73 FLRA No. 176

ASHLEY KJARBO
(Petitioner)

MC-0036

DECISION ON PETITION FOR
AMENDMENT OF RULES

June 27, 2024

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

I. Background

Under 5 U.S.C. § 553(e) and § 2429.28 of the Federal Labor Relations Authority's (FLRA's) Regulations,[1] the Petitioner requests that the FLRA amend §§ 2430.1-2430.11 of the FLRA's Regulations.[2] Sections 2430.1-2430.11 implement the Equal Access to Justice Act (EAJA),[3] which provides for an award of fees and other expenses (EAJA fees) to eligible parties to adversary adjudications.[4] Currently, the FLRA's Regulations only allow labor organizations to seek EAJA fees from the FLRA when they prevail over the FLRA's General Counsel (GC) in unfair-labor-practice (ULP) proceedings; they do not allow individuals to recover fees, or provide for recovery from federal agencies other than the FLRA.[5] The Petitioner asserts these limitations conflict with the EAJA,[6] and proposes several amendments to §§ 2430.1-2430.11.[7]

II. Decision: We deny the petition.

The Petitioner asserts that she filed a ULP charge, and the GC issued a complaint, against her employing agency, but the complaint settled and the settlement did not allow the Petitioner to recover counsel fees from her agency.[8] In response, the Petitioner filed the instant petition to amend the FLRA's EAJA Regulations.

First, the Petitioner argues the EAJA requires the FLRA to allow EAJA fees to be collected from other federal agencies, not just the FLRA.[9] As an initial matter, the EAJA is "a partial waiver of sovereign immunity" that "must be strictly construed in favor of the United States."[10] Therefore, we proceed with caution in assessing whether we may require other federal agencies to pay EAJA fees in connection with the FLRA's ULP proceedings.

The EAJA's underlying purpose is to "eliminate financial disincentives for those who would defend against unjustified governmental action."[11] In the FLRA's ULP proceedings, federal agencies may file the initial charge,[12] but it is the FLRA's GC – not the charging party – that issues the complaint and prosecutes the case against the charged respondent.[13] In those situations, the charged respondent is "defend[ing] against" the *GC and the GC's complaint is the "governmental action*."[14] Further, when a federal agency serves as the charged respondent in a ULP case, no individual is required to "defend against unjustified governmental action";[15] the agency is defending its own actions. In that situation, the EAJA's underlying purpose does not come into play.

To support her first argument, the Petitioner cites regulations from other federal agencies that purportedly allow prevailing parties to request EAJA fees from federal agencies other than the agencies conducting the adjudications.[16] However, nothing in the cited regulations indicates that they apply to adversary adjudications that are similar to the FLRA's ULP proceedings. Under at least some of the cited regulations, the federal agencies participate in the adversary adjudications in their

[1] 5 C.F.R. § 2429.28 (permitting "[a]ny interested person" to file petition to propose amendments to the FLRA's Regulations).
[2] *Id.* §§ 2430.1-2430.11.
[3] 5 U.S.C. § 504.
[4] *Id.* § 504(a)(1).
[5] 5 C.F.R. § 2430.1-2430.2.
[6] Pet. at 3-4.
[7] *Id.* at 7-14.
[8] *Id.* at 2.
[9] *Id.* at 4-7.
[10] *Ardestani v. INS*, 502 U.S. 129, 137 (1991).
[11] *Id.* at 138.
[12] *See, e.g.*, 5 C.F.R. § 2423.3(b) (defining "[c]harging [p]arty" as including "[an] agency").
[13] 5 U.S.C. § 7118(a)(1) (providing that, if a ULP charge is filed, "the [*GC*] shall investigate the charge and may issue and cause to be served . . . a complaint") (emphasis added)).
[14] *Ardestani*, 502 U.S. at 138 (emphasis added).
[15] *Id.*
[16] Pet. at 4-7 (citing 7 C.F.R. § 1.188; 15 C.F.R. § 18.9; 24 C.F.R. § 14.140; 29 C.F.R. § 16.108; 17 C.F.R. § 148.8; 47 C.F.R. § 1.1508; 46 C.F.R. § 502.501(g); 14 C.F.R. § 1262.108; 49 C.F.R. § 826.8; 10 C.F.R. § 12.108; 5 C.F.R. § 2610.109; and 49 C.F.R. § 1016.109).

regulatory capacity over private entities.[17] Accordingly, the cited regulations do not support providing for recovery of EAJA fees against other federal agencies in the FLRA's ULP proceedings. In fact, the Petitioner acknowledges that only eleven of the thirty-four sets of agency regulations she reviewed expressly allow for recovery of fees against other federal agencies.[18] That undercuts, rather than supports, a conclusion that the EAJA mandates such recovery in the FLRA's ULP proceedings. Therefore, the Petitioner's first argument lacks merit.

Second, the Petitioner argues the EAJA requires the FLRA to allow individuals, not just labor organizations, to seek EAJA fees.[19] Again, the EAJA's purpose is to "eliminate financial disincentives for those who would defend against unjustified governmental action."[20] The Federal Service Labor-Management Relations Statute (the Statute) permits the FLRA to issue ULP complaints against only agencies and labor organizations – not individuals.[21] As such, individuals are not required to defend against ULP complaints, and allowing them to recover EAJA fees would not further the EAJA's stated purpose.[22] Although the Petitioner asserts that precluding individual recovery violates the Petitioner's "rights to due process and equal protection of the laws,"[23] the Petitioner does not explain how the FLRA's Regulations – which were implemented under the APA's notice-and-comment procedures and "follow[ing] the model rules recommended by the Administrative Conference of the United States"[24] – violate the Petitioner's due-process or equal-protection rights. For these reasons, the Petitioner's second argument lacks merit.

As the petition discusses a ULP and the Petitioner's arguments concern a specific ULP proceeding, we read the petition as requesting an amendment limited to only ULP proceedings. Nevertheless, in order to explain why the FLRA's current Regulations are limited to ULP proceedings, we also note the following.

The EAJA provides for "[a]n agency that conducts an adversary adjudication" to award fees.[25] The EAJA defines "[a]dversary adjudication" as "an adjudication under [§] 554 of [the Administrative Procedure Act (APA)] . . . in which the position of the United States is represented by counsel or otherwise."[26] An adjudication under § 554 is one "required by statute to be determined on the record after opportunity for an agency hearing."[27] Applying these definitions, the only "adversary adjudications" the FLRA conducts are ULP proceedings.[28] Representation proceedings are investigatory, not adversarial, in nature.[29] As for negotiability proceedings, § 7117(b)(3) expressly gives the FLRA discretion to hold hearings, but does not require them.[30] Further, nothing in the Statute requires the FLRA to conduct hearings in connection with arbitration

[17] *See, e.g.*, *Robinson*, 2014 WL 2573386, at *9-10 (NOAA Feb. 20, 2014) (administrative law judge for the U.S. Environmental Protection Agency ruling on application for EAJA attorney fees under 15 C.F.R. § 18 after applicants prevailed in an adversary adjudication brought by the National Oceanic and Atmospheric Administration for fishing in a protected area); *Pierce*, HUDALJ 05-98-0298-8, 2001 WL 36011998, at *1 (Jan. 3, 2001) (ruling on matter of EAJA attorney fees for defending against a discriminatory housing charge that was brought by HUD); *Garcia*, No. 86-MSP-107, 1991 WL 733599, at *6 (Oct. 10, 1991) (ruling on matter of EAJA attorney fees for defending against the Department of Labor's decision to revoke "farm labor contractor's certificate of registration"); *In re Frey*, CFTC No. 75-16, 1990 WL 282782, at *11 (Jan. 19, 1990) (ruling on matter of EAJA attorney fees for defending against charge of price manipulation brought by the Commodity Futures Trading Commission); *Application of Gartner*, No. 259-EAJA-SE-14023, 1998 WL 719554, at *4-5 (July 10, 1998) (ruling on matter of EAJA attorney fees for defending against regulatory violations brought by the Federal Aviation Administration).

[18] Pet. at 4-5 ("Petitioner's counsel has identified EAJA-implementing regulations promulgated by thirty-four of the agencies . . . . Among those thirty-four sets of regulations, Petitioner's counsel found that eleven of them expressly permit the promulgating agency to award EAJA fees against another agency of the United States when a party prevails over that agency in an adversary adjudication before the promulgating agency." (emphasis omitted)).

[19] *Id.* at 2-4.

[20] *Ardestani*, 502 U.S. at 138.

[21] *See* 5 U.S.C. § 7116(a), (b), & (c) (limiting ULPs to actions by an agency, a labor organization, or an exclusive representative).

[22] We also note it is consistent with the EAJA to not allow federal agencies to recover EAJA fees, as the EAJA provides for awards of fees and expenses "to a prevailing party *other than the United States*." *Id.* § 504(a)(1) (emphasis added).

[23] Pet. at 7.

[24] Equal Access to Justice Act Implementation, 46 Fed. Reg. 48,623, 48,623 (Oct. 2, 1981).

[25] 5 U.S.C. § 504(a)(1).

[26] *Id.* § 504(b)(1)(C).

[27] *Id.* § 554(a).

[28] *Id.* § 7118(a)(6) (providing that, in ULP proceedings, the Authority or its designee "shall conduct a hearing on the complaint" and that "[a]ny such hearing shall, to the extent practicable, be conducted in accordance with the provisions of" the APA).

[29] 5 C.F.R. § 2422.18(a) ("Representation hearings are considered investigatory and not adversarial."); *see also U.S. Dep't of Energy, Fed. Energy Regul. Comm'n*, 22 FLRA 3, 5 (1986) (finding the FLRA's Regulations "codify the well-established principle that the purpose of representation proceedings . . . is to resolve the issues presented in a non-adversary environment where no party has the burden of proof").

[30] *See* 5 U.S.C. § 7117(b)(3) (providing that "[a] hearing *may be held*, in the discretion of the Authority, before a determination is made" (emphasis added)); *id.* § 7117(c)(5) (same).

appeals,[31] and the Authority has expressly held that underlying proceedings before arbitrators are not "adversary adjudications" for EAJA purposes.[32] Thus, the FLRA's regulatory limitation of EAJA fees to ULP proceedings is consistent with the EAJA.

In sum, the Petitioner's arguments do not support amending the FLRA's EAJA Regulations in the manners the Petitioner proposes. Thus, we deny the petition.[33]

[31] *See* 5 U.S.C. § 7122 (allowing parties to file exceptions to arbitration awards, and stating "the Authority may take such action . . . concerning the award as it considers necessary," but not referencing or requiring a hearing).

[32] *AFGE, Loc. 1960*, 34 FLRA 799, 804 (1990); *U.S. Army Corps of Eng'rs*, 17 FLRA 424, 425 (1985).

[33] *NTEU*, 73 FLRA 428, 429 (2023) (Chairman Grundmann concurring) (denying petition after rejecting proposed regulatory amendments).

Member Kiko, concurring:

I agree that the Petitioner does not raise arguments that support amending the FLRA's Equal Access to Justice Act (EAJA) Regulations. At the same time, I sympathize with the Petitioner's circumstances. The facts that the General Counsel (GC) alleged exemplify how the systemic prioritization of the institutional interests of federal sector unions and agencies often comes at the expense of individual employee rights.[1] Specifically, as discussed in more detail below, her struggle to revoke her union-dues authorization highlights the importance of the Authority's decision in 2020 to protect the associational rights of individual employees by adding § 2429.19 to its Regulations.[2]

Under § 7115(a) of the Federal Service Labor-Management Relations Statute (the Statute), once an employee provides an agency with a written assignment authorizing the agency to deduct a portion of their salary for the payment of periodic union dues, that "assignment may not be revoked for a period of [one] year."[3] The Authority previously interpreted that wording as a continuing restriction, such that "authorized dues allotments may be revoked only at intervals of [one] year."[4] However, in 2020, the Authority recognized that this interpretation "was unsupported by the plain wording" of § 7115(a), which makes no mention of an annual revocation period.[5] Thus, the Authority concluded that, in interpreting § 7115(a) in this fashion, the Authority had "made a policy judgement to impose annual revocation periods after the first year of an assignment."[6]

Because this policy judgment unnecessarily restricted individual employees' freedom, the Authority amended the Authority's Regulations "with the aim of adopting an implementing regulation that hews more closely to the Statute's text."[7] Under § 2429.19, after an employee's dues assignment has been in place for one year, the employee "may initiate the revocation of [the] previously authorized assignment at any time that the employee chooses."[8] However, recognizing that many existing dues assignments were expressly for recurring one-year terms, and mindful of § 7115(a)'s requirement that agencies "honor [an employee's dues] assignment,"[9] the Authority determined that it was appropriate to apply the new rule only to dues assignments made after August 10, 2020.[10]

In negotiating the collective-bargaining agreement at issue in the Petitioner's unfair-labor-practice charge, the Internal Revenue Service (Agency) and the National Treasury Employees Union (Union) agreed on a provision that extended the rule's new flexibility only to those employees the rule required to be covered—those employees who made assignments after August 10, 2020.[11] Conversely, under this provision, any employee who had been paying union dues before August 10 could revoke their dues allocation only during a single two-week window per year.[12]

According to the Petitioner, she had been a dues-paying member of the Union since 2004.[13] Based on her personal values and financial circumstances, the Petitioner decided in 2022 that she no longer wanted to be a Union member or to have Union dues deducted from her paycheck.[14] But, unlike coworkers who submitted assignments many years after her, the Petitioner could not

[1] As the Authority has consistently found it appropriate to take official notice of other FLRA proceedings, I consider the Petitioner's related unfair-labor-practice proceedings here. *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fairton, N.J.*, 62 FLRA 187, 189 (2007) (taking official notice of relevant documents in related unfair-labor-practice cases); *NTEU*, 70 FLRA 57, 58 (2016) (taking official notice of a related unfair-labor-practice charge); *see also* 5 C.F.R. § 2429.5 (Authority may take official notice "of such matters as would be proper").

[2] Miscellaneous and General Requirements, 85 Fed. Reg. 41,169 (July 9, 2020) (adopting 5 C.F.R. § 2429.19).

[3] 5 U.S.C. § 7115(a).

[4] *U.S. Army, U.S. Army Materiel Dev. & Readiness Command, Warren, Mich.*, 7 FLRA 194, 199 (1981).

[5] Miscellaneous and General Requirements, 85 Fed. Reg. at 41,169.

[6] *OPM*, 71 FLRA 571, 572-73 (2020).

[7] Miscellaneous and General Requirements, 85 Fed. Reg. at 41,169.

[8] 5 C.F.R. § 2429.19.

[9] 5 U.S.C. § 7115(a); Miscellaneous and General Requirements, 85 Fed. Reg. at 41,170 (noting that "the rule would not require agencies to disregard the terms of previously authorized assignments that the agencies received before the effective date of the rule").

[10] Miscellaneous and General Requirements, 85 Fed. Reg. at 41,169 ("This rule applies to the revocation of assignments that were authorized under 5 U.S.C. [§] 7115(a) on or after August 10, 2020.").

[11] GC's Ex. 1, Collective-Bargaining Agreement (CBA) at 28 (Art. 10, § 5(A)(3)).

[12] *Id.* ("Revocation notices for employees who have had dues allotments in effect for more than one . . . year must be submitted to the payroll office during . . . pay period fifteen . . . each year. Revocations will become effective during . . . pay period eighteen . . . .").

[13] Petitioner's Unfair-Labor-Practice Allegation (ULP) at 1.

[14] GC's Ex. 3, Email Exchanges at 3-4 (Petitioner's request to withdraw from Union, citing her financial circumstances and the Union "not represent[ing her] values").

resign from the Union outside the narrowly prescribed dues-revocation window.[15]

Due to this contractual restriction, when the Petitioner attempted to resign from the Union at the beginning of March 2022, the Union president denied her request and informed her that she could not even *submit* the revocation form until the end of July.[16] Further, even if she timely provided her notice during this two-week period in July, the revocation would not take effect until September.[17] Ultimately, according to the Petitioner, she remained a non-consenting, dues-paying member of the Union for an additional six months—*fourteen paychecks*—before the Union accepted her resignation.[18]

In 2022, the Union petitioned the Authority to revise § 2429.19 to again permit dues revocations only at one-year intervals.[19] Before adopting § 2429.19, the Authority had requested public comment on the proposed rule in 2020, and the Authority "heard from employees who were frustrated with narrow form-submission windows occurring on indecipherable anniversary dates."[20] Despite this recent comment period, the Authority once again sought comment on this exact issue in 2022.[21] As I stated in my dissent to that request for comments, returning to the previous rule would "subjugat[e] . . . employees' individual interests to federal unions' institutional interests."[22] While I assure the commenters who responded to the 2022 request that I will afford their views due consideration before taking any future action on this rule, I want to reiterate my position that § 2429.19 returns associational and financial freedom to individual employees and appropriately effectuates the Statute's purpose.[23]

As I have repeatedly noted, the Authority must take care to properly balance federal unions' institutional interests with employees' right to self-determination.[24] In the Petitioner's unfair-labor-practice case, the Union and Agency negotiated a collective-bargaining agreement that provided the Petitioner with a very short window in which to exercise her rights.[25] When she attempted to exercise her rights outside of this window, according to the Petitioner and the GC complaint, the Union threatened to report her to the Agency,[26] and the Agency accused her of "discourteous and unprofessional" behavior and threatened her with disciplinary action if she continued.[27] Facing two large institutions on her own, the Petitioner understandably enlisted the help of an attorney to vindicate her rights. Although I agree the EAJA does not contemplate granting attorney fees to employees in the Petitioner's predicament, I also believe that successfully balancing the competing interests of unions and individual employees requires that individuals have the types of associational freedoms the Authority recognized in § 2429.19.

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[15] *See* CBA at 28; *see also* GC's Ex. 5, Email Exchanges at 3 ("Any forms received after [the last day of pay period 15] will be returned to the employee requesting they resubmit during the next cancellation period."); Agency's Response to ULP at 5 (arguing that, pursuant to the parties' agreement, the Petitioner "needed to submit [the revocation form] to the Agency's payroll office during [pay period] 15 [of] 2022" because she made her original dues allocation before August 10, 2020).

[16] GC's Ex. 3, Email Exchange at 2 ("Contact the [U]nion office during pay period 15 for an appointment to process a withdrawal."); *id.* ("If there is any further contact [regarding withdrawal] before pay period 15, it will be reported to [your Agency supervisors].").

[17] CBA at 28 ("Revocations will become effective during [Agency] pay period eighteen . . . ."); GC's Ex. 5, Email Exchanges at 3 (noting that the revocation would be processed during the pay period starting August 28).

[18] ULP at 5; GC's Ex. 4, Agency's Pay Period Calendar at 1.

[19] Miscellaneous and General Requirements, 87 Fed. Reg. 78,014, 78,014 (Dec. 21, 2022).

[20] *Id.* at 78,016 (Dissenting Opinion of Member Kiko).

[21] *Id.* at 78,014.

[22] *Id.* at 78,017 (Dissenting Opinion of Member Kiko).

[23] *See* 5 U.S.C. § 7102 ("Each employee shall have the right to form, join, or assist any labor organization, or to *refrain from* any such activity, freely and without fear of penalty or reprisal . . . ." (emphasis added)).

[24] *See, e.g.*, *U.S. Dep't of the Interior, Nat'l Park Serv., Blue Ridge Parkway, N.C.*, 73 FLRA 526, 535 (2023) (Concurring Opinion of Member Kiko) ("[t]he Statute and Regulations cannot 'safeguard[] the public interest' if the Authority enforces them in a manner that restrains employee self-determination through fleeting and unclear windows of time" during which employees may petition for union decertification (quoting 5 U.S.C. § 7101(a)(1)(A)); *U.S. DHS, ICE*, 73 FLRA 299, 305 (2022) (Dissenting Opinion of Member Kiko) (noting that "the Statute has undoubtedly failed to 'safeguard[] the public interest,' or facilitate 'the effective conduct of public business'" if the Statute "can do nothing to protect employees whose union has unilaterally decided to sever its relationship with them" (quoting 5 U.S.C. § 7101(a)(1)(A)-(B))); *see also Nat'l Aeronautics & Space Admin., Goddard Space Flight Ctr., Wallops Island, Va.*, 67 FLRA 670, 681 (2014) (Concurring Opinion of Member Pizzella) ("Far too frequently, the Authority has considered only the interests of the union, or unions, without considering 'the concomitant right [of federal employees] . . . .'").

[25] *See* CBA at 28.

[26] GC's Ex. 3, Email Exchange at 2 ("If there is any further contact [regarding withdrawal] before pay period 15, it will be reported to [your Agency supervisors].").

[27] ULP at 5-6; GC's Ex. 6, Email Exchanges at 1 ("Please consider this a verbal warning that your behavior is considered discourteous and unprofessional and if it continues could result in disciplinary action.").