

63 FLRA No. 145

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY
UNITED STATES CUSTOMS
AND BORDER PROTECTION
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4056

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DECISION

June 30, 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 Roger P. Kaplan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator found that the Agency violated § 7116(a)(1) and (5) of the Statute, and Articles 17 and 37 of the parties' collective bargaining agreement by unilaterally suspending and terminating the joint awards committee process established in Article 17. He ordered the Agency to rerun the awards process for bargaining unit employees using the procedures set forth in Article 17.

For the reasons that follow, we deny the Agency's exceptions.

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

Pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (the Act), various components of other agencies were transferred to the Department of Homeland Security (Agency). Among those components was the Customs Service, referred to by the parties as "legacy Customs," which was transferred to the Agency from the Department of the Treas-

ury.¹ See *United States Dep't of Homeland Sec., Bureau of Customs & Border Prot.*, 61 FLRA 485, 486 (2006) (*DHS*). Legacy Customs employees in the Agency are represented by the National Treasury Employees Union (Union), which represented the employees before the transfer. It is undisputed that the agreement between legacy Customs and the Union remained in effect after the transfer to the Agency.

The Agency notified the Union that it intended to terminate the joint awards committee (committee) provided in Article 17 of the agreement between the Union and legacy Customs (agreement) and replace it with a "unified awards policy" that would apply to all CBP employees.² Award at 4. The Union requested bargaining and proposed that the committee remain in effect. The parties bargained to impasse, invoking the services of the Federal Mediation and Conciliation Service, and, ultimately, the Federal Service Impasses Panel (Panel). The Panel declined jurisdiction pending resolution of the Agency's claim that it had no duty to bargain.

During the impasse proceedings, the Union filed a grievance claiming that the Agency had improperly suspended the committee. The grievance was consolidated by the Union with a separate, unrelated grievance concerning cell phones. While the grievances were pending arbitration, the Agency implemented the new awards policy. The Union agreed that the Agency could grant awards to unit employees under the new policy, while retaining its position that the committee was negotiable. The grievance was not resolved and was submitted to arbitration.

B. Arbitrator's Award

The parties stipulated to the following issues: "1. Did the Agency violate Article 17 and/or Article 37 of the [agreement] and/or law by suspending and/or terminating the joint awards committee process? 2. If so, what should the remedy be?" *Id.* at 2.

The Arbitrator rejected the Agency's argument that the grievance was not procedurally arbitrable because it was, in effect, two separate unrelated griev-

1. In addition to the Customs Service, the Immigration and Naturalization Service and the Border Patrol were transferred to the Agency from the Department of Justice, and elements of the Plant Protection and Quarantine Office of the Agricultural Plant Health and Inspection Service were transferred to the Agency from the Department of Agriculture. After the transfer, all of the transferred components were grouped together in Customs and Border Protection (CBP), a component of the Agency. See *DHS*, 61 FLRA at 486.

2. The relevant text of Article 17 is set forth in the attached appendix.

ances.³ The Arbitrator also rejected the Agency's argument, raised in its post-hearing brief, that the grievance was not arbitrable because Article 32, Section 4.C of the agreement precluded the same arbitrator from hearing both cases. The Arbitrator rejected the Agency's argument concerning Article 32, Section 4.C because: (1) the argument was not one of the stipulated issues; and (2) the Union had not had an opportunity to respond to the argument since it was raised in the Agency's post-hearing brief. He concluded that the argument as to Article 32, Section 4.C was not timely raised and reasserted his previous conclusion that the grievance was arbitrable. *See supra*, n.3.

On the merits, the Arbitrator stated that the suspension of the joint awards committees "was a patent violation of the [a]greement, unless the . . . committees were unlawfully included in the [a]greement." Award at 7. The Arbitrator found "nothing in Article 17 as written, or as interpreted in practice by the parties or applied [in a previous arbitration award], which makes it an unlawful provision." *Id.* at 8. According to the Arbitrator, "[t]he mere possibility of an arbitrator acting outside his/her jurisdiction and/or contrary to law is not sufficient to find that Article 17 is unlawful." *Id.* at 9 (citing *AFGE, Nat'l Border Patrol Council*, 40 FLRA 521 (1991) (*Border Patrol Council*); *NTEU*, 39 FLRA 346 (1991)). Thus, the Arbitrator found that "[t]he Union's proposal to continue Article 17 was a negotiable proposal." *Id.* (citing *Dep't of the Navy, Naval Underwater Systems Ctr., Newport, R.I.*, 30 FLRA 697 (1987) (*Naval Underwater Systems Ctr.*); *NFFE, Local 1256*, 29 FLRA 171 (1987) (*Local 1256*); *AFGE, AFL-CIO, Local 1815*, 28 FLRA 1172 (1987) (*Local 1815*)). The Arbitrator concluded that when the Agency refused to negotiate over the proposal, it violated both law and Article 37. *Id.*

The Arbitrator rejected the Agency's "necessary functioning of the agency" defense. *Id.* at 11. In so doing, he noted the Agency's reliance on a statement by the Union President that differences in pay reduce employee morale and present obstacles to the unit cohesiveness necessary to the Agency's objective of providing a unified presence at the borders of the country. According to the Arbitrator, the Union President's statement did not demonstrate that a unified awards system was necessary for the Agency to function effectively,

finding that employees would not "stop performing their duties effectively and efficiently because the Agency took the time to negotiate a new awards policy." *Id.* Moreover, the Arbitrator found that the Agency had presented no evidence that the awards process was "ineffective or inefficient" during the years that Article 17 committees functioned along side of different awards policies in different units. *Id.* The Arbitrator concluded, therefore, that "[t]here was insufficient reason why the [fiscal year] awards had to all be based on the new awards policy." *Id.*

In determining an appropriate remedy, the Arbitrator rejected the Agency's claim that "special circumstances" existed that rendered a *status quo ante* remedy "inappropriate[.]" *Id.* at 12. Specifically, the Arbitrator rejected the Agency's claim that there was "a high probability of a decline in morale" if Article 17 were applied to the determination of awards for unit employees, finding that the claim "ignores" the boost in morale that employees would receive from the knowledge that the Agency could not change its awards policy without honoring its bargaining obligation. *Id.* The Arbitrator also found that the Agency's suspension of the joint committees, which, the Union asserted, were "essential" to the awards process under Article 17, prevented the committees from making recommendations for awards, thereby depriving employees of potential awards under that process. *Id.* at 13. For these reasons, the Arbitrator concluded that a *status quo ante* remedy was appropriate.

Based on the foregoing, the Arbitrator ordered the Agency "to reconstruct the joint awards committees and . . . allow them to function the way they functioned for some seven (7) years before they were suspended and then eliminated." *Id.* He also ordered that awards for the fiscal year at issue be rerun following the Article 17 procedures. He noted that his award did not require the payment of more than one award to any unit employee, and he specified that any employee who had received an award under the new Agency policy should have the amount of that award offset against the amount due under the Article 17 process.

III. Positions of the Parties

A. Agency's Exceptions

The Agency argues that Article 17 is contrary to law and unenforceable because the application of Article 17 is subject to the contractual grievance and arbitration procedure. According to the Agency, Article 17 allows an arbitrator to determine what constitutes assigned work, including whether representational activities constitute work, and review management's

3. The Agency had claimed in a motion prior to the hearing that the grievance was not procedurally arbitrable because, as relevant here, it concerned "unrelated issues." Award at 6. In a pre-hearing conference call, the Arbitrator rejected the Agency's claim and ruled that the grievance was arbitrable. *Id.* at 5-6.

decision to reject or modify an award recommendation of the awards committee. The Agency asserts that, as Article 17 contains no standards by which an arbitrator can assess whether management properly followed the procedures set forth in that provision, such arbitral review affects management's right to assign work under § 7106(a)(2)(B) of the Statute because it allows arbitrators to substitute their judgment for that of management. The Agency distinguishes *Border Patrol Council* and *NTEU* on the ground that Article 17 contains no standards to guide arbitral judgment as to what constitutes meritorious performance. The Agency also claims that the instant case is unlike *Border Patrol Council* because the Union's proposal to preserve Article 17 does not involve an attempt to incorporate a written policy in the parties' agreement. The Agency acknowledges the principle that the possibility of arbitrators substituting their judgment for that of management is not a basis for finding a proposal nonnegotiable. However, the Agency maintains that the principle does not apply in this case because Article 17 contains no clear standards for an arbitrator to apply.

The Agency also argues that the Arbitrator erred as a matter of law in rejecting its claim that implementation of its unified awards system was consistent with the necessary functioning of the Agency. The Agency concedes, consistent with the Arbitrator's finding, that it presented no evidence that differences in awards systems produced a decrease in employee morale or distractions on the job. The Agency maintains, however, that the Arbitrator should have found the Union President's statement sufficient, as an admission against interest, and not required the Agency to produce independent evidence. The Agency asserts that, in order for unit employees to receive awards, it was required to implement the unified awards system because, if the awards were delayed to a new fiscal year, then there would not be money available to pay for them. According to the Agency, delay would result in unit employees receiving no awards, which would be detrimental to unit morale and interfere with the Agency's mission objectives.

The Agency also claims that the Arbitrator's award of a *status quo ante* remedy is contrary to law. Specifically, the Agency asserts that the Arbitrator erred in rejecting its "special circumstances" defense. Exceptions at 27. The Agency identifies the special circumstances as the fact that "a *status quo ante* remedy creates a disparity between the awards privileges that [] bargaining unit members receive and those that all other legacy bargaining unit employees are able to receive." *Id.* at 28. The Agency contends, in this regard, that

awards for the fiscal year involved have already been granted and, by requiring it to rerun awards for that year under Article 17, the Arbitrator's remedy "presents the very real possibility that the Agency will have to recoup money from some employees if the joint awards committees' recommendations result in lesser award amounts than the employees received under the new policy." *Id.* at 28-29.

Finally, the Agency contends that the Arbitrator exceeded his authority by rejecting its procedural arbitrability claim. According to the Agency, the Arbitrator did not make a "determinative ruling" on its pre-hearing Motion to Dismiss and, thus, mistakenly refused to allow testimony on the issue at the hearing. *Id.* at 30.

B. Union's Opposition

The Union contends that the Arbitrator correctly found that the Union's proposal to retain Article 17 is negotiable. Citing *NTEU v. FLRA*, 793 F.2d 371 (D.C. Cir 1986) (*NTEU v. FLRA*), the Union asserts that the decision to grant an award is not an exercise of management's right to assign work under § 7106(a)(2)(B) of the Statute. The Union also maintains that proposals establishing joint awards committees do not affect management's rights under § 7106(a). Opposition at 11 (citing *Naval Underwater Systems Ctr., Local 1256*, and *Local 1815*). The Union contends that the Arbitrator correctly concluded that the Agency violated § 7116(a)(1) and (5) and Article 37 by failing to bargain over a negotiable proposal.

The Union also claims that the Agency's argument regarding an absence of standards "ignores the clear standards contained within Article 17, within the law, within regulations and within the local agreements." *Id.* at 12 (citing Article 17, Section 4.A; 5 C.F.R. § 451.104; Union Exs. 2 and 4). The Union maintains that the Agency's unilaterally-implemented unified awards system "contains no more standards than those outlined in Article 17." *Id.* at 16. According to the Union, there "is absolutely no meaningful distinction" between a grievance alleging that the Agency failed to properly apply the standards set forth in Article 17 and "other contractual disputes." *Id.* at 19. Further, the Union asserts that the Authority has consistently held that a claim that "an arbitrator's judgment may be substituted for its own is not a basis for finding a proposal to be nonnegotiable." *Id.* at 20 (quoting *Border Patrol Council*, 40 FLRA at 528).

As to the Agency's "necessary functioning of the [A]gency" defense, the Union asserts that the Arbitrator should not have applied that test as a defense to the uni-

lateral implementation of a substantively negotiable matter. *Id.* at 22 nn.12-13. According to the Union, that defense applies only where the matter at issue implicates the exercise of a management right under § 7106 of the Statute.

The Union asserts that Authority precedent “establishes that the law heavily favors a *status quo ante* order when an agency has unilaterally suspended an agreement that established a performance award system.” *Id.* at 31 (citing *FAA*, 55 FLRA 1271 (2000); *Naval Underwater Sys. Ctr.*, 30 FLRA at 701). The Union maintains that “[t]he Agency’s self-serving statements and bare assertions [are] insufficient ‘record evidence’ to satisfy the stringent ‘special circumstances’ test.” *Id.* at 32 (citing *Dep’t of the Navy, N. Div., Naval Facilities Eng’g Command*, 24 FLRA 907, 908 (1986)). Moreover, the Union disputes the Agency’s claim that it could not pay awards from a prior fiscal year in the current year, noting that the Back Pay Act, 5 U.S.C. § 5596, “authorizes an agency to use current budget year funds to compensate employees who were subject to an unjustified personnel action . . . during a prior budget cycle.” *Id.* at 26. The Union also disputes the Agency’s argument that the remedy will require recoupment from employees receiving awards under the unified system, claiming, among other things, that the award does not require this result.

Finally, with regard to the Agency’s exceeds authority exception, the Union maintains that the Agency “had an absolute obligation to submit any issues to the Arbitrator that it wanted resolved” and that it “did not submit any procedural issues for resolution.” *Id.* at 37.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Authority reviews questions of law *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 Defense, Dep’ts of the Army and 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.*

1. The Arbitrator’s determination that the Union’s proposal is substantively negotiable is not contrary to law.

The Authority has consistently held that where a union submits a bargaining proposal in response to a proposed change in conditions of employment, and the agency refuses to negotiate over that proposal based on the contention that it is outside the duty to bargain, the agency acts at its peril if it then implements the proposed change. See, e.g., *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999). If the union’s proposals are found to be negotiable, then the agency will be found to have violated § 7116(a)(1) and (5) of the Statute by implementing the change without bargaining over the negotiable proposals. *Id.* (citing *United States Dep’t of Health & Human Servs., SSA, Balt., Md.*, 39 FLRA 258, 262-63 (1991)). As it is undisputed that the Agency implemented the unified awards policy without completing bargaining over the Union’s proposal, the issue is whether the Agency properly implemented the system because the proposal is nonnegotiable.

The Agency’s contention that the Union’s proposal to retain Article 17 is outside the duty to bargain because it affects management’s right to assign work is not supported by precedent. In *NTEU v. FLRA*, the United States Court of Appeals for the District of Columbia Circuit held that “the terms ‘assign work’ and ‘direct employees’ were not meant to be so expansive” as to include the “right to reward [the] performance of what has been assigned.” *NTEU v. FLRA*, 793 F.2d at 374. Adopting the court’s rationale, see *NTEU*, 27 FLRA 132, 135 (1987), the Authority has subsequently and consistently held that proposals requiring that employees participate in making recommendations regarding performance awards do not affect management’s rights to direct employees and assign work under § 7106(a)(2)(A) and (B). See *NAGE, Local RI-203*, 55 FLRA 1081, 1083 (1999) (“management’s rights to direct employees and assign work do not extend to the decision to grant an award”); see also *NAGE, Local RI-144, FUSE*, 38 FLRA 456, 487 (1990) (citing *NFFE, Local 1256*, 31 FLRA 1203, 1206-07 (1988); *Int’l Org. of Masters, Mates and Pilots*, 36 FLRA 555, 565 (1990); *Local 1815*, 28 FLRA at 1179-81). Consistent with this principle, the Authority has held that joint labor-management awards committees that make recommendations regarding the granting of awards do not affect management rights under § 7106 of the Statute. See *Naval Underwater Sys. Ctr.*, 30 FLRA at 700 (among other things, committee made recommendations with respect to proposed awards for unit employees); see also *NFFE, Local 797*, 29 FLRA 333, 335 (1987); *NFFE, Local 1256*, 29 FLRA at 173-74; *Local 1815*, 28 FLRA at 1180 (union membership on committee which

makes recommendations with respect to proposed awards is negotiable).

The Agency's argument that the Union's proposal is outside the duty to bargain because it would potentially permit an arbitrator to review management's exercise of its rights under § 7106 is unpersuasive. The Authority has consistently held that such arguments are not a basis for finding a proposal outside the duty to bargain. *See, e.g., NTEU*, 46 FLRA 696, 708 (1992); *NTEU*, 45 FLRA 696, 709-10 (1992); *AFGE, Local 1923*, 39 FLRA 1197, 1200 (1991); *NTEU*, 39 FLRA 346, 350 (1991); *see also Newark Air Force Station*, 30 FLRA 616, 635-36 (1987) (the question of any impermissible interference with management's rights must be directed to the merits of an arbitration decision, including the remedy). Moreover, the Agency's attempt to distinguish *National Border Patrol Council* and *NTEU*, upon which the Arbitrator relies, is also unpersuasive. The distinctions relied on by the Agency are irrelevant with respect to the issue of whether arbitral review of limitations on the exercise of a management right is a ground for finding a proposal nonnegotiable. *See NTEU*, 46 FLRA at 708 (possibility of arbitral review is not a basis for precluding negotiation of a proposal). Moreover, because the decision to grant or deny an award does not constitute the exercise of a management right, the absence of standards governing awards decisions does not constitute an impediment under § 7106 to finding the Union's proposal negotiable.

We reject the Agency's argument that an arbitrator cannot review whether union representational activities constitute the work of the Agency. In this regard, as the Agency acknowledges, the Authority has long held that the "question of any impermissible arbitral interference with management's rights must be directed to the merits, including remedy, of an arbitration decision relating to performance standards' consistency with law." Exceptions at 20 (quoting *NTEU*, 39 FLRA at 350 (citation omitted)). As applied here, the Authority has reviewed several awards resolving disputes as to whether various representational activities constitute the work of the agency. *See, e.g., United States Dep't of Transp., FAA*, 60 FLRA 20, 22-23 (2004) (arbitrator's award granting holiday pay for representational work on Columbus Day held contrary to law); *see also Warner Robins Air Logistics Ctr., Warner Robins, Ga.*, 23 FLRA 270, 271-72 (1986). Therefore, the fact that, in applying the Union's proposal, an arbitrator may potentially be required to distinguish representational activities from agency work is not a basis for finding the proposal outside the duty to bargain or the award contrary to law.

Based on the foregoing, the Agency's exception does not provide a basis for finding that the Arbitrator's determination that the Union's proposal is substantively negotiable is contrary to law. Accordingly, we deny the Agency's exception.

2. The Arbitrator did not err as a matter of law in finding that the Agency's action was not consistent with the "necessary functioning" of the Agency.

The Agency claims that implementation of the unified awards system did not violate the Statute because that action was consistent with the necessary functioning of the Agency. "Necessary functioning" is a defense to an alleged unfair labor practice based on a unilateral implementation." *United States Dep't of Justice, INS*, 55 FLRA 892, 904 (1999) (*INS*) (then Member Cabaniss and Member Wasserman dissenting in part as to other matters) (citing *United States Dep't of Health & Human Servs., SSA and SSA, Field Operations, Region II*, 35 FLRA 940, 950 (1990) (*SSA, Field Operations*)). In particular, "[a] party asserting this defense must establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission." *INS*, 55 FLRA at 904 (citing *SSA, Field Operations*, 35 FLRA at 950; *United States Dep't of the Treasury, BATF*, 18 FLRA 446, 469 n.7 (1985)).

The Agency concedes that it "did not present specific examples of how the [prior] awards programs resulted in decreased morale and distraction on the job" to support its "necessary functioning" defense. Exceptions at 25. The Agency also fails to demonstrate why the Union President's statement concerning the negative effect on employee morale of differences in pay constitutes sufficient evidence to establish necessary functioning. In this regard, the Arbitrator specifically found, and the Agency does not dispute, that there is no evidence that those differences had affected employee morale in a way that interfered with the efficiency and effectiveness of its operations. Award at 11.

Finally, the Agency objects to the Arbitrator's finding that the Agency provided no support for its position that delay in granting awards to unit employees, pending the completion of bargaining, would have resulted in no awards being given to those employees. However, the Agency provides no statutory or other legal support for its claim. Further, the Agency fails to support its contention that, in the absence of awards for unit employees, morale would have suffered so as to

undermine the Agency's operations. Thus, the Agency's claim in this regard is purely speculative. *See SSA*, 35 FLRA 296, 302 (1990) (respondent failed to demonstrate, on either factual or legal grounds, that the Judge erred in concluding that its necessary functioning defense was speculative).

Consequently, the Agency fails to demonstrate that the Arbitrator erred in rejecting its "necessary functioning" defense.⁴ Accordingly, we deny the Agency's exception.

3. The Arbitrator did not err as a matter of law by failing to find that special circumstances warranted the denial of a *status quo ante* remedy.

In the absence of special circumstances, where management changes a condition of employment without fulfilling its obligation to bargain over the substance of the decision to make the change, the Authority orders a *status quo ante* remedy. *See SSA, Office of Hearings & Appeals, Region II, Buffalo Office of Hearings & Appeals, Buffalo, N.Y.*, 58 FLRA 722, 727 (2003) (*OHA, Region II*) (citing *United States Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 84 (1997) (*Memphis Dist.*)). The special circumstances exception is applicable in this case because, as found above, the Union's proposal is substantively negotiable. *See Memphis Dist.*, 53 FLRA at 84 (the special circumstances test applies only where an agency is obligated to bargain over the substance of a change). A party claiming special circumstances "bears the burden of establishing that they exist." *OHA, Region II*, 58 FLRA at 727 (citing *Memphis Dist.*, 53 FLRA at 85).

The Agency claims, but fails to demonstrate, that special circumstances exist in this case. In particular, the Agency's claim that the *status quo ante* remedy creates a disparity between the awards afforded unit employees and those available to all other employees is unpersuasive. In this regard, in addressing circumstances where multiple units at a single agency facility could bargain over the same condition of employment (parking), the court in *United States Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1443 (D.C. Cir. 1992), made clear that, as relevant here, "each union may lay claim to a right to negotiate over matters within the compass of mandatory subjects of bargaining for employees within its designated bargaining unit." Consistent with this reasoning, the fact that different awards systems exist in different

units, as the result of collective bargaining under the Statute, does not constitute a special circumstance warranting denial of a *status quo ante* remedy in this case.

Moreover, there is nothing about awards systems themselves that warrant the denial of a *status quo ante* remedy. As noted above, the Agency's claims as to the effect on employee morale of different award systems, and the consequent impact on the efficiency and effectiveness of the Agency's ability to accomplish its mission, are speculative and without support in the record. *See, e.g., Memphis Dist.*, 53 FLRA at 85 (claim too vague to establish special circumstances). Further, contrary to the Agency's argument, the award does not require recoupment, or prevent it, and the Agency provides no legal support for the proposition that it would be required as a result of the award in this case.

Consequently, the Agency has not met its burden of establishing that special circumstances warranting denial of a *status quo ante* remedy exist in this case. Accordingly, we deny the Agency's exception.

B. The Arbitrator did not exceed his authority.

The Authority generally will not find an arbitrator's ruling on the procedural arbitrability deficient on grounds that directly challenge the procedural arbitrability ruling itself. *See, e.g., United States Dep't of the Treasury, IRS, Austin, Tex.*, 60 FLRA 360, 361 (2004). To the extent the Agency's exception claims that the Arbitrator erred by finding, in the pre-hearing conference, that the grievance was arbitrable, the exception directly challenges the ruling itself and does not provide a basis for finding the award deficient.

To the extent that the Agency's exception claims that the Arbitrator exceeded his authority by failing to address its arbitrability claim with respect to Article 32, Section 4.C, the exception is unpersuasive. Arbitrators exceed their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregard specific limitations on their authority, or award relief to those not encompassed within the grievance. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996). The parties stipulated to the issues before the Arbitrator and the Arbitrator resolved those issues. The stipulation did not include any issue as to the effect of Article 32, Section 4.C on the arbitrability of the grievance and, as a result, the Arbitrator was not required to address that issue. *See United States Dep't of Homeland Sec., Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 816 (2005); *cf. United States Dep't of Def., Def. Contract Audit Agency, Cent.*

4. In light of this determination, we do not address the Union's claim that the "necessary functioning" defense does not apply in this case.

Region, Irving, Tex., 60 FLRA 28, 30 (2004) (arbitrator failed to directly resolve issue submitted to arbitration).

Relying on the stipulation, the Arbitrator found that the Agency's argument based on Article 32, Section 4.C was untimely raised and, noting his resolution of the Agency's previous arbitrability claims involving different grounds, reaffirmed his finding during the pre-hearing conference, *see supra*, n.3, that the grievance was arbitrable. Based on the foregoing, the Agency fails to establish that the Arbitrator exceeded his authority.⁵ Accordingly, we deny the Agency's exception.

V. Decision

The exceptions are denied.

APPENDIX

Article 17, Section 7 of the parties' agreement provides, in relevant part:

Article 17 Awards and Recognition

....

Section 7 Administration of Superior Achievement Awards

A. The local joint committee at the level of delegated authority for awards approval, using consensus decision[-]making methods, will negotiate a process for submitting nominations for awards and recognition, and for recommending which nominees receive awards and recognition . . . , and will use the process to make written recommendations as to which nominees receive awards and the types . . . of recognition to be received. If the local joint committee cannot reach consensus regarding an award nomination or recommendation, the final decision regarding an award will be made by the individual with award[-]approving authority. This decision may be disputed by the affected employee(s) or the local NTEU chapter.

....

C. The official with award approval authority will consider the joint committee recommendations and accept, modify, or reject them. If the recommendations are rejected, or modified, the approving official will provide the joint committee with a written explanation of the decision. The joint committee may request reconsideration of rejected/modified recommendations by making a written request with a justification for reconsideration. Final decisions rejecting or modifying joint committee recommendations may be disputed at the final step of the dispute resolution process provided for in Article 31.

Award at 2-3; Exceptions, Jt. Ex. 5 at 100-101.

5. The Union attached an affidavit to its Opposition to support its claim that the Agency waived the right to raise the Article 32, Section 4.C issue. Opposition, Ex. 1. The Agency filed a supplemental submission containing an affidavit contesting the statements in the Union's affidavit and requesting that the Authority consider its supplemental submission. *See* n.11, *infra*. Because we conclude that the Arbitrator did not exceed his authority by failing to address the Agency's Article 32, Section 4.C issue, we do not address the Union's affidavit and deny the Agency's request that we consider its supplemental submission, including its affidavit. *See, e.g., United States EPA, Region 2, N.Y., N.Y.*, 60 FLRA 431, 431 n.* (2004); *see also United States Dep't of the Interior, BIA, Navajo Area Office*, 53 FLRA 984, 990 (1997).