73 FLRA No. 68

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 298
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
OFFICE OF
THE COMPTROLLER OF THE CURRENCY
SOUTHERN DISTRICT
(Agency)

0-AR-5781

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DECISION

November 14, 2022

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Before the Authority: Ernest DuBester, Chairman, and Colleen Duffy Kiko and Susan Tsui Grundmann, Members

I. Statement of the Case

In a merits award, Arbitrator Elliot H. Shaller found that the Agency violated the parties' collective-bargaining agreement and Title VII of the Civil Rights Act of 1964 (Title VII)[1] by not granting the grievant a hardship transfer. In a remedial award, the Arbitrator determined that the grievant failed to mitigate damages and therefore limited the time period for which the Agency was liable for backpay. The Union filed exceptions to the remedial award on nonfact and contrary-to-law grounds. Because the Union does not demonstrate that the award is deficient on either ground, we deny the exceptions.

II. Background and Arbitrator's Award

The grievant lived in Orange, Texas and worked as a bank examiner in the Agency's New Orleans, Louisiana field office (New Orleans office). This position required the grievant to travel several times a year from Orange to the New Orleans office, and to banks in Mississippi and Alabama to participate in bank examinations. As a single mother, the grievant began to experience childcare issues due to work travel. Consequently, she began working a part-time schedule in 2018. Then, in January 2019, the grievant requested a hardship transfer (transfer) from the New Orleans office to the Agency's Houston, Texas field office (Houston office).[2] The Agency denied the transfer alleging a "lack of an appropriate opening and business need in the Houston office."[3]

The Union filed a grievance on February 5, 2021 alleging that the Agency violated the parties' agreement and Title VII when it denied the transfer. In a merits award, the Arbitrator found that the Agency violated the parties' agreement when it denied the transfer. The Arbitrator also found that the denial violated Title VII because it was unlawful retaliation for the grievant's past protected activity, in which the grievant filed an equal-employment-opportunity complaint related to alleged timekeeping issues. The Arbitrator directed the parties to submit supplemental briefs addressing "what, if any, remedial relief should be awarded."[4]

On October 31, 2021, the Arbitrator issued a remedial award. In the remedial award, the Arbitrator determined that the Agency's retaliatory denial of the transfer was an unjustified and unwarranted personnel action that caused the grievant to suffer a withdrawal or reduction of pay and benefits. In determining the amount of backpay to which the grievant was entitled, the Arbitrator noted an email from the grievant's supervisor stating that the grievant "would return to full-time status if [the grievant] were able to work [in] the Houston . . . [o]ffice."[5] The Arbitrator concluded that if the Agency had granted the transfer, the grievant would have resumed a full-time schedule in the Houston office. Therefore, the Arbitrator found that the grievant was entitled to backpay for lost wages from working part-time in New Orleans as opposed to full-time in Houston.

However, because the Agency instituted a maximum telework policy in March 2020 in response to the COVID-19 pandemic (pandemic), the Arbitrator found that the grievant could have, but did not, return to a full-time schedule by utilizing maximum telework. Based on these findings, the Arbitrator concluded that the

[1] 42 U.S.C. §§ 2000e to 2000e-17.

[2] The grievant requested a transfer four times: in May 2017, February 2018, November 2018, and January 2019. The Agency denied these requests on the same ground: that there was a lack of an open position and business need in the Houston office. The Arbitrator found that the grievance challenging the denials was timely only as to the January 2019 request. *See* Award at 3-4.

[3] *Id.* at 3. The Arbitrator noted that, while the Agency denied the transfer alleging a lack of an available position and business need in the Houston office, it granted another employee's hardship transfer from the Agency's Lubbock, Texas field office to the Houston office without informing the grievant of the open position. *See id.* at 5, 14.

[4] *Id.* at 2.

[5] *See id.* at 8.

Agency "sustained its burden" to establish that the grievant failed to mitigate damages because "[o]nce [the g]rievant could have performed [the bank examiner] duties [at home] as a result of the telework policy . . . , switching back to a full-time schedule would have been a 'reasonable effort' to [mitigate]."[6] Based on his conclusion that the grievant failed to mitigate her damages, the Arbitrator limited the grievant's backpay to the period of January 2019 to March 2020 – the period between when the Agency denied the transfer and when the grievant started teleworking.[7]

The Union filed exceptions to the award on November 30, 2021, and the Agency filed an opposition on December 22, 2021.

III. Analysis and Conclusions

A. The award is not based on a nonfact.

The Union argues the Arbitrator's conclusion that the grievant failed to make reasonable efforts to mitigate the damages is based on nonfacts.[8] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[9] However, disagreement with an arbitrator's evaluation of evidence, including the weight to be accorded such evidence, does not establish that an award is based on a nonfact.[10] Additionally, the Authority will not find an award deficient based on the arbitrator's determination of any factual matter that the parties disputed at arbitration.[11]

In support of its exception, the Union claims the Arbitrator failed to "cite to anywhere in the record" to support the conclusion that the grievant failed to "exercise due care or diligence" in seeking to return to a full-time schedule.[12] The Union further contends that "[t]he record is devoid of any evidence regarding whether a suitable full-time position was available [to the grievant] during the . . . pandemic."[13] However, the parties disputed these matters below.[14] Further, to support its argument that the grievant failed to mitigate the damages, the Agency cited the grievant's testimony;[15] provided evidence of the Agency's expanded telework policy;[16] and requested that the Arbitrator "take official notice" of the COVID-19 pandemic and its impact on government work policies.[17] Although the Union disagrees with the conclusions that the Arbitrator drew from the evidence presented, the Union's arguments provide no basis for finding the award based on a nonfact.[18] Accordingly, we deny this exception.[19]

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[6] *Id.* at 10.

[7] Specifically, the Arbitrator found no entitlement to backpay from March 2020, when the grievant began teleworking, to May 2021, when the grievant resigned from the Agency.

[8] Exceptions Br. at 8.

[9] *U.S. Dep't of VA, Nashville Reg'l Off., VA Benefits Admin.*, 72 FLRA 371, 374 (2021) (Member Abbott concurring) (citing *AFGE, Loc. 1594*, 71 FLRA 878, 880 (2020)).

[10] *NFFE, Loc. 1998*, 73 FLRA 143, 145 (2022) (*Local 1998*) (citing *U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 67, 70 (2022)).

[11] *NTEU*, 69 FLRA 614, 619 (2016); *see also AFGE, Nat'l Border Patrol Council, Loc. 2455*, 69 FLRA 171, 172 (2016) (rejecting union's argument that arbitrator's finding that the required "nexus in this case is amply supported by the evidence" was a nonfact based on "speculative testimony" because the existence of a nexus was disputed at arbitration).

[12] *See* Exceptions Br. at 10.

[13] *Id.* at 11.

[14] *See* Exceptions, Attach. 5, Agency's Supplemental Br. on Remedies at 14-15 (arguing that grievant failed to mitigate damages because the decision to remain part-time "was made independently and entirely of [g]rievant's own volition" even though the grievant "could have returned to a full-time schedule to mitigate [the] damages" when the Agency instituted maximum telework and eliminated travel to banks because of the pandemic); Exceptions, Attach. 8, Union Motion to Strike (asserting that Agency did not support its statements about changes instituted in response to the pandemic); Exceptions, Attach. 9, Agency's Opp'n to Union's Motion to Strike at 3-5 (asserting that Union's arguments regarding the Agency's telework policies are "disingenuous" and not supported by information published on the Union's website for bargaining-unit employees, and requesting that the Arbitrator take "official notice" of government-wide practices and published policies instituted because of the pandemic).

[15] Exceptions, Attach. 9, Agency Opp'n to Union Motion to Strike at 3 (quoting Exceptions, Attach. 2a, Tr. (Tr.) at 74-75).

[16] *Id.* at 4 (citing Union website documenting Agency's expanded telework policy and lack of onsite bank examinations during pandemic).

[17] *Id.* at 4-5 (citing media articles and government and Union websites).

[18] *Local 1998*, 73 FLRA at 146 (denying nonfact exception because it challenged arbitrator's evaluation of the evidence).

[19] To the extent the Union's exception challenges the Arbitrator's conclusion regarding the burden of proof governing the Union's claim, a challenge to an arbitrator's legal conclusions does not provide a basis for finding an award deficient on nonfact grounds. *See, e.g., Pension Benefit Guar. Corp.*, 64 FLRA 692, 696 (2010) (citing *AFGE, Loc. 3690*, 63 FLRA 118, 120 (2009)).

B. The Union does not demonstrate that the award is contrary to law.

The Union argues that the Arbitrator's conclusion that the grievant failed to make reasonable efforts to mitigate damages is contrary to law because it "shifted the burden of proof" from the Agency to the Union.[20] The Authority reviews questions of law de novo.[21] 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.[22] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are based on nonfacts.[23]

The Union asserts that under Title VII, once a grievant satisfies the initial burden of establishing the amount of damages, the burden shifts to the employer to prove, as an affirmative defense, that the grievant failed to mitigate those damages by showing that: "(1) there existed a suitable position that would have mitigated [the grievant's] damages, and (2) that the [grievant] either did not exercise reasonable care or diligence in pursuing the suitable position, or made no effort at all."[24]

Here, the Arbitrator clearly recognized that the Agency bore the burden to prove that the grievant failed to mitigate the damages.[25] Therefore, we reject the Union's assertion that the Arbitrator improperly shifted the burden of proof to the grievant. The Union's remaining arguments challenge the Arbitrator's evaluation of the evidence and finding that the Agency satisfied its burden.[26]

As to what the Agency was then required to prove, we note that the precedent cited by the Union applies the two-part test to situations in which complainants were displaced from their positions of employment, either because they were removed from their positions or were otherwise placed in a non-pay status by an agency. Here, of course, the grievant continued to work in her position with the Agency, albeit in a part-time status, following the retaliatory action.

Neither party has identified precedent applying this test to a situation similar to the one before us. Nor have we identified precedent squarely governing the unique circumstances of this case. Nevertheless, to resolve whether the Agency demonstrated that the grievant could have pursued a "suitable position" as compared to the position she would have had if the Agency had granted her requested hardship transfer, we note the following.

First, the Arbitrator found that had the Agency granted the grievant's hardship transfer, she would have worked a full-time schedule in the same bank examiner position, a finding that the Union does not challenge.[27] Second, as explained previously, the Arbitrator relied on the grievant's testimony and other evidence to find that the Agency "sustained its burden" to establish that the grievant failed to mitigate damages because "[o]nce [the g]rievant could have performed [the bank examiner] duties [at home] as a result of the telework policy . . . , switching back to a full-time schedule would have been a 'reasonable effort' to [mitigate]."[28]

Stated differently, the Arbitrator determined that the grievant could have returned to a full-time schedule in her existing bank examiner position while teleworking, and working that schedule would have been a "suitable position" as compared to the position that the grievant was denied in Houston. Because we have rejected the Union's arguments that the Arbitrator's findings are nonfacts, we defer to them. Moreover, we find no basis for disturbing the Arbitrator's reliance on these findings to conclude that the Agency met its burden of establishing this affirmative defense.

Consequently, we find that the Union's argument fails to demonstrate that the award is contrary to law.[29]

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[20] Exceptions Br. at 14.

[21] *U.S. Dep't of the Navy, Naval Med. Ctr. Camp Lejeune, Jacksonville, N.C.*, 73 FLRA 137, 140 (2022) (citing *NFFE, Loc. 1953*, 72 FLRA 306, 306 (2021)).

[22] *Id.* (citing *U.S. DOL, Off. of Workers' Comp.*, 72 FLRA 489, 490 (2021) (Member Abbott concurring)).

[23] *Id.*

[24] *See* Exceptions Br. at 13-14 (citing *Ferguson v. U.S. Postal Serv.*, EEOC Appeal No. 01912608, 1992 WL 1374753, at *10 (Dec. 16, 1991); *Hamilton v. U.S. Postal Serv. (Se. Area)*, EEOC Appeal No. 01A30899, 2004 WL 483457, at *4-5 (March 4, 2004); *Paolozzi v. U.S. Postal Serv. (Ne. Region)*, EEOC Appeal No. 01912743, 1992 WL 1369489, at *13-14 (Aug. 3, 1992)); *see also* Opp'n Br. at 14 (citing *Bedynek-Stumm v. Dep't of VA*, EEOC Appeal No. 0120111340, 2011 WL 5894136 (Nov. 15, 2011)).

[25] Award at 9-10 ("The Agency has the burden to prove its claim that [g]rievant failed to mitigate her damages, as it is an affirmative defense to a back pay claim.").

[26] Exceptions Br. at 12-14 (arguing that the Agency did not provide any evidence that the grievant failed to make reasonable efforts to mitigate damages by returning to a full-time schedule and that the Agency failed to prove that a full-time schedule was available to the grievant when the Agency instituted a maximum telework policy in March 2020).

[27] Award at 9.

[28] *Id.* at 10.

[29] *See, e.g.*, *AFGE, Nat'l Border Patrol Council, Loc. 2455*, 69 FLRA 171, 173 (2016) (rejecting contrary-to-law argument that arbitrator failed to apply required standards and stating that "upon reviewing the award, it is evident that the [a]rbitrator supported his conclusions with factual findings, to which we defer").

IV. Decision

We deny the Union's exceptions.