

71 FLRA No. 97

UNITED STATES
DEPARTMENT OF EDUCATION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 252
NATIONAL COUNCIL
OF DEPARTMENT OF EDUCATION LOCALS
(Union)

0-AR-5418

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DECISION

January 16, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

Today, the Authority distinguishes the circumstances presented here from those in its recent decisions in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Virginia (Navy)*¹ and *AFGE, Local 420, Council of Prison Locals, C-33 (Local 420)*,² and holds that § 7116(d) of the Federal Service Labor-Management Relations Statute (Statute)³ does not apply when the issues in a grievance and an earlier-filed unfair-labor-practice (ULP) charge are not substantially similar because they involve separate statutory claims.

The Agency filed a motion to dismiss with Arbitrator Joseph M. Pastore, Jr. arguing that the Union's grievance was barred under § 7116(d) because the Union's earlier filed ULP charge concerned essentially the same issue. In an interim award, the Arbitrator found that the grievance and ULP charge concerned sufficiently similar issues so that they could not be pursued concurrently; however, he suspended the Union's

grievance pending resolution of the ULP claim instead of dismissing it.

For the reasons discussed below, we find that the grievance is not barred under § 7116(d) of the Statute, and remand the matter to the parties for resubmission to the Arbitrator, absent settlement, for a determination in accordance with this decision.

II. Background and Arbitrator's Award

The parties' 2013 collective-bargaining agreement (CBA) was set to expire on December 17, 2016. Prior to its expiration, the Agency exercised its option to renegotiate the agreement and, consistent with the provisions of the 2013 CBA, the agreement was automatically extended for one year until December 17, 2017. The parties engaged in discussions and negotiations over a new agreement from the end of 2016 through 2017.

Absent a renegotiated CBA as of December 2017, the parties entered into a "Consolidated Past Practice Document" to be in effect until December 18, 2018.⁴ However, in December 2017, the Agency also presented the Union its "last and best offer."⁵ The parties failed to meet to discuss the "last and best offer" and in February 2018, the Agency informed the Union that it was moving forward with its proposed complete successor agreement (proposed CBA).⁶ The Union responded that the Agency had failed to bargain, and the Agency claimed that the Union had "failed to protect its right to bargain because of its failure to respond properly to the Agency's proposal."⁷ The Union subsequently submitted counterproposals, which the Agency rejected. The Union also presented the proposed CBA to its membership for ratification, which failed.

On March 12, 2018, the Agency unilaterally implemented the proposed CBA and the Union filed a ULP charge the same day. The ULP charge alleged that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to negotiate and bargain in good faith over ground rules and substantive contract proposals.⁸ Specifically, the charge alleged that the Agency violated the Statute when it "did not comply with the Union's request that the parties continue negotiations on ground rules because the parties were not at impasse;" "refused the Union's requests to negotiate over the proposed collective[-]bargaining agreement;" and "continued with its plan to impose its proposed

¹ 70 FLRA 512 (2018) (Member DuBester dissenting).

² 70 FLRA 742 (2018) (Member DuBester concurring).

³ 5 U.S.C. § 7116(d).

⁴ Award at 2.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Exceptions, Attach. 2, ULP Charge No. WA-CA-18-0173 at 2.

collective[-]bargaining agreement despite the fact that the Union membership had rejected the agreement.”⁹

On April 22, 2018, the Union filed a grievance alleging that the Agency violated § 7114(c) of the Statute¹⁰ and the parties’ agreement¹¹ when it “fail[ed] and refus[ed] to submit its collective[-]bargaining agreement for Agency[-]head [r]eview[,] thereby denying the Union the ability to review and challenge the agreement in a negotiability appeal.”¹² Specifically, the Union alleged that the Agency implemented the proposed CBA “without submitting the agreement for Agency[-]head [r]eview and advising the Union accordingly,” and that it thereby denied “the Union the right to file a negotiability appeal over the Agency’s lack of official position with the Agreement.”¹³ The Agency denied the grievance and the matter proceeded to arbitration.

The Agency filed a motion to dismiss alleging that the grievance was barred under § 7116(d) of the Statute because the earlier-filed ULP charge was based “on the same and substantially similar issues.”¹⁴

In his September 11, 2018 award, the Arbitrator addressed only the Agency’s challenge to arbitrability, not the merits of the grievance, and framed the issue as whether the Agency’s motion supported a decision to dismiss the Union’s demand for arbitration. He rejected the Union’s argument that the ULP charge and grievance were “directed at mutually exclusive issues, namely on the one hand a failure to bargain in good faith in the case of the ULP and, on the other hand, a failure to submit the

March 12, 2018 CBA for Agency[-]head [r]eview in the case of the grievance.”¹⁵ Instead, he found that “there is little question that the language of the ULP and the grievance are ‘sufficiently similar’ to suggest that the two are duplicative and [create] the expectation that if the Union is to pursue its ULP, it may not pursue its grievance concurrently.”¹⁶ The Arbitrator “suspended” the grievance pending resolution of the ULP charge.¹⁷

The Agency filed exceptions to the award on October 9, 2018. The Union filed an opposition to the Agency’s exceptions on November 13, 2018.

III. Preliminary Matter: The Agency’s exceptions are interlocutory, but we find extraordinary circumstances warranting review.

The Union argues that the Agency’s exceptions are interlocutory and should be dismissed under § 2429.11 of the Authority’s Regulations.¹⁸ The Agency recognizes that its exceptions are interlocutory, but maintains that the grievance is not arbitrable and that the Authority’s resolution of its exceptions would obviate the need for further arbitration.¹⁹

The Authority does not ordinarily consider interlocutory appeals.²⁰ However, any exception which would advance the ultimate disposition of a case and obviate the need for further arbitral proceedings presents an “extraordinary circumstance” warranting review.²¹ Because we find that resolution of the Agency’s exceptions could conclusively determine whether any

⁹ *Id.*

¹⁰ Section 7114(c) of the Statute provides, in part:

(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

5 U.S.C. § 7114(c).

¹¹ The Union alleged violations of the 2013 CBA, which it identified as “the expired collective[-]bargaining agreement.” Exceptions, Attach. 4, Grievance Form at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ Exceptions, Attach., Motion to Dismiss at 8.

¹⁵ Award at 7.

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ Opp’n Br. at 3.

¹⁹ Exceptions at 4.

²⁰ 5 C.F.R. § 2429.11; *see also U.S. Dep’t of the Treasury, IRS, 70 FLRA 806, 807 (2018) (IRS) (Member DuBester dissenting) (citing U.S. DHS, U.S. CBP, 65 FLRA 603, 605 (2011))* (the Authority will ordinarily not resolve exceptions to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration). An award is not final when the arbitrator postpones the determination of an issue. *IRS, 70 FLRA at 807 (citing U.S. Dep’t of the Air Force, Pope Air Force Base, N.C., 66 FLRA 848, 850 (2012) (Pope Air Force Base))*. Similarly, the parties’ agreement to conduct a separate hearing on a threshold issue does not operate to convert the arbitrator’s threshold ruling into a final award subject to exceptions being filed under § 7122 of the Statute. *Pope Air Force Base, 66 FLRA at 850-51*.

²¹ *NLRB, 71 FLRA 196, 196 (2019) (Member DuBester dissenting); see also IRS, 70 FLRA at 808 (clarifying Authority precedent and holding that establishing a “plausible jurisdictional defect” is one way, but not the only way, to demonstrate “extraordinary circumstances” warranting interlocutory review).*

further arbitral proceedings are required in this matter, we grant interlocutory review and turn to the substance of the Agency's exceptions.²²

IV. Analysis and Conclusion: The grievance is not barred under § 7116(d) of the Statute.

The Agency argues that the award is contrary to law²³ because the grievance is barred under § 7116(d) of the Statute.²⁴ Specifically, the Agency argues that the Arbitrator ignored § 7116(d), and recent Authority decisions, when he suspended the grievance instead of dismissing it.²⁵

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.²⁶ For an earlier-filed ULP charge to preclude a grievance under § 7116(d), the ULP charge and the grievance must concern the same issue.²⁷ 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.²⁸ The Authority's recent

decisions in *Navy*²⁹ and *Local 420*,³⁰ which the Agency relies on to support its argument, clarify when theories are "substantially similar."

In *Navy*, the Authority made clear that it does not require the theories advanced in an earlier-filed ULP charge be "identical" to those advanced in a later-filed grievance, just "substantially similar."³¹ In that case, the Authority found that § 7116(d) barred a grievance where the contractual claim was "a derivative of" the statutory claim and that the issues in the grievance did not differ "in any meaningful respect" from the issues in the earlier-filed ULP charge.³² Similarly, in *Local 420*, the Authority found that § 7116(d) barred a grievance where an earlier-filed ULP charge and grievance "both arose from the [a]gency's decision to implement [an] augmentation policy without bargaining."³³ In both cases, the Authority rejected as contrary to the intent and purpose of § 7116(d) the union's attempt to parse into different forums (grievance and ULP) the agency's contractual duty to bargain and the agency's statutory duty to bargain.³⁴

However, the circumstances of this case are distinguishable. Here, the arguments the Union raises in its grievance are not "derivative of" those presented in the earlier-filed ULP charge.³⁵ While the ULP charge alleges that the Agency violated § 7116(a)(1) and (5) of the Statute by failing to negotiate and bargain in good faith when it refused the Union's request to negotiate and unilaterally implemented the proposed CBA, the gravamen of the grievance is whether the Agency violated § 7114(c)(1) of the Statute and the parties' 2013 CBA when it failed to submit the proposed CBA for Agency-head review. Thus, the grievance concerns the parties' 2013 CBA and § 7114(c)(1), not § 7116(a)(1) and (5) – the issue in the ULP charge. We do not agree with the Agency that these legal issues are "essentially the same" because they concern two separate statutory claims, not just the Agency's statutory and contractual duties to bargain.³⁶ Consequently, unlike the situation in *Navy*, and contrary to the Agency's assertions, the allegations in the Union's grievance do differ in a meaningful way from the allegations in the earlier-filed ULP charge. Therefore, we find that the legal theories advanced in the ULP charge and the

²² See *NLRB*, 71 FLRA at 196 (granting interlocutory review because the agency's exceptions "could conclusively determine whether any further arbitral proceedings are required"); *U.S. Dep't of the Treasury, IRS*, 71 FLRA 192, 192 (2019) (Member DuBester dissenting) (granting interlocutory review because the agency's exception, "if meritorious, would obviate the need for further arbitral proceedings").

²³ When an exception involves an award's consistency with law, the Authority reviews the award de novo. 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. In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *E.g., U.S. DOD, U.S. Marine Corps, Air Ground Combat Center, Twentynine Palms, Cal.*, 71 FLRA 173, 174 n.8 (2019) (Member DuBester dissenting); see also *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 71 FLRA 188, 189-90 (2019) (Member DuBester dissenting) (*Air Force*) ("the Authority has previously reviewed an arbitrator's conclusion as to whether a ULP charge and a grievance involved similar factual circumstances as a question of law").

²⁴ Exceptions at 3-4.

²⁵ Member Abbott would like to take this opportunity to dissuade arbitrators from the belief that they have more than two options when addressing a motion to dismiss. Arbitrators may grant the motion or they may deny the motion. However, they do not have the option to "suspend" (or to place in abeyance) a grievance pending the outcome of another matter. The Arbitrator's treatment of the grievance in this case is puzzling.

²⁶ 5 U.S.C. § 7116(d).

²⁷ *Navy*, 70 FLRA at 514.

²⁸ *Id.*

²⁹ 70 FLRA 512.

³⁰ 70 FLRA 742.

³¹ *Navy*, 70 FLRA at 516-17 (citing *U.S. Dep't of the Army, Army Fin. & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991)).

³² *Id.* at 516.

³³ *Local 420*, 70 FLRA at 743.

³⁴ See *id.*

³⁵ *Navy*, 70 FLRA at 516.

³⁶ Exceptions at 7.

grievance are not substantially similar and, therefore, that § 7116(d) does not bar the grievance.

Here, the Arbitrator found the language of the ULP charge and the grievance “‘sufficiently similar’ to suggest that the two are duplicative” and may not be pursued “concurrently.”³⁷ He also found the Agency’s argument that the ULP charge and grievance could not exist simultaneously in different forums to be “supportable.”³⁸ Yet, the Arbitrator determined these findings did not warrant dismissal of the grievance, and concluded instead (without elaboration) that they justified suspending the grievance pending resolution of the ULP charge. However, given our determination that the grievance is not barred under § 7116(d), and that the Arbitrator’s findings in that respect were erroneous, the Arbitrator was not required to dismiss or “suspend” the grievance pending the outcome of a separate matter.

Accordingly, we find that a remand of this matter is appropriate. In order to promote the prompt and efficient resolution of this dispute, we remand this case to the parties for resubmission to the Arbitrator, absent settlement, for a determination on the outstanding procedural and substantive issues. The parties should request that the Arbitrator determine, in accordance with this decision: (1) whether the 2013 or 2018 agreement is in effect; (2) based on that determination, whether the Union’s grievance was timely filed;³⁹ (3) whether the Agency was obligated, by contract or statute, to submit the 2018 agreement for Agency-head review under § 7114(c)(1) of the Statute; and (4) if so, what is the appropriate remedy.

V. Decision

We remand the case to the parties for resubmission to the Arbitrator, absent settlement, for a determination in accordance with this decision.

Member DuBester, concurring:

I agree with my colleagues’ determination that 5 U.S.C. § 7116(d) does not bar the grievance.

³⁷ Award at 7.

³⁸ *Id.* at 8.

³⁹ We recognize that the Agency also filed an exception arguing that the award fails to draw its essence from the parties’ agreement because the grievance is untimely under Article 7, § 7.08 of the parties’ agreement (referring to the 2018 proposed CBA). Exceptions at 10-14. However, because we are remanding the case to the parties for resubmission to the Arbitrator to determine, in part, precisely this issue, we find it unnecessary to address the Agency’s exception.