interviews" without giving the Union proper notice and an opportunity to bargain.² For remedies, the ULP charge requested status-quo-ante relief and an opportunity to bargain.

Subsequently, the Union filed a grievance on behalf of certain named employees (the grievants) whom the Agency interviewed, but did not select, for the position.³ Like the ULP charge, the grievance claimed that the Agency changed a past practice of conducting performance-based interviews. However, unlike the ULP charge, the grievance alleged that the Agency violated: a memorandum of understanding regarding performance-based interviews; two Office of Personnel Management guides; § 7116(a)(7) of the Statute; and "[a]ny and all other relevant articles, laws, regulations, customs, and past practices not herein specified."⁴ For remedies, the grievance requested: step increases for the grievants; "suitable compensation(s) and any other remedy the [A]rbitrator deems necessary to make the [grievants] whole"; and "[a]ll attorney legal fees and expenses incurred and any other remedies appropriate[.]"⁵

The grievance went to arbitration. Before the arbitration hearing, the Agency moved to dismiss the grievance, arguing that § 7116(d) of the Statute barred it because it allegedly involved the same issues as the previously filed ULP charge.

Although the Union argued that § 7116(d) did not bar the grievance because the charge and the grievance concerned different aggrieved parties,⁶ the Arbitrator did not address that issue. She found that § 7116(d) barred the grievance because the grievance and the ULP charge involved the same issues. Specifically, she determined that the grievance and the ULP charge arose from the same set of factual circumstances: the "Agency's use of group interviews for" promotions to the position.⁷ She acknowledged that the grievance and the charge requested different remedies, but she found "the theories advanced in support of the ULP [charge] and the grievance are substantially similar, in that both claim that the Agency violated a past practice when it changed to group interviews."⁸ Further, she stated that the grievance did not allege any violations of the parties' collective-bargaining agreement, and that the only difference between the legal theories of the ULP charge and the grievance was that they alleged violations of different subsections of the Statute.

¹ 5 U.S.C. § 7116(d) ("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 an unfair labor practice . . . , but not under both procedures").

² Opp'n Br., Ex. B (ULP Charge) at 1.

³ Although the grievance listed three employees, the Union notes that it later withdrew the grievance as to one of the employees. Opp'n Br. at 9 n.8.

⁴ Opp'n Br., Ex. C (Grievance) at 3.

⁵ *Id.*

⁶ Award at 5-6.

⁷ *Id.* at 6.

⁸ *Id.* at 7.

Consequently, the Arbitrator dismissed the grievance under § 7116(d).

The Union filed exceptions to the award on March 25, 2022, and the Agency filed an opposition on April 7, 2022.

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

The Union argues the award is contrary to § 7116(d) of the Statute because the grievance and the ULP charge were brought on behalf of different aggrieved parties.⁹ When an exception challenges an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.¹⁰ In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law.¹¹ In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts.¹²

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."¹³ In order for a ULP charge to bar a grievance under § 7116(d), (1) the issue which is the subject matter of the grievance

must be the same as the issue which is the subject matter of the ULP; (2) such issue must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedure must have been in the discretion of the aggrieved party.¹⁴ In determining whether the selection of the ULP procedure was in the discretion of the aggrieved party, the Authority has held that the *aggrieved* party is not necessarily the *filing* party.¹⁵ For example, the Authority has found that where a union filed a grievance alleging harm to a bargaining-unit employee, the employee, not the union, was the aggrieved party.¹⁶ Additionally, the Authority has found that one factual predicate can give rise to more than one aggrieved party.¹⁷ In this regard, the United States Supreme Court has recognized that § 7116(d) would treat as distinct aggrieved parties: (1) "a union in its institutional capacity . . . [seeking] to enforce its own independent rights"; and (2) an employee seeking "to enforce his own individual rights" based on "the same factual situation."¹⁸

The Union filed the ULP charge before it filed the grievance. The charge does not name the grievants or any other bargaining-unit employees, and it does not allege any violations of individual employees' rights.¹⁹ Rather, it concerns only the Union's institutional, statutory rights to notice and an opportunity to bargain.²⁰ Therefore, we find that the Union is the aggrieved party at issue in the ULP charge.²¹

⁹ Exceptions Br. at 7-9.

¹⁰ *NTEU*, 73 FLRA 315, 318 (2022) (Chairman DuBester concurring).

¹¹ *Id.*

¹² *Id.*

¹³ 5 U.S.C. § 7116(d).

¹⁴ *AFGE, Loc. 1770*, 72 FLRA 74, 75 (2021) (Chairman DuBester concurring).

¹⁵ *U.S. Dep't of the Army, Army Fin. & Acct. Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1353 (1991) (*Army*) ("[U]nder [§] 7116(d), the term 'party' attaches when the choice of particular procedures has been made by the aggrieved party, regardless of who is formally the filing party." (citing *U.S. DOJ, INS*, 20 FLRA 743, 745 (1985) (*INS*)); *DOD Dependents Schs., Pac. Region*, 17 FLRA 1001, 1003 (1985) (same)).

¹⁶ *See Army*, 38 FLRA at 1354 (grievant was aggrieved party in both ULP charge and grievance because, "[a]lthough the ULP charge was formally filed by the [u]nion, it was drawn, in part, to allege specifically a violation of the grievant's rights and was filed soon after the [a]gency proposed to discipline the grievant[]"); *INS*, 20 FLRA at 745 (where union filed ULP charge but ULP charge's general allegations, "in addition to being drawn to specifically relate to relief for the grievant, also provided the date of receipt by the grievant of the proposed action as the date the charge arose," grievant was aggrieved party); *cf. AFGE, Loc. 3475*, 55 FLRA 417, 419 (1999) (*Loc. 3475*) ("Although a ULP charge may be formally filed by a union, when it is drawn, in part, to allege specifically a violation of the grievant's rights, the Authority has concluded that the grievant was the aggrieved party in both the ULP charge and grievance." (citing *Army*, 38 FLRA at 1353)).

¹⁷ *E.g., U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 679-80 (2009) (*McChord*) (where it was undisputed that the ULP and grievance arose from the same factual circumstances, finding that a ULP seeking relief for a union and a grievance seeking relief for an individual employee did not share the same aggrieved party for purposes of § 7116(d)).

¹⁸ *Cornelius v. Nutt*, 472 U.S. 648, 665 n.20 (1985).

¹⁹ ULP Charge at 1.

²⁰ *Id.*

²¹ *See McChord*, 63 FLRA at 680 (finding a union was the aggrieved party in a ULP charge which sought "no relief for the [individual] employee").

By contrast, the Union filed the grievance on behalf of the individual grievants and requested remedies for those grievants.²² The grievance does not allege any violations of the Union's institutional rights or request any remedies that relate to those rights.²³ As such, although the Union filed the grievance, we find that the grievants are the only aggrieved parties at issue in the grievance.²⁴

Because the ULP charge and the grievance do not involve the same aggrieved parties, § 7116(d) of the Statute does not bar the grievance.²⁵ Thus, we find the award is contrary to law and we grant the Union's exception.

IV. Decision

We grant the Union's contrary-to-law exception, set aside the award, and remand the matter to the parties for submission to an arbitrator of their choice, absent settlement.²⁶

²² Grievance at 2-3.

²³ *Id.*

²⁴ See *INS*, 20 FLRA 744-45 (grievant was aggrieved party for purposes of § 7116(d) even where grievance arbitration "was directly invoked by the [u]nion" on the grievant's behalf).

²⁵ The Union also argues the award is contrary to § 7116(d) of the Statute because the grievance and the ULP charge concern different issues. Exceptions Br. at 9-10. Because we find the

award contrary to law on different grounds, it is unnecessary to address the Union's argument. *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 470 n.27 (2023); *U.S. Dep't of HUD*, 73 FLRA 287, 290 n.30 (2022) (then-Member Grundmann concurring; Chairman DuBester dissenting).

²⁶ See, e.g., *NLRB Prof'l Ass'n*, 73 FLRA 50, 53 (2022) (issuing similar remand where arbitrator erred in finding grievance not arbitrable).