73 FLRA No. 107

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY COMBAT CAPABILITIES
DEVELOPMENT COMMAND
REDSTONE ARSENAL, ALABAMA
(Agency)

0-AR-5859

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DECISION

June 1, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

Arbitrator Leslie W. Langbein denied a grievance concerning the Agency's failure to select the grievant for two vacant positions. The Union filed an exception arguing the award is contrary to law because the Arbitrator applied the wrong burden of proof. As the issue before the Arbitrator was purely contractual, and the Union did not assert that the parties' agreement requires any specific burden of proof in these circumstances, the Union does not demonstrate the award is deficient. Accordingly, we deny the exception.

II. Background and Arbitrator's Award

The grievant applied, and was considered, for two vacancies for a lead-computer-engineer position. The Agency did not select the grievant for either vacancy. In 2016, the Union filed a grievance alleging the Agency violated the parties' collective-bargaining agreement by not giving the grievant a fair opportunity to compete, and not selecting him, for the position on the basis of race, color, and age. The Agency denied the grievance, and the parties proceeded to arbitration.

The Arbitrator framed the issues as whether the grievant: (1) "established that his age, race, or color tainted any of the processes or procedures used by the Agency to fill the [p]osition[] and [(]2) if so, what are the proper remedies?"[1]

The Arbitrator noted that the parties argued their positions using the burden-shifting analysis articulated in *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*).[2] However, in deciding the grievance, the Arbitrator applied the reasoning articulated in *Babb v. Wilkie* (*Babb*),[3] in which the U.S. Supreme Court revised the standard for demonstrating age-based discrimination in the federal sector. The Arbitrator stated that "the parties may have overlooked *Babb* and its progeny because the alleged discrimination took place in 2016, not in 2020 when *Babb* was decided."[4] She interpreted *Babb* to mean that the grievant "now need only show that an impermissible protected basis was considered at some stage of a personnel action."[5]

The Arbitrator then considered, and rejected, the Union's arguments that the evidence supported an inference of discrimination based on age, race, or color. She concluded that there was an "absence of circumstantial evidence proving that the Agency took [the g]rievant's race, color[,] or age into account at some point in the competitive process."[6] Therefore, the Arbitrator denied the grievance.

The Union filed an exception to the award on January 28, 2023, and the Agency filed an opposition to the Union's exception on February 23, 2023.

III. Analysis and Conclusions: The Union fails to establish that the award is contrary to law.

The Union asserts the Arbitrator erred by applying the analysis used in *Babb*, rather than *McDonnell Douglas*, to resolve its discrimination claims.[7] When resolving a contrary-to-law exception, the Authority reviews any question of law raised by the exception and the award de novo.[8] Applying a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[9] In making that assessment, the Authority

[1] Award at 25.
[2] 411 U.S. 792 (1973).
[3] 140 S. Ct. 1168, 1171 (2020).
[4] Award at 22-23.
[5] *Id.* at 24.
[6] *Id.* at 43.
[7] Exceptions Br. at 2.
[8] *NTEU, Chapter 338*, 73 FLRA 487, 488 (2023) (citing *U.S. Dep't of the Army, U.S. Army Garrison Redstone Arsenal, Huntsville, Ala.*, 73 FLRA 210, 211 (2022)).
[9] *Id.*

defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[10]

It is well established that "unless a specific burden of proof is required, an arbitrator may establish and apply whatever burden the arbitrator considers appropriate in resolving claims under the parties' agreement."[11] Here, the claim before the Arbitrator was whether the Agency violated the parties' agreement.[12] The Union does not assert that the parties' agreement sets forth any specific burden of proof governing the issues in this case. Thus, there is no basis for concluding the Arbitrator was required to apply *McDonnell Douglas* in resolving the Union's claim.[13]

Accordingly, we find that the Union's argument does not demonstrate that the award is contrary to law.

IV. Decision

We deny the Union's exception.

[10] *Id.* (citing *U.S. Dep't of VA, Robley Rex Med. Ctr.*, 73 FLRA 468, 469 (2023)).

[11] *AFGE, Loc. 3320*, 69 FLRA 136, 139 (2015) (Member Pizzella concurring) (denying contrary-to-law exception alleging arbitrator applied incorrect burden of proof); *SSA, Balt., Md.*, 57 FLRA 181, 184 (2001) (*SSA*) (denying contrary-to-law exception based on arbitrator's failure to apply *McDonnell Douglas* framework to a claim that the agency violated the equal-employment-opportunity article in the parties' agreement).

[12] Award at 3, 19-21 & n.1 (identifying the issue as limited to specific articles in the parties' agreement).

[13] *SSA*, 57 FLRA at 184.