65 FLRA No. 26

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES
CUSTOMS AND BORDER PROTECTION
WASHINGTON, D.C.
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4367

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DECISION

September 29, 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

This matter is before the Authority on exceptions to an award of Arbitrator Roger P. Kaplan filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the exceptions.

The Arbitrator found that the Agency's use of Personal Appearance Standards (PAS) in selection and promotion decisions violated "merit system principles[,] . . . law, regulations and/or the [parties'] [a]greement[,]" Award at 29, and directed the Agency to cease implementation of the PAS. For the reasons that follow, we dismiss the exceptions in part, and deny them in part.

II. Background and Arbitrator's Award

The Agency implemented PAS that imposed restrictions on employees concerning such matters as hair style and length, facial hair, application of cosmetics, size and quantity of jewelry, and body piercings and tattoos. Award at 12. The Union filed a grievance alleging that the Agency's implementation of the PAS violated law, regulation, and the parties' agreement. *Id.* at 11. When the grievance was unresolved, it was submitted to arbitration, where, absent a stipulation by the parties, the Arbitrator framed the substantive issues[1] as follows: "[D]id the Agency violate the parties' . . . [a]greement, or applicable [f]ederal laws or regulations when it implemented the [PAS]? . . . If so, what is the appropriate remedy?" *Id.* at 2.

The Arbitrator found that the PAS constitute an "employment practice" within the meaning of 5 C.F.R. § 300.101 (§ 300.101).[2] *Id.* at 21. In this regard, the Arbitrator found that "the evidence showed that compliance with [the] PAS was necessary for initial and continued employment and for advancement." *Id.* at 20-21. He also found that "it was clear from the record that the PAS [were] used in making decisions regarding 'appointments' and 'promotions'." *Id.* at 28. Consequently, the Arbitrator found that the Agency violated 5 C.F.R. § 300.103 by promulgating the PAS without having conducted the job analysis required by that regulation.[3] *Id.* at 21-22. In this regard, the Arbitrator found that the Agency failed to demonstrate a rational relationship between the PAS and job performance, and that the record did not support a finding that the PAS were professionally developed. *Id.* at 24, 25. The Arbitrator found that because the Agency implemented an "unlawful 'employment practice[,]'" the Agency "violated merit system principles[,] . . . the law, regulations and/or

1. The Arbitrator also addressed an issue concerning whether the grievance was timely, and found that it was. Award at 15-19. As there are no exceptions to this finding, we do not address it further.

2. Section 300.101 states, in pertinent part, that the regulatory subpart in which it is contained establishes principles to govern "employment practices of [federal agencies] that affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service[.]" Section 300.101 defines "employment practices" as including "the development and use of examinations, qualification standards, tests, and other measurement instruments."

3. 5 C.F.R. § 300.103 pertinently states that "[e]ach employment practice . . . shall be based on a job analysis to identify: (1) The basic duties and responsibilities; (2) The knowledges, skills, and abilities required to perform the duties and responsibilities; and (3) The factors that are important in evaluating candidates." It also states: "There shall be a rational relationship between performance in the position to be filled . . . and the employment practice used. The demonstration of rational relationship shall include a showing that the employment practice was professionally developed." *Id.*

the [parties'] [a]greement[,]" and, as a remedy, directed the Agency to "cease and desist" implementing the PAS. *Id.* at 28-29.

III. Positions of the Parties

A. Agency Exceptions

According to the Agency, "[t]he Arbitrator incorrectly ruled that compliance with the PAS was necessary for initial and continued employment and advancement and that an employee's failure to comply with the PAS would be considered . . . [in] evaluating the employee for advancement." Exceptions at 7. The Agency repeatedly asserts that "PAS are not used in selection decisions[,]" and that "[t]here is nothing in the record" to support the Arbitrator's contrary conclusion. *Id.* at 8, 7. In this regard, the Agency states that it "[c]learly . . . does not consider hair length, wearing of jewelry, and facial hair when selecting individuals for initial employment." *Id.* at 7.

The Agency asserts that the award is contrary to law "because it does not conform with applicable law with regard to the application of the terms 'employment practice' and 'qualification standard.'" *Id.* at 3. In this regard, the Agency argues that the PAS are a "condition of employment[,]" but not a "qualification standard[,]" *id.* at 6-7, and that the term "employment practice" in § 300.101 does not include the PAS because: (1) "'an individual agency action or decision that is not made pursuant to or as part of a rule or practice of some kind does not constitute an employment practice[,]'" *id.* at 5 (quoting *Wilcox v. MSPB*, Nos. 99-3314, 99-3315, 2000 WL 266481, at *2 (Fed. Cir. Mar. 9, 2000) (*Wilcox*)); and (2) "the term 'employment practice' is limited to actions that concern initial selection or promotion." *Id.* at 4-5 (citing *Meadows v. Palmer*, 775 F.2d 1193, 1198 (D.C. Cir. 1985) (*Meadows*)).

Additionally, the Agency argues that the Arbitrator's awarded remedy – directing the Agency to rescind the PAS – is contrary to law and exceeds the scope of the Arbitrator's authority. The Agency argues that the awarded remedy is contrary to law because the unit that filed the grievance no longer exists.[4] *Id.* at 11-13. In addition, the Agency argues that the Arbitrator exceeded his authority by instructing the Agency to rescind the PAS, which apply to *all* employees in the new unit, not only those who were formerly in the legacy unit that filed the grievance. *Id.* at 9-10.

B. Union Opposition

According to the Union, the Arbitrator properly found that the PAS are an employment practice within the meaning of § 300.101. Opp'n at 5-6. In addition, the Union argues that the Agency failed to raise its challenges to the remedy before the Arbitrator and that, in any event, the remedy is neither contrary to law nor outside the scope of the Arbitrator's authority. *Id.* at 9-16.

IV. Analysis and Conclusions

A. The award is not based on a nonfact.

We construe the Agency's argument that the Arbitrator incorrectly found that the Agency used the PAS in making selection and promotion decisions as a claim that the award is based on a nonfact. To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993) (*Lowry*). However, the Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed before the arbitrator. *Id.* at 593-94.

At arbitration, the Union argued, and the Agency disputed, that the Agency used the PAS as qualification criteria in making selection and promotion decisions. *See* Award at 19, 20. As the parties disputed this matter before the Arbitrator, the Agency's exception provides no basis for finding that the award is based on a nonfact. *See Lowry*,

4. We note, in this connection, that after the implementation of the PAS and the filing of the grievance, but prior to the arbitration hearing, the Authority certified a new bargaining unit (new unit) that includes, among other employees, all employees from the unit that filed the grievance (the legacy unit). *See* Award at 1, 14, 29-30; Exceptions, Attach., Hearing Transcript at 18; Exceptions at 3, 11. The Agency acknowledges that the Union was the elected exclusive representative for both the legacy unit and the new unit. Exceptions at 12-13.

48 FLRA at 593-94. Accordingly, we deny this exception.

B. The Arbitrator's finding that the PAS are an employment practice is not contrary to law.

When an exception involves an award's consistency with law, the Authority reviews any question of law raised by an 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 a *de novo* standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998) (*Local 1437*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

Employment practices of the federal government that "affect the recruitment, measurement, ranking, and selection of individuals for initial appointment and competitive promotion in the competitive service" are subject to 5 C.F.R. part 300, subpart A. 5 C.F.R. § 300.101. Section 300.101 defines "employment practices" as including "the development and use of examinations, qualification standards, tests, and other measurement instruments." *See also NTEU*, 61 FLRA 554, 556 (2006). However, this term "should not be restricted to" these items, *Bush v. OPM*, 315 F.3d 1358, 1361 (Fed. Cir. 2003) (quoting *Prewitt v. MSPB*, 133 F.3d 885, 887 (Fed. Cir. 1998)), but should be given a "broad and inclusive meaning[.]" *NTEU*, 61 FLRA at 556 (quoting *Dowd v. United States*, 713 F.2d 720, 723 (Fed. Cir. 1983)). *See also Vesser v. OPM*, 29 F.3d 600, 603 (Fed. Cir. 1994) (refusing to interpret "employment practices" as only "the kinds of 'measurement instruments' that determine a candidate's ability to perform the duties and responsibilities of a job"); *Meadows*, 775 F.2d at 1198; *Saya v. Dep't of the Air Force*, 68 M.S.P.R. 493, 496 (1995) ("[p]ractices other than . . . merit-based tests also fall within the definition [of employment practice] if they affect selection.")

In finding that the PAS constitute an employment practice within the meaning of § 300.101, the Arbitrator stated, as discussed previously, that "compliance with [the] PAS was necessary for initial and continued employment and for advancement[,]" and that "the PAS [were] used in making decisions regarding 'appointments' and 'promotions.'" Award at 21, 28. As we have denied the Agency's nonfact exception above, we defer to these factual findings in reviewing the Agency's contrary-to-law exception. *See Local 1437*, 53 FLRA at 1710. Under the broad and inclusive meaning of employment practice, these findings support the Arbitrator's conclusion that the PAS are an employment practice. *See NTEU*, 61 FLRA at 556; *Bush*, 315 F.3d at 1360-61; *Prewitt*, 133 F.3d at 887; *Vesser*, 29 F.3d at 603; *Meadows*, 775 F.2d at 1198; *Dowd*, 713 F.2d at 723-24.

The decisions cited by the Agency do not support a contrary conclusion. *Wilcox*'s holding that "an individual agency action or decision that is not made pursuant to or as part of a rule or practice of some kind does not constitute an employment practice" is inapplicable because, here, the Arbitrator expressly found that the Agency engaged in the practice of using the PAS to make multiple appointment and promotion decisions. *See* Award at 28; *Wilcox*, 2000 WL 266481, at *2. Thus, whereas *Wilcox* concerned a single employee's allegation that one vacancy announcement was cancelled and another was not published in order to circumvent merit-system principles, here the Union alleged, and the Arbitrator found, that the Agency engaged in a pattern of making selection and advancement decisions using the PAS. *See* Award at 20-21, 28. In addition, the award is consistent with *Meadows*, which held that the term "employment practice" is "limited to actions which concern initial selection or promotion[,]" 775 F.2d at 1198, given the Arbitrator's finding that the Agency used the PAS "in making decisions regarding 'appointments' and 'promotions.'" Award at 28. Accordingly, the Agency has not established that the Arbitrator's conclusion that the PAS are an employment practice is contrary to law.

Further, because the term "employment practices" is to be broadly construed and is not limited to the terms specifically mentioned in § 300.101, including "qualification standards," the Agency's argument that the Arbitrator mischaracterized the PAS as a "qualification standard" does not provide a basis for finding deficient the Arbitrator's conclusion that the PAS are an employment practice. *See NTEU*, 61 FLRA at 556; *Bush*, 315 F.3d at 1360-61; *Prewitt*, 133 F.3d at 887; *Vesser*, 29 F.3d at 603; *Meadows*, 775 F.2d at 1198; *Dowd*, 713 F.2d at 723-24.

Based on the foregoing, we deny these exceptions.

C. Section 2429.5 of the Authority's Regulations bars the Agency's exceptions to the remedy directed by the Arbitrator.

Under § 2429.5 of the Authority's Regulations, the Authority will not consider issues that could have been, but were not, presented to the arbitrator. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot., JFK Airport, Queens, N.Y.*, 62 FLRA 416, 417 (2008). Where a party makes an argument for the first time on exception that it could, and should, have made before the arbitrator, the Authority applies § 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Justice, Fed. Bureau of Prisons, USP Admin. Maximum (ADX), Florence, Colo.*, 64 FLRA 1168, 1170 (2010) (*BOP)*; *U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389 (2010) (*FAA*).

Before the Arbitrator, the Union stated that the relief it was seeking included the rescission of the PAS. *See* Tr. at 18. The Agency could have, but did not, argue to the Arbitrator, as it does now, that the Authority's certification of the new unit would mean that awarding the Union's requested remedy would be contrary to law or exceed the Arbitrator's authority. Accordingly, we dismiss the Agency's exceptions to the remedy as barred by § 2429.5. *See BOP*, 64 FLRA at 1170 (§ 2429.5 barred argument that awarding remedy sought by union would violate law where the issue could have been, but was not, presented to the arbitrator); *FAA*, 64 FLRA at 390 (same).

V. Decision

The exceptions are dismissed in part and denied in part.