**65 FLRA No. 83**

SOCIAL SECURITY ADMINISTRATION
DALLAS REGION
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES, AFL-CIO
LOCAL 3506
(Union)

0-AR-3999

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DECISION

December 23, 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 case is before the Authority on exceptions to an award of Arbitrator Patrick E. Zembower 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.

The Arbitrator found that the Agency violated the parties' agreement by failing to give the grievant proper consideration and opportunity for promotion to a supervisory, paralegal specialist position. For the reasons that follow, we deny the Agency's exceptions.

## II. Background and Arbitrator's Award

The grievant was one of nine candidates on the best-qualified list for promotion to a supervisory, paralegal specialist position, General Schedule (GS)-13. The recommending official, who was not the grievant's supervisor, interviewed all of the candidates except the grievant, who was on leave outside the country at the time the interview was scheduled and was to be conducted. The recommending official recommended a candidate other than the grievant, and the selecting official selected that candidate.

The grievant, an Asian-American female, filed a grievance alleging that the Agency violated the parties' agreement and Title VII of the Civil Rights Act of 1964 when it did not select her for the vacancy. Award at 14. Specifically, the grievant claimed that she was not selected because of her race. She additionally claimed that she was not afforded proper consideration because she was not interviewed and was not afforded the consideration required by the Agency's affirmative-action plan. *Id.* The parties did not resolve the grievance and submitted it to arbitration.

At arbitration, the parties were unable to agree on a stipulation of the issues, and the Arbitrator framed them as follows: "Was [the grievant] given proper consideration for promotion under [the vacancy announcement] and was she wrongly not selected? If so, what is the appropriate remedy?" *Id.* at 2. Specifically, the Arbitrator addressed whether the Agency: (1) afforded the grievant proper consideration for the vacancy; and (2) discriminated against the grievant because of her race. *Id.* at 15.

In regard to whether the grievant was given proper consideration, the Arbitrator addressed the selection process. He noted that the instructions on the best-qualified list "urge[d] the selecting official to do a couple of things: (1) interview; and (2) if there are two candidates that appear to be equally qualified, select[] the one who is of the underrepresented race." *Id.* at 15 n.2. He agreed with the Agency that it was not obligated to interview the candidates, but he determined that the Agency violated the agreement when it interviewed all of the candidates except the grievant. *Id.* at 15-16. As to the grievant being on leave, the Arbitrator stated: "If the [agreement] was followed[,] [then the grievant's] supervisor, the approving official[,] had [the leave] roster in her possession and should have known [the grievant's] situation when she [the recommending official] scheduled interviews." *Id.* at 7 n.1. The Arbitrator concluded that the Agency's failure to interview the grievant deprived her of the fair and equitable treatment required under Article 3, Section 2 of the parties' agreement.[1] *Id.* at 16. In so concluding, he stated that he did "not believe the reason of [the recommending official] as to why she could not

1. Article 3, Section 2 provides, in pertinent part: "All employees shall be treated fairly and equitably in all aspects of personnel management and without regard to political affiliation, race, color, national origin, sex, sexual orientation, marital status, age, or disabling condition, and with proper regard and protection of their privacy and constitutional rights." Award at 2.

accommodate [the grievant] for an interview" and that the asserted reason was a "pretext for discrimination." *Id.* at 16, 9. He also concluded that the failure to interview the grievant, as an Asian American, deprived her of equal opportunity and amounted to unlawful discrimination in violation of Article 18, Section 1 of the agreement.[2] *Id.* As a remedy, the Arbitrator directed the Agency to promote the grievant to the position of supervisory, paralegal specialist, GS-13, the next time a vacancy occurs in that position in the Agency's Fort Worth, Texas office. The Arbitrator further directed that, if a vacancy first occurs in that position elsewhere in the region, then the Agency will offer the position to the grievant without the grievant forfeiting her right to promotion in the Fort Worth office. *Id.* at 17.

## III. Positions of the Parties

### A. Agency's Exceptions

In support of its exceptions, the Agency submitted "sworn affidavits of key witnesses attesting to their testimony given during the arbitration hearing." Exceptions at 3. The Agency contends that this is necessary "[b]ecause the Arbitrator deliberately destroyed the record of the proceedings[.]" *Id.* In this regard, the Agency explains that it provided tapes and a tape recorder for the Arbitrator to record the hearing and requested the tapes so that it could transcribe the hearing. The Agency asserts that the Arbitrator denied the request, stated that the recording was for his exclusive use, and returned to the Agency blank tapes. *Id.*

With regard to the merits of the award, the Agency argues that the award is based on nonfacts. Specifically, the Agency contends that the Arbitrator "misstated the instructions listed on the [best-qualified] list" when he concluded that the instructions "required the selecting official to conduct interviews" and "mandate[d] that if there are two candidates that appear to be equally qualified, the selecting official must select the one who is of the underrepresented race." *Id.* at 15. The Agency also contends that the Arbitrator found that the recommending official should have known that the grievant was on leave when the official scheduled the interview because she was the "approving official" of the grievant's leave. *Id.* (citing Award at 7 n.1). The Agency argues that this finding is clearly erroneous because even the grievant stated that her supervisor had approved her leave. The Agency further argues that, but for this erroneous finding, the Arbitrator would have reached a different result. *Id.* at 15-17.

The Agency also argues that the award fails to draw its essence from Article 3, Section 2 of the parties' agreement. In this regard, the Agency argues that the Arbitrator's finding that Article 3, Section 2 requires "the Agency to interview all candidates for a vacancy, regardless of their availability" is inconsistent with the express wording of that article. *Id.* at 17. The Agency asserts that the Arbitrator acknowledged that the Agency was not obligated to interview any of the candidates, but failed to justify his finding of a violation of Article 3, Section 2. *Id.* at 18.

Finally, the Agency claims that the award is contrary to § 7106(a)(2)(C) of the Statute because the award "abrogate[s]" management's right to select employees for promotion. *Id.* at 9. In addition, the Agency contends that Article 3, Section 2 was not negotiated under § 7106(b)(3) of the Statute. *Id.* at 9-10. In this connection, the Agency maintains that the Arbitrator's interpretation of Article 3, Section 2 dictates that, if one candidate is interviewed, then all must be interviewed. The Agency claims that this interpretation of Article 3, Section 2 does not constitute an arrangement because it does not ameliorate the adverse effects of management's determination of whether to interview candidates. *Id.* at 11. Alternatively, the Agency argues that the award is deficient under prong II of the analytical approach set forth in *United States Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C.*, 53 FLRA 146 (1997) (*BEP*), because the Arbitrator's remedy does not reconstruct what management would have done had it complied with Article 3, Section 2. *Id.* at 14.

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2. Article 18, Section 1 provides, in pertinent part:

> The Administration and the Union affirm their commitment to the policy of providing equal opportunities to all employees and to prohibit discrimination because of race, color, religion, sex, national origin, disabling condition or age. . . . The parties agree that Equal Employment Opportunity shall be administered in accordance with Title 5 U.S.C., the Civil Rights Act of 1991, the Rehabilitation Act of 1973, as amended, the Age Discrimination in Employment Act (ADEA), Executive Order 11478, and other authorizing legislation, and applicable regulations.

*Id.* at 3.

B. Union's Opposition

As an initial matter, the Union contends that the Agency's affidavits should not be considered because they were not presented to the Arbitrator. Opp'n at 1. With regard to the Agency's nonfact exception, the Union argues that the Agency misstates the award and fails to establish that, but for the asserted nonfacts, the award would have been different. *Id.* at 8. As to essence, the Union claims that the Agency misstates the Arbitrator's interpretation of Article 3, Section 2. *Id.* at 9. As to management rights, the Union claims that the Arbitrator properly enforced Article 3, Section 2 and that the remedy reconstructs what management would have done had it not discriminated against the grievant. In this connection, the Union asserts that the Agency had no authority to make a selection based on illegal discrimination. *Id.* at 6-7.

## IV. Preliminary Issue

The Union contends that the Agency should not consider the affidavits submitted by the Agency. The disputed affidavits attest to testimony that was provided at the hearing, and were prepared after the hearing because the Arbitrator denied the Agency's request for the tapes of the hearing so that the Agency could transcribe them.

The Authority previously has permitted a party to submit, in support of exceptions, a statement that sought to reflect what transpired in an arbitration proceeding that lacked a formal transcript. *See NTEU, Chapter 45*, 52 FLRA 1458, 1461 (1997). Specifically, the Authority has held that such a statement was not precluded by § 2429.5 of the Authority's Regulations, as in effect at that time,[3] which provided that the Authority would not consider any evidence that could have been, but was not, presented to the arbitrator. *Id.* Rather, the Authority has accepted such a statement insofar as it constituted arguments in support of exceptions. *Id.*

The disputed affidavits in this case are submitted in support of the Agency's exceptions and seek to reflect what transpired at the arbitration hearing, for which there is no formal transcript. Accordingly, consistent with *NTEU, Chapter 45*, we find that consideration of the affidavits is not precluded by § 2429.5 insofar as they constitute arguments in support of the Agency's exceptions.[4]

## V. Analysis and Conclusions

A. The award is not based on nonfacts.

The Agency argues that the award is based on two nonfacts. 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. *E.g.*, *AFGE, Local 200*, 64 FLRA 769, 770 (2010); *AFGE, Local 1395*, 64 FLRA 622, 625 (2010).

The Agency's first nonfact argument claims that the Arbitrator misinterpreted the instructions on the best-qualified list when he concluded that the instructions "required the selecting official to conduct interviews" and "mandate[d] that if there are two candidates that appear to be equally qualified, the selecting official must select the one who is of the underrepresented race." Exceptions at 15. However, even assuming that the Arbitrator's interpretation of the instructions on the best-qualified list constitutes a factual determination subject to challenge as a nonfact, the Agency misstates the Arbitrator's interpretation. The Arbitrator noted that the instructions "urge[d] the selecting official to do a couple of things: (1) interview[;] and (2) if there are two candidates that appear to be equally qualified, selected [sic] the one who is of the underrepresented race." Award at 15 n.2. Consequently, the Arbitrator found that the instructions simply "urge[d]" the selecting official to conduct interviews and select the candidate of an underrepresented race when candidates are equally qualified; he did not interpret the instructions to require interviews or mandate a particular selection. Therefore, the Agency's argument provides no basis for finding that the award is based on a nonfact. *See AFGE, Local 1395*, 64 FLRA at 626.

3. The Authority's Regulations concerning the review of arbitration awards, as well as certain related procedural Regulations, including § 2429.5, were revised effective October 1, 2010. 75 Fed. Reg. 42,283 (2010). As the exceptions in this case were filed prior to October 1, 2010, we apply the prior version of the Regulations here. *See* 5 C.F.R. § 2425.1. However, we note that, like the prior version of § 2429.5, the revised version of § 2429.5 provides that the Authority will not consider any evidence that could have been, but was not, presented to the arbitrator.

4. In addition, we note that the Authority has accepted affidavits in support of exceptions alleging that the award was deficient on grounds that arose as a result of the award. *U.S. Dep't of Veterans Affairs Med. Ctr., N. Chi., Ill.*, 52 FLRA 387, 399 n.10 (1996).

The Agency's second nonfact argument contends that the Arbitrator erroneously found that the recommending official was the "approving official" of the grievant's leave. Exceptions at 15 (quoting Award at 7 n.1). However, even if the Arbitrator erred in this respect, the Agency does not establish that, but for such error, the Arbitrator would have reached a different result and found that the grievant was treated fairly and equitably. In this regard, the Arbitrator concluded that the grievant was not treated fairly and equitably because the Arbitrator did "not believe the reason of [the recommending official] as to why she could not accommodate [the grievant] for an interview" and found it to be a pretext for discrimination. Award at 16, 9. Consequently, the asserted error does not provide a basis for finding that the award is based on a nonfact. *See AFGE, Local 200*, 64 FLRA at 770.

Accordingly, we deny the nonfact exceptions.

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

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. *E.g., AFGE, Council 220*, 54 FLRA 156, 159 (1998). 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. *E.g., U.S. 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.

As noted previously, Article 3, Section 2 of the parties' agreement provides, in pertinent part, that management shall treat all employees "fairly and equitably in all aspects of personnel management[.]" Award at 2. The Agency claims that the Arbitrator's interpretation of Article 3, Section 2 to require "the Agency to interview all candidates for a vacancy, regardless of their availability" is inconsistent with the express language of the agreement. Exceptions at 17. However, as the Agency acknowledges, the Arbitrator found that the Agency was not obligated to interview the candidates. Thus, the premise of the Agency's first essence assertion is misplaced and does not establish that the award is unfounded, irrational, implausible, or manifestly disregards the agreement.

The Agency also claims that the Arbitrator failed to justify his finding of a violation of Article 3, Section 2. However, the Arbitrator did justify the finding. Specifically, he determined that the Agency violated Article 3, Section 2 when it interviewed all of the candidates except the grievant in circumstances that the Arbitrator found to be a pretext for discrimination. The Agency provides no basis for finding that the Arbitrator's interpretation and application of Article 3, Section 2 is unfounded, irrational, implausible, or manifestly disregards the agreement.

Accordingly, we deny the essence exceptions.

C. The award is not contrary to § 7106(a)(2)(C) of the Statute.

The Authority reviews questions of law raised by exceptions to an arbitrator's award de novo. *E.g., NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). 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. *Id.* at 1710.

The Authority recently revised the analysis that it will apply when reviewing exceptions alleging that awards are contrary to law because they are inconsistent with management rights. *See U.S. EPA*, 65 FLRA 113, 115 (2010) (Member Beck concurring) (*EPA*); *FDIC, Div. of Supervision & Consumer Prot., S.F. Region*, 65 FLRA 102 (2010) (Chairman Pope concurring) (*FDIC, S.F. Region*). Under the revised analysis, the Authority will first assess whether the award affects the exercise of the asserted management right. *EPA*, 65 FLRA at 115.[5]

5. For the reasons articulated in his recent concurring opinion and footnotes, Member Beck would conclude that it is unnecessary to assess whether the contract provision is an appropriate arrangement or whether it abrogates a § 7106(a) right. The appropriate question is simply whether the remedy directed by the Arbitrator enforces the provision in a reasonable and reasonably foreseeable fashion. *See EPA*, 65 FLRA at 120 (Concurring Opinion of Member Beck); *FDIC*, 65 FLRA at 107 (Concurring Opinion of Member Beck); *U.S. Dep't of the Air Force, Air Force Materiel Command*,, 65 FLRA No. 81, slip op. at 7

If so, then, as relevant here, the Authority examines whether the award enforces a contract provision negotiated under § 7106(b).[6] *Id.* Also under the revised analysis, in determining whether the award enforces a contract provision negotiated under § 7106(b)(3), the Authority assesses: (1) whether the contract provision constitutes an arrangement for employees adversely affected by the exercise of a management right; and (2) if so, then whether the arbitrator's enforcement of the arrangement abrogates the exercise of the management right. *See id.* at 118. In concluding that the Authority would apply an abrogation standard, the Authority rejected continued application of an excessive-interference standard. *Id.* at 113. In addition, in setting forth the revised analysis, the Authority rejected the continued application of the "reconstruction" requirement set forth in *BEP*. *FDIC, S.F. Region*, 65 FLRA at 106-07; *accord FDIC*, 65 FLRA 179, 181 (2010).

It is not disputed that the award affects management's right to select. The Agency contends that Article 3, Section 2 is not an appropriate arrangement within the meaning of § 7106(b)(3) because it does not constitute an arrangement.[7] As interpreted and applied by the Arbitrator, Article 3, Section 2 requires that management treat all employees fairly and equitably in exercising its right to make selections for promotion. To constitute an arrangement, Article 3, Section 2 must ameliorate or mitigate adverse effects that flow from management's exercise of its management rights. *E.g., U.S. Dep't of Veterans Affairs, Bd. of Veterans Appeals*, 61 FLRA 422, 425 (2005). The Authority has repeatedly found provisions requiring management to exercise its management rights fairly and equitably to constitute arrangements because they are intended to mitigate the adverse effects of the unfair or inequitable exercise of management's rights. *See, e.g., AFGE, Local 1367*, 64 FLRA 869, 876 (2010) (Member Beck dissenting as to other matters). Article 3, Section 2 ameliorates or mitigates the adverse effects on employees of all aspects of personnel management by ensuring that the Agency treats them fairly and equitably, without regard to various considerations, such as race, and with regard to their privacy and constitutional rights. For the foregoing reasons, we find that Article 3, Section 2 is an arrangement under § 7106(b)(3).

To the extent that the Agency's statement that the award "abrogate[s]" management's rights constitutes a claim that Article 3, Section 2 is not an appropriate arrangement, Exceptions at 9, the Authority has previously described an award that abrogates the exercise of a management right as an award that "precludes an agency from exercising" the right. *U.S. Dep't of the Army, Army Transp. Ctr., Fort Eustis, Va.*, 38 FLRA 186, 190 (1990) (*Ft. Eustis*) (quoting *Dep't of the Treasury, U.S. Customs Serv.*, 37 FLRA 309, 314 (1990)). The Arbitrator enforced Article 3, Section 2 to restrict management from interviewing all of the candidates except the grievant because, according to the Arbitrator, doing so deprived her of fair and equitable treatment. As interpreted and applied by the Arbitrator, Article 3, Section 2 does not preclude the Agency from exercising any of its rights; it merely requires the Agency to exercise them in a fair and equitable manner. Consequently, the Agency does not establish that the Arbitrator's enforcement of Article 3, Section 2 abrogates the exercise of a management right. *See Ft. Eustis*, 38 FLRA at 190. For the foregoing reasons, we find that Article 3, Section 2 was negotiated under § 7106(b)(3).

The Agency also argues that, if the Authority finds that Article 3, Section 2 constitutes a contract provision negotiated under § 7106(b)(3), then the award is deficient under *BEP* because the Arbitrator's remedy does reconstruct what management would have done had it complied with Article 3, Section 2. However, as noted above, the Authority no longer requires that an arbitrator's remedy reconstruct what management would have done had it not violated the contract provision. *FDIC*, 65 FLRA at 181. Thus, the Agency's argument does not provide a basis for setting aside the award. *See id.*

Additionally, as discussed above, the Arbitrator also concluded that the failure to interview the grievant constituted unlawful discrimination in violation of Article 18, Section 1. The Agency does not argue that the Arbitrator's enforcement of Article 18, Section 1 affects management rights or is otherwise deficient. The Arbitrator's relief is

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n.7 (2010); *U.S. Dep't of Health and Human Services, Off. of Medicare Hearings and Appeals*, 65 FLRA 175, 177 n.3 (2010), and *U.S. Dep't of Transp., Federal Aviation Adm.*, 65 FLRA 171, 173 n.5 (2010). Member Beck would conclude that the Arbitrator's award is a plausible interpretation of the parties' agreement and deny the exception.

6. When an award affects a management right under § 7106(a)(2) of the Statute, the Authority may also examine whether the award enforces an applicable law. *EPA*, 65 FLRA at 115 n.7.

7. As discussed further below, in contending that the award is deficient, the Agency does not address the Arbitrator's enforcement of Article 18, Section 1.

intended to remedy the harm of the violation of Article 18, Section 1, as well as the harm of the violation of Article 3, Section 2. *See* Award at 16. As the Agency does not assert that Article 18, Section 1 is unenforceable, the Arbitrator's reliance on that contract provision further supports the remedy.[8]

For the foregoing reasons, we deny this exception.

**VI. Decision**

The Agency's exceptions are denied.

8. For the reasons set forth in her concurring opinion in *FDIC, S.F. Region*, 65 FLRA at 112, Chairman Pope agrees that the Agency provides no basis for finding the Arbitrator's remedy deficient as it pertains to the violation of Article 3, Section 2 because the remedy is reasonably related to Article 3, Section 2 and the harm being remedied. Chairman Pope agrees, in addition, that the uncontested violation of Article 18, Section 1, provides an additional basis for the remedy.