65 FLRA No. 171

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4699

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DECISION

May 23, 2011

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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 Stanley H. Sergent 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 sustained a grievance alleging that the Agency racially discriminated against the grievant when it failed to select her for a vacant position. For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

While occupying a General Schedule, Grade 12 (GS-12) position with the Agency, the grievant applied for a vacant General Schedule, Grade 13 (GS-13) revenue agent position (the GS-13 position). Award at 2-3, 5-6. When the Agency selected another individual (the selectee) for the GS-13 position, the Union filed a grievance alleging, among other things, that the Agency racially discriminated against the grievant when it did not select her. *Id.* at 3. When the grievance was unresolved, the parties proceeded to arbitration. *Id.* at 4. As relevant here, the stipulated issue before the Arbitrator was whether the "Agency discriminate[d] against the grievant . . . based on race . . . when it did not select her for [the GS-13 position] . . . [, and,] [i]f so, what shall the remedy be?" *Id.*

The Arbitrator relied upon the *McDonnell Douglas* burden-shifting framework (the framework) – which complainants may use to "prov[e] a race discrimination case . . . in a Title VII[1] trial" – to assess the grievant's complaint of disparate treatment based on race. *Id.* at 17-19 (quoting and citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (*McDonnell Douglas*)[2] (internal quotation marks omitted)). In this regard, the Arbitrator found that the Union satisfied the first-step burden under the framework by establishing a prima facie case of race discrimination. *Id.* at 19. He found further that the Agency satisfied the second-step burden under the framework by articulating "legitimate non-discriminatory reasons" for preferring the selectee over the grievant, including the Agency's contentions that the selectee: (1) "had the best interview . . ."; (2) was "ranked at the top of the best qualified list . . ."; and (3) had "recent relevant experience[.]" *Id.*

Moving to the third step of the framework, the Arbitrator determined that, in order to prevail on the disparate treatment claim, the Union had to "prove[] by a preponderance of the evidence that the Agency's [articulated reasons were] pretextual." *Id.* at 20. With regard to this third-step burden, the Arbitrator stated that he would not "second-guess[]" the Agency's proffered reasons for choosing the selectee unless the Union proved, as relevant here, that: (1) the reasons articulated were "unworthy of credence . . ."; or (2) the grievant's "qualifications were plainly[, demonstrably, or observably] superior to those of the selectee." *Id.* (citing *Burchfield v. Dep't of Treasury*, EEOC Appeal Nos. 01970152, 01941579 (Apr. 6, 2000)); *id.* at 27-28 (citing *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006)).

1. In this context, "Title VII" refers to the seventh title of the Civil Rights Act of 1964 (codified, as amended, at 42 U.S.C. §§ 2000e to 2000e-17).

2. Under the framework, an employee "must first establish a prima facie case of discrimination. If [the employee] does, [then] the employer must articulate a legitimate, nondiscriminatory reason for the challenged action. Finally, if the employer satisfies this burden, [then] the employee must show that the reason is pretextual[.]" *Dawson v. Entek Int'l*, 630 F.3d 928, 934-35 (9th Cir. 2011) (*Dawson*) (citation omitted).

As part of his assessment of whether the Agency's reasons were "worthy of credence," the Arbitrator examined the parties' compliance with their obligation under the master labor agreement (Agreement) to "mak[e] a complete record during the steps of the grievance procedure[.]" *Id.* at 25 (quoting Agreement Art. 41, § 8.A.1.).[3] The Arbitrator found that the Agency violated that contractual obligation because, although the Union "made a detailed presentation" at the second- and third-step grievance meetings to support the discrimination claim, the Agency never offered a "substantive reply" or "any definitive explanations for the grievant's non-selection [until arbitration]. Instead, it simply denied the grievance." *Id.* In addition, the Arbitrator found that the testimony of the selecting official for the GS-13 position was "not credible[,]" *id.* at 31, because the official articulated different reasons at arbitration than he had articulated to the grievant in a counseling session, which the Arbitrator found to be a violation of Article 13, Section 9.D. of the Agreement.[4] *See id.* at 21 (quoting Agreement Art. 13, § 9.D.), 24, 27-28, 31.

In light of the Agency's failure to satisfy its contractual obligation to fully articulate its reasons for the grievant's nonselection during counseling and at the second- and third-step grievance meetings, the Arbitrator found that the Agency's proffered reasons were "not credible . . . because they obviously ha[d] been devised for the arbitration" proceedings. *Id.* at 27. "Thus, the only conclusion that [the Arbitrator could] properly . . . draw[] from th[e] evidence [was] that the Agency's [reasons] . . . [were] pretext for discrimination based on race." *Id.*; *see also id.* at 25 (failure to provide "substantive response" prior to arbitration "suggest[ed] . . . pretext for . . . discrimination based on race"). As an additional ground for finding that the Agency's explanations at arbitration were pretextual, the Arbitrator found that the grievant's qualifications were "plainly superior" to those of the selectee. *Id.* at 28; *see also id.* at 27-31.

Because the Union had established its prima facie case and the Arbitrator found the Agency's articulated reasons for nonselection to be pretextual, the Arbitrator concluded that the Agency discriminated against the grievant on the basis of race and that, "in the absence of such discrimination[,] the Agency would have selected her for the . . . [GS-13 position]." *Id.* at 32. Therefore, the Arbitrator sustained the grievance, awarded the grievant a retroactive promotion to the GS-13 position, and directed the Agency to make her whole for any lost pay and benefits. *Id.* at 32-33.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator's conclusion that it discriminated against the grievant on the basis of race is contrary to Title VII. *See* Exceptions at 7, 11. In this regard, the Agency contends that the Arbitrator erred as a matter of law in determining that the Agency's articulated reasons for not selecting the grievant were pretextual. Specifically, the Agency argues that its "failure to provide [the] reason[s]" for the grievant's nonselection during earlier stages of the grievance process "is not sufficient to establish pretext." *Id.* at 11. Moreover, the Agency contends that the grievant's qualifications were not "plainly superior" to the selectee's, but rather, "the selectee['s] qualifications . . . [were] far more recent and relevant than the grievant's." *Id.* at 10. *See also id.* at 7-11 (arguments regarding the alleged superiority of the selectee's qualifications). Consequently, the Agency asserts that "the [A]rbitrator's finding of pretext [is] insufficient as a matter of law" to a support his conclusion that the Agency intentionally discriminated against the grievant on the basis of race. *Id.* at 13.

B. Union's Opposition

According to the Union, because the Arbitrator found that the "Agency's stated reason[s] [were] unworthy of credence" and that the grievant's

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3. Article 41, Section 8 of the Agreement states, in pertinent part:

> A.
> 1. The parties will have the obligation of making a complete record during the steps of the grievance procedure. . . .
> B.
> With [exceptions not relevant here,] new issues may not be raised by either party unless they have been raised at [s]tep [two] of the grievance procedure. . . .

Opp'n, Attach. B at 131.

4. Article 13, Section 9.D. of the Agreement states, in pertinent part: "An applicant . . . who is not selected will, upon request, be entitled to counseling by the immediate supervisor or his or her designee . . . [and] additional counseling from the selecting official or his or her designee. The counseling will provide the reasons for [the applicant's] non-selection[.]" Opp'n, Attach. C at 53.

qualifications were "plainly superior" to those of the selectee, the Arbitrator correctly concluded that the Agency's articulated reasons were pretextual. Opp'n at 5; *see also id.* at 5-12, 15. Further, the Union asserts that the Authority has recognized that an arbitrator's findings of pretext constitute "factual findings[,]" to which the Authority defers. *Id.* at 15-16 (quoting *NTEU, Chapter 90*, 58 FLRA 390 (2000) (*NTEU*) (internal quotation marks omitted)). Finally, the Union argues that the Arbitrator applied the "correct legal standard" in his framework analysis, *id.* at 18, because his "disbelief of the reasons put forward" by the Agency, "together with the elements of the [Union's] prima facie case, suffice[d] to show intentional discrimination" by the Agency, *id.* at 10. *See id.* at 9-10, 18-19 (quoting and citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 519 (1993) (*St. Mary's*) (internal quotation marks omitted)).

IV. Analysis and Conclusions

The Agency asserts that the award is contrary to Title VII. When an exception involves an award's consistency with law, rule, or regulation, 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. *See id.*

The Agency disputes the Arbitrator's findings that its articulated reasons for nonselection were pretextual. *See* Exceptions at 7-11. The question of whether an employer's stated reasons for an employment action are pretextual is a factual one. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (quoting *McDonnell Douglas*, 411 U.S. at 804) (at third step of framework, claimant must establish that employer's "stated reason for [employment action] was *in fact* pretext" (emphasis added)); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (pretext is a question for "trier of fact"); *Dawson*, 630 F.3d at 936 (circumstantial evidence undermining employer's stated reasons "raise[s] a material question of fact on pretext"); *Bonds v. Leavitt*, 629 F.3d 369, 386 (4th Cir. 2011) (claimant "failed to create a genuine issue of material fact regarding . . . pretext"); *see also Cones v. Shalala*, 199 F.3d 512, 520 (D.C. Cir. 2000) (where pretext determination "ultimately turns on witness credibility," agency's stated reason for employment action "presents a question of fact that is . . . 'quintessentially one for the finder of fact'"). As noted by the Union, Opp'n at 15-16, the Authority has held that it will defer to arbitral findings – in connection with an arbitrator's analysis at the third step of the framework – that the stated reasons for an adverse employment action were pretextual. *See NTEU*, 58 FLRA at 394. In this regard, the Authority defers to arbitral findings of pretext in the same manner that the Authority defers to other arbitral factual findings when applying the de novo standard of review. *See Ala. Nat'l Guard*, 55 FLRA at 40. Thus, we defer to the Arbitrator's factual finding that the Agency's stated reasons for not selecting the grievant for the GS-13 position were pretextual.

The Agency also contends that, as a matter of law, its failure to articulate legitimate, nondiscriminatory reasons earlier in the grievance process is insufficient to establish pretext. Exceptions at 11. The Agency does not cite any legal authority to support this contention, and it is not consistent with court decisions regarding this issue. *See, e.g., Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006) (holding that "employer's failure to articulate *clearly* and *consistently* the reason for an [adverse employment action] may serve as evidence of pretext" (emphasis added)); *Harvey v. Office of Banks & Real Estate*, 377 F.3d 698, 711 (7th Cir. 2004) (holding that fact finder "entitled to infer that [employer's] decision was in fact motivated by racial animus[,]" where employer did not offer "any legitimate reason" for demoting employee when it first notified him of the demotion); *Lamphere v. Brown Univ.*, 875 F.2d 916, 922 (1st Cir. 1989) (holding that "changing reasons, *failure to articulate reasons contemporaneously*, [or] conflicts among individuals' reasons" may suggest pretext for discrimination (emphasis added)). Thus, we find that the Agency has not established that the Arbitrator erred as a matter of law in this respect.

The Agency contends further that the Arbitrator erred, as a matter of law, in finding that the grievant's qualifications were "plainly superior" to those of the selectee. *See* Exceptions at 7-11. In this regard, the Authority has held that, when an arbitrator bases an award on two or more separate and independent grounds, the appealing party must establish that all of the grounds relied on are deficient in order for the Authority to find the award deficient. *E.g., Broad.*

Bd. of Governors, Office of Cuba Broad., 64 FLRA 888, 892 (2010) (*Bd. of Governors*). If the excepting party has not demonstrated that the award is deficient on one of the grounds relied on by the arbitrator, then it is unnecessary to address exceptions to the other ground. *Id.* The Arbitrator identified two separate and independent grounds to support his finding that the Agency's articulated reasons were pretextual. Specifically, he found that: (1) the Agency's articulated reasons were "unworthy of credence"; and (2) the grievant's qualifications were "plainly superior[.]" Award at 20, 31; *see also id.* at 27-31. As discussed above, we have found that the Agency has not established that the Arbitrator erred in concluding that the Agency's reasons were "unworthy of credence[.]" As this conclusion provides a separate and independent ground for the award, we find it unnecessary to address the Agency's contention that the Arbitrator erred in finding that the grievant's qualifications were "plainly superior[.]" *See Bd. of Governors*, 64 FLRA at 892.

Finally, the Agency contends that the Arbitrator's findings of pretext do not support his ultimate conclusion that the Agency intentionally discriminated against the grievant. Exceptions at 13. However, the Supreme Court has expressly held that findings of pretext, together with the elements of a prima facie case, are sufficient to support a finding of intentional discrimination. *See St. Mary's*, 509 U.S. at 511, 519. Because we have found that the Arbitrator did not err in his findings of pretext, and as the Agency does not contest that the Union established a prima facie case, we find that the Arbitrator's framework analysis correctly applied the legal standard governing the disparate treatment claim.

For the foregoing reasons, we deny the Agency's exceptions contending that the award is contrary to law.

V. Decision

The Agency's exceptions are denied.