65 FLRA No. 10

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3506
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
SHREVEPORT, LOUISIANA
(Agency)

0-AR-4306

_____

DECISION

August 30, 2010

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

I. Statement of the Case

The matter is before the Authority on exceptions to an award of Arbitrator John B. Barnard 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.

The Arbitrator denied a grievance alleging that the grievant's non-selection for a Lead Case Technician (LCT), GS-9 position (position) violated the parties' agreement. For the reasons that follow, we deny the exceptions.

II. Background and Arbitrator's Award

The Agency's Office of Disability Adjudication and Review posted a vacancy announcement for the position in its Shreveport, Louisiana facility. Award at 4. The grievant, a GS-8 senior case technician, and Union member, applied for the position and was one of the five employees listed on the well-qualified list. *Id.* at 4 & 6; *see also* Exceptions, Attach., Jt. Ex. 14. The grievant ultimately was not selected for the position. Award at 4.

The grievant then filed a grievance claiming that his non-selection violated the parties' agreement. *Id.* The matter was unresolved and was submitted to arbitration. The Arbitrator did not frame an issue, but set forth the issue proposed by each party. *Id.* at 2. The Agency proposed: "Did the Agency violate the 2000 National Agreement, . . . [the parties' agreement] or any federal law or regulations, when it did not select the grievant for [the position] . . . . If so, what is the appropriate remedy?" *Id.* The Union proposed: "Whether or not the Agency violated the [parties' agreement], Articles 1, 2, 3, 18 or 26, when it non[-]selected the grievant for [the position] . . . . (If so, what is the proper remedy?) ."[1] *Id.*

Before the Arbitrator, the Union argued that the grievant was not selected for the position because of his "age, race, sex and Union membership." *Id.* at 10. The Union also contended that the parties' agreement provided the grievant "with more serious consideration than the other applicants" and noted that the grievant had "the most . . . experience of all the applicants and was stagnated in grade." *Id*. at 10, 8.

The Agency argued that the grievant had "presented no evidence" that the Agency's stated reasons for not selecting him were "pretextual." *Id*. at 13. The Agency also contended that Union had failed to present "any persuasive evidence" that anti-union animus played a role in the selection process and maintained that its reasons for hiring the selectee were "legitimate and non-discriminatory."[2] *Id*. at 13-14. According to the Agency, "after giving full and fair consideration," the Agency "properly exercised its right to select the candidate whose overall qualifications demonstrated the greatest potential for successful job performance." *Id* at 14.

As to the claim that the grievant was not selected because of his Union membership, the Arbitrator found that, although the testimony and evidence could give "the impression that anti[-]union sentiment" existed during the time of the grievant's non-selection, "nothing in [the grievant's] testimony" indicated "such described bias was . . . directed towards him." *Id.* at 16. The Arbitrator further determined that "no evidence or testimony" was

1. The relevant text of Articles 1, 2, 3, 18 and 26 is set forth in the appendix to this decision.

2. The Agency also claimed that the grievance was not arbitrable, but the Arbitrator rejected this contention. The Agency does not except to this finding; accordingly, we will not address it further.

presented regarding "alleged anti-[union] bias to the grievant, specifically as it relates to his non[-]selection." *Id.* The Arbitrator stated that he could not "conclude with any certainty that the grievant was not selected because of his Union membership." *Id.*

With respect to the claim that the grievant was not selected because of his race, sex, or age, the Arbitrator determined that the Agency had demonstrated legitimate business reasons for its selection of the selectee. Specifically, the Arbitrator found that the position includes some supervisory functions and that the evidence "demonstrate[d]" that the selectee has some experience in this regard. *Id.* at 17. The Arbitrator also found that the position requires "communicating with various levels of representatives" and that the selectee was rated as "possessing good communication skills[.]" *Id.*

Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the award is deficient because the Arbitrator failed to: (1) "follow the burdens in regard to reprisal for Union activity"; and (2) address the issue of grade stagnation in the award. Exceptions at 6.

As to the first assertion, the Union contends that the Arbitrator failed to follow appropriate law in finding that the grievant's non-selection was not based on his Union membership and sets forth a test which it contends the Authority applies in determining whether a "violation of the Statute" has occurred concerning a claim of reprisal for Union activity.[3] *Id.* at 3. The Union contends that the Agency "did not meet its burden . . . to justify its actions or to show that it would have taken the same action if the grievant had not been a Union member." *Id.* at 4. The Union asserts that it submitted "considerable unrebutted testimony and documentation that would lead a reasonable person to conclude that Union activity was a motivating factor in decision[]making" in the Shreveport office during the time of the disputed matter. *Id.* However, according to the Union, the Arbitrator "dismissed th[is] evidence[.]" *Id.*

As to the second assertion, the Union contends that the Arbitrator did not "consider the grievant's stagnation in grade." *Id.* The Union asserts that it "submitted" that Article 26, Section 11(C) of the parties' agreement "called for serious consideration of well-qualified candidates who were stagnated in grade[,]" and that the grievant, who has been in the same position for seven years, "should have received such consideration." *Id.* According to the Union, the award, therefore, is "legally deficient" because the Arbitrator failed to resolve all matters before him. *Id.* at 5.

B. Agency's Opposition

The Agency asserts that the parties, by stipulation, "submitted one issue" to the Arbitrator – whether the Agency violated the parties' agreement or any federal laws or regulations when it did not select the grievant for the position. Opp'n at 2. The Agency asserts that the Union presented no persuasive evidence that either of the selecting officials "violated [the parties' agreement] based on . . . anti-union animus or any illegal discrimination." *Id.* at 6. The Agency argues that it provided substantial testimony demonstrating that the selection was based on "legitimate business interests." *Id.* Furthermore, the Agency contends that a comparison of the grievant's qualifications with those of the selectee shows that no "illegal discriminatory factors [were] at work in the process." *Id.* at 8. The Agency also notes that the Arbitrator found that: (1) the grievant "did not testify that any anti-union bias was in any way directed toward him" and (2) there was no evidence or testimony of alleged bias toward the grievant regarding his non-selection. *Id.* at 10.

The Agency contends that the Union "has waived the issue of stagnation-in-grade." *Id.* at 9. The Agency asserts that "stagnation-in-grade" was not included in "any step of the grievance process" or discussed at the arbitration hearing, and that the matter was "only briefly alleged in the Union's [p]ost-[h]earing" brief without support. *Id.* at 6, 9. The Agency argues that, even if grade stagnation was properly raised, "that factor, in and of itself, would not entitle [the] [g]rievant to be selected for the position . . . when the Agency had a legitimate business reason" for the selection that it made. *Id.* at 9.

The Agency contends that the Union has not presented any evidence that demonstrates either that the Agency's stated reasons for its hiring decision were pretextual or that the real reason for the grievant's non-selection were his age, sex, race, or

3. Although the Union does not cite any case, the elements of the test that it sets forth are the same as those set forth in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990).

Union membership. *Id.* at 11. The Agency further contends that the requirement for "full and fair consideration" under Article 26 of the parties' agreement "was fulfilled" in the selection process and that the reasons for its hiring decision were "legitimate and non-discriminatory." *Id.* at 11 & 12.

IV. Analysis and Conclusions

A. The award is not contrary to law.

The Union asserts that the award is contrary to law because the Arbitrator "failed to follow the burdens in regard to reprisal for Union activity." Exceptions at 6. 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). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Union argues in its exception that the Agency committed a statutory unfair labor practice (ULP) when it allegedly based the grievant's non-selection on anti-union animus and that the Arbitrator erred by failing to so find. However, it is unclear from the issues proposed by the parties whether the Arbitrator was resolving statutory or contractual issues. *See* Award at 2. While the issue proposed by the Agency concerned both contractual and statutory issues, the issue proposed by the Union raised only contractual issues. Nevertheless, the Authority has applied statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, the Statute. *See, e.g., AFGE, Local 1164*, 64 FLRA 599, 600-01 (2010) (statutory principles applied in circumstance where exception was based on an alleged violation of the Statute and issue before the arbitrator was framed in contractual terms, which mirrored or were intended to be interpreted in the same manner as provision of the Statute); *NLRB*, 61 FLRA 197, 199 (2005) (*NLRB*) (same); *AFGE*, 59 FLRA 767, 769-70 (2004) (*AFGE*) (same). The issue proposed by the Union referenced certain contract articles, including Article 1, Section 1, which provides that the parties "shall be governed by existing or future laws . . . [,]" and Article 3, Section 1, which provides that "[e]ach employee shall have the right to join[] or assist the Union . . . without fear or penalty of reprisal . . . ." Award at 2. Therefore, assuming that the Arbitrator resolved statutory issues, we find, for the following reasons, that the Union has not established that the award is contrary to law.

Where statutory issues concerning Union discrimination are raised, the Authority reviews the award under the statutory principles applicable to § 7116(a)(2). *See, e.g., NLRB*, 61 FLRA at 199; *AFGE*, 59 FLRA at 769-70; *see also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009). Section 7116(a)(2) of the Statute provides that it is a ULP for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. When a grievance under § 7121 of the Statute involves an alleged ULP, the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *See, e.g., AFGE, Local 3529*, 57 FLRA 464, 465 (2001). In a grievance alleging a ULP by an agency, the union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See id.* As in other arbitration cases, the Authority defers to an arbitrator's findings of fact. *See id.*

Further, in cases alleging discrimination, the Authority applies the framework in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). *See AFGE, Local 2145*, 64 FLRA 661, 664 (2010) (*AFGE, Local 2145*) (Member Beck dissenting, in part). Under that framework, the party making such an assertion establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the *prima facie* showing is made, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity.

In this case, although the Arbitrator did not expressly apply the *Letterkenny* framework, the record is sufficient for the Authority to do so. The Arbitrator found that the grievant was a Union member; however, the Arbitrator rejected the Union's claim that the grievant's non-selection for the position was motivated by his Union membership. Award at 16. The Arbitrator found that the evidence

was insufficient to conclude that the "grievant was not selected because of his Union membership." *Id.*

A review of the record provides no basis for concluding that the Arbitrator's finding is deficient. In this regard, the record shows that the Arbitrator evaluated testimony and evidence offered by the Union and found that there was nothing in this evidence that showed the selection officials were biased towards the grievant in his non-selection. *Id.* at 15, 16. Although the Union asserts that it submitted "considerable unrebutted testimony and documentation that would lead a reasonable person to conclude that Union activity was a motivating factor in decision[]making[,]" Exceptions at 4, in the Shreveport office during the time of the disputed matter, the Union has not pointed to any evidence that demonstrates the grievant's non-selection was predicated on his Union membership.

Because the Union has not pointed to any evidence that demonstrates the grievant's non-selection was predicated on his Union membership and because the record does not establish that the selecting officials were biased towards the grievant in his non-selection, the Union has not satisfied the second part of its *prima facie* case under the *Letterkenny* framework. As a result, no *prima facie* case of discrimination based on protected activity has been established. *See, e.g.*, *AFGE, Local 2145*, 64 FLRA at 664 (Member Beck dissenting on other grounds) (finding no *prima facie* case of discrimination where evidence did not show that agency's action in disciplining employee for being absent without leave was motivated by employee's protected activities).[4]

Accordingly, we find that the award is not contrary to law, and we deny this exception.

B. The Arbitrator did not exceed his authority.

We construe the Union's contention that the Arbitrator failed to address Article 26, Section 11(C) of the parties' agreement as it concerns grade stagnation as an exception that the Arbitrator exceeded his authority. 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. *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

As noted previously, the Arbitrator did not frame the issue but set forth the issue proposed by each party. As relevant here, the Agency proposed: "Did the Agency violate the [parties' agreement] or any federal law or regulations, when it did not select the grievant for [the position . . . [,]" and the Union proposed: "Whether or not the Agency violated the [parties' agreement], Articles 1, 2, 3, 18 or 26 when it non[-]selected the grievant for the [LCT]. Award at 2. In resolving these issues, the Arbitrator specifically considered the parties' arguments, including both the Union's contention that the grievant was "stagnated in grade" and the Agency's contention that its non-selection of the grievant for the disputed position did not constitute a violation of the parties' agreement. *Id.* at 10, 12. After weighing such arguments and the record evidence, the Arbitrator determined that he "[could] not argue with [the selecting official's] rationale in her selection of [the selectee] over the grievant" and that the Agency had "met the burden of demonstrating that there were legitimate business reasons" for selecting the selectee instead of the grievant. *Id.* at 17, 18. The Arbitrator, thus, resolved the issues that were before him. Furthermore, that an award does not mention a specific provision of an agreement does not establish that such provision was not considered by the arbitrator and does not provide a basis for finding the award deficient. *See U.S. Dep't of the Army, Transp. Ctr., Fort Eustis, Va.*, 45 FLRA 480, 482 (1992); *Ill. Air Nat'l Guard, 182nd Tactical Air Support Group*, 34 FLRA 591, 593-94 (1990). Accordingly, we find that the Union has not demonstrated that the Arbitrator exceeded his authority, and we deny this exception.

V. Decision

The Union's exceptions are denied.

4. Even assuming the Union established a *prima facie* case, the Arbitrator's factual findings show that the Agency established a legitimate justification for its actions consistent with *Letterkenny*. Specifically, the Arbitrator found, among other things, that the disputed position includes some supervisory duties and the selectee had some experience in this regard while the grievant did not. Award at 17. Also, communication skills were important for the position and the selectee was rated as possessing good skills in this area. *Id.* In sum, after evaluating the evidence, the Arbitrator found that the Agency had "met the burden" of demonstrating that there was legitimate business reasons for the selection of the selectee over the grievant. *Id.* at 18. The Union has not established that the Arbitrator's evaluation of the evidence and his conclusions based thereon are improper. As the Authority defers to an arbitrator's factual findings, the Union has not demonstrated that the award is contrary to § 7116(a)(2) of the Statute.

APPENDIX

Article 1
Section 1

In the administration of all matters covered by this agreement, officials and employees shall be governed by existing or future laws and existing government wide rules and regulations as defined in U.S. [Chapter] 71, and by subsequently enacted government-wide rules and regulations implementing 5 U.S.C. [§] 2302.

Article 3
Section 1

Each employee shall have the right to join[] or assist the Union, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right . . . .

Article 3
Section 5A

Except as specifically authorized by this agreement, the SF-7B Extension file is the only authorized file for personnel records, which may be maintained by a supervisor, other than the official personnel file.

Article 18
Section 1

The Administration and the Union affirm their commitment to the policy of providing equal employment opportunities to all employees and to prohibit discrimination because of race, color, religion, sex, national origin, disabling condition, or age . . . .

Article 18
Section 6B

An employee has the option of filing a complaint under the negotiated grievance procedure (Article 24) or under the Agency EEO complaint procedure, but not both . . . .

Article 24
Section 2

A grievance means any complaint,

A. by an employee(s) concerning any matter relating to the employment of the employee.

. . . .

Article 26
Section 1

It is the intent of the parties to redesign the merit promotion process as a corollary to the two[-]tier appraisal system created in Article 21 and to assure openness and objectivity in merit promotion selections.

The parties agree that the purpose and intent of the provisions contained herein are to ensure that merit promotion principles are applied in a consistent manner with equity all employees . . . .

Award at 2-3.

Article 26
Section 11C

If the vacancy is one for which an under-representation exists and is a targeted occupation as identified in the Affirmative Employment Plan, and there are well-qualified candidates who would reduce the under-representation, then the selecting official will give serious consideration to those individuals who would reduce the under-representation. If an under-representation is not present, then the selecting official will seriously consider providing upward mobility for those well-qualified candidates who have been stagnated in grade.

Exceptions, Attach., Union's Post-Hearing Brief at 6.