

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL  
(Memorandum Web Opinion)**

GENERAL DRIVERS V. DUET OF EASTERN NEBRASKA

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GENERAL DRIVERS AND HELPERS UNION LOCAL NO. 554, APPELLANT,

v.

DUET OF EASTERN NEBRASKA HUMAN SERVICES AGENCY, APPELLEE.

Filed April 9, 2024. No. A-23-603.

Appeal from the District Court for Douglas County: LEANNE M. SRB, Judge. Affirmed.

M. H. Weinberg, of Weinberg & Weinberg, P.C., for appellant.

George E. Martin III and Addison C. McCauley, of Baird Holm, L.L.P., for appellee.

MOORE, BISHOP, and ARTERBURN, Judges.

ARTERBURN, Judge.

INTRODUCTION

General Drivers and Helpers Union Local No. 554 appeals from two orders of the district court denying the Union's motion for declaratory judgment and denying the Union's application to partially vacate an arbitration award resulting from a labor dispute. The Union sought declaratory judgment on the arbitrability of its grievance and sought partial vacatur of the arbitrator's award, asserting that the arbitrator failed to rule on the Union's grievance. The district court dismissed the motion for declaratory judgment, denied the Union's application for vacatur, and confirmed the arbitration award. Upon our review, we affirm.

BACKGROUND

This dispute began with five grievances, one asserted by the Union and four others asserted by individual employees. The employees worked for DUET, a program of the Eastern Nebraska Human Services Agency (ENHSA). Certain job positions at DUET were reclassified by ENHSA,

and as a result, employees in those positions were required to work holidays that they had previously had off, including Martin Luther King, Jr. Day. Four reclassified employees did not attend work on Martin Luther King, Jr. Day, which fell on January 17, 2022. The following day, they were each notified that because they did not attend work on January 17, they would not receive holiday pay and they would be assessed an attendance point. An attendance point is a type of penalty, and if an employee accumulates multiple attendance points, that employee may be disciplined or terminated.

The grievances asserted that ENHSA violated the parties' labor agreement when it required these employees to work a contractual holiday, denied them holiday pay, and assessed them an attendance point if they did not work the holiday. The grievances filed by the four individual employees requested remedies including reimbursement for lost holiday pay and removal of the attendance points they were assessed. The Union's grievance requested a return to the previous holiday schedule. As permitted in the labor agreement, the grievances were submitted to arbitration.

An arbitration hearing was held in March 2022. In September 2022, the arbitrator issued an award requiring ENHSA to reimburse the four individual grievants for the holiday pay they lost and to remove the attendance points they were assessed for not working the holiday. The arbitrator found that "[ENHSA] was required to discuss [employee classification] changes and holiday scheduling ramifications with the Union before changing the holiday work schedule for [the grievants]." Neither the individual grievants nor ENHSA sought judicial review of the arbitrator's decision.

The Union was nevertheless dissatisfied with the arbitrator's ruling and filed an application in the district court for Douglas County to partially vacate the award and for a declaratory judgment on the arbitrability of the Union's grievance. In its application, the Union asserted that the arbitrator failed to properly address its grievance that requested a return to the previous holiday schedule. ENHSA moved to dismiss on the basis of sovereign immunity as to the Union's declaratory judgment action under Nebraska's Uniform Declaratory Judgments Act (UDJA) and on the basis of failure to state a claim as to the Union's application for partial vacatur under Nebraska's Uniform Arbitration Act. After a hearing, the district court entered an order granting the motion to dismiss as to the Union's claim for declaratory judgment but denying the motion as to the Union's claim for partial vacatur.

The Union subsequently filed a motion for summary judgment. The district court determined that summary judgment was unavailable during a court's limited review of an arbitration award and treated this motion as the Union's original application to partially vacate. In June 2023, the court held a hearing on the application. During the hearing, the Union offered exhibit 7 to the court. Exhibit 7 was an email from the arbitrator that was sent after the arbitration award had been issued. In this email, the arbitrator stated that under the rules of arbitration and the collective bargaining agreement, the arbitrator did not believe he had the authority to add to or clarify his award without consent from both parties. ENHSA objected to exhibit 7, arguing that the email was sent after the arbitration hearing occurred and was not material to whether the arbitration award satisfied the arbitrator's obligations. The court sustained the objection to exhibit 7 and did not receive the exhibit into evidence. After the hearing, the Union filed a supplemental brief requesting reconsideration of the court's decision to exclude the exhibit.

In its August 7, 2023, order, the court addressed three questions: “(1) did the arbitrator consider and enter an award on the Union’s grievance, (2) if he did not rule on the Union’s grievance, did that failure exceed his powers, and (3) did [the court] err in refusing to receive Exhibit 7 at the hearing on this matter.” The court found that the arbitrator considered all five grievances, including the Union’s request to return to the previous holiday schedule, in his award. The Union’s claim that the arbitrator exceeded his powers by failing to arbitrate was deemed meritless. The court also declined to change its ruling excluding exhibit 7 and noted that even if the exhibit had been admitted, it would not have changed the analysis or final judgment. Finding no basis for vacatur, the court denied the Union’s application to partially vacate and confirmed the arbitration award.

The Union appeals.

### ASSIGNMENTS OF ERROR

The Union assigns, summarized and restated, that the district court erred in (1) denying its application for declaratory judgment, (2) declining to receive exhibit 7, and (3) denying its application to partially vacate the arbitration award based on the arbitrator’s failure to address the Union’s grievance.

### STANDARD OF REVIEW

A district court’s grant of a motion to dismiss is reviewed de novo. *Williams v. Frakes*, 315 Neb. 379, 996 N.W.2d 498 (2023).

A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *McPherson v. Walgreens Boot Alliance, Inc.*, 314 Neb. 875, 993 N.W.2d 679 (2023).

In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court’s ruling as to questions of law. *State v. Nebraska Assn. of Pub. Employees*, 313 Neb. 259, 984 N.W.2d 103 (2023). However, the trial court’s factual findings will not be set aside on appeal unless clearly erroneous. *Id.*

### ANALYSIS

#### *Declaratory Judgment.*

The Union first assigns that the district court erred by denying its application for declaratory judgment on the arbitrability of its grievance. ENHSA disagrees and argues that the district court properly granted its motion to dismiss based on a lack of subject matter jurisdiction.

A state’s immunity from suit is recognized as a fundamental aspect of sovereignty. See *Clark v. Sargent Irr. Dist.*, 311 Neb. 123, 971 N.W.2d 298 (2022). A trial court lacks subject matter jurisdiction over an action against the State unless the State has consented to suit. *Burke v. Board of Trustees*, 302 Neb. 494, 924 N.W.2d 304 (2019). A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Id.* Absent legislative action waiving sovereign immunity, a trial court lacks subject matter jurisdiction over an action against the State. *Id.* The UDJA does not waive the State’s sovereign immunity, and thus, a party who seeks

declaratory relief by suing only the State must find authorization for such remedy from a source other than the UDJA. *Id.*

A suit against a state agency is a suit against the State, and as such, state agencies can assert the State's sovereign immunity against suit. *Schaeffer v. Frakes*, 313 Neb. 337, 984 N.W.2d 290 (2023). ENHSA is a state agency that was established by Dodge, Washington, Douglas, Sarpy, and Cass Counties in Eastern Nebraska and created pursuant to the Interlocal Cooperation Act (ICA), Neb. Rev. Stat. § 13-801 et seq. (Reissue 2022). See Neb. Rev. Stat. § 83-1,143.06 (Reissue 2014). See, also, *Glover v. Eastern Neb. Com. Office of Retardation*, 686 F. Supp. 243 (D. Neb. 1988), *aff'd*, 867 F.2d 461 (8th Cir. 1989). DUET is a human service program within ENHSA.

After reviewing these authorities, the district court found that:

there is no dispute between the parties that the State has sovereign immunity from suit, unless there is explicit legislative action authorizing when the State may sue and be sued. Absent such legislation (i.e., waiver of sovereign immunity), the Court lacks subject matter jurisdiction over the suit. It is correct that the [UDJA] does not waive the State's sovereign immunity, and thus, a party who seeks declaratory relief by suing only the State must find authorization for such remedy from a source other than the [UDJA]. [Relevant case law] establishe[s] that ENHSA, and therefore, DUET, are state actors as they were created pursuant to a legislative act. Therefore, the question before this Court is whether the Union has authorization under statute to seek and be granted declaratory judgment relief in this matter.

(Citations omitted.) We agree and adopt the same analysis. In its brief on appeal, the Union fails to address or refute ENHSA's entitlement to sovereign immunity. The Union has not identified any statutory authorities in which sovereign immunity has been waived in a case such as this one. We therefore conclude that the district court did not err by granting the motion to dismiss and denying declaratory judgment.

#### *Exhibit 7.*

The Union asserts that the district court erred in refusing to receive exhibit 7 at the hearing on the Union's application for partial vacatur. A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion. *Elbert v. Young*, 312 Neb. 58, 977 N.W.2d 892 (2022). In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party. *In re Estate of Walker*, 315 Neb. 510, 997 N.W.2d 595 (2023).

Exhibit 7 was an email from the arbitrator stating that he did not believe he had the authority to add to or clarify his award *after* it had already been issued. The court declined to receive the exhibit based on ENHSA's objection that the email was immaterial as to whether the award should be vacated or affirmed. We find no abuse of discretion concerning this decision. The Union fails to show how the email is relevant to the arbitrator's award or the district court's review of that award.

Further, the Union was not unfairly prejudiced by this exclusion of evidence. The Union argues that it was prejudiced because without the exhibit, it could not show that ENHSA committed

acts of bad faith. Specifically, the Union argues that ENHSA submitted these labor dispute issues to the arbitrator and then later contested arbitrability of these issues. After reviewing the exhibit, we conclude that it does not contain evidence that ENHSA acted in bad faith or contested the arbitrability of the issues in this case. Rather, in his email, the arbitrator stated that it was his belief that without consent from both parties, he did not have the authority to clarify his award. Assuming without deciding that the arbitrator was correct and ENHSA did not consent to a clarification of the award, this is not an act of bad faith or an objection to arbitrability. This is resistance to further commentary on an arbitration award that has already been issued. For these reasons, we find no error in the district court's decision to exclude exhibit 7.

*Application for Partial Vacatur.*

The Union asserts that the district court erred in denying its application to partially vacate the arbitration award. Specifically, the Union argues that because the arbitrator failed to render a decision regarding its grievance requesting a return to the previous holiday schedule, the district court should have partially vacated the award.

The purpose of arbitration is the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. *State v. Nebraska Assn. of Pub. Employees*, 313 Neb. 259, 984 N.W.2d 103 (2023). In serving that purpose, a court gives strong deference to the arbitrator because when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process. *Id.* Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. *Id.* A court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one. *Id.*

Under Nebraska's Uniform Arbitration Act, the grounds for vacating an arbitration award are very narrow. Neb. Rev. Stat. § 25-2613(a) (Reissue 2016). Unless the party seeking vacatur proves an enumerated ground for vacating the award, the district court is required to confirm the award. § 25-2613(d). If the arbitrator exceeds his or her powers, that is grounds for vacatur. § 25-2613(a)(3). In deciding whether an arbitrator exceeded his or her power, the focus is on whether the arbitrator acted within the bounds of contractual authority because it is the parties' agreement from which the arbitrator's power derives. *City of Omaha v. Professional Firefighters Assn.*, 309 Neb. 918, 963 N.W.2d 1 (2021). A court's task is limited to deciding whether the arbitrator adhered to contract interpretation in his or her decision. *Id.*

We read the Union's assignment of error as an assertion that the arbitrator exceeded his powers by failing to rule on the Union's grievance. This is the same argument the Union made in the district court. In its final order, the district court stated:

The crux of the Union's dissatisfaction with the Award appears to be that it does not explicitly rule on its request to invalidate the new holiday schedule or address future holiday work for other members of the Union. However, a careful reading of the Award shows that the arbitrator considered this request. One issue discussed in the Award was when the contractual violation occurred - whether it was at the time [ENHSA] began communication about new holiday rules, when the holiday work schedule was published, or when [ENHSA] penalized employees who did not work newly-assigned holidays. The arbitrator determined that "the contract violation occurred on January 18th on which date

[ENHSA] notified the grievants that they were being docked for holiday pay for their failure to show up for work on Martin Luther King, Jr. [D]ay and would be assessed an attendance point for such conduct.” Given the arbitrator’s finding that the contract violation was *the punishment of employees rather than the creation of the holiday work policy*, it is unsurprising that the Award did not include a requirement that the policy be rescinded. As for future employees scheduled on holidays, the arbitrator hints that “It could also be fairly argued that a violation occurs each contractual holiday that these employees are required to work.” [] This could be read as a warning to [ENHSA] that it acts at its own peril if it continues to enforce the new holiday schedule rule without first negotiating with the Union.

It is not for this Court to revisit the facts or reasoning of the Award, only to determine whether the arbitrator’s Award disposed of all grievances before it. The Court concludes that the arbitrator did consider all grievances, including the Union’s grievance, in his Award. Therefore, the Union’s argument that the arbitrator exceeded his powers by failing to arbitrate the Union’s grievance is without merit.

(Emphasis in original.) We agree and adopt this analysis. The arbitrator essentially found that ENHSA could change the holiday schedule if it negotiated for the changes with the Union prior to their implementation in compliance with Articles 2, 8, and 18 of the parties’ labor agreement. Based on this finding, the arbitrator did not specifically award the Union its request to return to the previous holiday schedule. However, it did specify the steps that would have to be taken before the changes could be implemented. While this is not the ruling the Union requested on this issue, it is a final ruling made by the arbitrator. Therefore, the Union’s assertion that the arbitrator failed to rule on its grievance is without merit. We find no error in the district court’s denial of the Union’s application for partial vacatur.

#### CONCLUSION

The district court did not err by denying the Union’s motion for declaratory judgment, declining to receive exhibit 7, or denying the Union’s application for partial vacatur. We affirm the district court’s confirmation of the arbitration award.

AFFIRMED.