Social Security Administration, Baltimore, MD and American Federation of Government Employees, Local 1923

58 FLRA 592

Federal Labor Relations Authority

58 FLRA No. 149
0-AR-3401

June 12, 2003

Judge / Administrative Officer

Dale Cabaniss, Carol Waller Pope and Tony Armendariz

Full Text

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members

I. Statement of the Case

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

Following remand from the Authority, Social Security Administration, Baltimore, Md., 57 FLRA 690 (2002) (SSA I), the Arbitrator clarified his previous award and found that even in the absence of discrimination, the Agency nonetheless violated Article 18 of the parties' collective bargaining agreement. Accordingly, the Arbitrator reaffirmed his original decision that the grievant was entitled to an award of a priority consideration. For the following reasons, we deny the Agency's exceptions.

II. Background and Arbitrator's Supplemental Award

In SSA I, the Authority instructed the Arbitrator to explain his rationale for awarding a priority consideration to the grievant in the absence of a finding of discrimination. Moreover, we also directed the Arbitrator to clarify an apparent inconsistency between one of his findings and one of his conclusions. We stated:

Here, the Agency claims that the Arbitrator failed to address a controlling provision within Article 26. Specifically, it argues that under Section 1 of Article 26 a priority consideration is a remedy only available for "bargaining unit positions". Exceptions at 8 (setting forth language from Article 26, Section 1). It contends that the position to which the grievant is being awarded a priority consideration is outside the bargaining unit. Id. at 5.

In awarding a priority consideration for a non-bargaining unit position, the Arbitrator relies on Article 26, Section 13 and Article 18 of the parties' agreement. However, the Arbitrator neither sets forth the language in Article 26, Section 13, nor does he discuss the Agency's asserted conflicting language in Article 26, Section 1. Moreover, the Arbitrator does not address[] whether the remedy would be appropriate solely under Article 18 or for other reasons.

The Authority has previously found that where an interpretation of a contract provision appears to conflict with another provision within the same contract, an arbitrator must take this conflict into account. AFGE, Council 220, 54 FLRA 156, 159-60 (1998) (AFGE) . Here, as in AFGE, the Arbitrator's award fails to do so. Accordingly, consistent with AFGE, this matter is remanded to the parties for

resubmission to the Arbitrator, absent settlement. On remand, the Arbitrator should interpret and apply Article 26, Section 1 and Article 26, Section 13, as well as any other provisions the parties deem relevant, and take whatever action is appropriate on the basis of that interpretation and application. On remand, the Arbitrator should also explain his interpretation of Article 18. We note, in this regard, the apparent inconsistency between the Arbitrator's finding that the Agency did not discriminate against the grievant on the basis of race, gender or protected activity, and his conclusion that the Agency, at least to some extent, violated this portion of the parties' agreement.

SSA I, 57 FLRA at 693-94 (footnotes and some citations omitted)-I/

In his supplemental award, the Arbitrator explained that although he found no discrimination, the Agency nonetheless violated Article 18 of the parties' agreement because while it knew that no African American females had been promoted to the grievant's sought-after building management position, it failed to consider the grievant's race at all in making its selection. The Arbitrator determined that under Article 18, Section 1, the Agency was required to undertake a "positive, continuing and results-oriented program of affirmative action." Supplemental Award at 7, 8. He found that the selecting official for the position testified that, despite knowing of an under-representation in the building management position, no affirmative consideration was undertaken to address the situation. Accordingly, based on the Arbitrator's interpretation of Article 18,

and noting that the grievant was on the best qualified list and an African American female, the Arbitrator found that the lack of any specific plan of action in place to promote the Agency's stated policy of affirmative action for under-represented positions

]./ Pertinent portions of the relevant contract provisions are located in the appendix at the end of this decision.

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violated the spirit, if not the exact language, of Article 18.

Based on the foregoing, the Arbitrator ultimately determined that the appropriate remedy would be a priority consideration. In arriving at this conclusion, the Arbitrator stated, "in the total circumstances of this case, I am persuaded that a priority consideration modeled on the provisions set forth in Article 26, Section 13, is warranted to remedy the Agency's failure to abide by Section [Article] 18. "2/ Id. at 9.

Ill. Positions of the Parties A. Agency's Exceptions

The Agency alleges that the supplemental award is based on nonfact in three respects. First, it argues that the Arbitrator did not find discrimination. Exceptions at 5. Second, the Agency contends that absent such finding the Arbitrator could not and did not find a violation of Article 18 of the parties' agreement. Jd. at 8. Finally, it argues that the award is based "on non-fact that there was a procedural, regulatory, or program violation." Id.

Moreover, the Agency argues that "[o]nce the

Arbitrator found that there was no discrimination concerning the Grievant's non-selection for this position, his inquiry should have ended there" under Article 18. Exception at 5. In this respect, the Agency asserts that the award does not draw its essence from the contract because the Arbitrator

2/ The Arbitrator noted that under Article 26, the Agency failed to address why it acted favorably on the selectee's application when that application had neither been signed nor dated. Accordingly, the Arbitrator noted that the hiring of the selectee amounted to a "procedural, regulatory or program violation." Supplemental Award at 9. Therefore, in determining an appropriate remedy, while not finding a direct violation of Article 26, as by its terms Article 26 applied to only bargaining unit positions, the Arbitrator concluded that a priority consideration for the Article 18 violation was appropriate. See Article 26, Section 1.

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"found no discrimination under Article 18 of the parties' National Agreement." Id. at 8-9.

Additionally, the Agency argues on several occasions that the "Arbitrator exceeded his authority." Exceptions at

5. 9.

Furthermore, the Agency argues that the Arbitrator's supplemental award providing a priority consideration, yet finding no discrimination, is contrary to law because it does not comply with McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (McDonnell Douglas), or other Equal Employment Opportunity Commission case law. Exceptions at

6. 7.

Finally, the Agency reiterates its argument from SSA I, 57 FLRA at 693, by asserting that, "[t]he Authority has upheld the principle that a grievance concerning the nonselection of a Grievant for a promotion to nonbargaining unit position is not arbitrable under the terms of the Parties' collective bargaining agreement." Exceptions at 8.

B. Union's Opposition

The Union argues that the Arbitrator found that there was a "procedural, regulatory or program violation" when the selectee's application was not signed and noted that there is an under-representation of African American females in the building manager position. Moreover, it states that these matters were fully litigated before the Arbitrator and that, therefore, deference to the Arbitrator's factual findings is warranted. Opposition at 16-17.

With respect to the Agency's essence claim, the Union contends that the reasoning of the Arbitrator was rational and "firmly founded in the contract language." Id. at 15.

Turning to the Agency's argument that the Arbitrator exceeded his authority, the Union contends that this argument constitutes nothing more than a bare assertion. Id. at 16.

Finally, the Union argues that the award is not contrary to law. It contends that in the absence of discrimination the Agency's cited EEOC case law does not

apply. Id. at 10-11. Additionally, it argues that the Authority already resolved the Agency's arguments as to whether this matter was arbitrable as a matter of law in our previous decision. Jd. at 11, 14.

IV. Analysis and Conclusions

A. The Supplemental Award Is Not Based on Nonfact

To establish that an award is deficient as based on a nonfact, the appealing party must demonstrate that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. See United States Dep't of the Air Force, Lowry Air Force Base, Denver, Co., 48 FLRA 589, 593 (1993). Moreover, the Authority will not find an award deficient on the basis of an arbitrator's determination on any factual matter that the parties disputed at arbitration. United States Dep't of Health and Human Serv., Denver, Colo., 56 FLRA 133, 135 (2000) .

Here, the Arbitrator determined that while the grievant was not discriminated against, under Article 18, Section 1, the Agency was nonetheless required to undertake a "positive, continuing and results-oriented program of affirmative action." Supplemental Award at 8. The Arbitrator found that Article 18 was breached because "there was a total absence of consideration of the minority factor in the selection process where, as here, under-representation was a known fact," and that the "Agency has made no effort to demonstrate to what extent, if any, it addressed its long-time under-representation of black woman [sic] in the Building Manager's position under its Affirmative Employment Program Plan." Jd. at 8. As such, as clarified in the supplemental award, the basis for awarding a priority consideration was not itself premised on a finding of discrimination, but rather rested upon the lack of action or consideration of the under-representation required of the Agency under Article 18 in hiring for this position.3_/ As a result, the Agency's assertions, including

3_/ Additionally, the Arbitrator's finding that the selectee's application was not signed or dated, which he

(continued..

to the extent it argues that the Arbitrator erred in his interpretation of the contract, provide no basis for establishing that the award is based on nonfact. See United States Small Business Admin., Washington, D.C., 42 FLRA 890, 899 (1991). Accordingly, we find that the Agency has failed to show how the Arbitrator's supplemental award is based on nonfact.

B. The Arbitrator's Supplemental Award Draws Its Essence From the Contract

In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Authority applies the deferential standard of review that Federal courts use in reviewing arbitration awards in the private sector. See 5 U.S.C. § 7122(a)(2). Under this standard, 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. See United States Dep't of the Treasury, IRS, New Carrollton, Md., 57 FLRA 942, 946 (2002); United States Department 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's interpretation of the parties' collective bargaining agreement led to his determination that where under-representation exists in a particular job classification, the Agency is obligated to implement a plan of action to alleviate this problem under Article 18. As expressed above, the Arbitrator noted that the selecting official, although aware of under-representation, took no

3_/ (. . . continued)

found akin to a regulatory violation under Article 26, was

disputed at arbitration.

specific action as required under the parties' agreement to alleviate this concern. Supplemental Award at 7, 8. Accordingly, the Arbitrator found that even in the absence of specific discrimination, the Agency's failure to actively engage in promoting its EEO policy was a violation of Article 18.

Additionally, the Arbitrator noted that the applicant hired did not sign or date his application, while the grievant had. Id. at 9. In this regard, the Arbitrator explained that had this vacancy occurred in a bargaining unit position such a violation would have warranted a priority consideration under Article 26. Based on this, the Arbitrator determined that a priority consideration was appropriate for the violation of Article 18. Accordingly, we find that the Arbitrator's interpretation of the contract draws its essence from the parties' agreement and, therefore, provides no basis for finding the award deficient.

C. The Agency's Argument that the Arbitrator Exceeded His Authority Is a Bare Assertion

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 Am. Fed'n of Gov't Employees, Local 1617, 51 FLRA 1645, 1647 (1996).

Upon review of the Agency's exceptions, we find that its assertion that the Arbitrator exceeded his authority amounts to nothing other than a bare assertion. Accordingly, it is denied. See Social Security Administration, Baltimore, Md., 57 FLRA 181, 183 n.3 (2001) (SSA, Baltimore) .

D. The Arbitrator's Supplemental Award Is Not Contrary to Law

Section 7122(a)(1) of the Statute provides in pertinent part that an arbitration award will be found deficient if it conflicts with any law, rule, or regulation. As the exception involves the award's consistency with law, the question of law raised by the Arbitrator's award and the

Agency's exception must be reviewed de novo. NTEU, Chapter 24, 50 FLRA 330, 332 (1995) (citing United States Customs Service v. FLRA, 43 F.3d 682, 686-87 (B.C. Cir. 1994)). In applying a standard of de novo review, the Authority assesses whether the Arbitrator's legal conclusions are consistent with the applicable standard of law, based on the underlying factual findings. See NFFE, Local 1437, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the Arbitrator's underlying factual findings. See id; see also Panama Canal Commission, 56 FLRA 451, 457 (2000) (applying de .novo review to contrary to law exception based on the arbitrability of a grievance).

Here, we reject the Agency's argument that McDonnell Douglas or any of its other cited EEOC case law is applicable. See, e.g., SSA, Baltimore, 57 FLRA at 181. Rather, this case pertains to the Arbitrator's determination that the Agency breached Article 18 of the parties' agreement by failing to give any consideration to principles of affirmative action as required by the contract and not because he found evidence of discrimination. See id. at 184. As such, the award is not inconsistent with the Agency's cited cases as they are inapplicable.

With respect to the Agency's remaining argument, that this matter was not arbitrable as a matter of law, we note our decision in SSA I, 57 FLRA at 693 (finding that the Agency's cited cases did not stand for the proposition suggested), resolved this argument. Accordingly, we find that the Agency has not shown how the Arbitrator's supplemental award is contrary to law.

V. Decision

The Agency's exceptions are denied.

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Appendix Article 18

Equal Employment Opportunity

Section 1 - Policy

The administration and the Union affirm their commitment to the policy of providing equal employment opportunities to all employees and to prohibit discrimination because of race, color, religion, sex, national origin, disabling condition, or age . . . The administration will have a positive, continuing and results-oriented program of affirmative action ....

Section 3

Should adverse EEC impact be evidenced pursuant to the Affirmative Employment Program Plan, specific and measurable objectives shall be set to correct the conditions. Those objectives will include but not be limited to:

A. Validating existing selection procedures or;

B. Modifying or substituting selection procedures to alleviate adverse impact.

Article 26

Merit Promotion

Section 1 - Purpose and Policy

It is the intent of the parties to redesign the merit promotion process as a corollary to the two tier appraisal system created in Article 21 and to assure openness and objectivity in merit promotion selections.

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The parties agree that the purpose and intent of the provisions contained herein are to ensure that merit promotion principles are applied in a consistent manner with equity to all employees and without regard to political, religious, or labor organization affiliation or non-affiliation, marital status, race, color, sex, national origin, disabling condition, age, or sexual orientation and shall be based solely on

job-related criteria. This article sets forth the merit promotion system, policies, and procedures applicable to bargaining unit positions in the Administration.

Section 13 - Priority Consideration

A. Definition. For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of previous failure to properly consider the employee for selection because of procedural, regulatory, or program violation.