70 FLRA No. 199

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 5
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL NO. 238
LOCAL 704
(Union)

0-AR-5335

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DECISION

December 21, 2018

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

I. Statement of the Case

This case concerns the proper application of *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*)[1] to the Union's challenge to a selection. As such, we apply the legal standards for national-origin-discrimination claims under Title VII and grant the Agency's contrary-to-law exception.

Applying those standards, where record evidence is insufficient to demonstrate discriminatory intent, the complaining party must lose as a matter of law.[2] And, as will be discussed below, the record

[1] 411 U.S. 792 (1973).

[2] *See, e.g.*, *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000) (*Reeves*) ("[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred."); *Wheeler v. Georgetown Univ. Hosp.*, 812 F.3d 1109, 1113 (D.C. Cir. 2015) (*Wheeler*) (where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial); *id.* at 1114 (the central inquiry is whether the plaintiff produced sufficient evidence for a reasonable jury to find that the employer's asserted nondiscriminatory reason was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis); *Minter v. D.C.*, 809 F.3d 66, 68 (D.C. Cir. 2015) (summary judgment is appropriate if "the movant is entitled to judgment as a matter of law"); *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) (*Flowers*) (because the plaintiff has the burden of persuasion on this point, it is his responsibility to advance sufficient evidence of discrimination to create a triable factual dispute); *Conroy v. Vilsack*, 707 F.3d 1163, 1170 (10th Cir. 2013) (*Conroy*) (in granting summary judgment, court is finding that the movant is entitled to judgment as a matter of law); *Gilbert v. Napolitano*, 670 F.3d 258, 261 (D.C. Cir. 2012) (*Gilbert*) ("Where an employer offers a legitimate, nondiscriminatory explanation for its decision to promote one employee over another, the one central inquiry on summary judgment is whether the plaintiff produced enough evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the plaintiff on a prohibited basis."); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial); *Stockwell v. City of Harvey*, 597 F.3d 895, 903 (7th Cir. 2010) (*Stockwell*) (the defendant only has to produce admissible evidence that would permit a rational jury to conclude that the employment decision had not been motivated by discriminatory animus); *Hendricks v. Geithner*, 568 F.3d 1008, 1012 (D.C. Cir. 2009) (*Hendricks*) (if there is no genuine issue of material fact as to pretext, then the employer is entitled to judgment as a matter of law); *Abdulnour v. Campbell Soup Supply Co.*, 502 F.3d 496, 504 (6th Cir. 2007) (summary judgment is appropriate if the plaintiff only created a weak issue of fact as to whether the defendant's reason was untrue and there is ample evidence to support the employer's position); *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169 (10th Cir. 2007) (*Swackhammer)* (in determining whether a plaintiff's evidence of pretext is sufficient to permit an inference of discrimination and thereby avoid summary judgment, the U.S. Supreme Court has noted relevant factors "includ[ing] the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered" on a motion for summary judgment) (citing *Reeves*, 530 U.S. at 148-49)); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1183 (7th Cir. 2002) (*Millbrook*) ("an employer would be entitled to judgment as a matter of law . . . if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred"); *Dammen v. Unimed Med. Ctr.*, 236 F.3d 978, 981 (8th Cir. 2001) (*Dammen*) (an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred); *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1182 (D.C. Cir. 1996) (*Fischbach*) (a plaintiff must initially prove by a preponderance of the evidence that he was qualified for the position he sought but was rejected under circumstances which "permit the trier of fact to infer the ultimate fact of intentional discrimination") (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

evidence of discrimination in this case is legally insufficient to support a conclusion of illegal discrimination.

II. Background

The relevant facts here are straightforward.[3] The Agency announced an opportunity for employees to apply for two non-supervisory, general schedule (GS)-15 positions, including the Senior Counsel for Water Enforcement and Counseling. The announcement, which the Regional Counsel (the selecting official) emailed to employees, instructed potential applicants to submit a current resume and "an expression of interest that describes (four pages or less, [twelve]-point font, default margins) examples of your work experience and addresses how you would perform the major duties and responsibilities set forth in the position description of the job you are applying for."[4] The ultimate selectee's expression of interest was four pages long and detailed;[5] the grievant's, by contrast, was one page long and less detailed.[6]

A *screening* panel—consisting of three management officials (not including the selecting official)—then read each application independently, and met to discuss their individual findings. The screening panel determined, for various reasons, that all of the applicants should be interviewed, but it recommended two applicants—the ultimate selectee, and one other individual—as the best-qualified candidates for the Senior Counsel for Water Enforcement and Counseling position. The screening panel did not consider the grievant to be in the top six applicants for this position.

Next, a *selection* panel—consisting of three *different* management officials (the selecting official, the Deputy Regional Counsel, and the Associate Deputy Regional Counsel)—interviewed thirteen applicants for the two posted positions. The panel members individually rated the candidates and then met to discuss their respective ratings. They agreed as to who were the top three candidates for the Senior Counsel for Water Enforcement and Counseling position. That list included the ultimate selectee and two other individuals, but did not include the grievant. After a few days, the panel reconvened, and the selecting official then decided to choose the selectee.

The Union filed a grievance that went to arbitration. As relevant here, the grievance alleged that, by not selecting the grievant, the Agency had intentionally discriminated against him on the basis of his national origin (Mexican-American), and so, violated Articles 5, 8, and 36 of the parties' agreement. The Arbitrator found discrimination, and the Agency filed the exceptions that are before us now.

III. Analysis and Conclusion: The Award is Contrary to Law.

Under the burden-shifting framework set out in *McDonnell Douglas*,[7] once a complaining party establishes a prima facie case of discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the alleged discriminatory action.[8] If the employer meets this burden of production, then the burden shifts to the complaining party to show that the employer's stated reason for the employment action was, in fact, pretext.[9] However, the existence of the prima facie case, coupled with evidence of pretext, is not always enough to satisfy the plaintiff's burden of proving intentional discrimination.[10] Rather, at all times, the complaining party retains the ultimate burden of persuasion that the employer intentionally discriminated.[11]

Our dissenting colleague argues that the Arbitrator is due a level of deference that cannot be reconciled with either our statutory duty to review arbitration awards[12] or our case law.[13] Simply put, an

[3] *See also AFGE Local 704*, 70 FLRA 676, 676-77 (2018).
[4] Exceptions, Attach. F, Agency Hr'g Ex. 7 at 1; Opp'n, Attach. J, Union Hr'g Ex. 34 at 1721.
[5] Exceptions, Attach. F, Agency Hr'g Ex. 16.
[6] Exceptions, Attach. F, Agency Hr'g Ex. 15.
[7] 411 U.S. 792.
[8] *Id.* at 802.
[9] *Id.* at 804.
[10] *Millbrook*, 280 F.3d at 1183.
[11] *Wheeler*, 812 F.3d at 1114; *see also Benuzzi v. Bd. of Educ. of the City of Chi.*, 647 F.3d 652, 662 (7th Cir. 2011) (the ultimate burden of demonstrating that the defendant intentionally discriminated always remains with the plaintiff); *Amini v. City of Minneapolis*, 643 F.3d 1068, 1074 (8th Cir. 2011) (same); *Dammen*, 236 F.3d at 981 (same).
[12] 5 U.S.C. § 7122(a).
[13] Although the Arbitrator found a violation of the parties' agreement, the parties relied on the *McDonnell Douglas* framework, a legal framework, to determine whether there was a violation. Award at 14 ("The Union relies on the burden-shifting method of proof established in *McDonnell Douglas*."); *id.* at 18 ("The Agency sets forth the three[-]part analysis in *McDonnell Douglas*."). As such, the question before us is whether the Arbitrator properly applied a legal framework that the parties agreed applied; this is a legal question warranting a de novo review. *See, e.g., U.S. Dep't of the Treasury, IRS*, 65 FLRA 826, 828 (2011) (*IRS*) (where arbitrator looked to contract to find racial discrimination using *McDonnell Douglas* framework, Authority reviewed contrary-to-law claims de novo); *AFGE, Local 3615*, 55 FLRA 1160 (1999) (same). The dissent's assertion that *IRS* decided a race discrimination claim "as a matter of law," Dissent at 9 n.4, is not based on the text of that decision. *IRS*, 65 FLRA at 826-27. In reciting the background in *IRS*, the Authority did not discuss a finding by the arbitrator that the agency violated *a*

award does not escape our de novo review simply because the arbitrator couches an issue as a contract violation all while applying legal standards established outside the contract itself. The level of deference which our colleague is willing to accord to arbitral interpretations of contract provisions that enforce Title VII rights is far greater than what the EEOC accords to its administrative judges who are experts in that area of the law.[14]

After our de novo review of the award,[15] even with due deference to the few factual findings reached by the Arbitrator,[16] we have reached a different conclusion. Therefore, we must set aside the award and grant the Agency's exception.

Here, the Arbitrator found, and there is no dispute, that the Union met its prima facie case, and that the Agency articulated a legitimate, nondiscriminatory reason for its selection. Therefore, the only questions before us are whether the Union sufficiently demonstrated that the Agency's proffered reasons for selecting the selectee over the grievant are pretext, and whether it has met its overall burden of persuasion that the Agency engaged in intentional discrimination.

In order to demonstrate a pretext, the complaining party must show that the employer's proffered non-discriminatory explanations for its actions "are so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude [they are] unworthy of belief."[17] The focus is on the employer's justification for its decision—for example, did the employer offer inconsistent reasons for its decision, or is the employer's explanation so implausible that a factfinder could find it unworthy of credence?[18] In assessing the employer's explanation, courts look to the facts as they appear *to the person who made the decision*.[19]

In cases involving hiring decisions, courts have said that *some* subjectivity is to be expected.[20] In this regard, "Title VII does not do away with traditional management rights. An employer has discretion to choose among equally qualified candidates, provided that the decision is not based upon unlawful criteria."[21] Thus, "[t]he relevant inquiry is not whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs."[22]

Additionally, while different courts have framed the standards somewhat differently, they consistently have held that, to draw an inference of pretext based on a complaining party being better qualified than a selectee, the degree of difference in their qualifications must be *significant*.[23] In this connection, in Title VII

provision of law, and the dissent does not identify such a finding.

[14] 29 C.F.R. § 1614.405(a); *Carrie Brown v. Potter*, 2007 WL 1804255 (2007) (The EEOC will uphold an administrative judge's factual findings if they are supported by substantial evidence.) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)); *id.* (The EEOC reviews legal conclusions by administrative judges de novo.).

[15] *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 a de novo standard of review, the Authority assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. *See NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings unless the excepting party establishes that they are nonfacts. *See U.S. DHS, U.S. CBP, Brownsville, Tex.*, 67 FLRA 688, 690 (2014) (citing *U.S. Dep't of the Treasury, IRS, St. Louis, Mo.*, 67 FLRA 101, 104 (2012)).

[16] Member Abbott notes that deference to arbitral factual findings does not mean blind obeisance. As we note below, the Arbitrator failed to apply the proper legal rigor as he reached his factual findings. In such circumstances, no deference, let alone blind obeisance, is warranted.

[17] *Conroy*, 707 F.3d at 1172; *see also id.* at 1174 (a plaintiff can show pretext by demonstrating that the employer's explanation for its decision "was so implausible, incoherent, or internally contradictory" that the decision must have been made on some other basis).

[18] *Id.* at 1174.

[19] *Id.*

[20] *Id.* at 1177; *see also Stockwell*, 597 F.3d at 902 (subjective evaluations of each candidate are entirely consistent with Title VII).

[21] *Conroy*, 707 F.3d at 1177-78.

[22] *Swackhammer*, 493 F.3d at 1170.

[23] *Conroy*, 707 F.3d at 1172 (court will not draw an inference of pretext "based upon 'minor differences between plaintiff's qualifications and those of successful applicants'; rather, there must be 'an overwhelming merit disparity'"); *see also Gilbert*, 670 F.3d at 261 ("Because in a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call, the employee must show that a reasonable juror could find him 'substantially more qualified' than the selected employee."); *Stockwell*, 597 F.3d at 907 n.9 (a plaintiff cannot establish pretext by showing that he was more qualified than those eventually promoted to the positions; mere comparison of relative qualifications cannot establish an illicit motive unless "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"); *Hobbs*, 573 F.3d at 462 (evidence of qualifications would only serve as evidence of pretext if the differences were "so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue"); *Hendricks*, 568 F.3d at 1012 (a plaintiff can show that her employer discriminated by showing that she was "significantly" or "markedly" more qualified for the job than was the candidate who actually received it; without

intentional-discrimination cases, the role of courts is "not to act as a super personnel department that second guesses employers' business judgments."[24] The role of arbitrators, and the Authority, should be no different.

In finding intentional, national-origin discrimination in this case, the Arbitrator stated that there were "two bases for finding that [the selectee] was given preferential treatment for her selection: (1) [she] was preselected; and (2) [the grievant's qualifications were superior to the selectee['s]."[25]

As to the first basis for alleged preferential treatment, the Arbitrator relied on an error in the preparation of the position-description cover sheet. However, there was *no* evidence connecting the deciding official to the processing of the form. Consequently, this evidence could not have demonstrated that the deciding official preselected the selectee, on a prohibited basis, for the position.[26]

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such a decisive showing, the court defers to the business judgment of an employer and will not infer discrimination); *Sublett v. John Wiley & Sons*, 463 F.3d 731, 738 (7th Cir. 2006) ("evidence of the applicants' competing qualifications does not constitute evidence of pretext unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue"); *Barnette v. Chertoff*, 453 F.3d 513, 517 (D.C. Cir. 2006) (a reasonable jury may infer discriminatory intent when an employer fails to select the "significantly" or "markedly" more qualified candidate); *Millbrook*, 280 F.3d at 1180-81 (where an employer's proffered non-discriminatory reason for its employment decision is that it selected the most qualified candidate, evidence of the applicants' competing qualifications does not constitute evidence of pretext "unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue"; "[i]n effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question'"); *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 103 (2d Cir. 2001) ("When a plaintiff seeks to prevent summary judgment on the strength of a discrepancy in qualifications, . . . [i]n effect, the plaintiff's credentials would have to be so superior to the credentials of the person selected for the job that 'no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'"); *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) ("When two candidates are equally qualified in that they both possess the objective qualifications for the position and neither is clearly better qualified, 'it is within the employer's discretion to choose among them so long as the decision is not based on unlawful criteria.'"); *Fischbach*, 86 F.3d at 1183 (evidence indicating that an employer misjudged an employee's performance or qualifications is relevant to the question whether its stated reason is a pretext masking discrimination; if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so).

[24] *Conroy*, 707 F.3d at 1177; *see also Vill. of Freeport v. Barrella*, 814 F.3d 594, 614 (2d Cir. 2016) (even to the extent that the plaintiff was more qualified, federal antidiscrimination law "does not require that the candidate whom a court considers most qualified for a particular position be awarded that position; it requires only that the decision among candidates not be discriminatory"); *Wheeler*, 812 F.3d at 1114 (courts do not sit as a "super-personnel department" that reexamines an employer's business decisions, and "may not second-guess an employer's personnel decision absent demonstrably discriminatory motive"); *Flowers*, 803 F.3d at 1338 (courts are not a "super-personnel department" assessing the prudence of routine employment decisions, "no matter how medieval," "high-handed," or "mistaken"); *id.* at 1330 (Title VII functions only as a bulwark against unlawful discrimination; it does not substitute the business judgment of federal courts for any other nondiscriminatory reason); *Stockwell*, 597 F.3d at 905 (courts are not "superpersonnel department[s]" charged with determining best business practices); *Millbrook*, 280 F.3d at 1184 (hiring decisions are often difficult and sometime require companies to make close calls, but those decisions are for the employer to make – not the court and not the jury – unless there is evidence of illegal discrimination); *Arraleh v. Cnty. of Ramsey*, 461 F.3d 967, 967 (8th Cir. 2006) ("the employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination"); *Blise v. Antaramian*, 409 F.3d 861, 867 (7th Cir. 2005) ("[The court does] not sit as a superpersonnel department where disappointed applicants or employees can have the merits of an employer's decision replayed to determine best business practices."); *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 279 (5th Cir. 1999) ("differences in qualifications between job candidates are generally not probative evidence of discrimination unless those differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue"); *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 646 (8th Cir. 1997) (courts may not second-guess an employer's personnel decisions, and employers are free to make their own business decisions, even inefficient ones, so long as they do not discriminate unlawfully); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) (federal courts do not sit to second-guess the business judgment of employers); *Fischbach*, 86 F.3d at 1183 ("Title VII liability cannot rest solely upon a judge's determination that an employer misjudged the relative qualifications of admittedly qualified candidates. . . . Short of finding that the employer's stated reason was indeed a pretext, however – and here one must beware of using 20/20 hindsight – the court must respect the employer's unfettered discretion to choose among qualified candidates."); *Lidge-Myrtil v. Deere & Co.*, 49 F.3d 1308, 1312 (8th Cir. 1995) (courts do not sit to determine if the legitimate, non-discriminatory reason is based on sound principles of business judgment).

[25] Award at 25.

[26] *Conroy*, 707 F.3d at 1174.

As to the second basis for alleged preferential treatment, the Arbitrator relied on his own assessment of the grievant's qualifications relative to the selectee's and the other candidates.[27] But the Agency provided wholly rational explanations for its selection decision, and the Union has not demonstrated that those explanations are *untrue*.[28]

Looking at the entirety of the record, the Union has failed to meet its burden of demonstrating that the Agency's proffered reason for promoting the selectee is a pretext,[29] let alone one that is grounded in national-origin discrimination.[30]

In short, "we are left with a case where there is no evidence of intentional [national-origin] discrimination, and therefore [the Agency] was entitled to judgment as a matter of law."[31] Thus, we set aside the Arbitrator's finding of national-origin discrimination.[32]

IV. Decision

We grant the Agency's exceptions, and we vacate the award.

[27] *See* Award at 26-27 (finding that "[d]espite [the grievant's] extensive expertise in the Clean Water Act and [e]nforcement record, the [s]creening [p]anel did not find [him] to be among the top six candidates. . . . Instead, they recommended applicants who had no real water experience."); *id.* at 27 (finding that the Union "demonstrated pretext by showing that [the grievant's] qualifications were plainly superior to those of the selectee," and rejecting the Agency's assessment of his qualifications).

[28] *Chao, O. v. Johnson*, 2017 WL 527260 *2 (2017) ("These explanations for [the agency's] decision not to recommend Complainant for the promotion are not incompatible with the [a]gency's articulated reason.").

[29] *See, e.g.*, *Hobbs*, 573 F.3d at 461.

[30] *Israel J. v. Sessions*, 2018 WL 1737482, *9 (2018) ("In the absence of evidence of unlawful discrimination, the Commission will not second guess the Agency's assessment of the candidates' qualifications." (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981))).

[31] *Millbrook*, 280 F.3d at 1184.

[32] Because we set aside the award, we do not need to address the Agency's remaining exceptions alleging that the Arbitrator based the award on nonfacts. Exceptions Br. at 26.

Member DuBester, dissenting:

The decision in this case is another example of the majority's "continuing . . . non-deferential treatment of arbitrators and their awards."[1] Contrary to the Arbitrator's unchallenged framing of the issue as purely contractual, the majority erroneously conducts a de novo review of the award. And replacing the Arbitrator's factual findings with their own, the majority erroneously overturns the Arbitrator's well-reasoned, contractually-based determinations sustaining the grievance.

Contrary to Authority precedent, the majority reframes the issue before the Arbitrator in order to conduct a de novo, contrary-to-law review of the Arbitrator's contract interpretation. The Agency claims,[2] and the majority agrees,[3] that the award is contrary to law because the Arbitrator misapplied the *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*) framework.[4]

However, the Arbitrator framed the issue as whether the Agency violated the parties' agreement. The parties did not challenge the Arbitrator's framing of the issue. And although the Arbitrator considered the *McDonnell Douglas* framework, he ultimately found that "the Agency's actions violated Articles 5, 8, and 36 of" the parties' agreement.[5]

Reading the award in the context of the undisputed framed issue and how the Arbitrator resolved that issue, it is clear that the award concerns whether the Agency's actions violated the parties' contract. Since the Agency did not file an essence exception, there is no basis for finding the Arbitrator's interpretation and application of the contract deficient. Nor is there a basis for disturbing the Arbitrator's credibility[6] and other factual determinations[7] in his award. Similarly, the Arbitrator's reference to the *McDonnell Douglas* framework cannot be reasonably read as more than an aid in interpreting the contract. Thus, contrary to the majority's decision, the Arbitrator's discussion of *McDonnell Douglas* does not provide a basis for finding the award deficient.[8]

Further, even assuming a de novo review of the award under a contrary-to-law standard were appropriate, the majority still errs by not deferring to the Arbitrator's underlying factual findings.[9] In his award, the Arbitrator found that "the Union . . . demonstrated pretext by

[1] *U.S. Dep't of the Navy, Commander Navy Region, Sw. Naval Air Weapons Station-China Lake*, 70 FLRA 980, 982 (2018) (Dissenting Opinion of Member DuBester); *see also U.S. Small Bus. Admin.*, 70 FLRA 885, 888 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS*, 70 FLRA 806, 810 (2018) (Dissenting Opinion of Member DuBester); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Florence, Colo.*, 70 FLRA 748, 750 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of Transp., FAA*, 70 FLRA 687, 690 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of the Treasury, IRS, Austin, Tex.*, 70 FLRA 680, 683-84 (2018) (Dissenting Opinion of Member DuBester); *U.S. Dep't of VA, Med. Ctr., Asheville, N.C.*, 70 FLRA 547, 549 (2018) (Dissenting Opinion of Member DuBester).

[2] Exceptions Br. at 6.

[3] Majority at 4.

[4] Exceptions Br. at 9 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The majority's reliance on *U.S. Department of the Treasury, IRS*, 65 FLRA 826 (2011) (*IRS*) is misplaced. Majority at 4 n.13. Unlike this case, where the Arbitrator framed the issue as purely contractual, in *IRS*, the parties' stipulated issue did not limit the arbitrator to a purely contractual analysis. 65 FLRA at 826. And in *IRS*, the arbitrator relied on the *McDonnell Douglas* burden shifting framework to determine if the grievant in that case was discriminated against on the basis of race as a matter of law under Title VII of the Civil Rights Act of 1964, not the parties' collective-bargaining agreement. *Id.*

[5] Award at 29.

[6] *See, e.g.*, Award at 26 (finding the selecting official's testimony "not credible"); *id.* at 29 ("credit[ing the grievant]'s account of [a] meeting").

[7] *U.S. Small Bus. Admin., Charlotte Dist. Office, Charlotte, N.C.*, 49 FLRA 1656, 1661 (1994) (finding that an exception challenging an arbitrator's "evaluation of the evidence and testimony, including the credibility of witnesses and the weight to be given their testimony, and . . . attempt[ing] to relitigate the case before the Authority . . . provides no basis for finding the award deficient"); *U.S. Dep't of VA, Med. Ctr., Northport, N.Y.*, 49 FLRA 630, 637 (1994) (same).

[8] When 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. 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." *Bremerton Metal Trades Council*, 68 FLRA 154, 155 (2014) (citing *AFGE, Council 220*, 54 FLRA 156, 159 (1998)); *see AFGE, Local 1815*, 69 FLRA 621, 623 (2016) (holding that a contrary-to-law argument does not provide a basis for finding an award deficient on essence grounds). The majority's reliance on the different, non-deferential review the EEOC conducts of its administrative judges' (AJs') decisions is misplaced. *See* Majority at 4; *see also id.* at 4 n.14. Contrary to the majority, the EEOC's review of an AJ's "legal conclusions," Majority at 4 n.14, is not analogous to the Authority's review of an arbitrator's contract interpretations. *See* 5 U.S.C. § 7122(a)(2); *see also* H.R. Rep. No. 95-1717, at 153 (1978) (conf. rep.), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2887 (Authority is authorized to review awards only "on very narrow grounds"). The Statute requires the Authority to apply the highly deferential essence standard when reviewing those interpretations. *E.g., U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990).

[9] *See NFFE, Local 1437*, 53 FLRA 1703, 1710-11 (1998) (In determining whether an award is consistent with the applicable standard of law, the Authority *defers* to an arbitrator's underlying factual findings.).

showing that [the grievant's] qualifications were plainly superior to those of the selectee,"[10] that the Agency preselected the selectee,[11] and that the Agency did not select the grievant because of his national origin.[12] Based on those findings, the Arbitrator concluded that the Agency violated Articles 5, 8, and 36 of the parties' agreement. But the majority sets these findings aside, based on its own analysis of the record. This is a further error by the majority that invalidates their decision.

For these reasons, I disagree with the majority's disposition of the case, and would deny the Agency's exceptions.

[10] Award at 27.
[11] *Id.*
[12] *Id.* at 28-29.