70 FLRA No. 20

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
WACO REGIONAL OFFICE
WACO, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2571
(Union)

0-AR-5197

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DECISION

December 14, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella, concurring)

I. Statement of the Case

The Union filed a grievance alleging that the Agency violated the parties' master and supplemental agreements by denying an employee's (the grievant's) request to work 100% official time as the newly elected Union president. Before proceeding to hearing, the Agency filed an objection to the grievance's arbitrability with Arbitrator Michael D. Gordon. The Agency argued that the Federal Service Labor-Management Relations Statute (the Statute)[1] bars the grievance because the Union had previously filed an unfair-labor-practice (ULP) charge, and the grievant had also previously filed an Equal Employment Opportunity (EEO) complaint – both resulting from the Agency's denial of the grievant's request to work 100% official time.

In an email (the interim award), the Arbitrator stated that he was "not yet fully persuaded" that the grievance, the ULP charge, and the EEO complaint involved the same legal theories, and he ordered a hearing on "all procedural and substantive issues."[2] The Agency filed an exception to the Arbitrator's decision to hold a hearing that would include addressing the merits of the grievance.

The main issue before us is whether the interim award conflicts with § 7121(d) of the Statute by allowing the grievant to challenge the same personnel "matter" under both the "statutory [EEO] procedure" and the parties' "negotiated grievance procedure."[3] Because the EEO complaint and the later-filed grievance both concern the Agency's denial of the grievant's official-time request, the answer is yes.

II. Background and Arbitrator's Interim Award

After the grievant was elected Union president, the grievant notified the Agency that she would – in accordance with the parties' agreement – be working 100% official time in her new Union role. The Agency denied the grievant's official-time request, and informed her that she could only work 50% official time to perform her duties as Union president.

On September 29, 2015, the Union filed a ULP charge, alleging that the Agency violated § 7116(a)(1) of the Statute because the Agency did not "honor the [parties' agreement]" when it denied the grievant 100% official time.[4] The ULP charge also alleged "discrimination against a person of color."[5] On December 23, 2015, the grievant filed an EEO complaint against the Agency, alleging that the Agency "failed to adhere to the [parties' agreement]" when it denied the grievant's request to work 100% official time "on the basis of race."[6] Five days later, on December 28, 2015, the Union filed a grievance alleging that the Agency violated the parties' master and supplemental agreements by denying the grievant's request to work 100% official time.[7] Subsequently, the Union withdrew the ULP charge, and the Agency issued a Final Agency Decision dismissing the grievant's EEO complaint. The Union then invoked arbitration of the grievance.

Before the Arbitrator scheduled a hearing, the Agency objected to the grievance's arbitrability. The Agency argued that §§ 7116(d) and 7121(d) of the Statute bar the grievance because the Union filed a ULP charge and an EEO complaint over the Agency's denial of the grievant's official-time request before the Union filed the grievance. The Union responded, arguing that § 7116(d) does not bar the grievance because the ULP charge, the EEO complaint, and the grievance are each based on different legal theories.

In an interim award concerning the grievance's arbitrability, the Arbitrator stated that he was "not yet fully persuaded [that] the legal theories behind the

[1] 5 U.S.C. §§ 7101-7135.
[2] Interim Award at 1.
[3] 5 U.S.C. § 7121(d).
[4] Exceptions Br., Ex. C (ULP Charge) at 1.
[5] *Id.*
[6] Exceptions Br., Ex. D (EEO Complaint) at 1.
[7] Exceptions Br., Ex. E (Grievance) at 1.

grievance and the ULP/EEO[] charges are substantially similar."[8] He also found that "[t]here . . . may be some latent ambiguity in the [Authority's] approach to . . . [§] 7116(d) and/or [§] 7121" of the Statute.[9] The Arbitrator ordered a merits hearing to address "all procedural and substantive issues."[10] He noted that, at the hearing, the parties "can renew, expand[,] or modify [their] position . . . regarding" the grievance's arbitrability.[11]

The Agency filed a contrary-to-law exception. The Union did not file an opposition to the Agency's exception.

III. Preliminary Matter: The exception is interlocutory, but the Agency alleges a plausible jurisdictional defect in the interim award.

Because the arbitrator's interim award directed a hearing to consider all procedural and substantive issues, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why its exception to that award should not be dismissed as interlocutory.[12] The Agency concedes that the exception is interlocutory.[13] However, the Agency requests that "the Authority set aside the Arbitrator's decision to proceed to a hearing on the merits and rule that the instant grievance is not . . . arbitrable" as a matter of law.[14]

The Agency claims that there is a plausible jurisdictional defect in the interim award because both §§ 7116(d) and 7121(d) of the Statute bar the Union's grievance as a matter of law.[15] The Authority's Regulations provide that "the Authority . . . ordinarily will not consider interlocutory appeals" to arbitration awards.[16] The Authority reserves this review for extraordinary circumstances.[17] The Authority has found that extraordinary circumstances exist when a party alleges "a plausible jurisdictional defect" in an award[18] "– meaning that the arbitrator did not have the power to issue the award as a matter of law – if addressing that defect will advance the ultimate disposition of the case" by ending the litigation.[19] Therefore, the Authority will grant review of interlocutory exceptions that help the parties avoid "additional, unnecessary expenditures in processing the merits of the grievance."[20]

The Authority has recognized that § 7121(d) limits an arbitrator's jurisdiction to resolve a grievance.[21] As discussed further below, we find that the Agency's claim that the interim award is contrary to § 7121(d) identifies a "plausible jurisdictional defect" in the interim award.[22] Therefore, as we find that the conditions of § 7121(d) have been met to bar the Union's grievance, it is unnecessary to address the Agency's related § 7116(d) claim.[23] Further, because the parties did not identify any other matters in dispute except the Agency's denial of the grievant's request to work 100% official time, interlocutory review will "advance the ultimate disposition" of this case by ending the litigation.[24]

Accordingly, we grant interlocutory review of the Agency's exception.

IV. Analysis and Conclusion: Section 7121(d) of the Statute bars the grievance.

The Agency argues that the interim award ordering a hearing on the merits of the grievance is contrary to § 7121(d) of the Statute.[25] As relevant here, § 7121(d) provides that an employee may raise a personnel "matter under a statutory [EEO] procedure or the negotiated procedure, but not both."[26] Further, an employee makes a binding choice between those two options when the employee "timely initiates an action under the applicable statutory procedure or timely

[8] Interim Award at 1.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Order to Show Cause at 1-2.
[13] Agency's Resp. to Order to Show Cause at 1.
[14] Exceptions Br. at 1.
[15] *Id.*
[16] 5 C.F.R. § 2429.11.
[17] *AFGE, Local 2145*, 69 FLRA 563, 564 (2016) (citing *U.S. Dep't of the Army, Letterkenny Army Depot, Chambersburg, Pa.*, 68 FLRA 640, 641 (2015)).
[18] *U.S. DOJ, Exec. Office for Immigration Review*, 67 FLRA 131, 132 (2013) (*DOJ*) (citing *U.S. Dep't of the Air Force, Pope Air Force Base, N.C.*, 66 FLRA 848, 851 (2012)).
[19] *U.S. Dep't of the Navy, Naval Undersea Warfare Ctr. Div. Keyport, Keyport, Wash.*, 69 FLRA 292, 293 (2016) (*Navy*).
[20] *U.S. Dep't of the Interior, Bureau of Reclamation*, 59 FLRA 686, 688 (2004).
[21] *Navy*, 69 FLRA at 293 (citing *U.S. Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 195 (1999)).
[22] *DOJ*, 67 FLRA at 132.
[23] *AFGE, Local 1760*, 36 FLRA 212, 216 (1990) (finding that it was unnecessary to address § 7116(d) claim when conditions of § 7121(d) bar were met).
[24] *Navy*, 69 FLRA at 293.
[25] Exceptions Br. at 1-2.
[26] 5 U.S.C. § 7121(d). As indicated, because we decide this case under § 7121(d), we do not reach the Agency's arguments based on § 7116(d), under which an earlier-filed ULP charge bars a grievance when the issue that is the subject matter of the grievance is the same issue that is the subject matter of the ULP charge. *AFGE, Local 919*, 68 FLRA 573, 575 (2015) (Member Pizzella dissenting). The Authority will find that a ULP charge and a grievance involve the same issue for § 7116(d) purposes when they arise from the same set of factual circumstances and advance substantially similar legal theories. *Id.*

files a grievance in writing . . . whichever event occurs *first*."[27] For purposes of § 7121(d), the term "matter" refers "'not to the issue or claim of prohibited discrimination,' but, rather, to the personnel action involved."[28]

Thus, in order to resolve the Agency's contrary-to-law exception under § 7121, we must assess which personnel actions were at issue in the EEO complaint and the grievance. As relevant here, it is clear from the record that the only underlying personnel action at issue in the EEO complaint, and in the grievance, was the Agency's denial of the grievant's request to work 100% official time.[29] Accordingly, we find that the Agency's denial of the grievant's official-time request was the personnel action – or "matter"[30] – at issue in both the EEO complaint and the grievance.[31]

In ordering a hearing on the merits of the grievance, the Arbitrator found "[t]here . . . may be some latent ambiguity in the [Authority's] approach to . . . [§] 7121."[32] We disagree. Consistent with the standards set forth above, as the grievant elected to raise the official-time "matter"[33] under the statutory EEO procedure first, § 7121(d) bars the Arbitrator from resolving the merits of the grievance over the same matter.[34] Accordingly, the interim award is contrary to § 7121(d), and we set it aside.

V. Decision

We grant interlocutory review and set aside the interim award as contrary to § 7121(d) of the Statute.

[27] 5 U.S.C. § 7121(d) (emphasis added).
[28] *Navy*, 69 FLRA at 294 (quoting *U.S. Dep't of the Air Force Headquarters, Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 43 FLRA 290, 297 (1991)).
[29] EEO Complaint at 1; Grievance at 1.
[30] 5 U.S.C. § 7121(d).
[31] *Navy*, 69 FLRA at 294.
[32] Interim Award at 1.
[33] 5 U.S.C. § 7121(d).
[34] *Navy*, 69 FLRA at 294.

Member Pizzella, concurring:

As I noted in *U.S. DOJ, Federal BOP, Metropolitan Correctional Center, New York, New York* (*BOP*), Congress never "intended"[1] for the "question of when, and under what circumstances, a grievance will be barred by an earlier-filed ULP charge"[2] "to depend on how a union words its complaint[] and grievance[]."[3] And then in *AFGE, Local 919 (AFGE, Local 919)*, I noted that the Federal Service Labor-Management Relations Statute (the Statute),[4] does not permit parties to initiate "*duplicative proceedings*" over the same issues and matters but requires parties to "make *an election of remedies*."[5]

In other words, Congress never intended for the complaints processes established for federal employees by Titles V and VII of the U.S. Code to become a smorgasbord from which federal unions and employees may "parse, into separate grievances and complaints, those issues or matters – that involve the same parties, the same collective-bargaining agreement (CBA), and involve issues or matters that easily could have been consolidated into a single action."[6]

Therefore, I join with my colleagues in this decision which sets aside the arbitrator's award because AFGE, Local 2571 tried to file a grievance over the same matter it had earlier filed as an EEO complaint. The grievance is clearly precluded by 5 U.S.C. § 7121(d).

Unlike my colleagues, however, I would apply the Pizzella "standard" (which the majority named in *AFGE, Local 919*[7]) here and definitively conclude that this grievance is *also* barred by Section 7116(d) of the Statute because Local 2571 complained of the same issue in a previously filed unfair-labor-practice charge.

It is not at all surprising that the Arbitrator would get these questions wrong because, as he noted in his award, the majority has created a "*latent ambiguity*" in the manner it applies §§ 7116(d) and 7121(d).[8]

Therefore, it is incumbent upon the Authority to state with unmistakable clarity that Local 2571's *attempts* to circumvent the election-of-remedy *provision***s** of the Statute will not be tolerated in this or future cases.

Thank you.

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[1] 67 FLRA 442, 453 (2014) (Dissenting Opinion of Member Pizzella).
[2] *Id*. at 451.
[3] *Id*. at 453.
[4] 5 U.S.C. §§ 7101-7135.
[5] 68 FLRA 573, 577 (2015) (Dissenting Opinion of Member Pizzella) (quoting *BOP*, 67 FLRA at 451 (quoting *AFGE, Local 1411 & Helen Owens v. FLRA*, 960 F.2d 176, 178 (D.C. Cir.1992))).
[6] *BOP*, 67 FLRA at 452.
[7] *AFGE, Local 919*, 68 FLRA at 578.
[8] Award at 1 (emphasis added).