

**71 FLRA No. 118**

SPORT AIR  
TRAFFIC CONTROLLERS ORGANIZATION  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE AIR FORCE  
EDWARDS AIR FORCE BASE, CALIFORNIA  
(Agency)

0-AR-5483

DECISION

March 10, 2020

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, we remind the federal labor-management relations community that the first-in-time requirement for choice-of-forum provisions applies even if a charge is later withdrawn.<sup>1</sup>

In this case, the parties disputed whether they were governed by a 1994 collective-bargaining agreement (1994 CBA) or an agreement implemented by the Agency in 2017 (new CBA).<sup>2</sup> The Union grieved the Agency's denial of the customary twenty hours of official time per week as provided by the parties' 1994 CBA. Arbitrator Jill Klein found that the parties were governed by the new CBA, and that the Agency did not violate the Federal Service Labor-Management Relations Statute

<sup>1</sup> *AFGE, Local 420, Council of Prison Locals, C-33*, 70 FLRA 742, 743 (2018) (Member DuBester concurring) (*Local 420*) (citations omitted).

<sup>2</sup> This is the third time the parties are before the Authority on claims stemming from the negotiation process of the new CBA. See *SPORT Air Traffic Controllers Org.*, 70 FLRA 554 (2018) (*SATCO I*) (Member DuBester concurring) (finding Union violated § 7116(b)(5) of the Statute by failing to recognize Agency's bargaining representatives); see also *SPORT Air Traffic Controllers Org.*, 71 FLRA 25 (2019) (*SATCO II*) (Member DuBester concurring) (denying petition for reconsideration of *SATCO I*).

(Statute), Agency regulation, or the new CBA when it failed to schedule twenty hours per week of official time for the Union president. Because the grievance and an earlier-filed unfair-labor-practice (ULP) charge both raise the same issue—the legality of the Agency's implementation of the new CBA—we find that the grievance is barred by § 7116(d) of the Statute.<sup>3</sup> Therefore, we vacate the award as contrary to law.

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

As relevant here, on December 7, 2015, the Agency provided notice of its desire to renegotiate the 1994 CBA. The parties met in January 2016 to discuss ground rules. At the meeting, the Union refused to recognize the Agency's designated representatives, and after three months of back and forth, the Agency filed a ULP charge against the Union on May 4, 2016.<sup>4</sup>

On February 22, 2017, while its charge remained pending, the Agency sent an email to the Union asserting that the Union waived its right to bargain over the new CBA, and that the Agency's "last, best proposal" for a new CBA—attached to the email—would be implemented on May 1, 2017.<sup>5</sup> Over the next few days, the Union asserted that it did not waive its right to bargain over ground rules or the new CBA and that it agreed to some of the ground rules, but would like to talk about the others. On March 13, the Agency responded reiterating that the Union waived its right to bargain, and that the Agency intended to implement the new CBA on May 1.

On March 27, 2017, the Union filed a ULP charge alleging that the Agency failed to bargain in good faith by "notif[ying] the Union of its intention to unilaterally implement a 'collective[-]bargaining agreement' on May 1, 2017."<sup>6</sup> On April 24, the Union filed the instant grievance, alleging the Agency violated the parties' 1994 CBA by failing to schedule the Union president for twenty hours of official time per week for the duty period starting in May of 2017. On September 27, 2017, the Union amended its ULP charge to include the Agency's unilateral implementation of the new CBA on May 1, 2017. Sometime after November 14, 2017, the Union withdrew this ULP charge.

The issues as framed by the Arbitrator were whether the Agency violated: (1) the Statute or Agency regulation by unilaterally implementing the new CBA, and (2) the parties' agreement by failing to schedule

<sup>3</sup> 5 U.S.C. § 7116(d).

<sup>4</sup> See generally *SATCO I*, 70 FLRA 554.

<sup>5</sup> Award at 25.

<sup>6</sup> Exceptions, Attach. 9, ULP Charge, Case No. SF-CA-17-0305.

twenty hours per week of official time for the Union president. The Arbitrator considered at length the parties' bargaining history over 2016 and 2017 and found that the Agency did not violate the Statute, Agency regulation, or the parties' agreement by unilaterally implementing the new CBA or failing to schedule twenty hours per week of official time for the Union president. The Arbitrator concluded that the Union had waived its right to bargain over the new CBA, the new CBA was the agreement in effect, and the new CBA did not provide for twenty hours per week of official time for the Union president.

On, March 18, 2019, the Union filed exceptions to the Arbitrator's award. On April 18, 2019, the Agency filed its opposition to the Union's exceptions.

### III. Analysis and Conclusion: The grievance is barred by § 7116(d) of the Statute.<sup>7</sup>

Neither party challenged the arbitrability of the grievance;<sup>8</sup> however, an award cannot stand if the arbitrator lacked jurisdiction to resolve the grievance in the first place.<sup>9</sup> Furthermore, the Authority can consider jurisdictional issues sua sponte.<sup>10</sup> Therefore, we consider whether the grievance is barred by the earlier-filed ULP charge in accordance with § 7116(d) of the Statute.

<sup>7</sup> The Authority reviews questions of law de novo. *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 conducting a 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 assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party established that they are nonfacts. See *U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).

<sup>8</sup> Exceptions Br. at 2 (arguing that the award is contrary to law because the Agency did not conduct agency-head review); *id.* at 3 (arguing that the Arbitrator's finding that the new CBA governed failed to draw its essence from the parties' agreement); *id.* at 3-4 (arguing that the award is contrary to law because the Union did not waive its right to bargain); Opp'n Br. at 2-3 (arguing that the award is consistent with law); *id.* at 3-6 (arguing that the award draws its essence from the parties' CBA).

<sup>9</sup> *SSA*, 71 FLRA 205, 205-06 (2019) (Member Abbott concurring; Member DuBester dissenting) (citing *U.S. DOL*, 70 FLRA 903, 904 (2018) (Member DuBester dissenting) (citation omitted)).

<sup>10</sup> *U.S. DOJ, Fed. BOP, Fed. Med. Ctr. Carswell, Fort Worth, Tex.*, 70 FLRA 890, 891 (2018) (Member DuBester dissenting) (stating that jurisdictional issues can be considered sua sponte (citation omitted)); *U.S. Dep't of HUD*, 70 FLRA 605, 607 (2018) (Member DuBester dissenting) (stating that a "statutory exclusion 'appl[ies] irrespective of whether a party makes such a claim before the Authority'" (citation omitted)); *U.S. Small Bus. Admin., Wash., D.C.*, 51 FLRA 413, 432 n.9 (2015).

Section 7116(d) provides that "issues [may] be raised under a grievance procedure . . . or as a [ULP] under this section, but not under both procedures."<sup>11</sup> For the purposes of § 7116(d), an earlier-filed ULP charge will bar a grievance if the earlier filed charge concerns the same issue.<sup>12</sup>

To determine whether the issues involved in a ULP charge and a grievance are the same, the Authority looks at whether: (1) the ULP charge arose from the *same set of factual circumstances* as the grievance; and (2) the *theories* advanced in support of the ULP charge and the grievance were *substantially similar*.<sup>13</sup>

Here, the Union's earlier-filed ULP charge alleged that the Agency violated the Statute by notifying the Union of its intention to implement a new CBA on May 1, 2017, and refusing to bargain with the Union over the new CBA.<sup>14</sup> The Union's later-filed grievance alleged that the Agency violated the parties' 1994 CBA by failing to schedule the Union president for twenty hours of official time per week for the duty period of May 2017—the first duty period for which the new CBA governed granting official time.<sup>15</sup> Therefore, to decide the grievance, the Arbitrator had to consider and make factual findings about the bargaining history of the parties that led to the implementation of the new CBA. Thus, the ULP charge and the grievance arose from the same set of factual circumstances—the Agency's implementation of the new CBA.<sup>16</sup>

<sup>11</sup> 5 U.S.C. § 7116(d).

<sup>12</sup> *U.S. Dep't of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 514 (2018) (*Navy Mid-Atlantic*) (Member DuBester dissenting). In addition, the selection of the ULP procedure must have been in the discretion of the aggrieved party. *Id.*

<sup>13</sup> *Id.* (citing *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010)) (quotations omitted).

<sup>14</sup> Exceptions, Attach. 9, ULP Charge, Case No. SF-CA-17-0305.

<sup>15</sup> Exceptions, Attach. 11, Grievance Form.

<sup>16</sup> See *U.S. Dep't of the Air Force, Minot Air Force Base, N.D.*, 70 FLRA 867, 868 (2018) (Member DuBester dissenting) (finding that both (1) a ULP charge alleging the agency violated the Statute by arbitrarily determining the grievants' previous hazard-pay approval was invalid and (2) a grievance alleging the agency violated the Statute by terminating its practice of paying the grievants hazard pay without bargaining involved the same factual circumstances).

Further, the ULP charge and the grievance rely on substantially similar theories—that the Union did not waive its right to bargain the new CBA under the Statute, and, therefore, the 1994 CBA still governed.<sup>17</sup> The Authority has held that election-of-forum provisions were intended to prevent unnecessary or redundant filings on related, similar, or same matters.<sup>18</sup> Both the ULP charge and the grievance required the fact-finder to determine whether the new CBA governs the parties' relationship.<sup>19</sup> Furthermore, the Authority has stated that it “cannot simply turn a blind eye when parties, *through carefully crafted pleadings*, try to avoid the § 7116(d) bar in order to get two bites of the proverbial apple.”<sup>20</sup>

In our opinion, this is what the Union's grievance, alleging that the denial of official time was in violation of the 1994 CBA, attempts to do, namely bring the same issue through the negotiated grievance procedure as it charged as a ULP (the unilateral imposition of a new CBA). Therefore, we find that the Union's earlier-filed ULP charge and the grievance raise the same issue.<sup>21</sup>

That the Union now asserts that it withdrew the ULP charge to convince the Agency to process the grievance<sup>22</sup> is of no consequence. The Authority looks to when a ULP charge is *filed* to determine if an issue has been raised for the purposes of § 7116(d).<sup>23</sup> And the Authority has consistently held that an issue is raised for purposes of § 7116(d) upon the filing of a ULP charge, *even if* that charge is subsequently withdrawn.<sup>24</sup> Here, the Union filed the ULP charge on March 27, 2017, alleging the Agency violated the Statute with its notice of

its intention to unilaterally implement the new CBA.<sup>25</sup> As such, the Union raised the issue in the earlier-filed ULP, even though it later withdrew the charge.

Because the issue in the earlier-filed ULP charge and the grievance is the same and the issue was raised in the earlier-filed ULP charge, the grievance is barred under § 7116(d) of the Statute. Accordingly, we vacate the award because the Arbitrator lacked jurisdiction to address the grievance.

#### IV. Order

We vacate the award.

<sup>17</sup> Exceptions, Attach. 9, ULP Charge, Case No. SF-CA-17-0305; Exceptions, Attach. 10, Amended ULP Charge (alleging the Agency violated the Statute by unilaterally implementing the new CBA); Exceptions, Attach. 11, Grievance Form; Award at 2, 30-31, 34 (discussing the Union's argument that the new CBA was not valid); Exceptions Br. at 8 (asking the Authority to find that the Agency “unlawfully repudiated the 1994 collective-bargaining agreement”).

<sup>18</sup> *Navy Mid-Atlantic*, 70 FLRA at 515.

<sup>19</sup> *See, e.g.*, Award at 39 (finding that resolution of the issue before her “turn[ed] on which labor contract was in effect on May 1, 2017”).

<sup>20</sup> *Navy Mid-Atlantic*, 70 FLRA at 516 (emphasis added).

<sup>21</sup> *Id.* at 514.

<sup>22</sup> Exceptions Br. at 7.

<sup>23</sup> *Local 420*, 70 FLRA at 743 (finding that an issue is raised for the purposes of § 7116(d) when a ULP charge is *filed*, even if it is withdrawn before adjudication on the merits) (citing *U.S. Dep't of Transp., FAA*, 62 FLRA 54, 56 (2007); *IAMAW, Lodge 39*, 44 FLRA 1291, 1298-99 (1992) (citation omitted); *DOD Dependents Sch., Pac. Region*, 17 FLRA 1001, 1003 (1985) (citation omitted)).

<sup>24</sup> *Local 420*, 70 FLRA at 743.

<sup>25</sup> Exceptions, Attach. 9, ULP Charge, Case No. SF-CA-17-0305.

**Member DuBester, dissenting:**

Given the unique circumstances of this case, I would not find that the grievance is barred by § 7116(d) of the Federal Service Labor-Management Relations Statute.<sup>1</sup> Accordingly, I would consider the Union's exceptions to the Arbitrator's award.

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<sup>1</sup> 5 U.S.C. § 7116(d).