64 FLRA No. 124

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
EDUCATION ACTIVITY
DOMESTIC DEPENDENT ELEMENTARY
AND SECONDARY SCHOOLS
PUERTO RICO DISTRICT
FORT BUCHANAN, PUERTO RICO
(Agency)

0-AR-4535

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DECISION

April 22, 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 William J. Miller, Jr., 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.

A grievance was filed alleging that the Agency changed a past practice for substitute-teacher assignments and that the change discriminated based on age, in violation of the parties' agreement and the Age Discrimination in Employment Act (ADEA). The Arbitrator denied the grievance.

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

II. Background and Arbitrator's Award

The Agency operates a school district, for which it employs both full-time and intermittent substitute teachers. Full-time teachers at the Agency's middle school frequently requested a particular employee (the employee) to serve as their substitute because of the employee's excellent professional reputation. The Agency adopted a policy requiring that substitute-teacher assignments follow a rotation list of eligible instructors, without exceptions that would accommodate full-time teachers' requests for particular substitutes. Thereafter, the employee's income from assignments at the middle school, where she had worked most frequently, decreased significantly.

A grievance was filed alleging that the Agency violated the parties' agreement by changing the method for assigning substitute teachers. The grievance further alleged that the change discriminated against older workers, including the employee, in violation of the parties' agreement and the ADEA. When the grievance was unresolved, the parties proceeded to arbitration. Without a stipulation from the parties, the Arbitrator framed the following issues for resolution: (1) "[Can] the workplace activity in question [i.e., the former method for assigning substitute teachers] be considered a past practice[?]" and (2) "[Did] the Agency violate[] Article 8, Section b of the [a]greement[[1]] and the [ADEA] by . . . unlawfully denying [the employee] employment opportunities in favor of younger . . . educators[?]" Award at 31, 30.

In order to determine whether the former substitute-assignment method constituted a condition of employment established by past practice, the Arbitrator "consider[ed] the factors of clarity and consistency of the pattern . . ., longevity and repetition . . ., and mutual accepta[nce.]" *Id.* at 31. The Arbitrator determined that: (1) full-time teachers' abilities to secure their preferred substitutes varied according to conditions that changed on a "daily basis," which indicated a lack of clarity and consistency; (2) although administrators "repeated[ly]" attempted to honor substitute requests "over a long period of time," such repetition and longevity nevertheless did not involve a clear, consistent pattern of conduct; and (3) despite the parties' mutual acknowledgement that some teachers obtained requested substitutes, the evidence did not support a mutually accepted, "specific method of filling . . . vacancies." *Id.* at 31-32. On the basis of these determinations, the Arbitrator found that an established past practice did not exist, and therefore, that the Agency did

1. Article 8, Section b states, in pertinent part:

> Under the provisions of current law, it is the policy of . . . this Employer to provide equal opportunity in employment for all persons [and] to prohibit discriminatory [*sic*] in employment because of race, color, religion, sex, national origin, age, and physical or mental disability, . . . in accordance with policy established by the Department of Defense and/or other appropriate authority for equal opportunity in the Federal service.

Award at 28.

not violate the parties' agreement by changing its method for assigning substitute teachers. *Id.* at 33.

Proceeding to the Union's age-discrimination complaints, the Arbitrator analyzed the alleged violations of the agreement and the ADEA together.[2] He stated that, in order to establish a *prima facie* case of age discrimination, the Union must show that the employee is: (1) "a member of the protected age group[;]" (2) "qualified for the position in question[;]" (3) "adversely affected" by an employment action related to the position; and (4) older than, and at least as qualified as, the employee benefited by the disputed employment action. *Id.* at 33-34. The Arbitrator found that the Union established the first two elements. *See id.*.

However, the Arbitrator determined that the employee had not been adversely affected. Although he found that, in the year after the rotation list's implementation, the Agency's change in assignment procedures contributed to a 50% reduction in the employee's earnings, the Arbitrator also found that the employee could and did work at other district schools when the middle school did not offer her assignments. *Id.* Moreover, he found that the employee declined at least one long-term middle-school assignment, for which she would have earned a higher rate of pay.[3] *Id.* at 34.

Finally, the Arbitrator determined that, among substitutes younger than the employee with qualifications similar to or lesser than hers, none benefited at the employee's expense as a result of the rotation of substitutes. *See id.* at 35. Although the Union alleged that a younger substitute received preferential middle-school assignments — characterized by greater frequency and higher compensation than those offered to the employee — the Arbitrator found "there was insufficient evidence to establish that [the younger substitute] received the assignments that should have been given to the [employee]." *Id.* Consequently, the Arbitrator denied the grievance, finding that under both the parties' agreement and the ADEA, the Union failed to establish a *prima facie* case for its age-discrimination claims. *See id.*

III. Positions of the Parties

A. Union's Exceptions

The Union contends the Arbitrator erred in finding that the Agency did not have an established past practice of honoring full-time teachers' requests for particular substitute teachers whenever possible. *See* Exceptions at 2-3. The Union adds that, although the Arbitrator determined that no past practice existed because not every teacher's substitute request was successful, a past practice did exist whereby the Agency assigned a requested substitute so long as that substitute "was available, and willing." *Id.* at 12. In addition, the Union argues that the Arbitrator violated its due process rights by allowing an Agency witness to recount a conversation with a non-testifying third party about the district's substitute-assignment practices. *Id.* at 9, 11.

Further, the Union asserts that the Arbitrator's failure to acknowledge that the Union established a *prima facie* case of age discrimination contradicts case law construing the ADEA, particularly decisions holding that discrimination claimants may rely on circumstantial evidence and those explaining that *prima facie* case requirements are "not . . . onerous." *Id.* at 13-17.[4] Although a change to substitute-teacher rotations "drastically reduced" the employee's work offers from the middle school, the Union argues that a younger and less-qualified substitute managed to secure assignments "every single day of the . . . school year [following the change in policy], most of which were long term assign-

2. The Authority applies statutory standards in assessing the application of contract provisions that mirror, or are intended to be interpreted in the same manner as, a statutory counterpart. *See, e.g.*, *U.S. Dep't of the Treasury, U.S. Customs Serv., Port of New York & Newark*, 57 FLRA 718, 721 (2002) (citing *U.S. Dep't of Justice, Fed. Corr. Facility, El Reno, Okla.*, 51 FLRA 584, 589 n.5 (1995) (*Port of N.Y. & Newark*)). As noted previously, Article 8, Section b of the parties' agreement states that the Agency's nondiscrimination policy operates "[u]nder the provisions of current law," such as the ADEA. *See supra* note 1.

3. The Arbitrator also credited the Agency's documentary evidence reflecting the number of days the employee worked during the relevant academic years, reproduced below in pertinent part:

- 2004-2005 *(district still entertaining teachers' requests)*: 157 of 187 days
- 2005-2006 *(first year using substitute-rotation list)*: 121 of 187 days
- 2006-2007: 161 of 187 days
- 2007-2008: 144 of 187 days

See Award at 34-35.

4. Specifically, the Union cites: *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (*Aikens*); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*); *Woods v. Friction Materials*, 30 F.3d 255 (1st Cir. 1994); *Vega v. Kodak*, 3 F.3d 476 (1st Cir. 1993); *Mesnick v. Gen. Elec.*, 950 F.2d 816, 823 (1st Cir. 1991) (*Mesnick*); *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979) (*Loeb*).

ments [carrying a higher rate of pay]." *Id.* at 3. Finally, the Union contends that the Arbitrator improperly failed to recognize the Agency's substitute rotation policy as a "sham" intended to conceal discriminatory treatment. *See id.* at 6.

B. Agency's Opposition [5]

The Agency asserts that any change in the employee's gross wages "could very likely" have been caused, in part, by the substitute-rotation policy. Opp'n at 14-15. Because the Arbitrator found that the rotation policy did not constitute an impermissible change in practice, the Agency contends that any of the policy's effects on the employee's wages resulted from permissible and nondiscriminatory managerial decisions. *See id.* at 15.

IV. Analysis and Conclusions

A. The award is not based upon a nonfact.

The Union argues that the Arbitrator erred by finding that there was no established past practice regarding substitute assignments. The Authority analyzes challenges to an arbitrator's determination of whether a past practice exists as nonfact exceptions. *E.g.*, *AFGE, Local 2328*, 61 FLRA 510, 513 n.6 (2006) (Chairman Cabaniss concurring) (citing *AFGE, Local 2128*, 58 FLRA 519, 522 n.9 (2003)). To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See NFFE, Local 1984*, 56 FLRA 38, 41 (2000) (citing *U.S. Dep't of the Air Force, Lowry Air Force Base, Denver, Colo.*, 48 FLRA 589, 593 (1993)). However, the Authority will not find an award deficient on a nonfact basis where the alleged nonfact was disputed by the parties before the arbitrator. *E.g.*, *U.S. Dep't of the Treasury, Internal Revenue Serv., Greensboro, N.C.*, 61 FLRA 103, 105 (2005) (Member Armendariz concurring in part and dissenting in part as to other matters) (citing *Soc. Sec. Admin., Office of Hearings & Appeals*, 58 FLRA 405, 407 (2003) (Chairman Cabaniss dissenting in part as to other matters)) (*IRS Greensboro*).

Before the Arbitrator, the parties disputed the existence of a past practice for assigning substitutes. *See* Award at 20 (stating Union's position on past practice), 24 (stating Agency's position on past practice). Accordingly, the Union's exception does not support finding that the award is based on a nonfact, and we deny the exception. *See IRS Greensboro*, 61 FLRA at 105.

B. The admission of certain testimony did not violate due process.

In connection with its nonfact exception, *supra* Part IV.A, the Union also alleges that the Arbitrator violated due process by permitting an Agency witness to testify about her conversation with another person who did not testify at the hearing. The Authority has addressed similar arguments using a fair-hearing analysis. *See, e.g.*, *U.S. Dep't of Def., Def. Mapping Agency, Hydrographic/Topographic Ctr.*, 44 FLRA 103, 108-09 (1992) (*Def. Mapping Agency*).

An award will be found deficient on the ground that an arbitrator failed to provide a fair hearing where a party demonstrates that the arbitrator refused to hear or consider pertinent and material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See AFGE, Local 1668*, 50 FLRA 124, 126 (1995) (citing *U.S. Dep't of the Air Force, Hill Air Force Base, Utah*, 39 FLRA 103, 105-07 (1991)). It is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See AFGE, Local 22*, 51 FLRA 1496, 1497-98 (1996) (citing *Nat'l Air Traffic Controllers Ass'n, Local NKT*, 49 FLRA 499, 505 (1994)).

The Authority has long held that the "liberal admission by arbitrators of testimony and evidence is a permissible practice." *Def. Mapping Agency*, 44 FLRA at 109 (citing *Veterans Admin. & VA Med. Ctr. Register Office*, 34 FLRA 734, 738 (1990)). *See also Nat'l Border Patrol Council & Nat'l Immigration & Naturalization Serv. Council*, 3 FLRA 401, 404-05 (1980)

5. The Agency's opposition was required to be filed with the Authority by July 6, 2009. Upon learning from the United States Postal Service (USPS) that its timely-mailed opposition filing had been lost en route to the Authority, the Agency dispatched another copy of the lost opposition filing, which was received by the Authority from a commercial carrier on July 20, 2009. The copy of the Agency's opposition incorporated a motion for waiver of the expired time limit.

The motion included: (1) certified mail receipts showing that the Agency sent its opposition to the Union and the Authority via USPS boxes, with a postmark of June 29 and a USPS pickup on June 30; (2) sworn affidavits from Agency personnel who prepared the boxes and handed them to a USPS pick-up driver; (3) a letter from USPS stating that "[a]n empty wrapper with your [Agency] address was found in the mail and is believed to have been separated from a parcel during handling[;]" and (4) reproductions of the outside markings from the aforementioned empty wrapper, which bore a postmark date and shipping price corresponding to the certified mail receipts, *supra* (1). Mot. for Waiver, Attachs. 1-5. Based on the substantiating documentation provided, we accept the opposition as timely filed.

(explaining that the liberal admission of testimony and evidence is the "usual practice" in arbitration). In addition, the Authority has stated that disagreement with an arbitrator's evaluation of evidence and testimony, including the determination of the weight to be accorded such evidence, provides no basis for finding the award deficient. *E.g.*, *AFGE, Local 3295*, 51 FLRA 27, 32 (1995) (citing *AFGE, Local 2128*, 47 FLRA 962, 966 (1993) (*Local 3295*)).

Neither the Arbitrator's "liberal admission" of testimony from an Agency witness, *Def. Mapping Agency*, 44 FLRA at 109, nor the Union's disagreement with the Arbitrator's reference to this testimony, *Local 3295*, 51 FLRA at 32, supports finding the award deficient. Accordingly, we deny the exception.

C. The award is not contrary to law, rule, or regulation.

The Union argues that the Arbitrator's analysis of the age-discrimination complaints is contrary to law because he found that the Union did not establish a *prima facie* case of discrimination. [6] It further contends that the award is legally erroneous because the Arbitrator failed to recognize that the Agency's rotating-substitute policy is a "sham" to conceal discriminatory treatment. Exceptions at 6. 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*. *E.g.*, *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) (citing *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998)) (*Ala. Nat'l Guard*). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

There is no dispute that the framework established in *McDonnell Douglas*, *supra* note 4, 411 U.S. at 802, applies to the Union's ADEA claim and its contractual counterpart. [7] As relevant to this dispute, [8] a *prima facie* case of disparate treatment requires establishing that the employee: (1) was within the protected class, i.e., over forty; (2) was qualified for the disputed position; (3) suffered an adverse employment action; and (4) was older than (and at least as qualified as) the employee who filled the position. [9] *See Arroyo-Audifred v. Verizon Wireless, Inc.*, 527 F.3d 215, 219 (1st Cir. 2008) (citing *Mesnick*, *supra* note 4, 950 F.2d at 822, *cert. denied*, 504 U.S. 985 (1992)); *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167 (3d Cir. 2001) (citing *Connors v. Chrysler Fin. Corp.*, 160 F.3d 971, 973-74 (3d Cir. 1998)). *See also Geller v. Markham*, 635 F.2d 1027, 1034-35 (2d Cir. 1980) (explaining the elements of an ADEA *prima facie* case established by a teacher who alleged disparate treatment).

If a *prima facie* case is established, [10] then the burden shifts to the employer "to articulate [some] legitimate, nondiscriminatory reason" for the allegedly adverse employment action. *McDonnell Douglas*, 411 U.S. at 802. The employer's burden at this stage of the *McDonnell Douglas* framework is met if it *produces* a reason for the employment action; the explanation

6. As the Union does not except to resolving the statutory and contractual age-discrimination claims within a single analysis, its exceptions concerning both claims are hereafter addressed using the legal standards applicable to the ADEA. *See* decisions cited *supra* note 2 and accompanying text.

7. The Supreme Court "has not definitively decided whether the evidentiary framework of *McDonnell Douglas*" applies to ADEA actions, *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2349 n.2 (2009), but the Court has found it appropriate to "assume . . . that the . . . framework is fully applicable" when "the parties do not dispute the issue[,]" *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (*Reeves*). *Accord Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 447 n.2 (1st Cir. 2009) ("This circuit . . . has long applied the *McDonnell Douglas* framework to ADEA cases. . . . Until told otherwise by the Supreme Court, we shall continue to do so." (citations omitted)).

8. The elements of a *prima facie* case in an action under the ADEA will vary according to the circumstances. *See, e.g.*, *Loeb*, *supra* note 4, 600 F.2d at 1010. For example, the required *prima facie* case for an allegedly discriminatory demotion will differ from the required *prima facie* case for an allegedly discriminatory failure to hire.

9. In addition, we note that the fourth element of a *prima facie* case does not require showing that the employee who filled the position was outside of the protected class, i.e., under forty, although the fact that someone under forty was chosen to fill the position may be probative in determining which party ultimately prevails in a dispute. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996).

10. Regardless of particular factual circumstances, the *prima facie* case is "a small showing that is not onerous and is easily made[.]" *Kosereis v. Rhode Island*, 331 F.3d 207, 213 (1st Cir. 2003) (citations and internal quotation marks omitted).

need not persuade the decision-maker in order to be sufficient. *See Reeves*, *supra* note 7, 530 U.S. at 142 ("This burden is one of production, not persuasion; it 'can involve *no credibility assessment*.'" (emphasis added)). If the employer meets this production requirement, then the burden shifts to the employee "to show that [the] employer's stated reason for [the employment action] was in fact pretext[.]" *McDonnell Douglas*, 411 U.S. at 804. The determination of whether the employer's proffered justification is pretextual is a factual one. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 519 (1993) (*St. Mary's Honor Ctr.*).

The Union argues that it established a *prima facie* case of discrimination. However, even assuming, *arguendo*, that the Union had established a *prima facie* case, the *prima facie* case would have only entitled the Union to the Agency's articulation of a legitimate, nondiscriminatory reason for the allegedly adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. Before the Arbitrator, the Agency did articulate a legitimate, nondiscriminatory reason for the changes in the employee's assignments and wages, and it has reiterated that explanation in its opposition. Specifically, the Agency has articulated the details of its substitute-rotation policy. Because the Agency articulated a legitimate, nondiscriminatory reason for its actions toward the employee, the Authority need not decide whether the Arbitrator erred in his assessment of the Union's *prima facie* case. *See AFGE, Local 704,* 57 FLRA 468, 474 (2001) (citing *Aikens*, *supra* note 4, 460 U.S. at 715 ("Where the defendant has done everything that would be required . . . if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.")).

The remaining contrary-to-law exception is the Union's contention that the Arbitrator should have recognized the substitute-rotation policy as a "sham." However, as discussed above, the determination of whether an employer's proffered justification for the allegedly adverse employment action is pretextual is a factual one, *St. Mary's Honor Ctr.*, 509 U.S. at 519, and in assessing whether an arbitrator's legal conclusions are consistent with the applicable standard of law, the Authority defers to the arbitrator's underlying factual findings, *Ala. Nat'l Guard*, 55 FLRA at 40. Therefore, when the Arbitrator determined that the Agency's reliance on its substitute-rotation policy was not a pretextual explanation for its employment actions, he made a factual finding to which the Authority defers. Accordingly, the Union's argument that the policy is actually a "sham," exceptions at 6, provides no basis for finding that the award is contrary to law, and we deny the exception.

For the foregoing reasons, we deny the contrary-to-law exceptions.

V. Decision

The Union's exceptions are denied.