

**64 FLRA No. 193**

UNITED STATES  
DEPARTMENT OF THE NAVY  
NAVAL AIR ENGINEERING STATION  
LAKEHURST, NEW JERSEY  
(Agency)

and

NATIONAL ASSOCIATION  
OF GOVERNMENT EMPLOYEES  
LOCAL R2 - 84  
(Union)

0-AR-4638

DECISION

July 21, 2010

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

**I. Statement of the Case**

This matter is before the Authority on an exception to an award of Arbitrator Jay D. Goldstein filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exception.

The Arbitrator found that the Agency violated the parties' collective bargaining agreement by refusing to compensate police officers for their on-duty lunch periods in accordance with the Fair Labor Standards Act (FLSA). For the following reasons, we set aside the award.

**II. Background and Arbitrator's Award**

Article 34, Sections 1 and 2 of the parties' agreement establish a workday of eight and one-half hours for civilian police officers, including one half-hour compensated as overtime.<sup>1</sup> See Award at 4.

1. Article 34, Section 1 of the parties' agreement states, in pertinent part: "Hours of work . . . will be eight and one-half hours per day. . . . Employees shall have no designated lunch break, but will be permitted to eat lunch on the

Under those provisions, officers were permitted to eat "on-the-clock" without a designated lunch break. *Id.*

In November 2004, the Agency advised the Union that these agreement provisions were unlawful, that the work shift would begin to include an unpaid half-hour lunch period, and that the "previously paid one-half hour of daily overtime would be eliminated." *Id.* at 2.

In February 2005, the Union filed unfair labor practice (ULP) charges alleging that, by eliminating the paid lunch period, the Agency had repudiated Article 34, Sections 1 and 2 of the agreement in violation of the Statute. *Id.* The Authority's Regional Office dismissed the charges, and the Authority's Office of General Counsel denied the Union's subsequent appeal of that dismissal. *Id.*

The Union filed a grievance in February 2008 alleging "[r]epudiation of elements of the overall negotiated agreement[.]" and that "Article 34 . . . , Sections 1 and 2 have been completely ignored[.]" Exception, Attach., Ex. H at 2. The Union also filed a handwritten addendum to the grievance stating that "[t]he Union's position is that Management is in violation of the bargaining agreement." *Id.* at 3. The grievance was unresolved and submitted to arbitration. Award at 3.

At arbitration, the parties stipulated to the following issue: "Whether the civilian police officers . . . are entitled to 'standby' pay, or, are, in an on-call status (i.e., unpaid) during their one-half hour 'unpaid' lunch period?" *Id.* The Arbitrator found that the officers were required to be "on-duty" during their lunch period and, therefore, were entitled to compensation under Article 12, Section 12 of the parties' agreement.<sup>2</sup> *Id.* at 14-15. The Arbitrator noted that the Agency failed to raise any procedural or arbitrability questions regarding the Union's right to bring a claim. *Id.* at 15.

clock." Exception, Attach., Ex. B at 1. Article 34, Section 2 of the parties' agreement states, in pertinent part: "[T]he basic workweek will consist of five consecutive work days of eight and one-half hours each. Any time over eight hours in a day will be compensated as overtime in accordance with applicable laws and regulations." *Id.*

2. We note that Article 12, Section 12 of the parties' agreement specifically requires the Agency to comply with the FLSA.

### III. Positions of the Parties

#### A. Agency's Exception

The Agency argues that the award is contrary to § 7116(d) of the Statute.<sup>3</sup> Specifically, the Agency contends that the Union's ULP charges and grievance are based on the same legal theory that the Agency repudiated the parties' agreement. Exception at 9-10. The Agency also contends that, although it failed to raise § 7116(d) at arbitration, this does not preclude the Authority from considering the issue because challenges to subject-matter jurisdiction can be raised at any time. *Id.* at 10-11.

#### B. Union's Opposition

The Union contends that the award is not barred by § 7116(d) of the Statute because its grievance and ULP charges advance two different legal theories. Opp'n at 7-8. The Union concedes that "the initial grievance documents did claim repudiation," but argues that § 7116(d) did not bar the grievance because the Union: (1) did not pursue the repudiation theory at arbitration; (2) did not make a repudiation argument in its brief to the Arbitrator; and (3) added an addendum to the grievance that presented only a breach-of-contract theory. *Id.*

### IV. Preliminary Issue

It is undisputed that the Agency did not raise § 7116(d) before the Arbitrator. However, the Authority has held that a party's failure to raise § 7116(d) before an arbitrator does not preclude the Authority from addressing § 7116(d) issues. *See EEOC*, 48 FLRA 822, 827 (1993). In this connection, the Authority has held that "[e]xceptions that challenge an arbitrator's jurisdiction under the Statute may be considered by the Authority regardless of whether the jurisdictional argument was made to the arbitrator." *Id.* at 827-28 (citing *U.S. Dep't of Justice, Immigration & Naturalization Serv., El Paso, Tex.*, 40 FLRA 43, 51-52 (1991)). Accordingly, we will consider the Agency's § 7116(d) exception.

### V. Analysis and Conclusions

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*. *See 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 applying the standard of *de novo* review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

As set forth above, § 7116(d) of the Statute provides, in pertinent 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 an unfair labor practice . . . , but not under both procedures." In order for a grievance to be barred from consideration under § 7116(d) by an earlier-filed ULP charge: (1) 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; (2) the issue raised in the grievance must have been earlier raised under the ULP procedures; and (3) the selection of the ULP procedures must have been at the discretion of the aggrieved party. *See, e.g., U.S. Dep't of Health & Human Servs., Indian Health Serv., Alaska Area Native Health Servs., Anchorage, Alaska*, 56 FLRA 535, 538 (2000) (*HHS*). In determining whether a grievance and a ULP charge involve the same issue, the Authority examines whether the ULP charge and the grievance arose from the same set of factual circumstances and whether the legal theories advanced in support of the ULP charge and the grievance are substantially similar. *See id.* In this connection, the Authority has held that a ULP charge alleging a contract repudiation in violation of the Statute raises a sufficiently distinct theory from a grievance alleging a mere breach of a contract, even when both matters arise from the same set of facts. *See, e.g. U.S. Dep't of Labor, Wash., D.C.*, 59 FLRA 112, 115 (2003) (Chairman Cabaniss concurring & Member Armendariz dissenting).

There is no dispute that: (1) the ULP charges were filed prior to the grievance; (2) the selection of the ULP procedures was made at the discretion of the aggrieved party, i.e., the Union; and (3) the ULP charges and grievance arise from the same set of

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3. Section 7116(d) of the Statute provides, in pertinent 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 an unfair labor practice . . . , but not under both procedures." 5 U.S.C. § 7116(d).

factual circumstances. Consequently, the specific issue before the Authority is whether the grievance and ULP charges raise substantially similar theories.

The Union concedes that the “initial grievance documents did claim repudiation,” but asserts that it did not pursue that theory at arbitration. Opp’n at 7. However, an issue is “raised” within the meaning of section 7116(d) at the time of the filing of a grievance or a ULP charge, even if the grievance or ULP charge is subsequently withdrawn and not adjudicated on the merits. *See, e.g., HHS*, 56 FLRA at 538. As the grievance raised repudiation at the time of filing, it raised the same legal theory as the ULP charges. Accordingly, we find that § 7116(d) barred the grievance, and we set aside the award.

## **VI. Decision**

The award is set aside.