

Social Security Administration, Baltimore, MD and AFGE, Local 1923

Federal Labor Relations Authority

0-AR-3346; 57 FLRA No. 44; 57 FLRA 181

May 24, 2001

The Authority Upheld The Arbitrator's Award Finding The Agency Had Not Given The Grievant Bona Fide Consideration For A Supervisory Position When He Had Invoked His Priority Consideration In His Application.

The grievant, a unit employee, applied for a lead inventory management specialist position. The grievant exercised his right to priority consideration he received in settlement from a prior EEO complaint. The grievant was not selected and filed a grievance. The grievance went to arbitration. The parties stipulated to an issue and the Arbitrator clarified the issue to be whether the Agency had properly given the grievant priority consideration. The Arbitrator determined that the Agency had not given the grievant bona fide consideration and rejected the Agency's justification for the grievant's non-selection as being without merit [101 FLRR 2-1021]. The Agency excepted to the award, arguing that the Arbitrator exceeded his authority, the position applied for was outside the unit and therefore the negotiated grievance procedure did not apply, the award did not draw its essence from the parties agreement, the award was contrary to law. The Authority found the Arbitrator could clarify a stipulated issue. The Authority stated the clarified issue arose in the context of resolving the stipulated issue and was properly before the Arbitrator for consideration. The Authority denied the Agency's exceeds authority exception. The Authority then set out that it is not the applied for position's unit status that is dispositive in a dispute, but the current status of the employee at the time of application. Since the grievant was a unit employee, the Arbitrator properly reviewed the parties' CBA in determining the award. The Authority also pointed out that the original stipulated issue referred to the CBA. The Authority then determined that the award drew its essence from the parties' agreement. The Authority went on to find the award was not contrary to law. The Authority denied the Agency's exceptions.

Before: Cabaniss, Chair; Wasserman and Pope, Members

Decision

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Hugh D. Jascourt 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 Agency's exceptions.

For the reasons that follow, we deny the Agency's exceptions.

II. Background and Arbitrator's Award

Exercising a priority consideration received in settlement of a prior Equal Employment Opportunity (EEO) complaint, the grievant applied, but was not selected for, a Lead Inventory Management Specialist position. The Union filed a grievance, which was unresolved and submitted to arbitration, where the parties agreed to the issue as:

Whether the Union has proved by a preponderance of evidence that SSA discriminated against [the grievant] on the basis of age, sex, and/or race and retaliated against him in violation of the [g]rievant's rights under Article 18 and 24 of the [parties' agreement] or other law or regulation when it declined to select him, via priority consideration for a Lead Inventory Supply Specialist position. If so, what is the appropriate remedy?

Award at 2.1

Based on the parties' arguments, the Arbitrator found that the real issue before him was whether the "[g]rievant receive[d] the priority consideration he was promised in his EEO settlement." Id. at 8. To resolve that issue, the Arbitrator found that "the only burden of proof [the g]rievant must meet is that he was not given bona fide consideration for his priority consideration," and rejected the Agency's claim that the standards in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) should apply. Id. at 7.

The Arbitrator refused to resolve the Agency's claim that the position for which the grievant was not selected was not in the bargaining unit, finding that the unit status of the position was not necessary to the outcome of the grievance. Id. at 6. In addition, the Arbitrator rejected the Agency's claim that because the selection at issue was made under the Management Officials Promotion Plan (MOPP), the grievance must be resolved in the Agency grievance procedure, as opposed to the negotiated grievance procedure set forth in the parties' agreement. The Arbitrator found that the grievant was entitled to have his claim resolved in the negotiated grievance procedure because he is a unit employee. The Arbitrator also found that it was not necessary to determine whether the priority consideration procedures under the MOPP or the parties' agreement were applicable because the result of the grievance would be the same under both.2

Addressing the merits of the grievance, the Arbitrator found that, in determining not to select the grievant pursuant to priority consideration, the grievant was evaluated in comparison to other applicants in violation of both the MOPP and Article 26 of the parties' agreement. The Arbitrator also found that there was "no testimony in the record that [the g]rievant could not be very successful in the position in issue," and that the Agency's justification for not selecting the grievant---that he would require extensive training---was without merit. Id. at 9. Based on these findings, the Arbitrator concluded that the grievant was not afforded the bona fide consideration to which he was entitled. The Arbitrator further found that whether the failure to afford the grievant priority consideration was based on the grievant's age or sex, or in reprisal for his prior EEO complaint was not relevant, because the "[d]enial of an EEO settlement must be viewed on its face as an act of discrimination."Id. at 10.

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the award is contrary to law and the Arbitrator exceeded his authority on the following three grounds. First, the Agency argues that by construing the issue as whether the grievant received the priority consideration provided in the EEO settlement, the Arbitrator created a new issue beyond the scope of the parties' stipulated issue. Second, the Agency argues that the Arbitrator applied Article 26 of the parties' agreement, which applies only to bargaining unit positions, to a non-bargaining unit position. In this connection, the Agency also argues that the Arbitrator implicitly found that the position at issue was a bargaining unit position, and that arbitrators have no authority to determine the bargaining unit status of an employee in arbitration. Third, the Agency argues that the Arbitrator applied and interpreted the provisions of the MOPP, and that grievances involving the MOPP may only be resolved through the Agency grievance procedure.

Additionally, the Agency asserts that the award is contrary to law because the Arbitrator improperly found that the standards set forth in *McDonnell Douglas* were not applicable. The Agency further argues that had the Arbitrator applied the appropriate standard, the grievance would have been denied.

B. Union's Opposition

The Union asserts that the Arbitrator did not exceed his authority in construing the stipulated issue because the issue as construed by the Arbitrator was necessary to the resolution of the grievance. The Union also asserts that the Arbitrator explicitly found that it was not necessary to determine whether the position for which the grievant was not selected was a bargaining unit position or whether the MOPP or the agreement applied. In response to the Agency's claim regarding the Arbitrator's application and interpretation of the MOPP, the Union

argues that this claim is actually an issue of arbitrability, which was already addressed and resolved by the Arbitrator. Finally, the Union asserts that the Arbitrator's finding that the McDonnell Douglas standard was not applicable is not contrary to law, because the real issue in this case was whether the Agency gave the grievant bona fide priority consideration.

IV. Analysis and Conclusions

A. The Arbitrator did not exceed his authority 3

Arbitrators exceed their authority when they resolve an issue not submitted to arbitration. *United States Dep't of the Interior, Nat'l Park Serv., Golden Gate Nat'l Recreation Area, S.F., Cal.*, 55 FLRA 193, 194 (1999). Arbitrators do not exceed their authority by addressing any issue that is necessary to decide a stipulated issue, *NATCA, MEBA/NMU*, 51 FLRA 993, 996 (1996), or by addressing any issue that necessarily arises from issues specifically included in a stipulation, *Air Force Space Div., L.A. Air Force Station, Cal.*, 24 FLRA 516, 519 (1986). In determining whether an arbitrator has exceeded his or her authority, the Authority accords an arbitrator's interpretation of a stipulation of issues the same substantial deference that it accords an arbitrator's interpretation and application of a collective bargaining agreement. *United States Info. Agency, Voice of Am.*, 55 FLRA 197, 198 (1999).

In this case, the issue stipulated by the parties involved whether the Agency discriminated against the grievant in violation of the parties, agreement or any other law or regulation when it declined to select him by means of priority consideration. The Arbitrator considered the stipulated issue and the parties' arguments and found that to establish that the grievant was discriminated against, the Union was required to demonstrate that the grievant was not given bona fide consideration for the position. Based on this finding, the Arbitrator construed the issue as whether the "[g]rievant receive[d] the priority consideration he was promised in his EEO settlement." Award at 8. Although the parties' stipulated issue did not explicitly set forth the issue of bona fide consideration as the dispute, that issue arose in the context of resolving whether the grievant was improperly not selected and is consistent with the arguments made before the Arbitrator.

Read in context of the record as a whole, the issue as construed by the Arbitrator reflects the Arbitrator's interpretation of the stipulation of the parties and his interpretation of what issues needed to be addressed to resolve the grievance. In view of the substantial deference to be accorded the Arbitrator's interpretation, there is no basis for concluding that the Arbitrator exceeded his authority on this ground. See *United States Dep't of Vet. Affairs, Med. and Reg. Ctr., Togus, Me.*, 55 FLRA 1189, 1191-92 (1999); *FDIC, Chicago Region*, 45 FLRA 437, 447 (1992).

Moreover, the Arbitrator's finding that the Agency's violation of the settlement agreement constituted discrimination is directly responsive to the parties' stipulated issue. This finding also supports a conclusion that the Agency discriminated against the grievant in violation of Article 18 of the parties' agreement---the EEO article---which is a matter explicitly set forth in the parties' stipulated issue. As such, the Arbitrator clearly addressed the stipulated issue, and there is no basis for concluding that the Arbitrator exceeded his authority by deciding an issue that was not before him.

Based on the foregoing, we deny the exception.

B. The award does not fail to draw its essence from the parties' agreement

Although the Agency states that the arguments in its second and third exceptions raise exceeded authority claims, the issues raised by the arguments involve the Arbitrator's interpretation and application of the agreement. Accordingly, we construe the Agency's arguments as claims that the award fails to draw its essence from the parties' agreement. See Int'l Ass'n of Machinists and Aerospace Workers, Local 2333, 53 FLRA 1605, 1610 (1998). The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. United States Dep't of Labor (OSHA), 34 FLRA 573, 575 (1990). The Authority and the courts defer to arbitrators in this context "because it is the arbitrator's construction of the agreement for which the parties have bargained." *Id.* at 576.

The Arbitrator interpreted the parties, agreement as permitting an employee to file a grievance under the negotiated grievance procedure based on the unit status of the employee at the time of the filing. The Agency does not dispute that under the parties, agreement, it is the unit status of the grievant at the time of the filing---as opposed to the unit status of the position at issue---that determines whether a grievance is properly resolved under the negotiated grievance procedure. As such, the Agency has failed to demonstrate that the Arbitrator's conclusion that the grievance could properly be resolved under the negotiated grievance procedure is irrational, implausible, or manifests a disregard for the parties' agreement.

In addition, there is no basis for finding that the Arbitrator's application or interpretation of the MOPP is irrational, implausible, or manifests a disregard for the agreement. Nothing in the agreement precludes the applicability of the MOPP standards in the negotiated grievance procedure. Further, although the Arbitrator addressed the provisions of the MOPP in resolving the issue, contrary to the

Agency's assertions, the Arbitrator explicitly found that it was not necessary to determine the unit status of the position at issue and declined to determine whether the MOPP or the parties' agreement applied to the grievance. In these circumstances, there is no basis for finding that the award fails to draw its essence from the agreement.

Based on the foregoing, we deny the Agency's second and third exceptions.

C. The award is not contrary to law

It is well-established under Authority precedent that if a standard of proof is set forth in law, rule, regulation or a collective bargaining agreement, then an arbitrator's failure to apply the prescribed standard will constitute a basis for finding the award deficient as contrary to law, rule, regulation, or as failing to draw its essence from the agreement. See AFGE, Local 2250, 52 FLRA 320, 323-24 (1996) (AFGE); United States Dep't of the Navy, Naval Aviation Depot, Norfolk, Va., 36 FLRA 217, 222 (1990). However, in the absence of a specified standard of proof, arbitrators have the authority to establish whatever standard they consider appropriate and the Authority will not find an award deficient because a party claims that an incorrect standard was used. See AFGE, 52 FLRA at 324.

As set forth above, the issues in this case were whether the grievant was given the priority consideration to which he was entitled under the settlement agreement and the parties' contract and, if not, whether the breach of the settlement agreement violated the EEO article of the parties' agreement.

Insofar as the Arbitrator was determining whether the Agency violated the parties' contract, there is no claim that there is a specified burden of proof set out in the contract regarding such a claim. Thus, there is no basis for concluding that the Arbitrator was bound to apply a particular burden of proof in resolving the contractual claims set forth in the grievance. See AFGE, 52 FLRA at 324.

Insofar as the Arbitrator was resolving a discrimination claim, the Arbitrator found that the "denial of an EEO settlement must be viewed on its face as an act of discrimination." Award at 10. Contrary to the argument of the Agency, such a finding need not be analyzed using the McDonnell Douglas framework. The McDonnell Douglas standards are used to establish claims of disparate treatment that do not involve direct evidence of discriminatory motive, and are not necessarily applicable to other discrimination theories. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Liza Maca*, 1998 WL 774573 (E.E.O.C.). The E.E.O.C. has held that "a settlement agreement constitutes a contract between the employee and the agency, to which ordinary rules of contract construction apply." *Stone v. Summers*, 2001 WL 27624 (E.E.O.C.). Accordingly, where a complainant alleges a breach of a settlement agreement, the E.E.O.C. does not apply the McDonnell Douglas standards. See *id.* As the

issue, as construed by the Arbitrator, was whether the Agency had breached the settlement agreement, there is no reason why an evaluation of the McDonnell Douglas factors would be required for the resolution of that issue.

In sum, the Arbitrator was not required to apply a particular burden of proof in resolving the contractual claims, and the McDonnell Douglas standards need not apply to the resolution of this claim of breach of the settlement agreement. Accordingly, we deny the exception.

V. Decision

The Agency's exceptions are denied.

1 Article 18 of the parties' agreement concerns EEO policies and procedures. Article 24 sets forth the negotiated grievance procedure.

2 Article 26, Section 13 of the parties' agreement, provides in relevant part that:

Prior to the referral of eligible candidates to the assessment panel, the name(s) of the employee(s) requesting to exercise priority consideration will be referred to the selecting officer. The selecting officer will make a determination on the requests prior to the assessment panel's evaluation of any other candidates for the Vacancy.

Agency's Exceptions, Attachment 3 at 144.

Article X of the MOPP, provides in relevant part that an employee exercising a priority consideration "must receive a bona fide consideration by the selecting officer before other candidates are sought through the procedures cited in this plan." Agency Exceptions, Attachment 6 at 17.

3 The Agency includes with this exception additional claims that the award is contrary to law. However, the Agency does not cite to any law, rule or regulation. Because these contrary to law claims are bare assertions, we deny them. United States Dep't of Veterans Affairs, Med. Ctr., Coatesville, Pa., 56 FLRA 966, 971 (2000); AFGE, Local 1840, 45 FLRA 497, 499 (1992).