**68 FLRA No. 94**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 919
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
LEAVENWORTH, KANSAS
(Agency)

0-AR-5045

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DECISION

May 14, 2015

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

## I. Statement of the Case

The Union filed a grievance alleging that the Agency's new software program for distributing overtime was unfairly skipping bargaining-unit employees in violation of the parties' collective-bargaining agreement. But Arbitrator Mark W. Suardi dismissed the Union's grievance without considering its merits, finding that he lacked jurisdiction because the grievance was barred by § 7116(d) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The Arbitrator applied § 7116(d) because he found that an unfair-labor-practice (ULP) charge previously filed by the Union over the new software program's implementation concerned "the very same factual matters set forth in the grievance."[2]

The only question before us is whether the Arbitrator erred as a matter of law when he found the grievance barred by § 7116(d). Because the ULP charge and the grievance are based on different legal theories, the answer is yes.

[1] 5 U.S.C. § 7116(d).
[2] Award at 20.

## II. Background and Arbitrator's Award

The Agency implemented new roster software (software) – which included an updated overtime distribution system – without bargaining with the Union. The Union filed a ULP charge, claiming that the Agency failed to negotiate with the Union regarding the impact and implementation of the software, in violation of § 7116(a)(1) and (5) of the Statute.

Federal Labor Relations Authority (FLRA) Regional Director Gerald M. Cole (RD) dismissed the ULP charge, finding that the "unilateral[-]change allegation [was] subject to dismissal" because the "evidence fail[ed] to establish that the [Agency] changed employees' conditions of employment."[3] Further, the RD found that, "[t]o the extent that it could be argued that there was a change in conditions of employment in this case, in cases where the matter to be bargained is expressly covered by the term of the existing collective[-]bargaining agreement, no duty to bargain is triggered."[4] The RD found that "Article 38 of the parties' agreement specifies that overtime assignments will be distributed and rotated equitably among bargaining[-]unit employees and therefore expressly covers the issue in [the ULP charge]."[5]

Following the RD's dismissal, the Union filed a grievance alleging that the Agency violated Article 18, Section p (Article 18(p)) of the parties' collective-bargaining agreement because it failed to equitably distribute overtime assignments by skipping bargaining-unit members in the assignment of overtime.[6] Article 18(p) requires the Agency to "ensure equitable distribution of overtime assignments to members of the [bargaining] unit."[7]

The parties were unable to resolve the grievance and proceeded to arbitration. As relevant here, the Arbitrator framed the issue as: "Does the Arbitrator have jurisdiction to decide the grievance?"[8]

Before the Arbitrator, the Union argued that the Agency, using the new software, continuously skipped employees in the assignment of overtime or incorrectly marked them as refusing an overtime assignment, in violation of Article 18(p) of the parties' agreement.[9] Further, the Union argued that "the Agency's reliance on the . . . [FLRA's] letter [dismissing] the Union's [ULP]

[3] Opp'n, Attach., Ex. A, Dismissal Letter at 2.
[4] *Id.*
[5] *Id.* at 2-3.
[6] Exceptions, Attach. 2, Joint Ex. J-10, Union's Grievance Form (Grievance Form) at 1.
[7] Award at 11.
[8] *Id.* at 7-8.
[9] *Id.* at 14; Grievance Form at 1.

charge should be rejected" because "the ULP [charge] had nothing to do with overtime or compensation for skipped overtime."[10]

Relying on § 7116(d), the Agency argued that the grievance was not arbitrable. Section 7116(d) provides, in relevant part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as [a ULP] . . . *but not under both procedures*."[11] The Agency claimed that – as a result of the Union's election to bring the ULP charge first – the Arbitrator did not have jurisdiction to resolve the grievance because it was barred by § 7116(d). In support, the Agency argued that "[a]ll of the conditions to the application of [§ 7116(d) had] been met,"[12] and that "[t]he issue presented . . . [was] based on the same factual predicate as that before the FLRA."[13] Further, the Agency argued that "[i]n both proceedings there was a claim that the new [software] was improperly implemented and that overtime assignments were not properly being made."[14]

The Arbitrator found the grievance barred by § 7116(d). The Arbitrator explained his legal framework for applying § 7116(d). To apply § 7116(d), the Arbitrator found, "the issue which is the subject matter of the grievance must be the same as the issue which is the subject matter of the ULP charge."[15] Explaining further, the Arbitrator stated, "[w]hen 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."[16]

Applying this framework, the Arbitrator found that the RD's letter dismissing the Union's ULP charge "shows his consideration of nearly the same evidence as presented to the Arbitrator on the Union's concern about the introduction of the new [software] and its effects after implementation."[17] He further found that "there was also evidence before the [RD] as to the . . . fact of missed overtime, the fact senior employees were being overlooked or logged incorrectly[,] and the disruption which occurred in the [overtime] sign up process."[18] The Arbitrator concluded that "[t]hese are the very same factual matters set forth in the grievance."[19]

Accordingly, finding that the "Union's earlier[-]filed ULP charge raise[d] the same issue over the same subject matter" as its grievance, the Arbitrator dismissed the grievance as barred by § 7116(d).[20]

The Union filed an exception, and the Agency filed an opposition to the Union's exception.

## III. Analysis and Conclusions

The Union argues that the award is contrary to § 7116(d) of the Statute.[21] Specifically, the Union claims that the Arbitrator failed to apply the correct rule under Authority precedent and "failed to engage in the necessary analysis" to determine whether the Union's grievance was barred under § 7116(d) as a result of the Union's earlier-filed ULP charge.[22] Further, the Union argues that "[w]hen the proper rule is applied to [the Union's] grievance, it is clear that the grievance and the ULP [charge] involve[] different legal theories and[,]therefore[,] the grievance is not barred by the [earlier-]filed ULP [charge]."[23]

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo.[24] 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.[25] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[26]

The legal framework to determine whether a grievance is barred by an earlier-filed ULP charge is well established. As set forth above, § 7116(d) provides, in relevant part, that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as [a ULP] . . . *but not under both procedures*."[27] The Authority has held that "this wording precludes duplicate filings of an issue *actually raised* in the grievance and [ULP] forums [but] does not extend to an issue [that] the aggrieved party could have, but did not, raise in [an] earlier[-]selected forum."[28] The Authority has further

[10] Award at 15.
[11] 5 U.S.C. § 7116(d) (emphasis added).
[12] Award at 16.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 19.
[16] *Id.* at 19-20 (internal quotation marks omitted).
[17] *Id.* at 20.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Exception at 7.
[22] *Id.* at 10.
[23] *Id.* at 9.
[24] *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)).
[25] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[26] *Id.*
[27] 5 U.S.C. § 7116(d) (emphasis added); *see also* Award at 18 (quoting § 7116(d)).
[28] *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444-45 (2014) (*BOP NY*) (Member Pizzella

held that "in order for an earlier-filed ULP charge to bar a grievance under § 7116(d), the issue that is the subject matter of the grievance must be the same issue that is the subject matter of the ULP charge."[29] In this regard, "the Authority will find that a grievance and a ULP charge involve the same issue when they arise from the same set of factual circumstances *and advance substantially similar legal theories.*"[30]

Regarding the "substantially similar-legal-theories" requirement, the Authority has long held that "an alleged statutory violation relies on a different legal theory than an alleged contract violation, and, as a result, a ULP charge alleging a violation of the Statute does not result in a § 7116(d) bar on a subsequent grievance alleging a breach of the parties' agreement."[31] And "the determination of whether § 7116(d) applies to . . . the grievance before the [a]rbitrator depends on the content of the [u]nion's earlier[-]filed ULP charge – and *not* on any subsequent analysis of the charge by [an RD]."[32]

Here, the Arbitrator failed to analyze whether the ULP charge and the grievance advance substantially similar legal theories. The Arbitrator considered only whether the ULP charge and the grievance arose out of the same factual circumstances.[33] And the Arbitrator erred in basing his determination, in any part, on the content of the RD's dismissal letter instead of the content of the ULP charge itself.[34] Also, as discussed above, the determination of whether a ULP charge and a grievance arise out of the same factual circumstances is only part of the inquiry necessary to conclude that a later-filed grievance is barred by § 7116(d).[35] Therefore, it was necessary for the Arbitrator to analyze whether the ULP charge – as articulated by the Union in the charge itself – and the grievance "advance substantially similar legal theories."[36]

Applying the framework set forth above, we find that the Union's grievance is not barred by § 7116(d) because it does not "advance a substantially similar legal theor[y]"[37] as the earlier-filed ULP charge. Here, the Union's ULP charge is based on a statutory claim that the Agency failed to negotiate with the Union regarding the impact and implementation of the new software, in violation of § 7116(a)(1) and (5) of the Statute. The Union's ULP charge does not mention the parties' agreement at all.

The Union's later-filed grievance is based on a contractual claim that the Agency is violating Article 18(p) of the parties' agreement by failing to equitably distribute overtime assignments by skipping bargaining-unit members in assigning overtime.[38] As discussed above, the Authority has long held that "an alleged statutory violation relies on a different legal theory than an alleged contract violation."[39] Therefore, the Union's ULP charge, which alleged a violation of the Statute, does not result in a § 7116(d) bar on the Union's later-filed grievance, which alleges a violation of the parties' agreement.

In concluding that the Arbitrator misapplied § 7116(d) of the Statute, we reject, as we have in other cases,[40] the dissent's suggestion that a union's grievance – alleging only a contractual violation – and its ULP charge – alleging only a violation of the Statute – "raise the same issue over the same subject matter."[41] The dissent notes that "[t]he only difference between" the Union's claims is that, in the grievance, the Union did not mention the Statute.[42] The dissent describes this distinction as a "sleight of hand" or "ruse" by the Union.[43] But it is well settled under Authority precedent "that purely contractual violations are not ULPs and, thus, may not be litigated in the statutory-ULP process."[44] And the U.S. Court of Appeals for the District of

dissenting) (internal quotation marks omitted) (citing *INS, U.S. DOJ*, 18 FLRA 412, 414 n.3 (1985)); *Olam Sw. Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 807 (1996) (stating that second sentence of § 7116(d) "plainly precludes only subsequent litigation of issues that . . . *were raised* earlier," regardless of "whether . . . [the filing party] could have raised [other] issues" in an earlier proceeding) (emphasis added)); *Dep't of the Army, Headquarters, Presidio of S.F.*, 30 FLRA 50, 52 (1987)).

[29] *Id.* at 445 (citing *U.S. Dep't of the Navy, Naval Air Eng'g Station, Lakehurst, N.J.*, 64 FLRA 1110, 1111 (2010) (*Navy*)).

[30] *Id.* (emphasis added).

[31] *Id.* (citing *U.S. DOL, Wash., D.C.*, 59 FLRA 112, 115 (2003); *see also U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord Air Force Base, Wash.*, 63 FLRA 677, 680 (2009) (*Air Force*) (earlier-filed grievance alleging contractual violation did not trigger § 7116(d) bar on later-filed ULP charge alleging violation of the Statute)).

[32] *Id.* (citing *Air Force*, 63 FLRA at 680 (agreeing with administrative law judge that the application of a § 7116(d) bar depends on how "the charge is . . . drawn"); *Navy*, 64 FLRA at 1111 (stating that § 7116(d) bar applies only to those issues raised through the statutory ULP procedure "at the discretion of the aggrieved party")).

[33] Award at 17-20.

[34] *BOP NY*, 67 FLRA at 444-45.

[35] *Id.* at 445.

[36] *Id.*

[37] *Id.*

[38] Grievance Form at 1.

[39] *BOP NY*, 67 FLRA at 445.

[40] *See id.* at 446; *U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 546 (2014).

[41] Dissent at 3.

[42] *Id.* at 2.

[43] *Id.*

[44] *BOP NY*, 67 FLRA at 447 (citing *Iowa Nat'l Guard & Nat'l Guard Bureau*, 8 FLRA 500, 500-01, 510-11 (1982) (*Iowa*)).

Columbia Circuit, "[e]ndorsing this distinction under § 7116(d) . . . observed that it 'would be strange indeed . . . to contend' that a ULP 'charge concern[ing] a statutory violation' and a grievance alleging a 'violation of [a parties'] agreement . . . present an identical issue.'"[45] The dissent provides no basis for abandoning this well-established distinction when applying the § 7116(d) bar.

Moreover, the dissent's interpretation of § 7116(d) is inconsistent with the section's aim "to provide most 'federal employees [with] . . . the right to choose between bringing their employment-related complaints as ULP charges [before the Authority], or as grievances under the [parties'] negotiated[-]grievance procedure.'"[46] The dissent proposes to apply the § 7116(d) bar in cases that "involve issues or matters that easily could have been consolidated into a single action."[47] But longstanding precedent holds that "the ULP process does not provide a mechanism for resolving disputes over contract interpretation or application."[48] Thus, under the dissent's proposed standard, an aggrieved party that wants to allege a purely contractual violation and a statutory violation arising out of the same facts will not be able to litigate the claims under the statutory-ULP process, and will be limited to raising these claims under the negotiated-grievance procedure. In those circumstances, the dissent's interpretation would do away with an aggrieved party's statutory right to choose an appropriate forum for distinct legal claims under the Statute, and therefore, is not faithful to the wording and purpose of § 7116(d).

Accordingly, we set aside the award because the Arbitrator erred as a matter of law in concluding that § 7116(d) barred him from resolving the Union's grievance alleging violations of the parties' agreement. Where the Authority sets aside an arbitrator's finding that the substance of a grievance is not arbitrable, "the Authority's general practice is to remand the award to the parties for resubmission to an arbitrator of their choice, absent settlement, for further action consistent with the Authority's decision."[49]

## IV. Decision

We grant the Union's contrary-to-law exception and set aside the award. We remand the matter to the parties for resubmission to an arbitrator of their choice, absent settlement, for a decision on the merits of the remaining issues.

[45] *Id.* at 445 (quoting *Overseas Educ. Ass'n v. FLRA*, 824 F.2d 61, 72 (D.C. Cir. 1987)).
[46] *Id.* at 447 (quoting *Dep't of Commerce, Bureau of the Census v. FLRA*, 976 F.2d 882, 888 (4th Cir. 1992)).
[47] Dissent at 2.
[48] *BOP NY*, 67 FLRA at 447 n.55 (citing *Iowa*, 8 FLRA at 500-01, 510-11).
[49] *AFGE, Local 1401*, 67 FLRA 34, 38 (2012) (citing *AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010)).

**Member Pizzella, dissenting:**

This is not the first time that AFGE, Council of Prison Locals 33 (Council 33) has filed a grievance (this time through AFGE, Local 919 (Local 919)) over the process by which the Bureau of Prisons assigns overtime to its officers.[1]

This time the Union argues that some officers at the federal prison at Leavenworth, Kansas (Bureau) were "routinely skipped"[2] for overtime and "missed overtime [opportunities]."[3] The Union blames the missed overtime opportunities on a newly implemented software program, which was being "used in all [Bureau prisons]"[4] to ensure that overtime would be awarded "fairly and equitabl[y]" and in compliance the parties' master agreement and local supplement.[5]

"Attempt[s] to merge the old . . . system" with the "new computerized system did not work."[6] Under the old system, senior officers were permitted to work overtime "repeatedly before less senior staff."[7] Apparently, Council 33 and Local 919 preferred the old system[8] even though it was not "fair[] and equitable."[9] They were determined to stop the new system no matter how many complaints, grievances, or appeals it would take.

There was just one problem with this strategy. Section 7116(d) does not permit "*duplicative proceedings*" and requires parties "to make *an election of remedies*."[10]

Local 919's first line of attack was to file an unfair-labor-practice (ULP) charge. In that charge, Local 919 argued that the Bureau violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by "implementing [the] new computerized overtime roster program without giving [AFGE] the opportunity to negotiate prior to [its] implementation."[11] More specifically, Local 919 complained that the new software caused some officers to "miss[] overtime"[12] even though it did not change "the procedures for requesting and assigning overtime" which were established by the master agreement and local supplement.

Then in a sleight of hand that it apparently learned from Council 33,[13] Local 919 filed a grievance (just forty-eight days later) and argued that the new computerized roster program caused some officers to "miss[] overtime."[14] The only difference between the earlier-filed charge and the later-filed grievance is that, in its grievance, Local 919 cleverly argued that the Bureau violated the relevant provisions of the parties' agreement, avoiding any mention of the Statute.[15]

The ULP was dismissed by Regional Director Gerald Cole (RD) on July 22, 2010 because he found no evidence to show that "any losses of overtime . . . [could] be attributed to the new program."[16] He also found that some officers had missed overtime both before and after the new software program was implemented. In other words, the missed overtime had nothing whatsoever to do with the new software program. Therefore, the RD denied Local 919 any relief[17] including any retroactive payment of overtime.

Four years later, when the grievance finally made its way to arbitration, Arbitrator Mark Suardi saw right through Local 919's ruse and determined that, no matter how the Union tried to frame the later-filed grievance, the ULP charge and the grievance "raise[d] the *same issue* over the *same subject matter*."[18] He dismissed the grievance because it was barred by § 7116(d).[19]

Without a doubt, Arbitrator Suardi got it right. He recognized, as did I in *BOP*, that Local 919's antics mimic "Bluto" Blutarsky's infamous line from the movie Animal House: "Over? Did you say 'over'? Nothing is over until we decide it is!"[20]

Local 919 takes, all too literally it seems, the euphemistic title from Yogi Berra's book of wit and inspiration: *When You Come to a Fork in the Road, Take*

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[1] *U.S. DOJ, Fed. BOP, Met. Corr. Ctr, N.Y C., N.Y.*, 67 FLRA 442 (2014) (*BOP*) (Member Pizzella dissenting).
[2] Award at 14.
[3] Opp'n, Attach., Ex. A (Regional Director's (RD's) Decision) at 2.
[4] Award at 16.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] *Id*. at 15.
[9] *Id*. at 16.
[10] *BOP*, 67 FLRA at 451 (Dissenting Opinion of Member Pizzella) (quoting *AFGE, Local 1411 & Helen Owens v. FLRA*, 960 F.2d 176, 178 (D.C. Cir. 1992) (*Local 1411*)).
[11] RD's Decision at 2.
[12] *Id*.
[13] *BOP*, 67 FLRA at 451 (Dissenting Opinion of Member Pizzella).
[14] Award at 20.
[15] *Id*. at 7.
[16] RD's Decision at 2.
[17] *Id*. at 3.
[18] Award at 20 (emphasis added).
[19] *Id*. at 21.
[20] *BOP*, 67 FLRA at 453 (Dissenting Opinion of Member Pizzella) (internal quotation marks omitted).

*It!*[21] And the majority demonstrates once again that they are entirely comfortable permitting a union "to 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."[22] According to the majority, Local 919's grievance raises a "different legal theory" simply because "the [earlier-filed] ULP charge *does not mention* the parties' agreement" and the later-filed grievance *only alleges* a violation of the agreement,[23] even though it is quite obvious that the charge and the grievance "raise the *same issue* over the *same subject matter*" and involve "the very *same factual matters.*"[24]

I am flattered that the majority takes the time to acknowledge my "standard," which they assert prevents a union from alleging "a contractual violation *and* a statutory violation arising *out of the same facts*."[25] They are indeed correct on that *one point*, but there are significant differences between our "interpretation[s]" of § 7116(d).

The majority's interpretation sounds a lot like Yogi Berra's aforementioned euphemism to the extent that they do not require a union or grievant to make *any choice* whatsoever when they come to a "fork" in the road.[26] Instead, the majority gives them the fork itself.

Under my "standard,"[27] however, when a union or grievant has the *option* of alleging either a contractual violation or a statutory-ULP violation, which arise out of "the very same factual matters,"[28] then the union or grievant *must choose* one path or the other. That is the *point* of § 7116(d). Contrary to the majority's assertion, my "standard" does not "limit" an aggrieved party's ability to file a statutory ULP,[29] *unless it first files* a contractual grievance on the same factual matters. Likewise, if a party first files a statutory ULP, it will not be able to file a contractual grievance on those same matters.

Section 7116(d) does not create an absolute "statutory *right to choose*" to file *both* a grievance *and* a ULP over the same matter.[30] Section 7116(d) only provides a union or grievant "***an option*** of using [either] the negotiated grievance procedure ***or*** [the ULP process]."[31]

Far too often, unions and grievants treat the various *options* of redress that are set forth in the Statute as though they are an all-you-can-eat smorgasbord of unlimited choices, rather than a menu from which one must select a single entree. Limiting a party to one choice is not contrary to the purpose and intent of the Statute. Many protections afforded to employees under the Civil Service Reform Act require an employee to make *the choice between two* different avenues of redress (i.e. matters that constitute performance-based actions covered by § 4303, disciplinary actions covered by § 7512, or prohibited personnel actions covered by § 7121(g)(1)-(3)), but, in those circumstances, the employee *must* nonetheless *choose one and only one*. Other protections provide *just one* avenue of redress, *with no choice* whatsoever, by excluding those matters from a grievance procedure altogether (i.e. matters concerning prohibited political activities; examination, certification, or appointment; and classification).[32] Therefore, requiring a union or grievant to choose between several options does not "do away" with any right, any more than providing just one avenue of redress does.[33]

In fact, a "faithful [reading of] the wording and purpose"[34] of the Statute also respects the Statute's mandate to discourage parties from "unwisely consum[ing] federal resources . . . and . . . undermin[ing] 'the effective conduct of [government] business.'"[35] "Congress made clear that it intended to prevent '*duplicative proceedings* by requiring [unions and grievants] to make *an election of remedies.*'"[36] And, most certainly, Congress never "intended the application of § 7116(d) to depend on how a union words . . . its complaints and grievances."[37]

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[21] Yogi Berra, *When You Come to a Fork in the Road, Take It!* (Hyperion New York 2001).
[22] *BOP*, 67 FLRA at 452.
[23] Majority at 4-5; (emphasis added); *see also BOP*, 67 FLRA at 550 n.17 (Dissenting Opinion of Member Pizzella).
[24] Award at 20 (emphases added).
[25] Majority at 6 (emphases added).
[26] *When You Come to a Fork in the Road, Take It!*
[27] *See* Majority at 6.
[28] Award at 20; *see also* Majority at 6.
[29] Majority at 7.
[30] *Id.* (emphasis added).
[31] 5 U.S.C. § 7116(d) (emphases added).
[32] *Id.* § 7121(c)(1), (3), (5).
[33] *See* Majority at 7.
[34] *Id.*
[35] *BOP*, 67 FLRA at 452 (Dissenting Opinion of Member Pizzella) (quoting 5 U.S.C. § 7101(a)(1)(B)).
[36] *Id.* at 451 (quoting *Local 1411*, 960 F.2d at 178).
[37] *U.S. Dep't of the Navy, Marine Corps Combat Dev. Command, Marine Corps Base, Quantico, Va.*, 67 FLRA 542, 550 (2014) (Dissenting Opinion of Member Pizzella) (quoting *BOP*, 67 FLRA at 453 (Dissenting Opinion of Member Pizzella)).

Arbitrator Suardi got it right. The Union made the choice to first pursue this matter through a ULP charge. The Union's later-filed grievance *is barred* by § 7116(d). Accordingly, I would deny the Union's exceptions.

Thank you.