

**63 FLRA No. 134**

AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES  
NATIONAL BORDER PATROL COUNCIL  
LOCAL 1929  
(Union)

and

UNITED STATES DEPARTMENT  
OF HOMELAND SECURITY  
UNITED STATES CUSTOMS  
AND BORDER PROTECTION  
UNITED STATES BORDER PATROL  
EL PASO SECTOR  
EL PASO, TEXAS  
(Agency)

0-AR-4251

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DECISION

June 16, 2009

Before the Authority: Carol Waller Pope, Chairman and  
Thomas M. Beck, Member

**I. Statement of the Case**

This matter is before the Authority on exceptions to an award of Arbitrator James P. O'Grady filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

As relevant here, the Arbitrator determined that the grievance was not substantively arbitrable. For the reasons set forth below, we find that the award is contrary to law, set it aside, and remand to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits.

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

Five Agency bargaining unit employees were involved in an off-duty fight. The Agency interviewed each employee as part of its investigation of the fight, but decided that no further action was necessary. *See* Award at 3. The Union filed a grievance alleging that the Agency's investigation of the five employees violated Article 4H of the parties' agreement because the employees' off-duty conduct had no nexus to their offi-

cial duties.<sup>1</sup> *See id.* at 4. The matter was unresolved and was submitted to arbitration.

The Agency filed a pre-hearing motion arguing that the Union's grievance was not arbitrable because, among other reasons, it interfered with management's right to determine its internal security practices and did not involve an issue that was within the Agency's duty to bargain. *See* Exceptions at 7-9. Although the Arbitrator found that the parties' agreement does not permit either party to file pre-hearing motions, he nevertheless determined that he could consider the Agency's motion because the parties were not permitted to contractually waive challenges to subject matter jurisdiction. *See* Award at 6-7, 12. The Arbitrator bifurcated the hearing, and framed the sole issue for resolution as "[i]s the grievance arbitrable?" *Id.* at 2.

The Arbitrator concluded that he lacked subject matter jurisdiction and the Union's grievance was, therefore, not substantively arbitrable because the grievance directly interfered with management's right to determine its internal security practices under § 7106(a)(1) of the Statute and the subject matter of the grievance was not within the Agency's duty to bargain.<sup>2</sup> *See id.* at 7, 11-12, 13, 14. Having found that the grievance was not substantively arbitrable, the Arbitrator determined that it would be inappropriate for him to consider whether the Union was entitled to any remedy. *See id.* at 14. The Arbitrator also concluded that he had no authority under the parties' agreement to award a remedy because the grievance did not involve any disciplinary action. *See id.* 9.

Despite his assertion that his award was "limited to arbitrability[.]" the Arbitrator also decided the merits of the grievance. *Id.* at 10. In this regard, the Arbitrator concluded that the Agency's decision to investigate the five employees did not violate Article 4H of the parties' agreement because there was a nexus between the

1. Article 4H, "Rights and Obligations," provides:

Any inquiry into an employee's off-duty conduct must be based on an activity which, if verified, would have a nexus to the employee's official position. The [Agency] and Union agree that the conduct of employees while off duty shall result in action concerning the employee only when there is a nexus between the conduct and the employee's official position. Employees will not be subject to harassment or frivolous inquiries.

Opposition, Attach. 5 at 7.

2. § 7106(a)(1) of the Statute states, in relevant part: "[N]othing in this chapter shall affect the authority of any management official of any agency . . . to determine the . . . internal security practices of the agency[.]"

employees' conduct and their official duties. *See id.* at 13, 14.

### III. Positions of the Parties

#### A. Union's Exceptions

The Union argues that the Arbitrator's conclusion that the grievance was not substantively arbitrable is contrary to law and fails to draw its essence from the parties' agreement because the Authority has consistently held that the management rights provision of § 7106 of the Statute has no bearing on the arbitrability of a grievance. *See* Exceptions at 9-10, 18 (citing *United States DHS, Customs & Border Prot. Agency, N.Y., N.Y.*, 61 FLRA 72 (2005) (Member Pope concurring as to other matters) (*DHS*)). The Union further alleges that the Arbitrator's arbitrability determination is contrary to law and fails to draw its essence from the parties' agreement because his determination that the grievance did not concern an issue that is within the Agency's duty to bargain has no bearing on the arbitrability of the grievance. *See id.* at 11. Alternatively, the Union asserts that Authority precedent establishes that Article 4H and similar provisions are within the Agency's duty to bargain. *Id.* at 12-13 (citations omitted).

The Union further claims that the Arbitrator exceeded his authority because he addressed an issue that was not part of the issue he framed, namely, whether the Agency's investigation violated Article 4H of the parties' agreement. *See id.* at 14. The Union also contends that the Arbitrator's decision to consider this issue deprived the Union of a fair hearing because it was not given an opportunity to argue this issue. *See id.* at 15. Finally, the Union asserts that the Arbitrator's conclusions that he could consider the Agency's pre-hearing motion and that he had no authority under the parties' agreement to award any remedy fail to draw their essence from the parties' agreement. *See id.* at 17, 18.

#### B. Agency's Opposition

According to the Agency, the Arbitrator's conclusion that the Union's grievance was not arbitrable was a procedural arbitrability determination. *See* Opposition at 8-9. As the Union's contrary to law arguments directly challenge the Arbitrator's procedural arbitrability determination, the Agency asserts that, under Authority precedent, they must be denied. *See id.* at 8-9. Alternatively, the Agency contends that Authority precedent establishes that the Union's grievance directly interferes with management's right to determine its internal security practices and the Union's reliance on *DHS* is misplaced. *See id.* at 9-11 (citations omitted).

The Agency does not address the Union's arguments that the Arbitrator exceeded his authority or denied the Union a fair hearing; instead, the Agency alleges that the Arbitrator correctly found that the Agency did not violate Article 4H of the parties' agreement. *See id.* at 15-16. Finally, the Agency contends that the Arbitrator correctly concluded that the parties could not contractually waive their right to challenge subject matter jurisdiction and that his decision not to award the Union any remedy was proper. *See id.* at 12-14.

### IV. The award is contrary to law

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*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *United States Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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. *See United States Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.* Where an arbitrator's substantive arbitrability determination is based on law, the Authority reviews that determination *de novo*. *See NTEU*, 61 FLRA 729, 732 (2006) (*NTEU*).

The Union disputes the Arbitrator's conclusion that the grievance was not substantively arbitrable because it conflicts with management's right to determine its internal security practices. The Authority has consistently held that the management rights provisions of § 7106 of the Statute do not provide a basis for finding grievances non-arbitrable. *See, e.g., DHS*, 61 FLRA at 75; *Newark Air Force Station*, 30 FLRA 616, 631-35 (1987) (*Newark*). An arbitrator may not rely on § 7106 at the outset of a hearing in order to determine whether he or she has jurisdiction over a grievance. *See Newark*, 30 FLRA at 634. An arbitrator may only rely on § 7106 to consider the substantive issue presented by the grievance and any possible remedy. *See id.* Consistent with the foregoing precedent, the Arbitrator's conclusion that § 7106 rendered the Union's grievance non-arbitrable because it conflicted with management's right to determine its internal security practices was erroneous. *See id.*

The Union also disputes the Arbitrator's conclusion that the grievance was not substantively arbitrable because the grievance did not involve an issue that was within the Agency's duty to bargain. The Authority has

stated that an issue concerning the scope of bargaining is not dispositive of an issue concerning the arbitrability of a grievance. *See, e.g., NTEU, Chapter 15*, 33 FLRA 229, 238 (1988) (citation omitted) (*NTEU, Chapter 15*); *see also GSA*, 54 FLRA 1582, 1588 (1998) (stating that negotiability disputes which arise between an agency and a union under the Statute must be resolved only by the Authority as required by the Statute and that such disputes may not be resolved by an arbitrator in the guise of a grievance). A matter that is outside the duty to bargain is not necessarily outside the scope of a negotiated grievance procedure. *See NTEU, Chapter 15*, 33 FLRA at 238. Even assuming that the Arbitrator correctly found that the grievance did not involve an issue that was within the duty to bargain, as the foregoing precedent establishes, the Arbitrator's reliance on this finding to conclude that the grievance was not arbitrable was erroneous. *See id.*

The Agency's assertion that the Arbitrator's substantive arbitrability conclusion was a procedural arbitrability conclusion is misplaced. Procedural arbitrability involves "procedural questions, such as whether the preliminary steps of the grievance procedure have been exhausted or excused," and is distinguished from substantive arbitrability, which involves questions regarding whether "the *subject matter* of a dispute is arbitrable." *Fraternal Order of Police, New Jersey Lodge 173*, 58 FLRA 384, 385 (2003) (Chairman Cabaniss dissenting) (quoting Elkouri & Elkouri, *How Arbitration Works* 305) (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (emphasis in original). In particular, substantive arbitrability is a question of subject matter jurisdiction: whether the parties have agreed to arbitrate a particular category or type of dispute. *Id.* As the Arbitrator's arbitrability determination was based on the *subject matter* of the grievance, not a procedural provision of the parties' agreement, he made a substantive -- not procedural -- arbitrability determination. Thus, the Agency's argument does not provide a basis for concluding that the Arbitrator's arbitrability conclusion was a procedural arbitrability conclusion. *See, e.g., id.* at 385-86.

The Union's argument that the Arbitrator's substantive arbitrability conclusion fails to draw its essence from the parties' agreement is a restatement of its claim that the Arbitrator's substantive arbitrability conclusion is contrary to law. As such, we do not address the Union's arguments separately. *See Library of Cong., Wash., D.C.*, 63 FLRA 122, 125 (2009) (as agency's claim that arbitrator exceeded his authority did nothing more than restate its essence claim, the claims were not addressed separately). Based on the foregoing, we find

that the Arbitrator's conclusion that the grievance was not substantively arbitrable is contrary to law.

The Arbitrator erroneously concluded that the grievance was not substantively arbitrable; however, he nevertheless decided that the Agency did not violate Article 4H of the parties' agreement. *See Award* at 13, 14. Under Authority precedent, when an arbitrator incorrectly concludes that a grievance is not substantively arbitrable, the Authority has consistently remanded the award to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits. *E.g., United States Dep't of the Army, United States Army Dental Activity Headquarters, XVIII Airborne Corps. & Ft. Bragg, Ft. Bragg, N.C.*, 62 FLRA 70, 72 (2007) (Member Pope not participating); *NTEU*, 61 FLRA at 733. However, Authority precedent does not clearly establish what action the Authority must take where an arbitrator incorrectly concludes that a grievance is not substantively arbitrable, but has already addressed the merits of the grievance. *Cf. AFGE, Local 1668*, 51 FLRA 714, 719 (1995) (upholding arbitrator's determination that grievance was not substantively arbitrable and denying remaining exceptions that were based on arbitrator's discussion of the merits). Stated differently, Authority precedent does not address whether an award must be remanded to an arbitrator for a decision on the merits following an incorrect substantive arbitrability determination even though the arbitrator has already considered the merits.

Although Authority precedent does not provide a clear resolution for the above issue, it does establish that, once an arbitrator determines that a grievance is not arbitrable, the arbitrator's comments concerning the merits of the grievance constitute non-binding *dicta*. *See, e.g., AFGE, Local 2172*, 57 FLRA 625, 629 (2001); *AFGE, Local 1668*, 51 FLRA at 719; *see also NLRB, Wash., D.C.*, 61 FLRA 41, 45 (2005) (arbitrator's comments on issue not before him constituted *dicta*). Statements that are *dicta* do not provide a basis for finding an award deficient because these statements do not constitute a determination on the merits. *United States Dep't of Commerce, NOAA, Office of Marine & Aviation Operations, Marine Operations Ctr., Va.*, 57 FLRA 430, 434 (2001) (Member Armendariz not participating).

An examination of federal court precedent yields similar results. *See EEOC*, 53 FLRA 465, 477 (1997) (applying federal court precedent to resolve substantive arbitrability issue). In this regard, although courts have addressed situations where an arbitrator comments on the merits of a grievance after rendering an erroneous substantive arbitrability conclusion, they have not

squarely addressed the appropriate course of action. *See, e.g., Shank/Balfour Beatty v. Int'l Brotherhood of Electrical Workers, Local 99*, 497 F.3d 83, 93 (1st Cir. 2007) (*Shank*) (arbitrator rendered a decision on the merits after he inappropriately determined that he could resolve substantive arbitrability question, but appellant did not challenge merits award); *Bokunewicz v. Purolator Products*, 907 F.2d 1396, 1400 (3rd Cir. 1990) (where arbitrator commented on merits of grievance after he incorrectly determined that it was not substantively arbitrable, court decided merits of claim because the parties did not have a binding arbitration agreement). However, as with Authority precedent, federal court precedent establishes that, once an arbitrator determines that a grievance is not substantively arbitrable, his or her comments on the merits are non-binding *dicta*. *See Shank*, 497 F.3d at 93; *see also United Indus. Workers v. Virgin Islands*, 987 F.2d 162, 171-72 (3rd Cir. 1993) (arbitrator's comments concerning merits of grievance were *dicta* and did not provide a basis for finding that arbitrator was biased against a party).

The above precedent sufficiently establishes that the Arbitrator's comments concerning the merits of the grievance are non-binding *dicta*. In this regard, neither the record nor the award contains any indication that the Arbitrator informed the parties that he would consider the merits of the grievance regardless of his arbitrability determination; to the contrary, the sole issue the Arbitrator framed for resolution was "[i]s the grievance arbitrable?" Award at 2; *see also id.* at 10 (Arbitrator stated that his award was "limited to arbitrability"). In addition, the Arbitrator's award does not contain any indication that the Arbitrator solicited, accepted, or considered any arguments from either party concerning the merits of the grievance. The foregoing establishes that the only issue properly before the Arbitrator was whether the grievance was arbitrable. As such, once the Arbitrator determined that the grievance was not substantively arbitrable, it was inappropriate for him to address any other matters. Thus, the Arbitrator's comments on the merits of the grievance constitute non-binding *dicta*. *See AFGE, Local 1668*, 51 FLRA at 719.

As the question of the interpretation of the parties' agreement is "a question solely for the arbitrator" because it is the arbitrator's construction of the agreement for which the parties have bargained, we are unable to offer our own interpretation of the parties' agreement. *United States Dep't of Def., Def. Logistics Agency, Def. Distrib. Agency, Red River, Texarkana, Tex.*, 56 FLRA 62, 67 (2000) (citation omitted). Accordingly, we set aside the award and remand it to the

parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits of the grievance.<sup>3</sup>

## V. Decision

We grant the Union's contrary to law exception, set aside the award, and remand to the parties for resubmission to the Arbitrator, absent settlement, for a decision on the merits.

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3. In view of our decision to remand the award, we find that it is unnecessary to address the Union's remaining exceptions. *See AFGE, Local 3230*, 59 FLRA 610, 612 n.4 (2004) (Member Armendariz dissenting) (Authority declined to address remaining fair hearing and essence exceptions where it remanded award for a decision on the merits of the grievance).