65 FLRA No. 63

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL DEPOSIT INSURANCE
CORPORATION
(Agency)

0-AR-4286

_____

DECISION

December 6, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Jerome H. Ross 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, and both parties filed supplemental submissions, which are discussed further below.

The Arbitrator found that the Agency's distribution of certain awards did not violate Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), or Agency Circular 2420.1 (Circular).

For the reasons that follow, we deny the Union's exceptions in part and remand the award in connection with the remaining exceptions.

II. Background and Arbitrator's Award

The Agency and Union negotiated the terms of an employee-reward program called the "Corporate Success Awards" (CSAs),[1] as well as the Circular and a memorandum of understanding (MOU) concerning the program.[2] The Union filed a grievance alleging that the Agency distributed CSAs in a manner that violated antidiscrimination statutes and provisions of the Circular and MOU, which require fair and equitable CSA distributions.[3] *See* Award at 2. When the grievance was unresolved, the parties proceeded to arbitration, where the Arbitrator framed the issue as follows: "Did the [Agency] violate Title VII . . ., the [ADEA,] or the 'fair and equitable' provision of [the] Circular . . . in its implementation of the [CSA] program for contribution year 2004?" *Id.* at 8.

The Union contended, on the basis of statistical analyses, that the "'subjective and undisciplined' procedures to select the employees to receive awards" resulted in an underrepresentation of certain employee groups among CSA recipients. *Id.* at 8-9. Specifically, the Union alleged that the award distributions resulted in statistically significant disparities in the awards received by eligible: (1) African-American and Hispanic employees, as compared to white employees; (2) employees forty years of age or older (forty-plus employees), as compared to those younger than forty; and (3) employees working at grade-level twelve and below, as compared to those working at grade-level thirteen and above. The Union argued that: (1) each of these group disparities violated the MOU and Circular; (2) the disparate impact on African-American and Hispanic employees violated Title VII; and (3) the disparate impact on forty-plus employees violated the ADEA. *Id.* at 8-10. The Agency disputed the Union's characterization of the awards process as subjective and undisciplined, as well as the significance and reliability of the Union's statistical analyses. *Id.* at 6-8.

Addressing the Union's Title VII and ADEA disparate-impact claims, the Arbitrator explained that, although he was "not prepared to resolve . . . th[e] dispute between the parties over the statistical

1. The Circular describes a CSA as "an annual award that provides for a 3.0 percent increase in basic pay . . . for those employees who are recognized as the top contributors within the [Agency]." Exceptions, Attach. C-6 (Joint Ex. 6-C: Circular 2420.1, § 11-1). In addition, the Circular states that CSAs "shall be distributed to employees in a fair and equitable manner." *Id.*

2. Although the Circular existed prior to the MOU, the parties negotiated revisions to the Circular in conjunction with the MOU. Acknowledging that both documents reflect the terms of the parties' agreement regarding CSAs, "[t]he MOU provides, in section 1, 'CSAs will be distributed to employees in a fair and equitable manner, and in accordance with the terms of this MOU and [the] Circular[.]'" Award at 2.

3. *See supra* notes 1 and 2 for the relevant Circular and MOU language.

tests applied[,] . . . it may not be unreasonable to conclude that [the Union's] analys[e]s disclose[] sufficient evidence of disparate impact . . . with respect to selection of African-Americans, [forty-plus employees], and perhaps Hispanic employees" to establish *prima facie* cases for those claims. *Id.* at 14. On the basis of these "not . . . unreasonable" conclusions, the Arbitrator "assum[ed], *arguendo*, that the record support[ed]" the Union's *prima facie* cases of disparate impact with regard to African-American, Hispanic, and forty-plus employees. *Id.* at 14-15, 17.

Proceeding to the next stage of the disparate-impact analysis under Title VII, the Arbitrator found that, in response to a *prima facie* showing, the Agency need only "produce evidence of a business necessity" to account for any disparities in the CSA distributions. *Id.* at 17. However, the Arbitrator did not determine whether the Agency had satisfied this burden. *Id.* Rather, he concluded that the "criteria to which the parties agreed [in the MOU, for the allocation of CSAs] . . . are general and less than specific. . . . [T]hey cry out for subjective evaluation. . . . Accordingly, little standardization could be expected[,] and a subjective process was logical and reasonable." *Id.* at 18.

Moving to the ADEA claim, the Arbitrator found that, in response to a *prima facie* showing, "the nature of [the Agency's] rebuttal is to present reasonable factors other than age [(RFOAs)] as possible bases for the disparate impact[,]" and he concluded that the Agency's "business objective[] . . . of identifying and rewarding top contributors was a legitimate goal, agreed to by the [Union in] . . . the MOU and . . . [the] Circular[.]" *Id.* at 18-19. As for the means that the Agency used to pursue that goal, the Arbitrator determined that "[o]nce the parties jointly agreed to the subjective course inherent in the [CSA] criteria, the argument that the process" produced unreasonably subjective outcomes "is not compelling." *Id.* at 19.

With respect to the Union's contention that CSA distributions underrepresented employees working at grade-level twelve and below, the Arbitrator determined that this complaint was "based on [an alleged violation of] the fair and equitable provision of [the] Circular[.]" *Id.* at 21. Although he found that "the data may well reflect a disparate impact" on employees working at grade-level twelve and below, the Arbitrator also concluded that the Union "offered no basis for defining the two groups for comparison purposes" at the "[grade-]level 12/13 breaking point[.]" *Id.* Because he found that the Union's chosen "breaking point" was "arbitrary," the Arbitrator determined that the resulting disparate-impact analysis "does not support a conclusion . . . that . . . the CSA selection process was . . . [un]fair [or in]equitable[,] in violation of [the] Circular[.]" *Id.*

Therefore, the Arbitrator denied the grievance as to all claims.

III. Positions of the Parties

A. Union's Exceptions

The Union argues that the Arbitrator erred by holding that, under Title VII, the Agency need only "produc[e] evidence" – but need not satisfy a burden of persuasion – to justify a racially disparate distribution of CSAs. Exceptions at 31, 36-38. In addition, the Union asserts that it was legal error for the Arbitrator to: (1) consider the MOU when determining the lawfulness of the CSA process, as employers cannot "rely on . . . collective bargaining agreements to defend employment practices" against Title VII claims, *see id.* at 32, 43-45 (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (*Alexander*)); and (2) conclude that the awards process was "job related" and consistent with "business necessity" merely because it seemed "logical" or "reasonable," *see id.* at 33, 46-48 (citing *Smith v. City of Jackson*, 544 U.S. 228 (2005) (*City of Jackson*); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (*Albemarle*)). Consequently, the Union requests that the Authority find that the Arbitrator misallocated the parties' burdens under Title VII and that the Agency failed to establish that the CSA criteria and distribution processes were job related and consistent with business necessity. *Id.* at 33, 37-38, 48, 55-56 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)[4]).

4. 42 U.S.C. § 2000e-2(k)(1)(A)(i) provides, in pertinent part:

> An unlawful employment practice based on disparate impact is established . . . if . . . a complaining party demonstrates that a[n employer] uses a particular employment practice that causes a disparate impact . . . and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity[.]

Further, the Union asserts that the Arbitrator erred in determining whether the CSAs' disparate impact on forty-plus employees was justified by a "business necessity" or based on "reasonable factors other than age." *Id.* at 34, 56-59 (citing 29 U.S.C. §§ 623(a), 623(f)(1), 633a[5]). In this regard, the Union contends that, under the ADEA, it was legal error for the Arbitrator to: (1) rely upon the MOU to deny the claim; and (2) find that the subjective criteria and process for CSA distributions were "reasonable means" to serve a "legitimate goal" of the Agency, without conducting "an independent review of the reasonableness" of the Agency's methods. *Id.* at 57-59.

Moreover, the Union contends that the Arbitrator found that the Agency did not violate the "fair and equitable" provisions of the MOU and the Circular, and, according to the Union, this finding fails to draw its essence from those provisions because it disregards a provision of the MOU in which the Union reserved a right to challenge the implementation of CSA criteria.[6] *See id.* at 63-64. Finally, the Union contends that the Arbitrator's rejection of its claim that employees working at grade-level twelve and below "did not receive fair and equitable treatment" is based on the nonfact that the Union arbitrarily selected a breaking point for comparing lower and higher grade-level employees. *Id.* at 65-66.

B. Agency's Opposition

According to the Agency, because the Union "negotiated the terms of the CSA program . . . [and], in particular, the MOU and the Circular, the Union should be precluded from taking positions that are inconsistent with th[ose] agreements." Opp'n at 13 n.19. The Agency argues that the decisions cited by the Union fail to establish that a bargaining party may challenge the very agreement that it negotiated, where that agreement is not discriminatory on its face. *See id.* at 13-14.

The Agency contends that the Arbitrator properly applied Title VII standards. Specifically, the Agency contends that the Arbitrator found that: (1) the Agency "demonstrate[d] that the implementation of the CSA program was . . . consistent with a business necessity[;]" and (2) the CSA criteria were job related because they required that awards for "employee[s'] achievements reflect[] important contributions to the Agency." *Id.* at 5, 9-12.

With regard to the Union's claim that the award is contrary to the ADEA, the Agency contends that the claim ignores the Arbitrator's conclusion that the

5. 29 U.S.C. § 623 provides, in pertinent part:

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

. . . .

(f) Lawful practices; age an occupational qualification; other reasonable factors[.]

It shall not be unlawful for an employer . . . or labor organization –

(1) to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 633a provides, in pertinent part:

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees . . . at least 40 years of age . . . in executive agencies . . . shall be made free from any discrimination based on age.

. . . .

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department [or] agency . . . referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of [the ADEA], other than . . . the provisions of this section.

6. The MOU provides that, although the parties agree to a joint-review process for determining whether statistical disparities in CSA distributions "can be justified by a legitimate business reason or explained by the size(s) of the group(s) being compared[,] . . . this joint[-]review process does not waive the right of the Union or any employee to seek remedial relief in any appropriate legal forum." Exceptions, Attach. C-6 (Joint Ex. 6-B: MOU between FDIC & NTEU, cl. 3).

CSA process "for identifying and rewarding top contributors 'was a reasonable means to meet' the [Agency's] business objectives[.]" *Id.* at 16. The Agency further contends that it was the Union's "burden [to] show[] that the basis for the [Agency's] age neutral practices was unreasonable." *Id.* at 17-18 (citing *City of Jackson*, 544 U.S. at 242-43).

Responding to the Union's essence claim, the Agency argues that the Union is impermissibly attempting to relitigate contract-interpretation issues, despite the Arbitrator's finding that the CSA distributions were "fair and equitable." *Id.* at 18.

IV. Preliminary Matter: The Parties' Supplemental Submissions

The parties' supplemental submissions include: (1) the Union's reply (Union's reply) to the Agency's opposition to the exceptions; and (2) the Agency's opposition to the Union's reply (Agency's opposition to reply), in which the Agency contends that the Authority should not consider the Union's reply.

In addition, the parties' filed several submissions concerning a late-developing Supreme Court decision. In this regard, the Union's exceptions cited a decision of the United States Court of Appeals for the Second Circuit – *Meacham v. Knolls Atomic Power Laboratory*, 461 F.3d 134, 141-42 (2d Cir. 2006) (*Knolls*). Exceptions at 59-61. The Agency's opposition disputed the Union's characterization of *Knolls*. *See* Opp'n at 17 n.24. While the parties' dispute was pending before the Authority, the Supreme Court granted certiorari to review *Knolls*. *See* 552 U.S. 1162 (2008), *granting cert. to Knolls*, 461 F.3d 134. The Court ultimately vacated the Second Circuit's judgment. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008) (*Meacham*), *vacating Knolls*, 461 F.3d 134. In connection with those legal developments, the parties filed the following supplemental submissions: (1) from the Union, a notice that the Supreme Court granted certiorari to review *Knolls*, *see* Notice of Recent Development (Jan. 25, 2008) (certiorari notice); (2) from the Union, a copy of the Supreme Court's decision in *Meacham* (decision text); (3) the Union's arguments as to how *Meacham* should affect the Authority's evaluation of the exceptions and opposition, *see* Notice of Relevant Development (June 23, 2008) at 1-2 (Union's *Meacham* arguments); and (4) the Agency's response to the Union's *Meacham* arguments, *see* Agency Response to Union's Notice of Relevant Development (July 1, 2008) (Agency's *Meacham* response). To summarize, the parties have filed six supplemental submissions: the Union's reply, the Agency's opposition to reply, and four submissions concerning *Meacham*.

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 provides that the Authority may, in its discretion, grant leave to file "other documents" as deemed appropriate. *E.g.*, *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004) (*Cong. Research*). A filing party must demonstrate why its supplemental submission should be considered. *NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004). For example, the Authority has granted leave to file other documents where the supplemental submission responds to issues raised for the first time in an opposing party's filing. *See Cong. Research*, 59 FLRA at 999. Parties have also been granted leave to address the applicability of court decisions that issued while the parties' dispute was pending before the Authority. *E.g.*, *U.S. Dep't of Justice, Fed. Bureau of Prisons, Metro. Corr. Ctr., Chi., Ill.*, 63 FLRA 423, 423 n.1 (2009) (*Metro. Corr. Ctr.*) (citing *U.S. Customs Serv.*, 46 FLRA 1080, 1080 n.1 (1992)).[7]

However, where a party seeks to raise issues that it could have addressed in a previous submission, the Authority ordinarily denies requests to file a supplemental submission concerning those issues. *See, e.g.*, *U.S. Dep't of the Army, Corps of Eng'rs, Portland Dist.*, 61 FLRA 599, 601 (2006) (*Corps of Eng'rs*), *recons. denied*, 62 FLRA 97 (2007).[8] Finally, the Authority has denied requests for leave to file supplemental submissions on the basis of a party's contention that a party-opponent mischaracterized the party's position or misstated matters of law. *See Bremerton Metal Trades Council*, 64 FLRA 103, 104 (2009); *U.S. Dep't of the*

7. *But see U.S. Dep't of the Interior, Bureau of Reclamation, Mo. Basin Region*, 42 FLRA 820, 820 n.1 (1991) (finding "no circumstances warranting" consideration of supplemental submissions concerning decisions issued while parties' dispute was pending before Authority, but noting that Authority was "cognizant of the case law cited" in those submissions). As evidenced by *Metro. Corr. Ctr.*, the Authority's more recent practice has been to grant requests for leave to file arguments regarding relevant, intervening court decisions. 63 FLRA at 423 n.1.

8. However, the Authority has granted leave for a party to supplement its arguments in support of exceptions to an arbitration award, where the supplemental submission concerned a decision that issued one day before the party filed the exceptions. *See U.S. Dep't of HUD, Denver, Colo.*, 53 FLRA 1301, 1302 n.1, 1308-09 & n.6 (1998).

Navy, Naval Sea Sys. Command, 57 FLRA 543, 543 n.1 (2001) (*Naval Sea Sys. Command*).

A. Union Reply

The Union asserts that the Authority should consider its reply because: (1) the opposition "acknowledge[s], for the first time" that the Agency bore the burden of persuasion as to the business necessity of CSA processes resulting in disparate impact, Mot. for Leave to File Mem. in Reply at 2; (2) the opposition allegedly contains "a number of significant misstatements of the governing law[,]" *id.*; and (3) the matters in dispute "involve[] a number of complex legal issues . . . of first impression[,]" *id.* at 3.

The Union essentially requests leave to reiterate and elaborate its arguments regarding the burdens that parties bear in disparate-impact cases. However, the Union already had an opportunity to – and did in fact – address those issues in its exceptions. *See Corps of Eng'rs*, 61 FLRA at 601. Moreover, although the Union contends that the opposition contains "misstatements," Mot. for Leave to File Mem. in Reply at 2, such allegations do not merit granting leave to file a supplemental submission. *See Naval Sea Sys. Command*, 57 FLRA at 543 n.1. Finally, the Union has already been afforded an adequate opportunity to address the case's complexities. *See Corps of Eng'rs*, 61 FLRA at 601. Accordingly, we find that the Union has not demonstrated that its reply should be considered, and, therefore, we decline to consider it.[9] *See NTEU, Chapter 98*, 60 FLRA 448, 448 n.2 (2004).

B. Submissions Concerning *Meacham*

Although the Union filed both the *Meacham* decision text and its *Meacham* arguments, the Union did not request leave to file either submission. Similarly, the Agency did not request leave to file its *Meacham* response. Consistent with Authority precedent, the *Meacham* decision text and the holding reflected therein will be considered, to the extent appropriate, in resolving the exceptions. *See Metro. Corr. Ctr.*, 63 FLRA at 423 n.1. However, as leave was not requested to file the Union's *Meacham* arguments or the Agency's *Meacham* response, we decline to consider those submissions.[10] *See* 5 C.F.R. § 2429.26.

V. Analysis and Conclusions

A. The award is remanded with respect to the Arbitrator's findings regarding Title VII and the ADEA.

The Union argues that the award is contrary to Title VII and the ADEA. 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 *U.S. 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 U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *Id.*

As an initial matter, the Agency asserts that, because the Union agreed to the CSA criteria, the Union may not contest the award's determination that CSA distributions complied with Title VII and the ADEA. Opp'n at 13 & n.19. In effect, the Agency contends that the Union may not challenge the Agency's distribution of CSAs because the Union bargained for the MOU and Circular addressing CSAs.

"Title VII . . . concerns . . . an individual's right to equal employment opportunities. Title VII's strictures are *absolute* . . . . *Of necessity, the rights conferred can form no part of the collective-bargaining process* . . . ." *Alexander*, 415 U.S. at 51 (emphasis added). Thus, "[r]ights established under Title VII . . . are 'not rights which can be bargained away – either by a union, by an employer, or by both acting in concert[.]'" *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 447 (D.C. Cir. 1976) (quoting *Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971) (*Robinson*)); *see also Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2d Cir. 1980) (*Bethlehem Steel*); *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 857 (5th Cir. 1975) ("Arbitration is a collective right; a Title VII cause of action is a personal right."); *United States v.*

9. Given this finding, the Agency's opposition to reply is moot, and we do not consider it. *See IBEW, Local 121*, 56 FLRA 1019, 1019 (2000) (declining to consider agency's response to union's unsolicited supplemental submission because supplemental submission itself would not be considered).

10. In light of the Supreme Court's decision in *Meacham*, as well as our consideration of that decision, the certiorari notice is moot, and we do not consider it.

N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973) (*N.L. Indus.*). In addition, as relevant here, decisions confirming the inalienability of Title VII rights also apply to similar ADEA rights. *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121 (1985) (*Thurston*); *see also U.S. EEOC v. Calumet Cnty.*, 686 F.2d 1249, 1256 (7th Cir. 1982) ("[T]he decision in *Alexander* extends to the ADEA."). As employees' statutory EEO rights cannot be bargained away, and because employers may not rely on labor agreements to immunize their actions from Title VII or ADEA claims, we find that the Union is not prohibited from excepting to the award's legal determinations regarding CSA distributions. *See Alexander*, 415 U.S. at 51.

1. Parties' Burdens Under Title VII and the ADEA

Turning to the merits of the exceptions, as relevant here, Title VII and the ADEA require disparate-impact claimants to satisfy the same *prima facie* burden. "[T]o establish a *prima facie* case of [disparate-impact] discrimination, a [claimant] need only show that the facially neutral standards in question [result] in a significantly discriminatory pattern." *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (*Dothard*) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (*Griggs*)).

After the *prima facie* stage, Title VII and ADEA disparate-impact analyses differ. *See Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009). Under Title VII, "[o]nce it is . . . shown that the [challenged] employment standards are discriminatory in effect, the employer [must defend those standards by] 'showing that any given requirement [has] . . . a manifest relationship to the employment in question.'" *Dothard*, 433 U.S. at 329 (quoting *Griggs*, 401 U.S. at 432). In particular, and as relevant here, in response to a Title VII *prima facie* showing, the employer must establish that the challenged standard or practice manifestly relates to the employment in question by "demonstrating" (i.e., proving) its job relatedness and consistency with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(ii), *as extended to employees of the fed. gov't*, 42 U.S.C. § 2000e-16.[11] In this context, the "term 'demonstrates' means meets the burdens of production *and persuasion*." 42 U.S.C. § 2000e(m) (emphasis added), *as extended to employees of the fed. gov't*, 42 U.S.C. § 2000e-16.[12]

Although, as relevant here, an employer's only available defense to a Title VII disparate-impact claim is to prove that a challenged standard is job related and consistent with business necessity, potential defenses to an ADEA disparate-impact claim are not so limited.[13] Specifically, in response

---

11. *See supra* note 4 for the relevant language of 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In pertinent part, 42 U.S.C. § 2000e-2(k)(1)(B)(ii) provides:

> If [an employer] demonstrates that a specific employment practice does not cause the disparate impact, the [employer] shall not be required to demonstrate that such practice is required by business necessity.

42 U.S.C. § 2000e-16 provides, in pertinent part:

> (a) Discriminatory practices prohibited; employees . . . subject to coverage
>
> > All personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color[,] . . . or national origin.
>
> . . . .
>
> (e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity
>
> > Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes[,] or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

12. To satisfy this burden, an employer must demonstrate more than a legitimate "business purpose" or "legitimate, nondiscriminatory reason" for the challenged practice or standard. *N.L. Indus.*, 479 F.2d at 365-66; *Bethlehem Steel*, 635 F.2d at 1015-17. Although each case must be evaluated on its particulars, demonstrations of business necessity may involve: (1) evidencing a strong correlation between a requirement and "highly effective [job] performance[,]" *Griggs*, 401 U.S. at 431-34; (2) establishing that a practice is essential for the safety and efficiency of business, *e.g.*, *Robinson*, 444 F.2d at 798; or (3) verifying, through an expert validation study, that evaluative criteria predict actual on-the-job performance or otherwise comply with the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607. *See Albermarle*, 422 U.S. at 431 (finding validation study defective).

13. Just as in Title VII cases, an employer may defend against an ADEA disparate-impact claim by demonstrating job relatedness and business necessity. However, the Agency did not rely upon such a defense in this case; thus, we do not further address this defense in connection with the ADEA.

to an ADEA *prima facie* disparate-impact showing, an employer may defend "otherwise prohibited" employment actions by demonstrating that the "differentiation [of forty-plus employees and younger employees] is based on [RFOAs.]"[14] 29 U.S.C. § 623(f)(1).

2. Arbitrator's Application of Parties' Title VII and ADEA Burdens

With regard to Title VII, after noting that the Union had "argue[d] that the [Agency] is required to 'prove' a business necessity[,]" the Arbitrator stated that the Union "appears to overstate the [Agency]'s burden." Award at 17. The Arbitrator also stated that the Agency, as an employer, need only "produce evidence of business necessity." *Id.* As the Agency had a burden of persuasion – not merely a burden of production – concerning job relatedness and business necessity, *see* 42 U.S.C. §§ 2000e-2(k)(1)(A)(i), 2000e(m), *as extended to employees of the fed. gov't*, 42 U.S.C. § 2000e-16, the Arbitrator erred as a matter of law in this respect.

In addition, even if the Arbitrator had properly set forth the Title VII burdens, the Arbitrator also improperly considered the parties' collective bargaining agreements as evidence of job relatedness and business necessity. For the same reasons that the parties' agreement to the MOU and Circular cannot prohibit the Union from filing contrary-to-law exceptions, *see supra* Part V.A., the fact that the parties agreed to CSA criteria is irrelevant to determining whether they satisfied their respective burdens. Thus, the Arbitrator erred as a matter of law in treating the MOU and Circular as evidence that the Agency had satisfied its burden of proof.[15]

Similarly, with respect to the ADEA, the fact that the Union and Agency agreed to CSA criteria is not a legally permissible basis for: (1) rejecting employees' EEO claims; or (2) finding that the Agency satisfied its statutory burden. *See Thurston*, 469 U.S. at 121; *Alexander*, 415 U.S. at 51. Moreover, as discussed previously, after the award issued, the Supreme Court clarified that an employer bears a burden of persuasion regarding RFOAs. *See Meacham*, 554 U.S. at 91-95. The award is unclear as to whether the Arbitrator held the Agency to a burden of persuasion on the issue of RFOAs. *Compare* Award at 18 ("[T]he nature of [the Agency's] rebuttal is to *present* [RFOAs] as possible bases for the disparate impact." (emphasis added)), *with id.* at 19 ("[T]he [Union's] *argument* that the process reflects that [the Agency's] course was not reasonable . . . *is not compelling*." (emphases added)). However, this ambiguity need not be resolved in order to decide whether to grant the ADEA contrary-to-law exception because, regardless of whether the Arbitrator held the Agency to the proper statutory burden, the Arbitrator erred as a matter of law in relying on the MOU and Circular as the basis for denying the ADEA claims.

Further, with regard to both the Title VII and ADEA claims, the Arbitrator, at the first stage of disparate-impact analysis, *assumed* that the Union met its *prima facie* burdens, and, thus, he did not resolve the parties' factual disputes or weigh the evidence presented for and against the statutory claims. Similarly, because he assumed *prima facie* showings, the Arbitrator did not specify which of the parties' statistical analyses, if any, should be credited and why.[16] Therefore, the current record does not

14. We note that there is no dispute in this case that an RFOA affirmative defense is available to federal government employers.

15. As discussed above, the Union's agreement to CSA criteria cannot legitimize subjective employment standards that have a statistically significant disparate impact on protected groups. Consequently: (1) neither the Arbitrator's determination that the CSA criteria "are general[,] less than specific[, and] cry out for subjective evaluation[,]" Award at 14; (2) nor his finding that "little standardization could be expected and a subjective process was logical and reasonable[,]" *id.*, provides a legally cognizable basis for rejecting *statutory* EEO challenges to those standards. *See Alexander*, 415 U.S. at 51; *cf. Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) ("If an employer's undisciplined system of subjective decision[-]making has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.")

16. We note that a statistical report that incorporates data from similarly situated employees at different worksites should normally be considered probative of class-wide disparate impact if the employer uses substantially *similar* standards or practices at those sites, even when different individuals work at each site. *Cf., e.g., EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981). *But see* Award at 13 ("[T]he premise of [the] report is questionable[]" because "employees in one division [were not] vying for selection against employees in another division.") Moreover, although the Arbitrator expressed doubts as to the probative value of statistics that aggregate award-distribution rates from different Agency divisions, *see* Award at 13-14, statistical aggregation is often the preferred method for establishing class-wide disparate impact among employees who are similarly situated with respect to the challenged employment standard or practice, but whose work locations or tenures differ. *See, e.g., EEOC v. Atlas Paper Box Co.*, 868 F.2d 1487, 1495

provide a sufficient basis for determining: (1) whether the Union satisfied its *prima facie* statutory burdens; or (2) whether the Agency satisfied its persuasive burdens as to its defenses.

Accordingly, we remand this matter to the parties for resubmission to the Arbitrator, absent settlement, for further findings and application of the proper statutory burdens. In doing so, we emphasize that the Arbitrator must first re-evaluate the evidence and determine whether the Union has satisfied its *prima facie* statutory burdens. *If* the Arbitrator finds that the Union has satisfied those burdens, *then* the Arbitrator must proceed to determine whether the Agency has satisfied its statutory burdens.

B. The award does not fail to draw its essence from the Circular.

The Union contends that the award fails to draw its essence from the "fair and equitable" provisions of the MOU and the Circular because, according to the Union, the Arbitrator erred in finding that the Union had arbitrarily chosen grade-level employee groups for CSA-distribution comparisons.[17] In this regard, the Union argues that the grade-level twelve/thirteen "breaking point" provided the appropriate basis for evaluating whether CSAs were fairly and equitably distributed to employees working at grade-level twelve and below. Exceptions at 66.

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that federal courts use in reviewing arbitration awards in the private sector. *See* 5 U.S.C. § 7122(a)(2); *AFGE, Council 220*, 54 FLRA 156, 159 (1998). Under this standard, the Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor* (*OSHA*), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id*. at 576.

The Union has not identified a provision of the Circular that supports its contention that the Arbitrator erred in determining that the grade-level twelve-thirteen "breaking point" was an arbitrary basis for comparing CSA distributions among employees working at different grade levels. Exceptions at 66. In addition, the Union fails to identify language in the Circular to support a finding that the Arbitrator's interpretation of the phrase "fair and equitable" was irrational, unfounded, implausible, or in manifest disregard of the Circular. *OSHA*, 34 FLRA at 576. Consequently, we deny the essence exception.

C. The award is not based on a nonfact.

The Union contends that the award is based on a nonfact because the Arbitrator found that the Union's chosen "breaking point" for grade-level comparison groups of employees was arbitrary. Exceptions at 66. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000). However, an arbitrator's conclusion that is based on an interpretation of the parties' collective bargaining agreement does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA 88, 92 (1995). As discussed previously, the Arbitrator's determination that the Union selected an arbitrary "breaking point" for comparison groups was based on his interpretation of the Circular – specifically, the Circular provision calling for "fair and equitable" CSA distributions. Award at 21. Such an interpretation does not constitute a fact that can be challenged as a nonfact. *See NLRB*, 50 FLRA at 92. Therefore, we deny the nonfact exception.

VI. Decision

The award is remanded to the parties for resubmission of the Title VII and ADEA claims to the Arbitrator, absent settlement. The remaining exceptions are denied.

(6th Cir. 1989); *Segar v. Smith*, 738 F.2d 1249, 1286 (D.C. Cir. 1984); *Capaci v. Katz & Besthoff, Inc.*, 711 F.2d 647, 654-56 (5th Cir. 1983).

17. As discussed previously, the Arbitrator determined that the Union's complaint regarding the distribution of CSAs to employees working at grade-level twelve and below was "based on [an alleged violation of] the fair and equitable provision of [the] Circular." Award at 21. Thus, the award does not resolve any alleged violations of the MOU, which also contains a "fair and equitable" CSA distribution provision, *supra* note 2. Therefore, we do not further address the Union's exception contending that the award fails to draw its essence from the MOU.