70 FLRA No. 134

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 704
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5
(Agency)

0-AR-5334

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DECISION

June 29, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

In this case, we consider whether an arbitrator properly applied federal law in determining that the Agency did not discriminate against the grievant when it did not select her for a promotion.

The Agency announced openings for two non-supervisory GS-15 senior counsel positions. The grievant—an Agency attorney—applied for both positions, but was not selected. In response, the Union filed a grievance alleging disparate impact employment discrimination; that the Agency discriminated against the grievant based on her race, color, national origin, and disability; and that it retaliated against the grievant for participating in protected activities.

Arbitrator Elizabeth C. Simon denied the grievance because the Union did not satisfy its burden to show that the Agency violated law or the parties' agreement. For the reasons that follow, we uphold the award and deny the Union's exceptions.

II. Background and Arbitrator's Award

When the Agency announced the senior counsel position openings, in June 2016, the Agency outlined a two-tier selection process and identified which members of management would be involved. First, the Agency's screening panel would review written submissions and recommend applicants for interviews. Then, the Agency's senior management panel would conduct interviews, review written submissions, and make a final recommendation to the selecting official.

The grievant, along with over a dozen other applicants, applied for each position. The grievant's one-page application summarized her more than twenty years with the Agency, her personal qualities, and her professional skills relating to the senior counsel positions. The screening panel recommended that all applicants be interviewed.

The senior management panel reviewed the applicants' written submissions and conducted thirty-minute interviews with each applicant. The panel members then prepared a comment sheet reflecting their impressions and made their final recommendations to the selecting official. In September 2016, the Agency announced its two selectees—both Caucasians with over twenty-seven years of Agency experience. The grievant—who is of Indian decent—was not selected.

In October 2016, the Union filed a grievance alleging that the Agency violated law and the parties' agreement by discriminating against the grievant due to her race, color, national origin, and disability, and by retaliating against her for participating in protected activities.[1] The Agency denied the grievance, and the parties submitted the matter to arbitration.

The parties agreed that the Arbitrator should apply the *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*)[2] three-step, burden-shifting framework to assess the grievant's discrimination complaints.[3] The Union contended that it established a prima facie case of discrimination on the basis of the grievant's race, color, national origin, and disability, and that the Agency failed to rebut the inference of discrimination and did not establish a nondiscriminatory, nonpretextual reason for not selecting the grievant. The

[1] The parties' agreement incorporates 5 U.S.C. § 2302's prohibited personnel practices: the Agency may not "[d]iscriminate for or against any employee or applicant on the basis of race, color, religion, sex, age, handicapping condition, marital status, political affiliation[,] or national origin." Award at 3 (quoting Art. 8, § 5(A) of the parties' agreement); *see also* 5 U.S.C. § 2302(b) (prohibiting discrimination on the basis of a handicapping condition under section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791). In resolving whether an award is contrary to the Rehabilitation Act, the Authority applies the standards of the Americans with Disabilities Act (ADA) because Congress has specifically adopted those standards for determining whether there has been disability discrimination in violation of the Rehabilitation Act. *See* 29 U.S.C. § 791(f); *see also U.S. DOJ, INS*, 57 FLRA 254, 255 (2001).

[2] 411 U.S. 792, 802 (1973).

[3] Award at 18-20.

Union also alleged disparate impact employment discrimination, and that the Agency retaliated against the grievant for participating in protected activities. The Agency denied discriminating or retaliating against the grievant, and claimed that its selection process complied with all applicable laws, rules, and regulations.

For all but the disability claim, the Arbitrator found that the Union satisfied its first-step burden to establish a prima facie case of discrimination. She further found that the Agency established a "legitimate, non-discriminatory reason" for its selections, citing the selectees' "extensive experience and expertise" in their respective fields.[4]

However, the Arbitrator concluded that the Union failed to show that the Agency's articulated reason for not selecting the grievant was a pretext for discrimination. The Arbitrator found that the "use of subjective [hiring] criteria was unavoidable" here because the "Agency was selecting for two high-level non-supervisory positions from a pool of highly-experienced applicants."[5] Specifically, the Arbitrator found that there was no evidence to support the Union's claim that the selection process was arbitrary, unlawful, or tainted.[6] She credited unrebutted testimony that the Agency did not preselect employees and followed applicable personnel guidance.[7] And, she determined that the grievant's one-page application was "less detailed and comprehensive," and that the grievant "did not have the same level of enforcement or counseling experience as the two successful applicants."[8] Accordingly, the Arbitrator denied the grievance's discrimination claims.

The Arbitrator also denied the Union's retaliation and disparate impact claims. The Union alleged that the Agency retaliated against the grievant because of her protected activities—requesting a desk audit, grieving a performance rating, and alleging assignment-related harassment. But, the Arbitrator found that this evidence did not establish a causal connection between her protected activities and her nonselection. And, regarding the disparate impact claim, the Arbitrator found that the Union did not show "a statistically significant adverse effect on a protected group."[9]

[4] *Id.* at 21; *see id.* at 27.
[5] *Id.* at 26.
[6] *Id.* at 23.
[7] *Id.* at 23-24.
[8] *Id.* at 27.
[9] *Id.* at 28.

On December 12, 2017, the Union filed exceptions to the award.[10]

III. Analysis and Conclusions

A. The award is not contrary to *McDonnell Douglas*.

The Union asserts that the award is contrary to *McDonnell Douglas*.[11] When an exception involves an award's consistency with law, rule, or regulation, the Authority reviews any question of law raised by the exception and the award de novo.[12] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[13] In making that determination, we defer to the arbitrator's underlying factual findings.[14]

Under *McDonnell Douglas*,[15] as relevant here, if an employee makes a prima facie showing of discrimination, the burden then shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's [non-selection]."[16] If the employer meets its burden, then the employee has the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[17]

The Union argues that the Arbitrator failed to properly analyze the evidence which supports its claim that the Agency's stated reasons for not selecting the grievant were pretextual. Specifically, the Union argues that the Arbitrator improperly "requir[ed] separate and

[10] The Agency's opposition was due January 11, 2018, but the Agency did not file it until January 26, 2018. The Agency concedes that its opposition is untimely, and does not state an "extraordinary circumstance" warranting waiver of the expired time limit. 5 C.F.R. § 2429.23(b); s*ee U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 67 FLRA 632, 633 (2014). Accordingly, we do not consider the Agency's untimely opposition.
[11] Exceptions Br. at 6-15, 18-19.
[12] *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)).
[13] *See U.S. DOD, Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998).
[14] *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014).
[15] *U.S. Dep't of the Treasury, IRS, Helena Dist.*, 37 FLRA 1410, 1420 (1990).
[16] *McDonnell Douglas*, 411 U.S. at 802.
[17] *NLRB, Wash., D.C.*, 48 FLRA 1337, 1344 (1994) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 249 (1981)); *see McDonnell Douglas*, 411 U.S. at 804.

independent 'direct evidence,'"[18] rather than assessing "all the pieces of evidence . . . to determine whether . . . it was more likely than not that [the Agency]'s proffered reason for its selections was merely pretext for intentional discrimination."[19] We disagree.

The Arbitrator acknowledged that in discrimination cases, "there is frequently no direct evidence of discrimination, so courts utilize the burden-shifting approach first delineated in *McDonnell Douglas*."[20]

As to the Agency's articulated reasons for its selection, the Arbitrator found that all the applicants were "highly-experienced,"[21] and that the grievant did not "demonstrate[] that she had the same high level of performance and ability" (compared to the selectees) in three areas: "the level of complexity/difficulty of her work, the level of originality and creativity . . . , and her skill representing the Agency in her legal counseling work."[22] The Arbitrator also rejected the Union's allegations that the Agency retaliated against the grievant due to her past union involvement,[23] unlawfully released her personnel records,[24] pre-selected and gave preferential treatment to its selectees,[25] misled the grievant and used an arbitrary and subjective selection process,[26] and had a discriminatory history of not hiring GS-15 non-supervisory minorities.[27] The Arbitrator ultimately concluded, and we agree, that the Union failed to satisfy its burden to prove by a preponderance of the evidence that the Agency's stated reasons were merely pretext for discrimination.[28]

Accordingly, we find that the Union has failed to show that the Arbitrator misapplied *McDonnell Douglas*, and we deny the Union's first exception.[29]

B. The award's finding that the Union failed to establish a prima facie case of disability discrimination is not contrary to law.

The Union challenges the Arbitrator's conclusion that it failed to establish a prima facie case of disability discrimination.[30] The first requirement of a prima facie case of disability discrimination is to show that the employee has a qualifying disability that "substantially limits" one or more of such person's "major life activities."[31]

The Union claims that the Arbitrator "failed to make any findings of facts" with respect to the grievant's disability-discrimination claim.[32] But, the Arbitrator acknowledged the grievant's hospitalization for a stress-related illness and cancer surgery four years before her nonselection,[33] and found that these conditions were insufficient to substantiate a disability claim.[34] In its exceptions, the Union does not support its claim that either medical condition is a qualifying disability that substantially limits a major life activity, or is related to her nonselection.[35]

Accordingly, we deny the Union's second exception.

C. The award's finding of no disparate impact employment discrimination is not contrary to law.

The Union challenges the Arbitrator's finding that the grievant was not subject to disparate impact employment discrimination.[36] Specifically, the Union alleges that the Arbitrator ignored statistical evidence which shows that the Agency has a policy or practice of not hiring minority GS-15 non-supervisory attorneys in its regional office.[37]

To establish a prima facie case of disparate impact employment discrimination, a grievant must show

[18] Exceptions Br. at 3; *see also U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 53 (2009) ("Direct evidence is an action or statement of an employer which reflects a discriminatory or retaliatory attitude, and which correlates to the challenged act.").
[19] Exceptions Br. at 3.
[20] Award at 18.
[21] *Id.* at 26.
[22] *Id.* at 21.
[23] *Id.* at 7-8.
[24] *See id.* at 29.
[25] *Id.* at 22.
[26] *Id.* at 23-27.
[27] *Id.* at 27-28.
[28] *Id.* at 29.
[29] *See AFGE, Local 3438*, 65 FLRA 2, 4 (2010) (an arbitrator's alleged failure to mention particular testimony or evidence does not establish that the arbitrator failed to consider it or failed to provide a fair hearing).
[30] Exceptions Br. at 15.
[31] *OPM*, 61 FLRA 358, 361 (2005) (citing 29 U.S.C. § 705(20)(B)) (an individual with a disability is any person who has a physical or mental impairment which substantially limits one or more of a person's major life activities); *see* 29 C.F.R. § 1614.203.
[32] Exceptions Br. at 15.
[33] Award at 19 n.2.
[34] *Id.*
[35] *See* 42 U.S.C. § 12102(1)(A) (a qualified individual with a disability under the ADA must have a physical or mental impairment that substantially limits one or more major life activities); *see also U.S. DOL*, 68 FLRA 779, 782 (2015).
[36] Exceptions Br. at 15-18.
[37] *Id.*

that the agency's facially-neutral standards select applicants in a significantly discriminatory pattern.[38]

We agree with the Arbitrator that the Union failed to establish a prima facie case of disparate impact employment discrimination. Citing Authority precedent, the Arbitrator noted that the Union's "statistical evidence [must] show the Agency's *selection process* had a statistically significant adverse effect on a protected group."[39] But, at arbitration, the Union referred only to "two competitive selections in eight years involving different selecting officials"[40] to support its disparate impact claim. And, while the Union provides more detailed, historical statistical information on the Agency's racial composition,[41] it fails to show how this information supports its claim that the Agency's *competitive-selection process* results in a "significantly discriminatory pattern."[42]

Accordingly, we deny the Union's third exception.

D. The award's finding that the Agency did not retaliate against the grievant is not contrary to law.

The Union alleges that the Arbitrator erred in finding that the Agency did not retaliate against the grievant for her protected activities.[43] As relevant here, to establish a prima facie case of unlawful retaliation, a union must show that (1) the grievant engaged in a statutorily protected activity; (2) the agency took an adverse personnel action; and (3) a causal connection existed between the two.[44] If a prima facie case is established, the burden shifts to the agency to proffer a legitimate, nonretaliatory reason for its actions.[45] If the agency meets this burden, the burden shifts back to the union to show that the reasons given are mere pretext for retaliation.[46]

We agree with the Arbitrator's finding that the record did not establish a "causal connection" between the grievant's union activities and her nonselection.[47] Specifically, on this point, the Arbitrator found "no suggestion" that the grievant's protected activity "adversely affected . . . the decisions of the selecting panel."[48]

Accordingly, because the Union fails to satisfy its burden to show that the Agency's proffered reasons were pretext for retaliation, we deny the Union's fourth exception.[49][50]

IV. Decision

We deny the Union's exceptions.

[38] *NTEU*, 65 FLRA 302, 307 (2010) (*NTEU*) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971))).
[39] Award at 28 (emphasis added); *see NTEU*, 65 FLRA at 307.
[40] Award at 28.
[41] Exceptions Br. at 16-17.
[42] *NTEU*, 65 FLRA at 307; *see* Award at 28.
[43] Exceptions Br. at 18-20.
[44] *NTEU, Chapter 168*, 52 FLRA 1354, 1361 (1997) (*NTEU, Chapter 168*) (citing *McDonnell Douglas*, 411 U.S. at 802).
[45] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).
[46] *Id.*
[47] Award at 29.
[48] *Id.* at 28.
[49] *See NTEU, Chapter 168*, 52 FLRA at 1361 (denying exception challenging arbitrator's retaliation finding); *e.g. AFGE, Local 3295*, 51 FLRA 27, 33 (1995) (denying exception challenging arbitrator's applied legal standard).
[50] The Union also alleges that the Arbitrator applied the wrong legal standard to analyze its asserted contract violations. Exceptions Br. at 4, n.3. But, citing Authority precedent, the Union states that "the provisions of the [parties' agreement] were intended to be interpreted in the same manner as the underlying relevant statutes." *Id.* Accordingly, because we reject the Union's contrary-to-law claims above, we similarly reject this claim. *See AFGE, Local 2128*, 66 FLRA 801, 802-03 (2012).