FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-21

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
WASHINGTON, D.C.
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1917
CHARGING PARTY

Case Nos. BN-CA-12-0092
BN-CA-12-0333

Gail M. Sorokoff
For the General Counsel

Bruce I. Waxman
For the Respondent

Anthony Zito
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Under the Statute, an agency must allow unresolved grievances to proceed to arbitration unless the grievances are prohibited under clearly established law. In this case, the Agency acknowledges that it refused to let a local union's grievances go to arbitration. The Agency claims that its actions were justified because it was already arbitrating "identical" grievances filed by the national union. While the Agency may have legitimate concerns about litigating multiple grievances, it has failed to demonstrate that its arguments could not be made before an arbitrator, nor has it shown that the grievances were precluded by statute. Therefore, its refusal to arbitrate constituted an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or Authority), 5 C.F.R. part 2423.

On December 9, 2011, the American Federation of Government Employees, AFL-CIO, Local 1917 (Local 1917) filed an unfair labor practice (ULP) charge against U.S. Immigration and Customs Enforcement, Washington, D.C. (the Agency or Respondent), docketed as Case No. BN-CA-12-0092. GC Ex. 1(a). In that charge, Local 1917 asserted that the Agency violated the Statute by refusing to allow a grievance to proceed to arbitration. *Id.* After investigating the charge, the Regional Director of the Boston Region of the FLRA issued a Complaint and Notice of Hearing on July 31, 2012, asserting that the Respondent violated § 7116(a)(1) and (8) of the Statute by engaging in the actions alleged in the charge. GC Exs. 1(a) & 1(c). The Respondent filed its Answer to the Complaint on August 27, 2012, denying that it violated the Statute. GC Exs. 1(c) & 1(d). On June 12, 2012, Local 1917 filed a second unfair labor practice charge against the Agency, docketed as Case No. BN-CA-12-0333, asserting that the Respondent violated the Statute by refusing to allow another grievance to proceed to arbitration. GC Ex. 1(e). After investigating this charge, the Acting Regional Director of the Boston Region of the FLRA issued a second Complaint and Notice of Hearing on September 10, 2012, alleging that the Respondent violated § 7116(a)(1) and (8) of the Statute as alleged in the charge, and consolidating BN-CA-12-0092 with BN-CA-12-0333. GC Ex. 1(g). On October 3, 2012, the Respondent filed its Answer to the second Complaint, denying that it violated the Statute. GC Ex. 1(j). On November 28, 2012, the Respondent filed a Motion for Summary Judgment, which the General Counsel (GC) opposed and I denied. GC Exs. 1(*l*), 1(m) & 1(n).

A hearing in this matter was held on December 12, 2012, in New York City, New York. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

On May 15, 2013, the Respondent filed a Motion to Reopen the Hearing to Admit Previously Unavailable Evidence, namely, an arbitration award dated April 29, 2013. Upon consideration of that motion, and the lack of opposition by the GC or Charging Party, I granted the Respondent's motion on June 4, 2013.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent, a subordinate entity within the U.S. Department of Homeland Security (DHS), is an agency within the meaning of § 7103(a)(3) of the Statute.

GC Exs. 1(c), 1(d), 1(g) & 1(j); Jt. Ex. 1; Tr. 22. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. Jt. Ex. 1. As discussed further below, Local 1917 is an agent of AFGE for the purpose of representing bargaining unit employees at the Respondent's New York Field Office, its New York City Office of Enforcement and Removal Operations (ERO), and its New York City Office of the Principal Legal Advisor (OPLA). GC Exs. 1(c), 1(d), 1(g) & 1(j).

This story begins in 2000, when the U.S. Immigration and Naturalization Service (INS) entered into a collective bargaining agreement (CBA), known as Agreement 2000, with the AFGE's National Immigration and Naturalization Service Council (INS Council). Jt. Ex. 36. INS was dissolved in 2003, when components of INS and other entities were combined into a new organization, U.S. Immigration and Customs Enforcement (ICE), within the new DHS. Jt. Ex. 1, Decision and Order on Petition at 2; Tr. 22. In 2005, AFGE was certified as the exclusive representative of a clarified bargaining unit that includes all nonprofessional employees at ICE. Jt. Ex. 1. In 2006, AFGE split the INS Council into several entities, including Council 118. Jt. Ex. 3 at 2. Also in 2006, AFGE and ICE formally recognized that Agreement 2000 applied to AFGE and ICE (with minor changes not relevant here), and that AFGE had designated Council 118 as its representative and bargaining agent for the ICE unit. Jt. Ex. 3 at 1-2.

In February 2007, John Gage, AFGE's president, informed the Agency that AFGE was delegating aspects of its authority to various Council 118 officials "for the administration of the national . . . bargaining unit[.]" Jt. Ex. 2 at 1. This delegation gave Council 118 "the authority to deal with ICE on all matters which are broader than local in scope . . . including the administration and enforcement of the [CBA]." *Id.* The delegation also provided Council 118 "authority to negotiate over any personnel policy and/or practice and changes to conditions of employment." *Id.* At the same time, Gage stated that presidents of the local unions – there were twenty-six or twenty-seven of them nationwide (Tr. 92, 209-10) – would "continue to be delegated authority to negotiate on matters within the responsibility of the ICE management officials within each Local's respective jurisdictions . . . ." Jt. Ex. 2 at 2. Local presidents were "also authorized to file grievances directly with the appropriate local management officials in accordance with the [CBA]" and to "redelegate their authority as they deem appropriate . . . ." *Id.*

In June 2010, Gage informed the Agency that he was "continuing the delegation of authority to represent . . . ICE employees to AFGE Council 118." Jt. Ex. 4 at 1. This delegation included the authority "to deal with the Agency on all matters which are appropriate" under the Statute, "to negotiate over any changes in personnel policies, practices and conditions of employment[,]" and to file ULP charges. *Id.* Gage did not expressly refer to AFGE locals in this letter. *Id.* at 1-2.

This background information applies equally to the two disputes in this case. The first dispute pertains to the Agency's decision to bar employees from accessing their personal email accounts (webmail) at work. The second dispute pertains to the Agency's decision to modify a "detainer" form used by ICE officers. I describe the two disputes below.

I. The Webmail Dispute

On September 1, 2011, the Agency announced that it would block employee access to webmail on government computers, effective September 7. Jt. Ex. 5. This change affected employees nationwide, including the deportation officers, immigration enforcement agents, and other ERO and OPLA employees represented by Local 1917. *Id.*; Tr. 23.

On September 9, Stephen Weekes, Local 1917's president, initiated a grievance (Step A of the grievance procedure) with Christopher Shanahan, New York ERO Field Office Director, alleging that the Agency violated Articles 6(A) and 9(A) of Agreement 2000 by barring employee access to webmail.[1] Jt. Ex. 6 at 1; Tr. 35-36. As remedies, the Union asked that the Agency: (1) rescind its notice regarding access to webmail; (2) notify the Union if it still intends to change working conditions; (3) approve waivers for Union representatives to access webmail; (4) add workstations where employees can access webmail; and (5) not discipline employees for accessing webmail until the issue is resolved. Jt. Ex. 6 at 2-3.

On September 14, Weekes filed a Step A grievance with Aaron Todd, the Acting Chief Counsel of OPLA in New York City, alleging the same violations, and requesting the same remedies, as the ERO grievance. Jt. Ex. 7.

On September 30, Shanahan and Todd denied the grievances in a joint response. Jt. Ex. 8. In doing so, they asserted that the change was a "nationwide endeavor, rather than a local matter[,]" that Council 118 had been notified of the decision, and that "any grievance stemming from this undertaking rest solely with the Council and can only be grieved pursuant to Article 47(I)(3)."[2] *Id.* at 2. Weekes appealed the denial by filing Step B grievances with Michael Havrilesko, Director of Employee and Labor Relations at ICE headquarters in Washington, D.C, on October 5. Jt. Exs. 9 & 10; Tr. 150.

Things got complicated on October 6, when Council 118 filed a national grievance alleging that the Agency's decision to block access to webmail violated various sections of Article 9 of Agreement 2000 and the parties' past practice. Jt. Ex. 14. Council 118 asserted that the Agency did not properly notify the Union of the change regarding webmail access (as

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[1] Article 6 is entitled "Status of Employee Representatives" and Section A is entitled "No Restraint." Jt. Ex. 36 at 8. Article 9 is entitled "Impact Bargaining and Mid-Term Bargaining" and Section A is entitled "Notice of Proposed Change." *Id.* at 18.

[2] Article 47 is entitled "Grievance Procedure" and Section (I)(3) is entitled "National Level Disputes." Jt. Ex. 36 at 90, 96.

required by Article 9(C)), and that the unilateral implementation of the change without bargaining violated Article 9(F). *Id.* at 2. Council 118 asserted that it is the "exclusive representative of the bargaining unit employees of ICE . . . and represents the interests of all employees in the bargaining unit . . . ." *Id.* at 1. As a remedy, Council 118 requested that the Agency cease implementing policies unilaterally and bargain with Council 118 over the procedures to be used when implementing a new policy under Article 9(F) in the future. *Id.* at 2.

Shanahan denied Local 1917's Step B grievance on behalf of ERO employees on October 28, citing Council 118's grievance as the basis for denial. Jt. Ex. 11. Shanahan asserted that Council 118's grievance was "identical" to Local 1917's; that Article 47(C) of Agreement 2000 entitles "the Union" to select one of the identical grievances for processing; and that Council 118 had elected to process its grievance nationally. *Id.* The Agency did not respond to Local 1917's Step B grievance on behalf of OPLA employees. Jt. Ex. 13; Tr. 43.

Weekes then informed Havrilesko that he was invoking arbitration regarding Local 1917's grievances on behalf of ERO and OPLA employees on October 31 and November 14, respectively. Jt. Exs. 12 & 13. Weekes asked Havrilesko to provide Local 1917 with the names of the arbitrators who were next in line to hear a dispute, under the parties' arbitrator selection process. *Id.* Anthony Zito, Local 1917's executive vice president who represents employees in grievances, arbitrations, and other matters, explained at the hearing that grievances cannot proceed to arbitration unless the Agency cooperates and identifies the next arbitrator on the list. Tr. 32-34. Meanwhile, on November 22, Council 118 invoked arbitration in its nationwide webmail grievance. Jt. Ex. 18 at 1.

Management did not respond to Local 1917's invocation. So, on November 30, Zito emailed Havrilesko (and copied Council 118 official LeAnn Mezzacapo) reiterating that Local 1917 had invoked arbitration and wanted Havrilesko to provide the names of arbitrators to hear the grievances. Jt. Ex. 16 at 2; Tr. 44. On December 2, Havrilesko replied that he had been "in touch with the C118 outside legal counsel about their National Grievance and the Local 1917 grievances, re: 'Identical Grievances' on webmail access blocking." Jt. Ex. 16 at 1. That same day, Zito responded that Local 1917's grievances were not identical to Council 118's, but even if they were, Article 47(C) gives the Union, not the Agency, the option of selecting a grievance to proceed. *Id.*

Havrilesko replied to Zito, Mezzacapo and others on December 6. Jt. Ex. 17. He asserted that Local 1917's webmail grievances and Council 118's webmail grievance were "identical" and that "only one can proceed to arbitration" under Article 47(C) of the CBA. *Id.* at 1. He stated that he would hold the selection of arbitrators for Local 1917's grievances "in abeyance" until he received "a response from legal counsel for Council 118 whether it agrees that the Local 1917 grievance is an "Identical Grievance" as the National Grievance and which of the 3 grievances Council 118 selects to proceed to arbitration." *Id.* at 2. At the hearing, Havrilesko stated that he never heard back from Council 118, and that Local 1917's webmail grievances were still "in abeyance." Tr. 198-99.

The Agency permitted Council 118's webmail grievance to go to arbitration. Jt. Ex. 21. As a preliminary matter, the Agency filed a Motion for Resolution of a Threshold Issue with the arbitrator. Citing the allegedly identical grievances filed by Local 1917, and the Agency's contention that the Local Union's grievances have been "subsumed" by the national grievance, the Agency asked the arbitrator to agree that any remedy awarded in the Council 118 grievance would also be dispositive of Local 1917's grievances. Jt. Ex. 34 at 1-2. Noting his limited jurisdiction to decide only the national grievance, the arbitrator denied the Agency's motion on September 16, 2012. *Id.* at 3. Mezzacapo emailed the ruling to Zito and Weekes on September 28, advising them that the hearing on the merits of Council 118's webmail grievance would begin the following day. GC Ex. 2. She closed her message by saying, "Please let me know if there are any changes on your side." *Id.* On April 29, 2013, Arbitrator Jeffrey J. Goodfriend partially sustained Council 118's webmail grievance, ruling that the Agency improperly changed email procedures without first bargaining; however, he denied Council 118's request for status quo ante relief, ordering post-implementation bargaining instead. R. Ex. 4 at 31, 38-43.

II. The "Detainer" Form Dispute

In December of 2011, the Agency revised its "detainer" form (Form I-247), a document ICE officers fill out and serve on local law enforcement agencies, jails, or prisons, so that an ICE officer can take custody over a subject. Tr. 57-58; GC Ex. 3; *see also* Jt. Ex. 22. The change affected employees nationwide. GC Exs. 3, 12.

In late December, Council 118 emailed local presidents, asking if any of them planned to file grievances challenging the Agency's decision to revise the detainer form. GC Ex. 12; Tr. 135.

On January 18, 2012, Weekes filed a Step A grievance on behalf of Local 1917 with Shanahan. Jt. Ex. 23 at 1. The grievance alleged that the Agency violated Article 9(A) of the CBA by changing the detainer form without providing the union with notice and an opportunity to bargain over the change. With regard to remedies, Local 1917 requested that the Agency: (1) discontinue the new form; (2) notify the union regarding proposed changes; (3) give the union an opportunity to respond to such notice, request information, make proposals, and bargain in good faith; (4) not make reprisals against the union or employees in connection with issuing detainer forms; and (5) provide training regarding the form. *Id.* at 2.

Two days later, Council 118 filed a national grievance alleging that the Agency violated Articles 2(A), 9(A), and 9(B)(1)(a) of Agreement 2000 by unilaterally changing the detainer form. Jt. Ex. 27 at 1-2. Council 118 also stated that it "represents the interests of all employees in the bargaining unit . . . ." *Id.* at 1. As for remedies, Council 118 requested that the Agency: (1) cease implementation of the new detainer form; (2) return to the status quo ante; (3) cease disciplining employees in connection with the new form; (4) provide back pay for employees adversely affected by the new form's implementation; (5) notify Council 118 regarding changes associated with the new form; and (6) comply with Article 9 regarding bargaining over procedures and appropriate arrangements in connection with the new form. *Id.* at 2-3.

On February 6, Shanahan denied Local 1917's detainer grievance, asserting that the revised detainer form was a "national matter beyond the direct control" of the New York Field Office. Jt. Ex. 24 at 1-2. In this connection, Shanahan asserted that "there is only one exclusive representative of the ICE bargaining unit[,]" AFGE, and that "[g]rievances taken at the local level are respected as exercises of the power of the exclusive representative, which has been delegated to local subdivisions of AFGE." *Id.* at 2. "However," Shanahan stated, if Council 118 were to "take . . . action on this issue, . . . exercise of the power generating from the Union's status as the exclusive representative would supersede any local action, and this grievance would be effectively pre-empted and withdrawn." *Id.* Weekes appealed the denial, filing a Step B grievance with Havrilesko on February 8. Jt. Ex. 25. Meanwhile, on February 24, the Agency denied Council 118's detainer grievance. Jt. Ex. 28.

The Agency did not respond to Local 1917's appeal, and on March 9, Weekes informed Havrilesko that Local 1917 was invoking arbitration. Jt. 26; Tr. 62. Havrilesko did not provide Local 1917 with the name of an arbitrator, leaving Local 1917 unable to bring the matter to an arbitration hearing. Tr. 62-63.

On March 20, Council 118 invoked arbitration in its grievance. Jt. Ex. 29. An arbitrator was selected, but the hearing was postponed. Jt. Exs. 30, 32; Tr. 162. On July 3, Mezzacapo emailed Havrilesko (and copied Local 1917), asking him when she could receive the Agency's position on Local 1917's detainer grievance. Jt. Ex. 33 at 1-2. Havrilesko replied that the Agency's position was "consistent with the same defense we asserted" regarding Local 1917's webmail grievances. *Id.* at 1. Consistent with that position, Havrilesko did not select an arbitrator for Local 1917's detainer grievance, leaving that grievance "in abeyance." Tr. 199.

III. Council 118 Keeps Abreast of Local 1917's Grievances

On August 28, 2012, Mezzacapo emailed Weekes and Zito about Local 1917's grievances. GC Ex. 4. With regard to the webmail grievances, Mezzacapo noted that the "Agency has asked the Council a few times to withdraw the L1917 grievance," but that Council 118 "has and will continue to refuse to get involved in your grievance." *Id.* at 2. With regard to Local 1917's webmail and detainer grievances, Mezzacapo asked Weekes and Zito whether the Agency had assigned an arbitrator, and she stated, "[a]nytime this subject comes up, the Council ensures the Agency is aware that we believe they should assign an arbitrator." *Id.* At the hearing, Zito testified that this email "reiterates the council's support of our grievances and the fact that they feel that they should have proceeded to arbitration." Tr. 71. He further testified that no one from Council 118 had asked him not to proceed to arbitration on the webmail grievances. Tr. 56. Similarly, Weekes testified that Council 118 had not asked him not to go forward with the webmail and detainer grievances. Tr. 136. And Havrilesko acknowledged that no one at Council 118 had ever told him that Local 1917's grievances should not go to arbitration. Tr. 188.

IV. Additional Evidence Presented at the Hearing

At the hearing, the GC submitted a 2007 award by Arbitrator Martin Ellenberg involving Local 1917's allegation that the Agency violated the CBA by failing to notify Local 1917 about new standards regarding fugitive apprehensions that applied to employees nationwide. Jt. Ex. 35 at 2, 4. Arbitrator Ellenberg found that the Agency failed to properly notify Local 1917 about the new standards, in violation of Article 9(A) of Agreement 2000. *Id.* at 6. In doing so, he noted:

> While . . . the policy is National in scope, I find that the Agency's failure to advise the appropriate Union Officer, at the National Level, should not bar the filing of the grievance by Local 1917, representing its own members. Nevertheless, while it is also recognized that any Agency/Union discussions of the new policy would be more appropriate at the National Level, I find, as well, that if requested, a representative of Local 1917, the "Grievant," should be permitted, to be present or be kept informed of such discussions.

Id.

Zito testified that this showed that Local 1917 has been permitted to bring a grievance concerning a nationwide policy to arbitration. Tr. 27-29. Havrilesko suggested, however, that the grievance went forward because no national grievance had been filed. *See* Tr. 158.

The Agency also introduced an award, a 2012 decision by Arbitrator Alan Viani, involving Local 1917's allegation that the Agency violated Agreement 2000 by making a change so as to apply nationwide overtime policy to employees at the New York Field Office. Local 1917 requested bargaining over the change. R. Ex. 3 at 6. Arbitrator Viani denied the grievance in part, finding that the Agency was entitled to make the change and that the substance of the change was "not subject to negotiations at a local level." *Id.* at 18, 21. He sustained the grievance "to the extent that Agency is required to negotiate, on a local level, the practical impact of implementation . . . on covered employees." *Id.* at 21. The Agency cited the Viani award to support the claim that Local 1917's bargaining authority was limited to local matters. *See* Tr. 122; R. Ex. 3; R. Br. at 18.

With regard to the issue of arbitrability, Zito testified that under Articles 47(H) and 48(C) of Agreement 2000, disputes concerning the arbitrability of a grievance have been resolved by the arbitrator.[3] Tr. 67. Havrilesko, however, cited the parties' "mutual practice of dealing with the national union on national policies and national grievances, and not dealing with local unions on national polices and national grievances." Tr. 183.

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[3] Article 47(H) states, as relevant here: "If the Union or the Service elects to proceed to arbitration of the grievance, such grievability/arbitrability questions are to be decided as a threshold issue by the arbitrator who decides the merits of the grievance." Jt. Ex. 36 at 95. Article 48(C) permits the parties to agree to request an initial decision on a threshold issue and states, as relevant here, that "grievability/arbitrability questions are to be decided as a threshold issue by the arbitrator." *Id.* at 98.

Havrilesko was asked whether he was concerned that allowing locals to grieve nationwide policies would burden the Agency. He replied, "I don't have concerns. But I think it would be an absurd reading of this CBA when it has provisions for . . . national grievances." Tr. 209-10. He added that "if we had 12 policies that we wish to issue this fiscal year, that would be over 300 arbitration cases. And I think that that would be an absurd reading of this CBA." Tr. 210. When asked whether there had been a problem with numerous grievances on the same issue, Havrilesko answered, "No, because our practice has been national grievances, national bargaining is on a national level." *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel alleges that the Respondent violated § 7116(a)(1) and (8) of the Statute by refusing to allow Local 1917's grievances to proceed to arbitration.

The GC argues that once a party has invoked arbitration, § 7121 of the Statute requires the other party to participate, and that the failure to do so violates the Statute. *Dep't of the Air Force, Langley AFB, Hampton, Va.*, 39 FLRA 966 (1991) (*Langley AFB*); *AFGE, Local 2782, AFL-CIO*, 21 FLRA 339 (1986); *Dep't of Labor, Emp't Standards Admin./Wage & Hour Div., Wash., D.C.*, 10 FLRA 316, 319-22 (1982) (*DOL*). In this regard, the GC asserts that § 7121(a) expressly states that questions of arbitrability are also reserved for determination by an arbitrator. *See U.S. Dep't of Veterans Affairs, Veterans Canteen Serv., Martinsburg, W. Va.*, 65 FLRA 224 (2010) (*VCS Martinsburg*); *Langley AFB*, 39 FLRA at 969; *Dep't of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 11 FLRA 456, 457 (1983) (*Portsmouth*). The only exception to this rule – arising where "clearly established law" precludes a grievance – does not apply here. GC Br. at 11.

In addition, the General Counsel argues that Agreement 2000 does not justify the Agency's actions. As an initial matter, the GC asserts that Articles 45(H) and 46(C) reserve all questions of arbitrability for the arbitrator.[4] *Id.* at 10. Further, the GC contends that Council 118's and Local 1917's grievances were not "identical" under Article 47(C) and do not justify the Agency's actions, because: (1) Local 1917's grievances focused on different provisions of the contract, and sought different remedies, than Council 118's grievances; (2) Article 47(C)'s use of the word "may" indicates that consolidation of identical grievances is not mandatory; (3) Article 47(C) applies only to employee grievances, not institutional grievances like the ones at issue here; and (4) if there are identical grievances, the Agency does not get to select the grievance to bring to arbitration. *Id.* at 13-14.

[4] The GC's contract citations here appear to be a typographical error. Article 45(H) does not exist, and Article 46(C) pertains to the employer's responsibilities regarding sexual harassment. Jt. Ex. 36 at 86-87. It is likely that the GC intended to refer to Articles 47(H) and 48(C), which were cited by the GC's witnesses (Tr. 66-67), and which were cited elsewhere by the GC itself. GC Br. at 16.

The GC adds that "Local 1917 has invoked arbitration in the past on numerous occasions and never before has faced any argument that Local 1917 was not free to invoke arbitration or somehow needed the Council's approval to do so." *Id.* at 14-15. Nevertheless, Council 118 "clearly expressed its approval to Local 1917 for them to proceed[,]" and ICE "admits that there were no discussions . . . in which Council 118 indicated that Local 1917 was not authorized to file the grievances." *Id.* at 15.

The GC contends that while Havrilesko testified that Article 48(A) allowed him to determine whether a grievance is arbitrable, that assertion is "absurd[]" when read in conjunction with Articles 47(H) and 48(C). *Id.* at 16.

With regard to the remedy, the GC requests that a notice be posted nationwide, because the decision not to allow Local 1917's grievances to go to arbitration came "from the central office and applies throughout" the Agency. *Id.* at 18. Accordingly, the GC requests that the notice be signed by the ICE Director and posted at all facilities where ICE employees represented by AFGE are located. *See VCS Martinsburg*, 65 FLRA at 237; *U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 394-95 (1999) (*BOP*).

Respondent

The Agency denies that it violated the Statute by refusing to permit Local 1917's grievances go to arbitration. In this regard, the Agency first argues that, as a factual matter, AFGE did not delegate its authority to deal with national matters to Local 1917. Therefore, Local 1917 "lacks standing" to file the webmail and detainer grievances, and "[a]n arbitrator lacks jurisdiction to decide" those grievances. R. Br. at 12, 14.

The Agency also contends that it did not violate § 7121 of the Statute because it arbitrated the webmail and detainer grievances with Council 118. It acknowledges Authority rulings that an agency commits an unfair labor practice if it prevents a grievance from going to arbitration. *Id.* at 14 (citing *Langley AFB; Rolla Research Ctr., U.S. Bureau of Mines, Rolla, Mo.*, 29 FLRA 107, 115 (1987); and *Portsmouth*. But it argues that these cases are "inapposite," because the Agency cooperated with Council 118, the exclusive representative, in taking the national level grievances to arbitration. R. Br. at 14. Further, the Agency asserts that when a party opposes arbitration "but does not impede the arbitration[,]" there is no violation of the Statute. *Id.* at 15 (citing *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Phoenix, Ariz.*, 60 FLRA 405, 407 (2004) (*VA Phoenix*)). Similarly, the Agency contends that it was privileged to allow only Council 118's grievances go to arbitration, because under the CBA the Agency is "not required to arbitrate multiple grievances on the same subject." R. Br. at 12.

The Respondent makes a number of arguments pertaining to bargaining. Citing *NTEU, Chapter 137*, 60 FLRA 483, 486 (2004) (*NTEU*), the Respondent asserts that there is "no statutory obligation to bargain below the level of recognition." R. Br. at 12; *see also U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1274 (1998) (*FDA*), and

DOD Dependents Sch., 12 FLRA 52, 53 (1983). As the Authority stated in *U.S. INS, U.S. Border Patrol, Del Rio, Tex.*, 51 FLRA 768, 789 (1996), "[s]ince the exclusive recognition is at the national level, the Statute, in the absence of an agreement between the parties, or other appropriate delegation of authority, does not require negotiations at any other level." *See also FEMA, Headquarters, Wash., D.C.*, 49 FLRA 1189, 1201 (1994) (*FEMA*).

The Agency also maintains that the Ellenberg and Viani arbitration awards do not establish that the Agency was obligated to bring Local 1917's grievances to arbitration. With regard to the Ellenberg award, the Agency contends that it is not precedential, and that it is an "exception to the general concept that only Council 118 can grieve regarding national policy." R. Br. at 17. The Agency argues that the dispute in the Ellenberg grievance began before Council 118 was created, and that there "may have been a vacuum within the AFGE structure that allowed Local 1917 to file the grievance." *Id.* at 18. Moreover, the Agency contends, Arbitrator Ellenberg recognized that discussions over the policy in dispute would be "more appropriate at the National level." *Id.* With regard to the Viani award, the Agency asserts that the arbitrator only found that Local 1917 could bargain over local matters.

Next, the Respondent contends that requiring it to arbitrate the same transaction at both the national and local levels would conflict with the principle of promoting governmental effectiveness and efficiency under §§ 7101(b) and 7112(a) of the Statute.[5] *See U.S. Dep't of Justice, INS v. FLRA*, 995 F.2d 46, 47 (5th Cir. 1993); *U.S. Dep't of the Navy, Commander, Navy Region Se., Jacksonville, Fla.*, 62 FLRA 11, 14 (2007) (*Navy*); *Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms*, 18 FLRA 466, 468-69 (1985). In this regard, the Agency contends that allowing multiple locals to file grievances on nationwide matters would potentially result in a "lack of uniformity" and would "outstrip agency resources." R. Br. at 15.

With regard to a remedy, the Respondent opposes the nationwide posting of a notice to employees. It argues that "[t]his is a local issue, filed by Local 1917 in New York[,]" that there is "nothing extraordinary in this case that goes outside the City of New York and Local 1917," and that "there is no evidence that there was any knowledge of the dispute outside of New York, except among union officials." *Id.* at 22, 24; *see, e.g., U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1021 (1998) (*NOAA*).

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[5] As relevant here, § 7101 states that the provisions of the Statute "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. § 7101(b). Among other things, § 7112 provides that the Authority "shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of, the operations of the agency involved." 5 U.S.C. § 7112.

ANALYSIS

The Agency Violated § 7116(a)(1) and (8) of the Statute

Section 7121 of the Statute states that any negotiated grievance procedure shall "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration." 5 U.S.C. § 7121(b)(1)(C)(iii). Accordingly, the Statute "mandates" arbitration of unsettled grievances. *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 208, 211 (2010) (*FAA*). Further, choosing an arbitrator to hear a grievance, pursuant to the parties' agreed-upon procedures, is a fundamental component of the binding arbitration process. *Id.* An agency's refusal to participate in the arbitration process pursuant to a negotiated grievance procedure conflicts with § 7121 of the Statute and therefore violates § 7116(a)(1) and (8) of the Statute. *Id.* "This is because a party's refusal to participate in the arbitration process results in the hindrance or obstruction of grievance resolution through binding arbitration, which is contrary to the mandate and intent of Congress in enacting § 7121." *Id.*

The Authority has stated that a negotiated grievance procedure "must be read as providing that all questions of arbitrability not otherwise resolved shall be submitted to arbitration." *VCS Martinsburg*, 65 FLRA at 228. Questions of arbitrability include whether a party has standing to file a grievance and whether a grievance was properly filed at the local level. *See U.S. Dep't of the Navy, Naval Air Station, Whiting Field*, 66 FLRA 308, 309 (2011) (*Whiting Field*) (argument that union lacked standing to file grievance); *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., El Paso, Tex.*, 61 FLRA 741-42, 746 (2006) (argument that grievance should have been filed at national rather than local level).

It is well established that questions of arbitrability are "solely for an arbitrator to decide." *VCS Martinsburg*, 65 FLRA at 228. Accordingly, an administrative law judge errs by "attempting to resolve the question of arbitrability" himself or herself. *Portsmouth*, 11 FLRA at 457. Further, a refusal to arbitrate may not be justified by a party's contention, "however arguable or reasonable," that the parties intended the subject matter of the grievance to be excluded from the coverage of the negotiated grievance procedure. *U.S. Dep't of the Air Force, Headquarters, 92nd Air Refueling Wing, Fairchild AFB, Wash.*, 59 FLRA 434, 435 (2003) (*Fairchild AFB*). Thus, in *Portsmouth*, when the judge found that parties should not be "forced to the expense of arbitration in every instance" when a request for arbitration "is so clearly . . . frivolous[,]" the Authority reversed the judge and emphasized that "all" indeed means "all." 11 FLRA at 457, 474.

In *Director of Admin., Headquarters, U.S. Air Force*, 17 FLRA 372, 374-75 (1985) (*HQ, USAF*), the Authority created a limited exception to the rule that questions of arbitrability are solely for an arbitrator to decide, finding that "clearly established law" precluded a grievance regarding the termination of a probationary employee. This exception was applied to Veterans Canteen Service employees appointed under 38 U.S.C. § 7802 in

U.S. Dep't of Veterans Affairs, Veterans Canteen Serv., 66 FLRA 944 (2012); *but see VCS Martinsburg*, where the agency's refusal to arbitrate was found unlawful, in part because there were "threshold question[s] . . . of interpretation or statutory construction" that could "legitimately be resolved by an arbitrator." 65 FLRA at 228 (quoting *HQ, USAF*, 17 FLRA at 375). In other words, in order to justify a refusal to arbitrate, it is not enough to argue that a grievance is barred by statute; rather, it must be shown that the statutory bar is a matter of "clearly established law." Otherwise, the parties should make their nonarbitrability arguments to the arbitrator.

The Respondent admits that it declined to arbitrate with Local 1917 and acknowledges that the Statute forbids an agency from impeding arbitration. R. Br. at 14-15; *see also* Tr. 198-99. The Respondent offers a number of defenses for its action, but none justifies its refusal to arbitrate Local 1917's grievances.

First, the Respondent argues that AFGE did not delegate authority to Local 1917 to file grievances on matters of nationwide concern. Therefore, it argues, Local 1917 "lacks standing" to file the webmail and detainer grievances, and an arbitrator "lacks jurisdiction" to resolve them. R. Br. at 11, 14. But these are just different ways of saying that Local 1917's grievances are not arbitrable. They still must be decided by an arbitrator, no matter how "arguable" or "reasonable" the Agency's claims are. *See Fairchild AFB*, 59 FLRA at 435. The Agency's objection to Local 1917's authority is not a statutory one, but one that is dependent on interpreting delegation letters issued by the AFGE President (*see, e.g.*, Jt. Exs. 2 & 4) and a factual determination of whether these grievances were national or local (*see, e.g.*, Jt. Exs. 34 & 35). It is precisely these sort of threshold issues that an arbitrator is supposed to resolve. *See HQ, USAF*, 17 FLRA at 375.

Next, the Respondent asserts that it did not violate § 7121 of the Statute because it allowed the webmail and detainer grievances filed by Council 118 to go to arbitration, even though it did not allow Local 1917's webmail and detainer grievances to go to arbitration. But § 7121(b)(1)(C)(iii) provides that "*any* grievance not satisfactorily settled under the negotiated grievance procedures shall be subject to binding arbitration." (emphasis added). Contrary to the Agency's claim, § 7121 does not allow it to cherry-pick grievances. Its participation in the Council 118 arbitrations does not negate its refusal to arbitrate Local 1917's grievances.

The Respondent further contends that under Article 47(C) of Agreement 2000, it was "not required to arbitrate multiple grievances on the same subject." R. Br. at 12; *see also* Jt. Exs. 11, 17. But at the same time that the Agency cites Article 47(C) to support its position, the Union and the GC cite Articles 47(H) and 48(C) to support their position that questions of arbitrability should be decided by the arbitrator. Jt. Ex. 36 at 91-92, 95, 98. More fundamentally, however, this disagreement over the meaning of the CBA is precisely the sort of dispute that § 7121(b)(1)(C)(iii) reserves for arbitration. Local 1917 submitted its grievances to arbitration, and if the Agency believed Agreement 2000 barred duplicate arbitrations, it should have made that argument to the arbitrator. While *HQ, Air Force* allows

an agency to refuse arbitration where the grievance is prohibited by statute, that exception does not apply to issues of procedural or contractual arbitrability. *See VCS Martinsburg*, 65 FLRA at 228; *see also Whiting Field*, 66 FLRA at 309, regarding challenges to an arbitrator's ruling on arbitrability. Accordingly, the CBA does not justify the Agency's refusal to allow Local 1917's grievances to go to arbitration.

The Respondent also claims that there is "no statutory obligation to bargain below the level of recognition," and that an agency cannot "demand that a collective bargaining agreement be consummated between it and a local union, rather than the certified international union." R. Br. at 13. But the Agency is accused of failing to participate in arbitration, not failing to bargain, and the cases cited by the Agency in this regard are similarly inapposite. *NTEU, Chapter 137*, 60 FLRA at 486-88 (agency did not have to bargain at the local level over certain matters); *FDA*, 53 FLRA at 1273-81 (agency violated the Statute by insisting on separate collective bargaining agreements for employees included in a single bargaining unit); *FEMA*, 49 FLRA at 1190, 1200-04 (agency did not violate the Statute by refusing to negotiate with a person who lacked authority to represent the exclusive representative). Engaging with a union in a grievance and arbitration at a level other than that of exclusive recognition is not the same as negotiating; indeed, the Agency has participated in grievances and arbitrations with Local 1917. While the Respondent may have legitimate contractual and other reasons to argue that arbitrating these grievances with Local 1917 was improper, the place to make those arguments was before the arbitrator.

The Agency claims that requiring it to arbitrate the webmail and detainer grievances filed by both Local 1917 and Council 118 would conflict with § 7101(b) of the Statute, which requires that provisions of the Statute "be interpreted in a manner consistent with the requirement of an effective and efficient Government." As discussed above, the Authority interprets § 7121 as requiring arbitration of unresolved grievances; in *Portsmouth*, 11 FLRA at 457, it rejected similar claims of inefficiency and expense due to frivolous arbitration demands, and that rationale has been applied repeatedly since then. *See, e.g., Fairchild AFB*, 59 FLRA at 435.

The Respondent would interpret § 7121 to allow an agency to avoid arbitration any time it believes (sincerely or otherwise) that a grievance is not arbitrable, thus forcing a union to file an unfair labor practice charge just to bring the grievance to arbitration. This would result in the "hindrance or obstruction of grievance resolution through binding arbitration," which is "contrary to the mandate and intent of Congress in enacting § 7121." *FAA*, 65 FLRA at 211. In reality, forcing a grievant to pursue an unfair labor practice proceeding to get its case heard is equally vulnerable to the potential for abuse and delay as forcing a party to raise its nonarbitrability claims in multiple hearings. Accordingly, I am not persuaded that § 7101(b) justifies an exception to the consistent interpretation of § 7121. None of the cases cited by the Respondent in this regard is sufficiently analogous to the circumstances of this case to justify the refusal to arbitrate a grievance.

The Respondent claims that allowing locals to bring grievances on nationwide policies to arbitration could result in a "lack of uniformity" and "outstrip agency resources." R. Br. at 15. But since Havrilesko acknowledged at the hearing that the Agency has not actually experienced these problems, this argument is more speculative than real. The Union will face the same litigation risks and financial costs as the Agency if it pursues multiple arbitrations, and this is likely to discourage either party from abusing the system.

Finally, the Respondent submits that requiring it to arbitrate Local 1917's grievances would be contrary to § 7112(a) of the Statute. Section 7112(a) pertains to the Authority's determination of appropriate units in representation cases, and it is not analogous to the instant case; neither is the *Navy* decision, which it cites in support. While § 7112(a)'s goal of "promot[ing] effective dealings with, and efficiency of the operations of the agency involved[]" echoes § 7101(b)'s goal of an effective and efficient government, the Authority's case law under *Portsmouth* and § 7121 takes these values into account and requires both unions and agencies to raise their claims of nonarbitrability with the arbitrator, unless the grievance is statutorily barred under clearly established law.

In sum, the Agency admits that it refused to let Local 1917's grievances proceed to arbitration. The Agency also concedes that as a general rule, claims of nonarbitrability must be raised in the arbitration itself, but it urges that the general rule should not apply in this case. It has failed, however, to show that Local 1917's grievances were statutorily barred as a matter of clearly established law. Instead, it has made contractual and logical arguments which may be quite persuasive to an arbitrator, but which are not appropriate to block the arbitration entirely. Accordingly, I find that the Agency violated § 7116(a)(1) and (8) of the Statute.

REMEDY

The GC seeks a notice to employees that is signed by the ICE Director and posted nationwide. The Respondent seeks a notice signed and distributed only on a local level.

In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *BOP*, 55 FLRA at 394. First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. *Id.* Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Id.* at 394-95. In applying these principles, a relevant factor is whether the national office of a respondent was involved in the unfair labor practice. *U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., Swanton, Vt.*, 65 FLRA 1023, 1030 (2011). Where that has been the case, and the Authority has directed a nationwide posting, the Authority has also directed the highest official of the national office to sign the posting. *Id; compare with NOAA*, 54 FLRA at 1022-23 (notice appropriately limited to location of violation). Here, Havrilesko, the Director of Labor Relations at ICE headquarters in Washington, D.C., was a

central figure in preventing Local 1917's grievances from proceeding to arbitration. It was he who maintained the lists of arbitrators and who refused to assign an arbitrator for Local 1917's webmail and detainer grievances. *See, e.g.*, Jt. Ex. 17. Accordingly, the notice should be signed by the Director of ICE and should be posted nationwide.

Finally, in accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, both types of postings are appropriate here. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Based on the foregoing, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute) it is hereby ordered that U.S. Immigration and Customs Enforcement, Washington, D.C. (ICE), shall:

1. Cease and desist from:

(a) Failing or refusing to arbitrate the grievances filed by the American Federation of Government Employees, Local 1917 (Local 1917), concerning employee access to email (webmail) and concerning the I-247 detainer form.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Proceed to arbitration concerning the grievances filed by Local 1917 concerning webmail and concerning the I-247 detainer form.

(b) Post at all of its facilities where employees of ICE represented by the American Federation of Government Employees are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of ICE and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material. The Notice shall also be disseminated to all bargaining unit employees by email or other electronic media customarily used to communicate to employees.

(c) Pursuant to section 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Boston Regional Office, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., March 18, 2015.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that U.S. Immigration and Customs Enforcement, Washington, D.C., violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to arbitrate the grievances filed by American Federation of Government Employees, Local 1917 (Local 1917), concerning employee access to email (webmail) and concerning the I-247 detainer form.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured them by the Statute.

WE WILL arbitrate the grievances filed by Local 1917 concerning webmail and concerning the I-247 detainer form.

_____
(Agency/Activity)

Date: _____ By: _____
(Director, Immigration and Customs Enforcement)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Suite 472, Boston, MA 02222, and whose telephone number is: (617) 565-5100.