

**65 FLRA No. 188**

NATIONAL TREASURY  
EMPLOYEES UNION  
CHAPTER 145  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
U.S. CUSTOMS AND BORDER PROTECTION  
LAREDO, TEXAS  
(Agency)

0-AR-4492

DECISION

June 8, 2011

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 exceptions to an award of Arbitrator Don B. Hays filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that the issue of the propriety of the grievant's suspension was not arbitrable. For the reasons that follow, we set aside the award and remand this matter to the parties for submission, absent settlement, to an arbitrator of their choice.

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

The grievant contacted an Agency Equal Employment Opportunity (EEO) counselor and alleged that the Agency was acting unlawfully in various ways, including the denial of opportunities to work overtime. Award at 4. The grievant elected to participate in an informal, precomplaint mediation process, but when that process was unsuccessful, the grievant filed a formal EEO complaint. *Id.* at 4 & 6. Although the official complaint form did not identify

any specific unlawful actions, it was attached to a cover letter that mentioned, among other things, an Agency proposal to suspend the grievant for fourteen days. *Id.* at 6. The Agency dismissed the formal EEO complaint as untimely. *Id.*

Subsequently, the Agency mitigated the grievant's proposed suspension from fourteen to two days. *Id.* at 7. The Union appealed the two-day suspension by invoking expedited arbitration. *Id.* The Arbitrator framed the relevant issue as follows: "Does 5 U.S.C. § 7121 [(§ 7121)<sup>1</sup>] prohibit or otherwise limit the arbitration of the appeal of [the grievant's] two-day suspension [(the appeal)], because the subject matter[s] raised by [the appeal] were essentially the same 'matters' previously raised by the grievant in his original [EEO] complaint?"<sup>2</sup> *Id.* at 1.

The Arbitrator found that the formal EEO complaint and the appeal involved the same matters. *Id.* at 21. As such, and as the grievant filed his formal EEO complaint before the appeal, the Arbitrator determined that § 7121 barred the appeal. *Id.* The Arbitrator stated, in this regard, that the Agency had dismissed the formal EEO complaint "on the basis of *time limitations*["] *id.* at 6, and that "because of the previous (time) limitation forfeiture of [the grievant's] EEO claims, [the Arbitrator's] decision to summarily dismiss th[e] appeal will foreclose an independent 'due process' review["] of "the alleged injustice" of the two-day suspension, *id.* at 20. Nevertheless, the Arbitrator found that "the mandates of § 7121[,] can neither be waived, forfeited nor ignored." *Id.* Accordingly, the Arbitrator dismissed the appeal. *Id.* at 20.

**III. Positions of the Parties****A. Union's Exceptions**

The Union argues that the award is contrary to § 7121(d), 29 C.F.R. § 1614.301,<sup>3</sup> and applicable case law. *See* Exceptions at 14. In this regard, the Union argues that § 7121(d) does not bar the appeal because the grievant "did not timely file an EEO complaint." *Id.* at 15. Also in this regard, the Union

1. The pertinent wording of § 7121 is set forth below.

2. The Arbitrator also framed an issue regarding the merits of the grievance but did not resolve that issue because, as discussed further below, he found the grievance nonarbitrable.

3. The pertinent wording of 29 C.F.R. § 1614.301 is set forth below.

contends that under 29 C.F.R. § 1614.301(a), only the filing of a formal EEO complaint constitutes an election under § 7121(d), and that pre-complaint counseling does not constitute an election. *Id.* at 16. In addition, the Union argues that § 7121(d) does not bar the appeal because: (1) the grievant could not have filed a valid EEO complaint over his suspension when it initially was proposed, *id.* at 17; (2) the negotiated grievance procedure expressly precludes proposed personnel actions, *id.* at 18; and (3) the subject of the EEO complaint and the subject of the appeal are not the “same matter[.]” *id.* at 21.

#### B. Agency’s Opposition

The Agency argues that the Arbitrator did not err in finding that § 7121(d) bars the appeal. In response to the Union’s claim that the grievant did not timely file his EEO complaint, the Agency states that § 7121(d) bars arbitration when the employee has “*timely initiate[d] an action[.]*” and that “*initiating an action is not the same as filing a complaint.*” Opp’n at 10. The Agency claims that the grievant “*timely initiated the EEO action as required by the statute and regulations, and then he filed his formal EEO complaint.*” *Id.* at 11. Finally, the Agency contends that the Union’s remaining arguments do not demonstrate that the award is deficient. *See id.* at 11-26.

#### IV. Analysis and Conclusions

The Authority reviews questions of law 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 a standard of de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that determination, the Authority defers to the arbitrator’s underlying factual findings. *See id.*

Section 7121(d) provides:

An aggrieved employee affected by a prohibited personnel practice under [§] 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the

employee *timely* initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties’ negotiated procedure, whichever event occurs first.

5 U.S.C. § 7121(d) (emphasis added).

The Authority has held that, in order for § 7121(d) to bar a grievance, two requirements must be met: (1) the matter that is the subject of the grievance must be the same matter that was the subject of the action initiated under the statutory procedure; and (2) “such matter must have been earlier raised by the employee *timely* initiating an action under the statutory procedure.” *AFGE, Local 2145*, 61 FLRA 571, 573 (2006). *Accord U.S. DoJ, U.S. Marshals Serv.*, 23 FLRA 414, 416 (1986) (*Marshals Serv.*). *Cf. Verkennes v. Cheney*, EEOC Appeal No. 01913941 at 3 n.1 (Dec. 10, 1991) (untimely filed grievance would not bar formal EEO complaint on the same matter); *Frankl v. Kemp*, EEOC Appeal No. 05910261 (May 13, 1991) (*Frankl*) (same).

In addition, the Authority has held that the “timely initiation of an action” under statutory EEO procedures occurs with the “filing of a formal written complaint.” *AFGE, AFL-CIO, Nat’l INS Council*, 27 FLRA 467, 469-70 (1987) (*INS Council*). *Accord Marshals Serv.*, 23 FLRA at 417-18. This is consistent with Equal Employment Opportunity Commission regulations and precedent. *See* 29 C.F.R. § 1614.301(a) (stating, in pertinent part, that “[a]n election to proceed under this part is indicated only by the filing of a written complaint; use of the pre-complaint process . . . does not constitute an election for purposes of this section[.]”); *Frankl*, EEOC Appeal No. 05910261.

There is no dispute that the grievant’s formal EEO complaint was untimely. Although the Agency claims that § 7121(d) bars the appeal because the grievant “*timely initiated the EEO action*” before he filed his EEO complaint, Opp’n at 11, as stated above, it is the filing of the formal EEO complaint -- not any informal, precomplaint actions -- that is relevant for purposes of interpreting § 7121(d). *See INS Council*, 27 FLRA at 469-70; *Marshals Serv.*, 23 FLRA at 417-18. Thus, the Agency’s claim is misplaced. As there is no dispute that the grievant’s formal EEO complaint was untimely, the above-cited precedent supports a conclusion that the EEO complaint did not bar the appeal under § 7121(d). Accordingly, we find that the Arbitrator erred in

relying on § 7121(d) to find the appeal nonarbitrable, and we set aside the award.

Where an arbitrator incorrectly dismisses a grievance as nonarbitrable, the Authority remands the matter to the parties for submission, absent settlement, to an arbitrator of their choice. *See AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010). Consistent with this principle, we remand this matter to the parties for submission, absent settlement, to an arbitrator of the parties' choice.

#### **V. Decision**

The award is set aside, and this matter is remanded to the parties for submission, absent settlement, to an arbitrator of their choice.