69 FLRA No. 52

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
BUREAU OF LABOR STATISTICS
(Agency)

0-AR-5173

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DECISION

May 11, 2016

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

Arbitrator Charles Feigenbaum issued an award finding that the Agency did not violate the Age Discrimination in Employment Act (ADEA)[1] or the parties' collective-bargaining agreement, but finding that the Agency violated §§ 7114(b)(4) and 7116(a)(8) of the Federal Service Labor-Management Relations Statute (Statute).[2] As a remedy, the Arbitrator ordered the Agency to adhere to the Statute and respond to information requests in a timely manner under § 7114 of the Statute. The Arbitrator considered, but rejected, the Union's request for a notice-posting remedy.

The Union raises two exceptions to the Arbitrator's remedy. First, the Union argues that the award is contrary to an Agency-wide regulation. Because the Union does not adequately support this exception, we deny it.

Second, the Union contends that the Arbitrator's remedy is contrary to law because, "as a matter of law, [the Union] is entitled to a [notice-posting remedy]."[3] Because no statute or precedent mandates a posting as a remedy for an unfair labor practice (ULP) and the Union does not demonstrate that the Arbitrator's remedy is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute],"[4] we deny this exception.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency violated the parties' agreement and the ADEA in its promotion practices, specifically its failure to promote bargaining-unit employees over the age of forty to the general schedule (GS)-13 level. The grievance also alleged that the Agency was "unwilling to share information"[5] in violation of §§ 7114(b)(4) and 7116(a)(8) of the Statute. The parties did not resolve the grievance and submitted it to arbitration.

At arbitration, the parties stipulated to two issues: (1) whether the Agency discriminated against bargaining-unit employees by not promoting those employees who were over age forty for twenty-one positions at the GS-13 level; and (2) whether the Agency violated §§ 7114(b)(4) and 7116(a)(8) of the Statute due to a failure to properly provide information requested on three occasions.

The Union alleged that the Agency violated the parties' agreement and the ADEA by failing to promote employees over the age of forty. Specifically, the Union argued that statistical evidence demonstrated that the Agency discriminated against bargaining-unit employees over the age of forty by not promoting them to the GS-13 level over a one-year period. The Union also argued that the Agency committed a ULP in violation of § 7116(a)(8) of the Statute when the Agency's responses to information requests made under § 7114(b)(4) of the Statute were untimely, incomplete, and incorrect.

The Agency contended that it did not discriminate on the basis of age when conducting the competitive promotion process and did not violate §§ 7114(b)(4) or 7116(a)(8) when responding to the Union's information requests.

The Arbitrator found that the Union did not demonstrate that the Agency discriminated against bargaining-unit employees over the age of forty by not promoting any employees over age forty to the GS-13 level during a one-year period. In particular, the Arbitrator found that the Union failed to establish a prima facie case because the Union's statistical evidence was too speculative and the Union failed to identify a specific test, requirement, or practice that had an adverse impact on older workers. However, the Arbitrator also

[1] 29 U.S.C. §§ 621-634.
[2] 5 U.S.C. §§ 7114(b)(4), 7116(a)(8).
[3] Exceptions Br. at 4.
[4] *NTEU*, 66 FLRA 406, 408 (2011) (*NTEU*) (quoting *NTEU v. FLRA*, 647 F.3d 514, 517 (4th Cir. 2011) (*NTEU v. FLRA*)).
[5] Award at 6 (quoting the grievance).

found that the Agency was "dilatory and incomplete" in its responses to two of the Union's information requests.[6] Although the Arbitrator found no evidence of bad faith or animus, he found that "the insufficiency of the reply" and the time it took "to provide . . . limited and easily retrievable information[] is part of a pattern" of "not treat[ing information] request[s] with the care and attention [they] deserve."[7] As such, the Arbitrator found that the Agency violated §§ 7114(b)(4) and 7116(a)(8) of the Statute.

As a remedy, the Arbitrator ordered the Agency to "take due care and diligence in observing its responsibilities under 5 U.S.C. § 7114(b)(4) and that it respond to [information] requests in a timely manner."[8] However, the Arbitrator found that "a posting is [not] necessary or useful" and denied the Union's request for a notice-posting remedy.[9] In a supplemental award clarifying his remedy, the Arbitrator again stated that he was not ordering a posting and that he "consider[ed] the remedy [he] ordered to be appropriate under the circumstances."[10]

The Union filed exceptions challenging the Arbitrator's remedy, and the Agency filed an opposition to those exceptions.

III. Analysis and Conclusions

A. The award is not contrary to an Agency-wide regulation.

The Union raises an exception challenging the award as contrary to an Agency-wide regulation.[11] However, the Union does not provide any argument in support of this exception or cite any Agency-wide regulation. Instead, the Union provides only a string citation to: (1) § 7114(a)(4) and (b)(4) of the Statute; (2) Authority precedent that does not involve any Agency-wide regulations; (3) a decision of the Supreme Court; and (4) a ULP-case-law outline created by the Federal Labor Relations Authority's (FLRA's) General Counsel.[12] Under § 2425.6(e)(1) of the Authority's Regulations, "[a]n exception may be subject to . . . denial if . . . [t]he excepting party fails to . . . support" its argument, "or otherwise fails to demonstrate a legally recognized basis for setting aside the award."[13] Because the Union fails to adequately support this exception, we deny it under § 2425.6(e)(1).[14]

B. The award is not contrary to law.

The Union argues that the award is contrary to law because, "as a matter of law, [the Union] is entitled to a [notice-posting remedy]."[15] 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.[16] 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.[17] In making that assessment, the Authority defers to the arbitrator's underlying factual findings.[18]

Where an arbitrator finds that a party has committed a ULP, the Authority defers to the arbitrator's judgment and discretion in the determination of the remedy.[19] Thus, unless a party establishes that a particular remedy is compelled by the Statute, the Authority reviews remedy determinations of arbitrators in ULP-grievance cases just as the courts of appeals review the Authority's remedies in ULP cases.[20] This means that the Authority upholds the arbitrator's remedy determination unless the determination is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]."[21] The Authority has emphasized that making such a showing "is a heavy burden indeed."[22]

The Union argues that notice-posting remedies are "critical to [the] accomplishment of the Authority's remedial purposes of enforcing employee rights and preventing [ULPs]."[23] The Union notes that postings are a traditional remedy and that "the posting of a notice provides, for most [bargaining-]unit employees, the only visible indication that a respondent recognizes and

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[6] *Id.* at 24.
[7] *Id.* at 23.
[8] *Id.* at 24.
[9] *Id.*
[10] Supp. Award at 1.
[11] Exceptions at 5.
[12] *Id.*
[13] 5 C.F.R. § 2425.6(e)(1).
[14] *Id.*; *see, e.g.*, *U.S. DHS, U.S. CBP*, 68 FLRA 1015, 1022 (2015).
[15] Exceptions Br. at 4.
[16] *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995).
[17] *U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)).
[18] *Id.*
[19] *NTEU*, 66 FLRA at 408 (citing *NTEU*, 64 FLRA 833, 838 (2010) (*NTEU II*); *NTEU, Wash., D.C.*, 48 FLRA 566, 571 (1993) (*NTEU, Wash.*)).
[20] *Id.* (citing *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 436 (2010)).
[21] *Id.* (quoting *NTEU v. FLRA*, 647 F.3d at 517).
[22] *Id.* (quoting *NTEU, Wash.*, 48 FLRA at 572).
[23] Exceptions Br. at 4 (quoting FLRA, Office of the Gen. Counsel Guidance Mem. 11-01 at 2 (May 31, 2011)).

intends to fulfill its obligations under the Statute."[24] However, the Union does not point to any law, rule, or regulation mandating a notice-posting remedy where a party commits a ULP. In short, the Union presents arguments that a notice-posting remedy is an appropriate or desirable remedy, but the Union presents nothing that holds that such a remedy is required by any law, rule, or regulation.

Furthermore, the Union does not assert, or provide any basis for finding, that the Arbitrator's denial of a posting is a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [Statute]."[25]

Finally, the Union contends that, even were an arbitrator to have discretion to not grant a notice-posting remedy, "[Authority] precedent and regulation warrant[] a posting in this case."[26] As support, the Union cites *F.E. Warren Air Force Base, Cheyenne, Wyoming*, which notes that "a cease-and-desist order accompanied by the posting of a notice to employees . . . [is] provided in virtually all cases where a [ULP] violation is found."[27] However, because the granting of a notice-posting remedy is within the judgment and discretion of the Arbitrator, we defer to his remedy.[28]

Consequently, the Union's arguments do not demonstrate that the award is contrary to law, and we deny this exception.

IV. Decision

We deny the Union's exceptions.

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[24] *Id.* at 5 (citing *U.S. Dep't of HUD, S.F., Cal.*, 41 FLRA 480, 482 (1991)).
[25] *NTEU*, 66 FLRA at 408 (quoting *NTEU v. FLRA*, 647 F.3d at 517).
[26] Exceptions Br. at 5.
[27] *Id.* (quoting *F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996)) (emphasis omitted).
[28] *NTEU*, 66 FLRA at 408 (citing *NTEU II*, 64 FLRA at 838; *NTEU, Wash.*, 48 FLRA at 571).