BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY

U.S. Bureau of Prisons Leavenworth, KS, Agency, and American Federation of Government Employees Local 919, Union.	))))))))))	FMCS No. 10-01130-8

UNION'S EXCEPTIONS TO THE ARBITRATION AWARD OF MARK W. SUARDI

TABLE OF CONTENTS

Attachments:

Tab 1: Award of Mark W. Suardi, Arbitrator
Tab 2: Joint Exhibits
Tab 3 Agency Exhibits
Tab 4: Union Exhibits
Tab 5: Union's Post Hearing Brief
Tab 6: Agency's Post Hearing Brief
Tab 7: Union's September 23, 2009 Unfair Labor Practice Charge

UNION'S EXCEPTIONS

The American Federation of Government Employees, Local 919 ("AFGE" or the "Union") hereby timely files its Exceptions to the Arbitration Award of Arbitrator Mark W. Suardi ("Arbitrator"). In the above captioned matter, the Arbitrator found that AFGE filed an Unfair Labor Practice ("ULP") regarding the same issue as the grievance before him and the Union was therefore barred from bringing the grievance through the negotiated grievance process. [1] Thus, the Arbitrator failed to reach a decision on the merits whether the Federal Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas ("BOP" or the "Agency") was in violation of the Collective Bargaining Agreement ("CBA") and applicable laws when it implemented and utilized a new computerized overtime sign-up system at Leavenworth, KS.

At the hearing, the parties submitted joint exhibits (Tab 2), the Agency submitted Agency exhibits (Tab 3), and the Union submitted Union exhibits (Tab 4).[2] The parties submitted post hearing briefs; the Union's brief is attached as Tab 5 and the Agency's brief is attached as Tab 6. The Arbitrator mailed the Award on May 9, 2014 and the Award was received in the Union office on May 13, 2014. Because the Award was mailed, pursuant to 5 C.F.R. Part 2429.22, five days are added to timely file exceptions. As such, the Union timely files its exceptions to the Arbitrator's Award.

I. STANDARD OF REVIEW

5 U.S.C. § 7122(a) of the Federal Labor Relations Statute provides for review of arbitration awards by the Authority in the following circumstances:

(a) If upon review the Authority finds that the award is deficient –

[1] The Award is attached as Tab 1. It will be cited as "Award".
[2] Exhibits shall be referred to as follows: Joint exhibits shall be "Jx", Union exhibits shall be "Ux", and Agency exhibits shall be "Ax." The number following the abbreviation will indicate the specific exhibit.

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

5 U.S.C. § 7122(a); *see also*, 5 C.F.R. § 2425.3.

II. STATEMENT OF FACTS

While the Arbitrator's Award did not reach the merits of the grievance, a brief description of the factual background that led to the grievance would provide context to the arguments.

The Agency operates a U.S. Penitentiary in Leavenworth, Kansas and the Local represents the employees at that facility. Pursuant to the Master Agreement between the Federal Bureau of Prisons and the AFGE Council of Prison Locals, the Local and the Agency entered into a Local Supplemental Agreement in July 1999 which remains in effect today. Jx2. That agreement covered many issues, including the system to sign-up for overtime. Jx2, Article 18(g) of the Local Supplement. Following this agreement, employees could sign-up and request specific overtime days, shifts, and even job assignments and employees were contacted and offered these overtime opportunities based on seniority. *Id.*

In 2009, the Agency decided to implement a new computer software system to handle the overtime sign-up. In a Labor Management Relations meeting in March 2009, the Union made inquiries into the new system. Jx3. Over the course of the next several months and subsequent meetings, the Union expressed concern over the new overtime

sign-up system, and specifically that the new system was erroneously skipping employees. *See, generally,* Jx4-9. The Union repeatedly requested to meet with the Agency to discuss the impact and implementation of the new overtime sign-up system, but the Agency failed to respond or negotiate with the Union. *Id.*

On September 23, 2009, the Local filed an ULP with the Federal Labor Relations Authority ("Authority") against the Agency.[3] The ULP, in its entirety, reads:

> On May 27, 2009, the Union was invited to attend a computerized overtime class. **We were told by email, dated June 05, 2009, from Associated Warden Jon Loftness, we would be able to "discuss the impact and implementation" of this new procedure.** The Union brought up several issues with the instructors and the Lieutenants that were there. On June 24, 2009, Lt. Simek put out an email stating "that on August 02, 2009 the new computerized overtime would go into effect." On June 25, 2009 at a Labor Management Relations meeting, the Union brought up the same issues on the computerized overtime, and asked to meet with the agency. Again on July 23, 2009 the Union brought up the same issues, at [a] Labor Management Relations meeting. **The Union was told by Associate Warden Jordan Hollingsworth, that on August 02, 2009 the computerized overtime would go into effect. No one from the Agency would agree to meet with the Union.**

Tab 1 (emphasis added).

On July 22, 2010, Acting Regional Director Gerald M. Cole issued his decision on the ULP charge and found that the issuance of a complaint was not warranted. Ax2. However, as noted by Mr. Cole in the decision:

> The charge alleges that, on or about August 2, 2009, the U.S. Penitentiary, Leavenworth (Activity), through Warden Claude Chester, **implemented a computerized overtime roster program, without providing the American Federation of Government Employees, Local 919 (Union) with notice and the opportunity to negotiate**, in violation of 5 U.S.C. 7116(a)(1) and (5).

Ax2 (emphasis added).

---

[3] While the Agency included the Authority's decision on the ULP as Ax2 and cited the ULP several times in its brief, it does not appear that a copy of the actual ULP was included in the hearing record. As such, a copy of the ULP is attached as Tab 7.

The Union filed a grievance on or about November 10, 2009. Jx10. That grievance stated, in part: "The Union contends that beginning on August 30th through the present that the Employer has not distributed overtime equally among the bargaining unit." *Id.* As the remedy, the Union requested:

> That the agency comply with the Master Agreement, article 18, section p, #1 and #2. Conduct a formal audit of all overtime since the new custody overtime program was initiated. Make all employees that were skipped for overtime made whole. Training for all custody staff on the Overtime sign up roster program and anything else deemed necessary by the arbitrator.

Id.

That grievance proceeded through the negotiated grievance process, and the Union invoked arbitration on January 6, 2010. Jx19. The issues above were submitted to Arbitrator Suardi in a hearing on September 21 and 22, 2010 and on January 15, 2014. At the hearing, the Arbitrator heard testimony and saw evidence that numerous employees were skipped for overtime selection due to problems with the new overtime sign-up system.

After the January 2014 hearing, the parties submitted briefs. In its brief, the Agency, for the first time in this lengthy proceeding, argued that the Arbitrator lacked jurisdiction to decide the case because the Union had previously filed a ULP and was therefore barred under 5 U.S.C. § 7116(d) from pursuing a grievance. Agency's brief at pg. 2-3. In its brief, the Agency incorrectly stated the test for determining whether the issue in the ULP and the grievance were the same, writing: "The proper test for determining similarity of issues is to consider whether the ULP charge and the grievance rest upon the same factual predicate." Agency's Brief at pg. 3, *citing AFGE Local 1411 v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992). As will be discussed in later sections, this

is not the correct or full rule to determine the similarity of the issues. Because the Agency did not raise this issue at any other point in the grievance process, the Union was unable to submit any arguments on this issue or correct the Agency's mistake.

Arbitrator Suardi issued his award in the above captioned case on May 9, 2014. In the Award, the Arbitrator did not reach the merits of the Union's grievance. Instead, citing the Agency's incorrect rule, the Arbitrator held: "The grievance is barred pursuant to the provisions of 5 U.S.C. § 7116(d). The grievance is dismissed." Award at pg. 21.

III. ARGUMENT

A. The Contrary to Law Standard.

The Arbitrator's ruling failed to properly apply applicable law and Authority precedent to the grievance at hand. When confronted with a contrary to law exception to an arbitration award, the Authority analyzes the contested award *de novo* to determine whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See United States Customs Service v. F.L.R.A.*, 43 F.3d 682, 686-87 (D.C. Cir. 1994); *Dep't. of Defense, Alabama National Guard and Alabama Ass'n of Civilian Technicians*, 55 FLRA 37, 40 (1998).

An arbitration award is deficient if it conflicts with applicable law or regulations. 5 USC § 7122(a); *Ft. Campbell, 90 FLRR 1-1451*, 37 FLRA 186 (1990). If the award is contrary to any law, rule or regulation, then the Authority will set aside the award, or, if appropriate, the Authority may modify the award to bring it into conformity with the controlling law, rule or regulation. *See* 5 U.S.C. § 7122(a); *AFGE, Local 201 and U.S. Dep't of Defense, Defense Finance and Accounting Serv. Rome, NY*, 57 FLRA 874 (2002).

B. The Arbitrator's Award Failed to Properly Apply 5 U.S.C. § 7116(d) and Authority Precedent.

The Arbitrator's Award failed to properly apply 5 U.S.C. § 7116(d) and the full version of the Authority's precedent. 5 U.S.C. § 7116(d) provides that issues which may be raised under a negotiated grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or as an ULP, but not under both procedures.

For a grievance to be precluded under section 7116(d) by an earlier-filed ULP charge, the following elements must be met: 1) the issue which is the subject matter of the grievance must be the same as the issue which is the subject matter of the unfair labor practice; 2) such issue must have been earlier raised under the unfair labor practice procedures; and 3) the selection of the unfair labor practice procedures must have been in the discretion of the aggrieved party. *U.S. Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II and AFGE Local 1760*, 36 FLRA 448, 451 (1990). It was not disputed by the Union that the ULP at issue was filed prior to the grievance or that filing the ULP was at the discretion of the aggrieved party. Therefore, the sole concern is whether the subject matter of the issue is the same for both the grievance and the ULP.

The correct test for determining whether the grievance and the ULP involved the same issue is, "whether the ULP charge arose from the same set of factual circumstances as the grievance **and** the theory advanced in support of the ULP charge and the grievance are substantially similar." *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and AFGE*

Local 1411, 38 FLRA 1345, 1350-51 (1991) *review denied AFGE Local 1411 v. FLRA*, 960 F.2d 176 (D.C.Cir. 1992) (emphasis added). The subsequent action is only barred if both of these elements are satisfied. *See Olam Southwest Air Defense Sector, Point Arena Air Force Station, Point Arena, CA and NAGE Local R12-85*, 51 FLRA 797, 802 (1996) ("*Olam*"). Furthermore, actions seeking the same remedy and based on identical factual backgrounds do not necessarily present the same issue or substantially similar legal theories under § 7116(d). *Id.* at 805.

For example, in *U.S. Department of Veterans Affairs, Medical Center, North Chicago, IL and AFGE Local 2107*, 52 FLRA 387 (1996) ("*VAMC*"), the Authority found that a grievance alleging that the agency violated its contract when it failed to issue performances awards was not barred by an earlier filed ULP alleging that the agency unilaterally changed a condition of employment regarding the issuance of performance awards. The Authority reiterated the rule as stated above, and found:

> In this case, the theories are not substantially similar. The theory advanced in support of the ULP charge was that the Agency implemented a change in conditions of employment without providing the Union with notice and an opportunity to bargain. The theory advanced in support of the grievance was that the Agency's denial of performance awards to the grievants upon reconsideration after settlement of the ULP was not fair and equitable as required by the parties' collective bargaining agreement.

Id. at 392-93. In *VAMC*, the Authority also noted:

> In addition, the Agency's claim that the grievance was barred because the grievance and the ULP sought the same remedy is without merit. Although performance awards were sought in both forums, each case advanced a different legal theory. As the grievance did not present the same issue as the ULP, no basis is

> presented for finding that the Arbitrator's order is precluded by section 7116(d) of the Statute.

Id. (internal citations omitted).

In this case, the Arbitrator, following the Agency's mistaken rule in its brief, failed to properly note the Authority's legal precedent to determine whether the issues involved in the ULP and the grievance were substantially similar. In framing the rule to determine whether the issue of the ULP and the grievance were the same, the Arbitrator stated: "When viewing the nature of an issue under §7116(d), the proper approach is to look 'to the facts of the event in determining whether what is complained about in one filing is the same as that complained about in an earlier filing, no matter if they are of the same genre.'" Award at pg. 20; citing *State Department*, 123 LA 1169, 1177 (Moore, 2006). This is not the correct approach or the complete rule. The rule requires the reviewing body to consider whether the two matters were advanced under the same legal theory.

When the proper rule is applied to AFGE's grievance, it is clear that the grievance and the ULP involved different legal theories and therefore the grievance is not barred by the prior filed ULP. AFGE filed the ULP alleging that the Agency failed to negotiate with the Union over the impact and implementation of the overtime sign-up change. *See* Tab 7. This is similar to the union in *VAMC* filing an ULP over the agency unilaterally implementing a change in conditions of employment. *VAMC*, 52 FLRA at 387. AFGE's ULP was denied.

The Union then filed a grievance alleging specific instances where the Agency's new overtime sign-up system caused bargaining unit employees to lose overtime shifts, in violation of existing CBA agreements. Again, this is nearly

identical to the issue presented in *VAMC*. There, as in here, the ULP and the grievance, though based on the same set of underlying facts, advanced different legal theories.

In this case, the theory advanced in support of the Union's ULP was that the Agency failed to negotiate the impact and implementation of the new overtime sign-up system. The theory advanced in support of the Union's grievance was that the Agency violated the contract when it failed to distribute overtime in accordance with the CBA. These are separate and distinct legal theories.

The Arbitrator failed to properly articulate the rule and subsequently failed to engage in the necessary analysis to determine whether the grievance was barred due to the ULP. Instead, the Arbitrator simply noted that the two filings were based off of the same set of facts and therefore found the grievance to be barred. Award at pg. 20. However, as noted in *Olam*, even if the grievance and the ULP are based on *identical* factual backgrounds that does not mean they are necessarily advanced under the same legal theories. *Olam*, 51 FLRA at 802. In addition, even if the remedies requested in each filing intersect, or indeed are identical as in *VAMC* and *Olam*, this does not mean that the legal theories are substantially similar.

An accurate review using the correct Authority precedent clearly establishes that the Union's grievance was not barred by the ULP. The Arbitrator failed to properly apply 5 U.S.C. § 7116(d) and Authority precedent in his Award. The Award is therefore contrary to law and the Union's Exceptions should be granted.

IV. CONCLUSION

The Arbitrator failed to articulate the full and accurate version of Authority precedent and failed to properly apply 5 U.S.C. § 7116(d). Based on all of the foregoing reasons, the Union asks the Authority to grant the Union's exceptions and remand this case to the Arbitrator to issue an award based on the merits of the Union's grievance. If such a remand order is issued, the Union reserves the right to file an amended post hearing brief and request reasonable attorney fees under the Back Pay Act.

Respectfully submitted,

Andres M. Grajales
Deputy General Counsel
AFGE, Office of the General Counsel
80 F Street, NW
Washington, DC 20001
Tel. 202-639-6426
Fax. 202-379-2928
On behalf of AFGE Local 919

William R. Kudrle
Law Clerk
Office of the General Counsel
AFGE, AFL-CIO
Tele: (202) 639-6424
Fax: (202) 379-2928
Bill.Kudrle@afge.org
On behalf of AFGE Local 919

CERTIFICATE OF SERVICE

I certify that copies of the Union's Exceptions to the Arbitrator's Award were served on this 13th day of June, 2014, as indicated below:

Chief, Case Intake and Publication
Federal Labor Relations Authority
Docket Room, Suite 201
1400 K Street, NW
Washington, DC 20424-0001
Fax No: (202) 482-6657
Via efile

Mr. Mark W. Suardi, Esq.
Arbitrator
1650 Des Peres Road, Suite 135
St. Louis, MO 63131-1899
msuardi@aol.com
Via Certified U.S. Mail

Ruby Navarro
Lead Labor Relations Specialist
Federal Bureau of Prisons
230 N. 1st Ave. Ste. 201
Phoenix, AZ 85003
Via Certified U.S. Mail

William R. Kudrle
Law Clerk
Office of the General Counsel
AFGE, AFL-CIO
80 F Street NW
Washington, DC 20001
Tele: (202) 639-6424
Fax: (202) 379-2928