70 FLRA No. 148

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 420
COUNCIL OF PRISON LOCALS, C-33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL COMPLEX
HAZELTON, WEST VIRGINIA
(Agency)

0-AR-5345

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DECISION

July 26, 2018

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

I. Statement of the Case

In this case, the Authority reaffirms its recent decision, *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia* (*Navy*),[1] and finds that a filing party may not parse substantially similar matters into separate statutory and grievance actions simply because that party would prefer to change how it elected to pursue its claims.

Arbitrator John C. Alfano found that § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute)[2] barred a Union-filed grievance because the Union had previously filed an unfair-labor-practice (ULP) charge over the same issue. We deny all exceptions.

II. Background and Arbitrator's Award

The Agency is a federal correctional institution. All Agency employees in the Union's bargaining unit are "[c]orrectional [w]orkers," but their regular positions are designated as either "custody" or "non-custody."[3] The Agency would occasionally assign non-custody employees to work certain custody posts, such as when those posts were unstaffed during training periods or emergencies – a practice known as "augmentation."[4] On June 1, 2016, the Agency notified the Union that, because of vacancies in custody posts caused by unfilled positions or employees using leave, the Agency would implement a policy of regularly assigning non-custody employees to custody posts (the augmentation policy).

The Union sought to bargain over the impact and implementation of the augmentation policy, but the Agency notified the Union that it had no duty to bargain because the matter was covered by the parties' collective-bargaining agreement.

On June 17, 2016, the Union filed a ULP charge against the Agency with the Federal Labor Relations Authority's Washington Regional Director (RD). The charge alleged that the Agency violated the Statute and the parties' agreement by refusing to bargain over implementation of the augmentation policy. Shortly thereafter, the Union requested to withdraw the ULP charge, and the RD granted the Union's request.

Ten days after the Union withdrew the ULP charge, on August 15, 2016, the Agency implemented the augmentation policy. The Union then filed a grievance alleging that the Agency's failure to bargain and its implementation of the augmentation policy violated the Statute and the parties' agreement. The grievance sought, in part, a remedy that required the Agency to stop augmentation until the parties completed bargaining.

The grievance went to arbitration, where the Arbitrator framed the issues, in relevant part, as whether: (1) the grievance was arbitrable, and (2) the Agency violated the parties' agreement when it implemented the augmentation policy on August 15, 2016.

The Agency argued that the grievance was not arbitrable because the earlier-filed ULP charge barred the grievance under § 7116(d) of the Statute.[5] The Arbitrator found that the ULP charge and the grievance made the "same claims" and that both arose from the Agency's notice of its intent to implement the augmentation policy and the Agency's refusal to bargain.[6] For example, the Arbitrator found that both the ULP charge and the grievance cited the day on which the Agency first

[1] 70 FLRA 512, 516 (2018) (Member DuBester dissenting).
[2] 5 U.S.C. § 7116(d).
[3] Award at 2 (explaining that employees in custody positions deal directly with inmates, and employees in non-custody positions perform duties related to the daily operation of the institution).
[4] *Id.* at 3.
[5] 5 U.S.C. § 7116(d).
[6] Award at 36.

notified the Union of its intent to implement the augmentation policy as the initial date of the alleged violations, used nearly identical wording, contained the same "essential claims," and "would have resulted in the same relief if granted."[7] Thus, the Arbitrator concluded that § 7116(d) barred the grievance and he made no findings regarding the grievance's merits.

On January 19, 2018, the Union filed exceptions to the Arbitrator's award, and on February 23, 2018, the Agency filed an opposition to those exceptions.

III. Analysis and Conclusions

The Union argues that the award is contrary to law because the Arbitrator erroneously found that the earlier-filed ULP charge barred all of the claims in the grievance.[8]

Under § 7116(d) of the Statute, issues may be raised under a negotiated grievance procedure or under the statutory ULP procedure, but not under both procedures.[9] As relevant here, for an earlier-filed ULP charge to preclude a grievance under § 7116(d), the ULP charge and the grievance must concern the same issue.[10] To determine whether the issues involved in a ULP charge and a grievance are the same, the Authority examines whether: (1) the ULP charge and the grievance arose from the same set of factual circumstances, and (2) the theories advanced in support of the ULP charge and the grievance were "substantially similar."[11] As emphasized in *Navy*, § 7116(d) bars a later-filed grievance where the theories advanced in an earlier-filed ULP charge are "*substantially similar*" – it does not require that the theories "be *identical*."[12]

In *Navy*, the Authority found that a grievance's contractual claims were not "different in any meaningful respect" from a ULP charge's statutory claims and, therefore, § 7116(d) barred the grievance.[13] Here, the Union argues that the ULP charge and the grievance involved different theories because the ULP charge concerned the Agency's failure to bargain over implementation of the augmentation policy and the grievance concerned contractual violations that arose from the Agency's decision to implement without having bargained.[14] But the Arbitrator found that the charge and the grievance both arose from the Agency's decision to implement the augmentation policy without bargaining, were "essentially" the same, and sought the same relief.[15] Accordingly, we find that the theories advanced in support of both claims are "substantially similar,"[16] and the Arbitrator did not err in concluding that the ULP charge and the grievance concern the same issue.

Further, the Union is mistaken that, because it withdrew the ULP charge, it had a choice of filing either a ULP charge or a grievance after the Agency implemented the augmentation policy.[17] The Authority has consistently held that an issue is raised for the purposes of § 7116(d) when a ULP charge is filed, even if that charge is withdrawn before adjudication on the merits.[18] Thus, when the Union elected to file the ULP charge, it foreclosed its ability to file a grievance later over the same issue.

For the foregoing reasons, the Union has not demonstrated that the award is contrary to law. Additionally, because the Arbitrator correctly found that § 7116(d) barred the grievance,[19] he did not exceed his authority[20] by failing to resolve whether the Agency violated the parties' agreement.[21]

IV. Decision

We deny the Union's exceptions.

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[7] *Id.* at 36-37.
[8] Exceptions at 5-7.
[9] 5 U.S.C. § 7116(d).
[10] In addition, the issue must have been earlier raised under the ULP procedures, and the selection of the ULP procedures must have been in the discretion of the aggrieved party. *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (citing *U.S. Dep't of HHS, Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000)). Here, the Union's exception challenges only the Arbitrator's finding that the ULP charge and the grievance concerned the same issue.
[11] *Navy*, 70 FLRA at 514 (emphasis omitted) (citing *U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991), *pet. for review denied sub nom*, *AFGE, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992) (*Army*)); *IAMAW, Lodge 39*, 44 FLRA 1291, 1297 (1992) (*Lodge 39*) (citing *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, 37 FLRA 1268, 1272 (1990)).
[12] 70 FLRA at 517.
[13] *Id.* at 516.
[14] Exceptions at 6-7.
[15] Award at 36-37.
[16] *E.g.*, *Navy*, 70 FLRA at 516-17.
[17] Exceptions at 6-7.
[18] *E.g.*, *U.S. Dep't of Transp., FAA*, 62 FLRA 54, 56 (2007); *Lodge 39*, 44 FLRA at 1298-99 (citing *U.S. Dep't of Interior, Bureau of Indian Affairs, Chemawa Indian Boarding Sch.*, 39 FLRA 1322, 1324 (1991)); *DOD Dependents Sch., Pac. Region*, 17 FLRA 1001, 1003 (1985) (citing *Headquarters, Space Div., L.A. Air Force Station, Cal.*, 17 FLRA 969, 970-71 (1985)).
[19] Award at 37-38.
[20] Exceptions at 8.
[21] *See, e.g.*, *AFGE, Council of Prison Locals, Council 33*, 66 FLRA 602, 605 (2012) (arbitrator did not exceed his authority by failing to address merits of a grievance after he found grievance was not arbitrable); *United Power Trades Org.*, 63 FLRA 208, 209 (2009) (same); *AFGE, Local 2250*, 10 FLRA 47, 47-48 (1982) (same).

Member DuBester, concurring:

I concur in the determination that under § 7116(d) of the Statute, the Union's grievance is barred by the Union's earlier-filed ULP charge. Authority case law holds that where the factual circumstances and underlying legal theories are the same, two different proceedings raise the same issue, even though one proceeding challenges a proposed action, and the other proceeding challenges the action once it has been implemented.[1] As the Arbitrator found in applying the § 7116(d) bar, "the statement of the grievance tracks the ULP closely," and "the essential claims in each statement remain the same."[2]

I reach this conclusion even though I disagree with the § 7116(d) analytical framework that the majority adopts in the *Navy* case, for reasons stated in my dissent in *Navy*.[3] The result in this case is the same under *Navy*, which the majority references in its decision, and under the Authority precedent that *Navy*, unjustifiably, modifies.

Finally, the negative, irrelevant dicta in the majority's first paragraph is not consistent with the respect to which parties in cases before the Authority are entitled. Whether § 7116(d) bars the Union's grievance is a legal question the answer to which does not depend on the Union's reasons for filing both a ULP charge and a grievance.

[1] *See, e.g.*, *U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991), *pet. for review denied sub nom AFGE, Local 1411 v. FLRA*, 960 F.2d 176 (D.C. Cir. 1992).

[2] Award at 37.

[3] *U.S. Dep't of the Navy, Navy Region Mid-Atlantic, Norfolk, Va.*, 70 FLRA 512, 518 (2018) (Dissenting Opinion of Member DuBester).