

Case Summaries

CARTER v. GIBBS OVERRULED

Robert O. Mudge v. United States, No. 02-5024 (Fed. Cir., Oct. 17, 2002).

Holding

Relying on the "plain language" of § 7121(a)(1), as amended in 1994, the Federal Circuit abandons the position it took in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), where it had interpreted § 7121(a)(1) as precluding judicial remedies for matters (except for certain specified statutory options) that have not been explicitly excluded from the negotiated grievance procedure.

Summary

In January 1990, Mr. Mudge, an FAA maintenance mechanic, transferred from Nevada to Alaska, where he worked until March 1992, at which time he returned to Nevada. He filed a grievance for backpay under the CBA, seeking, among other things, a 12% pay differential for the time he worked in Alaska. When the agency rejected his claim the union refused to invoke arbitration.

Mr. Mudge consequently sought relief from the GAO and the MSPB, both of which found that they lacked authority to hear his case. He then filed his pay differential claim in the Court of Federal Claims (CFC), which dismissed his complaint on the ground that 5 U.S.C. § 7121(a)(1) deprived it of jurisdiction. That decision was appealed to the Federal Circuit.

In 1994 Congress amended § 7121 by, among other things, adding the word "administrative" to § 7121(a)(1). That section, which initially stated that collective bargaining agreement grievance procedures were the "exclusive procedures" for resolving grievances that fell within its coverage, was amended, in part, to read "exclusive *administrative* procedures." (Emphasis added.) The issue before the court was whether the insertion of the word "administrative" undermined the position that had been taken by the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990), where had it interpreted § 7121(a)(1) as precluding judicial remedies for matters that have not been explicitly excluded from the negotiated grievance procedure.

The court noted that Congress characterized its amendments of section 7121(a)(1) as "Technical and Conforming Amendments."

Nothing else in the direct legislative history of the 1994 amendments informs the meaning of the term "administrative" or Congress's intent in adding the word to § 7121(a)(1). H.R. 2970, the bill that ultimately amended § 7121(a)(1), passed the House without the term "administrative," and the word was only added later as a floor amendment in the Senate. *See* 140 Cong. Rec. 27,361 and 28,823-28 (1994). While the House subsequently adopted the Senate's amendment to the bill, *see id* 29,350, neither the House nor the Senate provided a discussion or an explanation of the disputed term.

The court also noted that there was some indirect history on the matter. Two NTEU officials testified, during subcommittee hearings on H.R. 2970, that Congress should overrule *Carter* by clarifying that while the NGP was a Federal employee's exclusive administrative remedy, it didn't foreclose access to judicial remedies. Also, a House committee report accompanying a different bill that failed to pass stated that the addition of "administrative" to § 7121 would clarify that

"[t]he grievance procedure was never intended to deprive employees of access to the courts" and thereby "correct" the decision in *Carter*.

The court further noted that the the CFC, in *Mudge v. United States*, 50 Fed. Cl. 500 (2001), rejected the aforementioned indirect history and had concluded that the word "administrative" merely made clear that the NGP constituted the only avenue of redress except where § 7121 explicitly offers a choice of administrative remedies, as it does in subsections (d), (e), and (g). There had been five other decisions by the CFC: in two of them the CFC reached the same conclusion as it did in *Mudge*. But in the other three cases CFC concluded that the 1994 amendments overruled *Carter*. After summarizing the arguments in those cases, the court reached the following conclusion, based on the "plain language" of the statute (aided by the distinction made between "administrative" and "judicial" in *Black's Law Dictionary*):

We conclude that Congress's addition of the word "administrative" to § 7121(a) established a federal employee's right to seek a judicial remedy for employment grievances subject to the negotiated procedures contained in his or her CBA. To the extent that *Carter* held otherwise, the court based its decision on the language of the statute as it read prior to the 1994 amendments and that decision is therefore no longer applicable. Accordingly, we reverse the Court of Federal Claim's dismissal of Mr. Mudge's claim for lack of jurisdiction and remand for further proceedings.

The rest of the Federal Circuit's decision gives its reasons for rejecting various Government arguments in support of *Carter*.

! It rejected the Government's claim that the word "administrative" merely makes plain that the NGP is the employee's only remedy, except where § 7121 explicitly offers a choice of other administrative remedies on the ground that such an interpretation "reads the word 'administrative' out of the subsection."

! It also rejected the Government's contention that because Congress characterized the insertion of "administrative" as a "technical and conforming amendment" it didn't intend to substantively change § 7121(a)(1), saying that "we 'appl[y] the usual tools of statutory construction' to all relevant amendments to the CSRA, regardless of their title."

! The Government's legislative history argument, that if Congress intended such a drastic change to the current scheme it would not have done so "without discussion, explanation, or debate" was rejected because it "impermissibly distorts the correct approach to legislative history when it suggests that Mr. Mudge bears the burden of finding additional support therein for the plain and unambiguous language of the statute. . . . To the contrary, it is the government that must show clear legislative history supporting its construction because it is the government that seeks to construe the statute contrary to its plain text."

! Nor did the court's interpretation render § 7121(a)(2), which states that the CBA can exclude any matter from the application of the NGP, superfluous. That section not only served as a means to preserve an employee's right to pursue his or her grievance in court, but also as a means of foreclosing access to the NGP and "directing certain matters to alternative administrative channels, such as an agency's administrative process or the Office of Personnel Management." Besides, the Government's proposed interpretation "itself risks rendering elements of the statutory language superfluous by disregarding the presence of the word 'administrative' in § 7121(a)(1)."

! The court rejected the Government's claim that construing "amended § 7121(a)(1) according to its plain text . . . would disrupt the congressional preference for collectively bargained grievance procedures expressed in the CSRA."

We agree that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the outdated patchwork of statutes and rules built up over almost a century that was the civil service system. . . . We cannot agree, however, with an interpretation of § 7121(a)(1) that privileges these policy concerns to the exclusion of the plain language of the statute.

! Nor was it convinced by the Government's assertion that limiting amended § 7121(a)(1)'s exclusivity provision "to the administrative realm" would create an imbalance between the procedural rights arising under subsections (d), (e), and (g) and grievances falling outside these subsections. But it continued as follows:

As for the argument that this interpretation privileges employees whose claims are not covered by these subsections by allowing them to obtain both administrative *and* judicial relief, we note that the Court of Federal Claims never addressed this question and that it is not properly before us on appeal. While the issue may or may not be dispositive on remand, we explicitly do not decide whether the addition of the word "administrative" to subsection (a)(1) permits a federal employee to pursue both arbitration and a judicial remedy under § 7121(a)(1).

Finally, the court declined to address the Government's non-statutory argument--viz., that the CBA that applied to Mr. Mudge had waived his right to go to court on his grievance. (The CBA stated that its NGP "shall be the exclusive procedure [not exclusive *administrative* procedure] available to the Parties and the employees in the unit for resolving grievances.") "As the government conceded, however, the *Mudge* court did not decide this issue, and for that reason, we decline to resolve the question on appeal."

Comments

Of the Government's arguments, it seems to us that its "imbalance" argument is the most cogent. In providing for the exceptions, under subsections § 7121(d), (e), and (g), to the exclusivity of the negotiated grievance procedure, Congress was at pains to make clear that the grievant would not be given "two bites at the apple." It is hard to believe that Congress would want to override *Carter* without at the same time making clear that the employee had to choose between arbitration and whatever judicial forum that would be available once *Carter* is overruled. It seems to us that both subsections (d), (e), and (g) of § 7121(d) and § 7123(a)(1), which permits court review of arbitration awards only when the award involves an unfair labor practice, favor an interpretation barring "two bites at the apple." But we'll have to wait and see how the CFC (and, thereafter, the Federal Circuit) will handle this issue.

Regarding the waiver-of-statutory-rights argument, it should be pointed out that the Federal Labor Relations Authority, in *INS*, 10 FLRA No. 40, held that an unknown statutory right cannot be "clearly and unmistakably" waived. Whether the Court of Federal Claims, on remand, takes a similar position, also remains to be seen.