65 FLRA No. 29

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3506
(Union)

and

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY
ADJUDICATION AND REVIEW
SAN ANTONIO, TEXAS
(Agency)

0-AR-4362

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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 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 found that the grievant's whistleblowing activities were a contributing factor in his nonselection for Hearing Office Director (HOD) and ordered the Agency to give the grievant priority consideration for the next HOD position in his region. For the reasons that follow, we deny the Union's exceptions.

II. Background and Arbitrator's Award

The Agency posted a vacancy announcement for a full-time permanent HOD. Award at 6. The grievant, who was President of the Union local, was one of eight applicants who qualified for the opening. *Id*. at 7. After the Agency decided not to select anyone for the position, the grievant filed a grievance concerning his non-selection. *Id*. Approximately three weeks later, the Agency posted a second vacancy announcement for the HOD position, this time for a full-time temporary position, not to exceed one year. *Id*. The grievant did not apply for this opening; rather, he filed a second grievance alleging that the temporary nature of the opening precluded his selection. *Id*. The Union made a discovery request for the promotion package related to the first vacancy announcement, but the Agency failed to produce it. *Id.* at 12-14. The grievant requested that an adverse inference be drawn from the Agency's non-production of the promotion package. *Id*. at 11-12

The Arbitrator addressed the following issues, which were proposed by one or both of the parties:

1. "As a threshold issue, is nonselection for a management position arbitrable under the parties' [collective bargaining agreement (CBA)] between the parties?"

2. "As a threshold issue, is management's decision to advertise a management position as temporary arbitrable under the CBA between the parties?"

3. "[Should] [a]n adverse inference be taken against the [A]gency for its failure/refusal to provide [the promotion package] related to [the first vacancy announcement]?"

4. "If the issue of non-selection for a management position is determined to be arbitrable, did the Agency violate the CBA by not selecting the grievant for the [permanent] HOD position . . . ? If so, what is the appropriate remedy?"

5. "If the issue of non-selection for a management position is determined to be arbitrable, did the Agency violate the CBA by advertising the . . . HOD position as temporary . . . ? If so, what is the appropriate remedy?"

6. "Was the grievant . . . not selected for [the permanent HOD position] because of his handicapping condition? If so, what shall the remedy be?"

7. "Were the grievant['s] . . . whistleblowing activities a contributing factor in the Agency's decision not to select him for [the permanent HOD

position]? If so, what shall the remedy be?"

8. "Was the grievant . . . not selected for [the permanent HOD position] because of his Union representational activities? If so, what shall the remedy be?"
9. "Was the grievant . . . not selected for [the permanent HOD position] because of his [Equal Employment Opportunity (EEO)] activities? If so, what shall the remedy be?"

10. "Was the grievant . . . not selected for [the permanent HOD position] because of the grievances that he filed? If so, what shall the remedy be?"

Id. at 2-3.

Regarding the first two issues, the Arbitrator found that the grievant's nonselection for a management position and the Agency's decision to post a temporary HOD position were arbitrable. *Id*. at 10-11. Regarding the third issue, the Arbitrator drew an adverse inference against the Agency for its failure to provide the Union with the promotion package related to the permanent HOD posting. *Id*. at 13-14. In this regard, the Arbitrator found that grievant's lack of access to the package denied him information central to his case and that the Agency offered no reasonable excuse for not having the package available. *Id*. at 14.

Regarding the fourth and fifth issues, the Arbitrator found that the Agency did not violate the CBA when it made no selection for the permanent HOD position and then posted a vacancy announcement for a temporary position. *Id*. at 11. As for the remaining issues, concerning whether certain factors contributed to the grievant's nonselection, the Arbitrator found that, with the exception of the whistleblowing activities, insufficient evidence had been presented to conclude that any of these were contributing factors. *Id*. at 18. As to the grievant's whistleblowing activities, the Arbitrator found that certain reports the grievant had made to both Congress and an Associate Commissioner of waste, fraud, and abuse in an awards program "could arguably be construed as having a chilling effect on the part of management when considerations are made in a promotional process." *Id*. at 19.

The Arbitrator considered and rejected the Agency's explanation that it did not make a selection from the first job announcement because it wanted to select the Hearing Officer Chief Administrative Law Judge (HOCALJ) before selecting the HOD. *Id*. at 15-16. The Arbitrator found that, because the Agency knew that the HOCALJ position was vacant when it posted for the permanent HOD, this explanation was both unsupported by sufficient evidence and unreasonable. *Id*. at 15, 17. In addition, the Arbitrator found that, because of the Agency's mishandling of the promotion package for the permanent HOD posting, he could not determine whether the grievant was on the well-qualified list or how he compared with the other applicants on the qualified list. *Id*. at 20. Under the circumstances, he found that a remedy short of placing the grievant in the position -- specifically, priority consideration for the next HOD position in the grievant's region -- was an appropriate and equitable remedy. *Id*.

III. Positions of the Parties

A. Union's Exceptions

The Union contends that the Arbitrator acted contrary to law and exceeded his authority when he ordered priority consideration as the remedy for the grievant's nonselection. Exceptions at 1. According to the Union, the appropriate remedy for a nonselection based on an applicant's whistleblowing activities is retroactive promotion to the denied position. *Id*. at 3. Further, the Union contends that the Arbitrator also exceeded his authority by failing to address, as possible motivating factors for the grievant's nonselection, the grievant's handicapping condition, representational activities, grievances, and EEO complaints. *Id*. at 5-8. The Union also contends that the Arbitrator improperly applied the adverse inference regarding the Agency's failure to produce the promotion package. In this regard, the Union contends that the adverse inference required the Arbitrator to find that the Union had met its evidentiary burden as to all contributing factors and to order a retroactive promotion.

B. Agency's Opposition

The Agency contends that the Arbitrator's award of priority reconsideration was consistent with law because the Arbitrator did not find that the Agency would have selected the grievant but for his whistleblowing activity. Opp'n at 6-7. Indeed, the Agency notes, the Arbitrator found that he could not make such a determination without the promotion package. *Id.* at 7. The Agency contends that there was clear and convincing evidence that the grievant would not have been selected, even if he had not

engaged in whistleblower activities. *Id*. In support, the Agency notes that the grievant was a GS-13 applicant, that a selecting official testified that she always selected a GS-14 applicant for the HOD position, and that a GS-14 applicant was selected for the temporary HOD position. *Id*. at 8. Citing *Social Security Administration, Office of Hearings and Appeals, Paducah, Ky.*, 58 FLRA 124, 125-26 (2002), the Agency contends that an award of promotion and backpay is not appropriate when there is no causal connection between a prohibited personnel practice and a non-promotion.

The Agency contends that the Arbitrator did not exceed his authority because he addressed each of the factors that possibly could have contributed to the grievant's nonselection and found that there was sufficient evidence only as to the whistleblowing activities. *Id*. at 11. As for the adverse inference drawn by the Arbitrator, the Agency argues that it did not require the Arbitrator to find that all of the alleged factors were contributing factors to the grievant's nonselection. *Id*. at 14. Instead, the Agency contends, the adverse inference was tied only to the Arbitrator's finding that whistleblowing could have been a contributing factor. *Id*.

IV. Analysis and Conclusions

A. The award is not contrary to law.

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 contends that the Arbitrator's remedy of priority consideration is contrary to case law establishing that retroactive promotion is the appropriate remedy for a nonselection made in violation of the Whistleblower Protection Act.[1] However, none of the cases cited by the Union supports its contention. *Ruggieri v. Merit Systems Protection Board*, 454 F.3d 1323 (Fed. Cir. 2006), stands only for the proposition that an applicant's nonselection for a position for which the vacancy announcement is ultimately canceled is a "failure to take a personnel action" within the meaning of the Whistleblower Protection Act. *Id*. at 1326 (quoting 5 U.S.C. § 2302(a)(2)(A)(i)). The court made no finding as to the appropriate remedy for the nonselection. Likewise, in *Morgan v. Department of Energy*, 81 M.S.P.R. 48 (1999), the Merit Systems Protection Board (MSPB) did not hold that a retroactive promotion is always the appropriate remedy for a nonselection made in violation of the Whistleblower Protection Act. Instead, it held that, in an individual right of action proceeding brought under 5 U.S.C. § 1221 and concerning a nonselection, the MSPB, if it orders corrective action, *may* order a retroactive promotion with back pay. *Id*. at 55.[2] Finally, although in *Costin v. Department of Health and Human Services*, 72 M.S.P.R. 525 (1996), the MSPB found that the grievant had been retaliated against because of his whistleblowing and ordered the grievant be prospectively promoted, the MSPB did not find that the grievant was *entitled* to that or any other specific remedy. Moreover, under 5 U.S.C.

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1. Under the Whistleblower Protection Act, an employer may not retaliate against an employee because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences — (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of anagency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences — (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety[.]

5 U.S.C. § 2303(b)(8).

2. To the extent the Union suggests the Arbitrator exceeded his authority by not ordering the grievant be retroactively promoted, we reject this contention as well. Because the Arbitrator was not required to award this relief, he did not exceed his authority by failing to do so.

§ 1221(e)(1), the MSPB is authorized to order "such corrective action as the Board considers appropriate" when a whistleblowing violation has been established. This provision, thus, further supports a conclusion that there is no legal prohibition against the Arbitrator's chosen remedy of priority consideration.

The Union also contends that the Arbitrator improperly applied the adverse inference regarding the Agency's failure to produce the promotion package. In this regard, the Union contends that the adverse inference required the Arbitrator to find that the Union had met its evidentiary burden as to all contributing factors and to order a retroactive promotion. Exceptions at 8. The adverse inference principle, however, merely "permits an adverse inference to be drawn; it does not create a conclusive presumption against the party failing to" produce evidence. *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981). Moreover, the adverse inference that the Arbitrator drew from the Agency's failure to produce the promotion package is a finding of fact. *See* 31A C.J.S. *Evidence* § 255 (2010) ("The unfavorable . . . inference arising from the withholding of evidence is not conclusive against the party, but is merely a fact for the consideration of the" finder of fact.). As noted above, the Authority defers to an Arbitrator's factual findings, and the Union has not challenged the award on the basis of nonfact. Thus, contrary to the Union's contention, the Arbitrator was not required to find that the Union had met its evidentiary burden as to all contributing factors or order a retroactive promotion, and he did not err in failing to do so.

Accordingly, we find that the Arbitrator did not err in awarding the grievant priority consideration and properly applied the adverse inference regarding the Agency's failure to produce the promotion package and deny the exceptions.

B. The Arbitrator did not exceed 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. *See AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996).

The Union contends that the Arbitrator exceeded his authority by failing to resolve certain issues that were before him. Specifically, the Union argues the Arbitrator failed to address whether the grievant's handicapping condition, representational activities, grievances, and EEO complaints were contributing factors in his nonselection. The Arbitrator, however, expressly considered each of these factors and concluded that "for the most part, while some arguments on each factor have possible merit, with the exception of the whistleblowing activities, there was not enough evidence presented to conclude a contributing factor." Award at 18. As a result, the Arbitrator resolved the issues before him.

Accordingly, we find that the Arbitrator did not exceed his authority and deny this exception.

V. Decision

The Union's exceptions are denied.