74 FLRA No. 41

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 133
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
(Agency)

0-AR-5991

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DECISION

May 21, 2025

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Before the Authority: Colleen Duffy Kiko, Chairman, and Susan Tsui Grundmann and Anne Wagner, Members

I. Statement of the Case

Arbitrator Elizabeth Bartholet issued an award finding the Agency did not violate the parties' collective-bargaining agreement or Title VII of the Civil Rights Act of 1964 (Title VII)[1] by bypassing two male officers and assigning a female officer to an overnight shift. The Union filed an exception on the ground that the award is contrary to law. For the reasons explained below, we deny the exception.

II. Background and Arbitrator's Award

The grievants are officers in the Agency's Passenger Processing Unit (PPU) at Boston Logan International Airport in Massachusetts. In the PPU, officers work overnight shifts performing duties such as detaining inadmissible travelers; conducting pat-down searches; and processing, monitoring, transporting, and escorting male and female detainees.

The Agency conducts an annual process during which officers request preferred work units and shift schedules based on seniority (annual bid).[2] Since at least 2016, the Agency has had a practice of assigning at least one officer of each sex to the overnight shift (the practice). In the 2024 annual bid, a female officer and two male officers requested the same overnight-shift slot. The Agency selected the female officer, even though she had less seniority than the two male officers. The Union then filed a grievance alleging that the practice violated the parties' agreement and Title VII. The Agency denied the grievance, and the parties proceeded to arbitration.

The parties did not stipulate an issue. As relevant here, the Arbitrator framed the issue as whether the Agency violated the parties' agreement or law "when it bypassed two male [officers] to ensure that a female [officer] was assigned to the overnight shift?"[3]

The Arbitrator noted that Articles 6 and 13 of the parties' agreement provide the Agency with "broad authority to make personnel decisions," including the authority to select officers for work assignments.[4] She also noted that Article 13 "gives the Agency the authority to find that sex was a qualification for the position here at issue."[5] Additionally, the Arbitrator found that various authorities "encouraged" or "mandated" the practice.[6] Specifically, she found that, in 2015, the Agency implemented "National Standards for the Transport, Escort, Detention and Search (TEDS)," which requires the Agency to consider sex in its assignment policies in order "to protect privacy in various situations . . . by limiting opposite[-]sex viewing," and "specifically provide[s] for assigning in a way to ensure that searches be conducted by persons of the same sex 'whenever operationally feasible.'"[7] She also found that an Agency handbook requires that when officers are "conducting" or "witnessing" a search, "they must be of the same [sex] . . . as the subject being searched, with the exception of an immediate patdown for officer safety."[8] She further noted that in 2020, the Agency issued a standard operating procedure which states that detainees will be watched and monitored by at least one officer of their same sex, "[u]nless not operationally feasible."[9] The Arbitrator also cited federal regulations related to the Prison Rape Elimination Act, which similarly concern "protecting inmate privacy and related issues of same[- versus] opposite[-]sex searches and monitoring."[10]

The Arbitrator then considered whether the practice violated Title VII. The Arbitrator explained that the practice is "a form of . . . [intentional] employment discrimination," but that Title VII provides that "it shall

[1] 42 U.S.C. § 2000e-2(a).
[2] *See* Award at 4.
[3] *Id.* at 10.
[4] *Id.* at 13; *see id.* at 19.
[5] *Id.* at 19.
[6] *Id.* at 14.
[7] *Id.* at 13 (quoting TEDS Section 5.5).
[8] *Id.* at 14 (quoting Joint Ex. 10, Agency Pers. Search Handbook, § 3.5).
[9] *Id.* (quoting Joint Ex. 11, Agency's Port of Boston Search Standard Operating Proc. at 6) (internal quotation mark omitted).
[10] *Id.* (citing 6 C.F.R. § 115.115).

not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of that particular business or enterprise."[11] The Arbitrator noted that, while the BFOQ defense to discrimination is "narrow," "courts have developed sex[-specific] privacy, security[,] and related exceptions to the strict BFOQ doctrine, allowing employers considerable leeway to assign women rather than men to positions in prisons . . . and other setting[s]" where an individual may find it "problematic to be monitored or served by persons of the opposite sex."[12]

The Arbitrator determined that the Agency "asserted significant privacy and security interests" to justify the practice as a BFOQ.[13] Specifically, she found that "[t]here are many women being monitored each night[,] [p]atdowns and other searches may need to be conducted, and there are also potential privacy issues involving monitoring of bathroom activities."[14] She also credited the Agency's assertion that the practice allows the Agency to accomplish its humanitarian and security goals of making detainees' situations as "comfortable as possible" and "creating a safer environment," "when dealing with travelers of different backgrounds and cultures" who are "in an unfamiliar and potentially intimidating setting."[15]

Lastly, the Arbitrator rejected the Union's assertion that the Agency could have pursued less-discriminatory alternatives for ensuring an employee "of the same sex was available" on the overnight shift such as "using [female] employees assigned to other positions," female supervisors, or non-Agency personnel to conduct duties involving female detainees.[16] In this regard, she found that the Agency had demonstrated that it considered, and rejected, the Union's proposed alternatives because they would have raised "the same issues about sex discrimination, and . . . other concerns . . . including overtime costs and disruption to employees being coerced into accepting assignments."[17] Therefore, the Arbitrator found that the Agency "satisfied the burden of demonstrating that [the practice] was reasonably necessary to the normal operation of its business."[18]

The Arbitrator concluded that "the Agency demonstrated the requisites of the BFOQ defense,"[19] and, therefore, the practice "did not violate the anti-discrimination provisions in either federal law or the [parties' agreement]."[20]

On October 21, 2024, the Union filed an exception to the award, and on November 19, 2024, the Agency filed an opposition to the exception.

III. Preliminary Matter: We deny the Agency's request to file a supplemental submission.

Citing § 2429.26 of the Authority's Regulations,[21] the Agency requested leave to file, and did file, a brief with attachments supplementing its opposition to the Union's exceptions.[22] Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 provides that the Authority may, in its discretion, grant leave to file "other documents" when appropriate.[23] A filing party must request leave to file the supplemental submission[24] and show why the submission should be considered.[25] The Authority has held that it will not consider a party's supplemental submission if the record before it is sufficient to resolve the issues presented.[26]

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[11] *Id.* at 15-16 (quoting 42 U.S.C. § 2000e-2(e)).
[12] *Id.* at 16 (citing *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (*Johnson Controls*)).
[13] *See id.* at 16-17.
[14] *Id.*
[15] *Id.* at 17 (quoting Opp'n, Ex. 1, Agency Post Hr'g Br. (Agency Br.) at 25).
[16] *Id.* at 17-18.
[17] *Id.*; *see* Agency Br. at 25-27 (arguing why "ad hoc" overtime, use of supervisory personnel, and use of non-bargaining-unit employees would not obviate the sex-based requirement and would pose additional concerns; and asserting that use of non-Agency personnel would raise safety and liability concerns not presented by Agency officers performing the duties).
[18] Award at 17-18 (internal quotation marks omitted).
[19] *Id.* at 18.
[20] *Id.*; *see id.* at 15 ("The language of the [parties' agreement] is based on the language of [Title VII], and neither party indicated that the parties' contract should be understood to do anything other than to replicate the federal law anti-discrimination mandate.").
[21] 5 C.F.R. § 2429.26.
[22] Agency's Supplemental Br. to Agency Opp'n to Union Exceptions (Agency Supp.) at 2.
[23] *AFGE, Loc. 15*, 73 FLRA 125, 126 (2022) (*Local 15*) (citing 5 C.F.R. § 2429.26).
[24] *U.S. DHS, U.S. CBP*, 68 FLRA 829, 831 (2015) (citing *SSA, Region VI*, 67 FLRA 493 (2014)).
[25] *Local 15*, 73 FLRA at 126 (citing *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012)).
[26] *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 69 FLRA 197, 199 (2016) (Member Pizzella dissenting, in part, on other grounds); *see U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 978-79 (2015) (*Commerce*) (declining to consider supplemental submissions where "the record [was] sufficient for the Authority to resolve the issues").

In its brief,[27] the Agency requests that the Authority consider a jury verdict, a court order denying a motion for judgment as a matter of law, and a court judgment in *Anderson v. Mayorkas* (*Anderson*).[28] The Agency argues that *Anderson* provides further support for the award because *Anderson* involves similar facts and a finding that a sex-based scheduling practice is a BFOQ.[29] Here, the record is sufficient for the Authority to resolve the issue before it – and deny the Union's exception – without the Agency's supplemental submission. Therefore, we deny the request and do not consider the Agency's supplemental submission further.[30]

IV. Analysis and Conclusion: The Union does not demonstrate that the award is contrary to law.

The Union argues that the award is contrary to law because the Arbitrator failed to properly apply the legal test for a BFOQ set forth in an Equal Employment Opportunity Commission decision.[31] 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.[32] In applying the standard of de novo review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law.[33] In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes they are nonfacts.[34]

Title VII makes it unlawful for an employer "to fail or refuse to hire . . . or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[35] However, Title VII also provides that sex-based employment policies are not unlawful when sex is a BFOQ "reasonably necessary to the normal operation of th[e] particular business or enterprise" at issue.[36]

According to the Union, to establish a BFOQ, an employer must: (1) "assert a practical basis for believing that hiring any members of one sex would undermine the privacy interests of patients, clients, or females, in order to protect the privacy interests of the latter"; (2) "show that the asserted privacy interest is entitled to protection under the law[]"; and (3) "demonstrate that no reasonable alternative exists to protect those interests other than the sex-based hiring policy."[37] The Union challenges the award only on the bases that the Arbitrator failed to determine whether the Agency satisfied the third element of this test,[38] and "perform[ed] no analysis of whether any of the Union's suggested alternatives would have been reasonable or less discriminatory."[39]

As discussed above, and not challenged by the Union, the Arbitrator found that the Agency established privacy and security reasons for the practice.[40] Contrary to the Union's argument, the Arbitrator did address the Union's suggested alternatives to the practice,[41] but she concluded that they "would raise the same issues about sex discrimination, and . . . would raise other concerns . . . [such as] overtime costs and disruption to employees being coerced into accepting assignments."[42] The Union does not allege that these findings are based on nonfacts. As such, we defer to the Arbitrator's findings that there were no reasonable alternatives to the practice,[43] which support her conclusion that the third element of the BFOQ test was met.[44] Consequently, the Union does not demonstrate that the Arbitrator erred as a matter of law in finding the Agency demonstrated the practice is a BFOQ, and we deny the exception.[45]

IV. Decision

We deny the Union's exception.

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[27] Agency Supp. at 2.
[28] No. 8:22-cv-2941-VMC-CPT, 2025 WL 268255 (M.D. Fla. Jan. 22, 2025).
[29] Agency Supp. at 3-4.
[30] *See, e.g.*, *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Se. Fisheries Sci. Ctr.*, 74 FLRA 205, 206 n.13 (2025) (*Fisheries*) (denying motion requesting leave to provide new evidence "[b]ecause the existing record [was] sufficient to decide [the] case"); *Commerce*, 68 FLRA at 979.
[31] Exception at 8 (citing *Pratt v. Chertoff*, EEOC Appeal No. 0720050059, 2007 WL 632967 (Feb. 23, 2007)).
[32] *Fisheries*, 74 FLRA at 206.
[33] *Id.*
[34] *Id.*
[35] *Muldrow v. City of St. Louis, Mo.*, 601 U.S. 346, 354 (2024) (quoting 42 U.S.C. § 2000e-2(a)(1)) (internal quotation mark omitted); *Dothard*, 433 U.S. at 328.
[36] 42 U.S.C. § 2000e-2(e)(1); *see Johnson Controls*, 499 U.S. at 200; *see also Dothard*, 433 U.S. at 333.
[37] Exception at 8-9 (citing *Pratt*, 2007 WL 632967, at *9).
[38] *Id.* at 9-13.
[39] *Id.* at 11.
[40] *See* Award at 17-18.
[41] *Id.*
[42] *Id.* at 17.
[43] *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr., Poplar Bluff, Mo.*, 73 FLRA 498, 503 (2023) (citing *NTEU*, 73 FLRA 315, 318 (2022) (Chairman DuBester concurring on other grounds)) (deferring to arbitrator's finding not challenged as nonfact).
[44] *See, e.g.*, *Stephany v. Nielsen*, EEOC Appeal No. 0120151021, 2018 WL 2085985, at *7 (Apr. 25, 2018) (finding sex-based shift assignments of Customs and Border Protection officers working at airport was a BFOQ where the agency "presented evidence that it had explored an alternative . . . without success" and "[n]either party . . . offered evidence of a viable alternative").
[45] *Id.*