American Federation of Government Employees, Local 1923 and Social Security Administration, Baltimore, MD

101 FLRR 2-1021

July 7, 2000

Appealed (O-AR-3346)

The Arbitrator found the agency violated the parties' agreement when it compared the grievant to other applications in contravention to his priority consideration status.

The grievant applied for a GS-13 position and invoked his priority consideration he received as part of an EEO complaint settlement from 1996. The grievant was not selected for the GS-13 position. The Union filed a grievance that the Agency breached the parties' agreement because it did not grant the grievant priority consideration. The Agency argued that the grievant did not have up-to-date experience for the GS-13 position and there were other employees who were also qualified. The Agency also argued that the collective bargaining agreement did not apply in this instance because the position applied for was not within the bargaining unit. The Arbitrator found that priority consideration meant that the grievant would be considered separate and apart from any other applicant and not be compared with other applicants. The Arbitrator found the Agency violated the CBA because it considered the grievant along with other applicants in contravention to his priority consideration status. The Arbitrator ordered the Agency to place the grievant in a GS-13 position for which he is qualified, to pay the grievant back pay and interest from the date of his non-selection and reasonable attorney's fees.

Arbitrator: Hugh D. Jascourt

DECISION AND AWARD

This is an arbitration pursuant to Articles, 18, 24 and 25 of the National Agreement (Agreement) between the American Federation of Government Employees Local 1923 (Union) and the Social Seem* Administration (SSA). Arbitrator Hugh D. Jascourt was selected from the panel maintained by the parties under Article 25 of the Agreement. A hearing was held on April 11, 2000 at the offices of SSA. At the hearing each party was afforded an opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. At the hearing the parties submitted four joint exhibits, and the Union submitted six exhibits and SSA submitted five exhibits which were admitted into evidence.

The parties agreed to submit post hearing briefs which were timely received by the Arbitrator on June 7, 2000. The Award in this matter is due no later than July 7, 2000.

On June 17, 1999, the Grievant, a GS-12 Management Grievance Analyst in the SSA History Room, a compartment of the Office of Publications and Logistics Management, asserted that by his nonselection for the position of Lead Inventory Management Specialist, GS-2010-13, on the Supply Management Team, also a component of OPLM constituted discrimination against him on the basis of age, sex, race and retaliation. However, the gist of the grievance was that SSA did not accord the Grievant the GS-13 priority consideration provided to him as the settlement of an EEO complaint in which the Grievant claimed he was not selected on the basis of his sex (Un.Ex.4)

The Issue

The parties agreed at the hearing to the following issue (TR.p.17):

Whether the Union has proved by a preponderance of evidence that SSA discriminated against him on the basis of age, sex, and/or race and retaliated against him in violation of the Grievant's rights under Article 18 and 24 of the 1996 SSA/AFGE National Agreement or other law or regulation when it declined to select him, via priority consideration for a Lead Inventory Supply Specialist position. If so, what is the appropriate remedy?

Relevant Documents

The EEO Settlement Agreement, signed May 1, 1996, provides in pertinent part (Un.Ex.7)

> The Agency will present Mr. Krebs with a Letter entitling him to priority consideration for any position covered by the SSA National Promotion Plan or any other Agency Promotion Place for which he is qualified

(Underlined portions were added in handwriting)

The Management Official Promotion Plan (MOPP) provides the pertinent part (UN.Ex.8):

> 17.1.1... Priority consideration does not guarantee selection.
>
> 17.2.2... An employee is entitled to only one priority consideration for noncompetitive promotion for each instance in which he or she was denied proper consideration.

> 17.4.5 ... The name(s) of the employee(s) requesting to exercise priority consideration must be referred by the personnel office to the selecting office prior to the referral of the best qualified list and the list of candidate to be considered noncompetitively. The selecting official must take time to give serious consideration to each priority consideration eligible.
>
> 17.4.5.2 ... Selecting decisions will be based on the selecting official's personal judgment at to whether the priority consideration had the potential for successful performance of the duties and the responsibilities of the position being filled. Considerations involved in reaching this decision include the employee's work history, work experiences and accomplishments (both paid and unpaid), training/education and awards as they relate to the requirements of the position.

Article 26 Section 13 of the Agreement, entitled priority considerations; provides in pertinent part:

> A. Definition. For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of previous failure to properly consider the employee for selection because of procedural, regulatory or program violation.
>
> B. Eligibility ...
>
> > 1. ... An employee is entitled to only one priority consideration for noncompetitive promotion for each instance in which he/she was previously denied proper consideration.
>
> C. Processing ...
>
> > 1. Prior to the referral of eligible candidates to the assessment panel, the names(s) of the employee(s) requesting to exercise priority consideration will be referred to the selecting officer. The selection officer will make a determination on the request prior to the assessment panel's evaluation of any other candidates for the vacancy.

Background

As indicated above, grievant had filed in April 1995 an EEO complaint based on gender when he was not selected for three GS-13 General Supply Specialist positions in the office of Finance Assessment and Management (DCFAM) in the office of Publications and Logistics Management (OLPM) under Vacancy Announcement Numbers I-757 and 58. On May 1, 1996 Grievant and the Agency reached a settlement in which SSA neither confirmed or denied Grievant's allegations but paid his attorney fees and granted him entitlement to "priority

consideration for any position covered by the SSA National Promotion Plan or any other agency promotion plan for which your are qualified." (Un.Ex.7).

As noted above, Grievant was entitled to only one use of his priority consideration. On March 1, 1999, Grievant invoked his priority consideration and applied for the position of Lead Inventory Management Specialist GS-2010-13 within DCFAM OLPM under Vacancy Announcement I-87 (Un.Ex.1.2). At that time Grievant was 52 years old (Un.Ex.4).

Harold Brittingham, Director of OLPM reviewed Grievant's application without interviewing him (TR p.213). He testified that he did not recommend Grievant for priority consideration solely because Grievant's experience was not up to date (TR p.213). He further explained that it would take six months to a year to train Grievant and to bring him up to speed as the result of having installed three major systems involving supply transactions (TR pp.237-238). Based on Mr. Brittingham's recommendations James F. Trickett, Associate Commissioner for OPLM determined that Grievant should not be selected (TR. p. 278). More specifically, after the March 5, 1999 closing date for applications (Un.Ex.2), Mr. Brittingliam. submitted a March 23, 1999 memo to Mr.Trickett. His rationale was:

> ... Presently, there are personnel working in the area, with current, up-to-date experience, who also qualify for the position.
>
> Therefore, in fairness to all applicants, I believe that equal consideration
>
> should be given to all employees, who appear on the best-qualified list

(Un.Ex.6).

Ultimately, Stephanie Maddox, a 45-year old female, was selected through a competitive process which included Grievant, who made the best-qualified list, (TR. pp.236, 243).

Positions of the Parties

The Union

The Grievant established a prima facie case on the basis of his being a 52 year-old male who had engaged in prior activity which was known to the Recommending and Selecting Officials who ultimately selected a 45-year old female through the competitive process. Even absent a prima facie case, SSA breached the EEO Settlement Agreement when it did not grant Grievant priority consideration. Instead, the Grievant was compared to the other applicants as shown by Mr. Brittingham's statement to Mr. Tickett in the Union Exhibit 6 that he

knew of "personnel working in the area, with current-up-to-date experience, who also qualify for the position."

In addition, Mr. Brittingliam's claim of the necessity for the need for Grievant to have up-to-date knowledge is pretextual. The position description did not add until October 25, 1999 the requirement of operation of computer equipment for the Warehouse Management Control System (Agency Ex. 3). This lack of knowledge was not a problem in his recommendation of Judy Dickerson for promotion, despite her needing a learning curve of a little over a year. He further pointed to the selectee's extensive experience with the DSOM system which he stated was installed in early 1999. However early 1999 was when Grievant applied for priority consideration. Also this special experience was not in the job description or the vacancy announcement.

Moreover, there was no Agency rebuttal to the Union's argument that Grievant was not considered alone on his own merits. The EEOC in Bishop, Department of Transportation (April 10, 1991) and Allen R. Bignall-Kreckel v. West, Jr., Secretary, Department of the Army 98 FEOR 1043 (1997) has ruled that priority consideration means "give candidates bona fide consideration on their own merits without competition with other potential candidates." Both the MOPP and Article 26 of the parties' agreement contain the same requirement. However whether neither Mr. Brittingham nor Mr. Trickett stated they felt the Grievant was not capable of performing the job in question - and performing it well. Absent such a determination, they were required to have selected Grievant. Mr. Trickett's supervisor, Michael Lott confirmed that Grievant was compared to other candidates. He told the EEO counselor that he thought Mr. Brittingham "expected that people with current experience would be available and might be better candidates."

In addition, SSA argues that the position sought by Grievant is out of the bargaining union. Only the Federal Labor Relations Authority can make that determination. Even if the SSA's position were valid, this does not affect the right of a bargaining union employee to have his priority consideration honored.

SSA

Grievant's discrimination claim are governed by Article 18 and not Article 26 because Article 26 pertains to promotions to bargaining unit positions and the position for which Grievant was not selected was a non-bargaining unit position. Moreover, the Arbitrator is precluded by FLRA case law from determining the bargaining unit status of an employee. In Small Business Administration v. AFGE Local 2532. FLRA No. 125 (1988) the FLRA stated such questions are in its exclusive jurisdiction even if the question is raised as a collateral issue in a grievance properly brought under the collective bargaining agreement.

Therefore, the Article 18 EEO process, not Article 26, governs the facts. The Grievant started this process by his informal EEO complaint. Consequently, Grievant is bound by the EEO rules that apply to the EEO statutory process. In addition, the MOPP procedures apply to the position for which the Grievant applied has priority consideration. Grievances under the MOPP lie in the agency grievance procedure.

In any event, under the MOPP, priority consideration requires "only that the employee receive a bona fide consideration by the selection officer before other candidate are sought." Mr. Brittingham gave Grievant just that. He believed Greivant did not have the needed experience as he had been out of the supply field the past six years. Over the past three to five years, SSA has installed three major systems; all involving supply transactions and systems.

The final selecting authority rests with SSA's selecting officials since 5 USC. 7106(a) provides that nothing in this chapter shall affect the authority of any management official with to make selections or appointments. As a result, the validity of Grievants claim rests upon his having met his burden of proof that shows that he was discriminated against within the meaning of Article 18 and applicable EEO rules and regulations. However, Grievant has demonstrated no prima facie case of discrimination or reprisal. The selecting officials articulated a legitimate business reason in deciding to not select Grievant since Grievant did not posses the needed experience.

In addition, because Grievant was 52 and the selectee was 45 both "were approximately at the same age range." Based on O'Connor v Consolidated Coin Caterers Corporation. 517 U-S 308 (1996) this difference in ages does not constitute a basis to find age discrimination.

Also there is no showing that the selection was based on gender. It was based on qualifications. Since 72% of SSA's workforce is female, "it would be reasonable for females to represent a majority of the selections." There is no prima facie case based on race as the selectee was the same race as Grievant. Greivant's claims of reprisal are defeated because no one in the selection process "had any specific prior knowledge of the Grievant's prior EEO, that he filed in 1995, alleging sex discrimination, were not involved with it and had no reason to retaliate against the Grievant." The priority consideration letter contained no reference to Grievant's age, gender or race or provide any specific information about the prior EEO settlement. In fact, a priority consideration can be based on a matter that may have had nothing to do with the individual employee, as in the case of a class action.

DISCUSSION AND ANALYSIS

1. Bargaining Unit Status

The agency contends that Article 26 does not govern the issue before the Arbitrator because the position for which the Grievant was not selected is not in the bargaining unit. It is accurate that when the position was posted it was identified as a non-unit position (Un.Ex.2, TR.p.700). There is testimony by the Agency that the position is non-unit because it is primarily a team leader and the FLRA Views Team Leader as supervisors (Tr. p. 206). However, Richard A. Matthews, the HQ Team Leader for the HQ Customer Service Team upon cross-examination revealed that the position issue has not been subject to a determination by the FLRA (Tr.p.208). The Union contests SSA's claim that the position is out of the unit.

SSA is correct that under SBA v. AFGE supra, questions concerning bargaining unit status of employees are within the FLRA's exclusive jurisdiction. This means that SSA cannot determine the unit status of the team leader position in issue. The FLRA does not make generic determinations. Instead it does so based on the specific facts of a particular position. It is undisputed that the FLRA has not made a determination. The Arbitrator has no basis to defer to SSA'a determination. Under Army Transportation Center, Ft.Eustis, v. And NAGE. Local R4-6, 34 FLRA 860 (1990), the Arbitrator would have to defer his decision until the FLRA were to determine unit status if such an adjudication of the issue is necessary to determine the outcome of the case.

Such a determination of the unit status of the Team Leader position in issue is not necessary to determine the outcome of the case. The Arbitrator's doing so shall not be constituted as his accepting SSA self-determination.

2. Effect of the MOPP

SSA contends that because the selection was made under the MOPP, a grievance over the application of the MOPP must be through the Agency grievance procedure. This in effect is an argument claiming the grievance is not arbitrable. Article 24, Section 6 of the parties' Agreement precludes raising arbitrability subsequent to the final step of the grievance procedure. No such claim of non-arbitrability was raised during the grievance procedure (UN.Ex. 4) or even at the arbitration hearing. Conversely, SSA told the Arbitrator that there was no issue of arbitrability (Tr.p.31)

Another effect could be that the MOPP and Article 26 of the Agreement provide different definitions of priority consideration or of a "bona fide consideration." However, the expert provided by SSA to describe priority consideration views both the MOPP and Article 26, section 13 to be basically the same (TR.p.253). At least no meaningful distinctions were made known to the Arbitrator.

Consequently, there is no reason to determine whether the MOPP or Article 26 is applicable. The same results should occur under either one.

Most importantly, no basis has been provided to preclude the negotiated grievance procedure from being applicable to Grievant, a unit employee, from claiming the settlement agreement he received was not honored. The settlement agreement precluded Grievant priority consideration "for any position covered by the SSA National Promotion Plan or any other agency promotion plan which your are qualified" (Un.Ex.7) (Emphasis supplied). In fact, the underlined words were added to the language originally typed.

3. The Applicability of Management Rights

SSA appears to be arguing that the Arbitrator cannot judge whether the selection officials gave Grievant "bona fide" consideration because 5 U.S.C 7106(a) precludes a union from negotiating on the right of a management official to make a selection. SSA then fiwther argues the only way that such a selection can be examined is to determine whether EEO regulations or laws were violated in this process. It is so basic that a Union can grieve whether an agency has obeyed its own rules that no further discussion is needed. However, the Arbitrator cannot believe that SSA is arguing that Article 26, section B on priority consideration is unenforceable.

4. EEO Considerations

a. Age

SSA contends that by the selectee being 45 and the Grievant 52, they are in the same class and that the Supreme Court in O'Connor, supra, held age discrimination cannot be found on that basis. However, what the Supreme Court did in that case was to reverse the Fourth Circuit Court which had held that because a replacement was 40 years old, he was not the same class a complainant. In fact SSA even highlighted to the Arbitrator these words of the Supreme Court.

> ADEA prohibits discrimination on the basis of age and not class membership.

b. Reprisal

SSA argues that reprisal could not occur because the responsible

management officials had no specific information about the prior EEO settlement and that priority consideration could even be based on a matter which had nothing to do with the individual employee. However, the document provided to the officials involved in the selection process specified that priority consideration as "a result of the settlement of your discrimination complaint" (emphasis added).

c. General

SSA appears to be arguing that the EEO settlement cannot be enforced unless a complainant is able to show, under the method of analysis set forth by the Supreme Court in McDonnell Douglas Corp. v. Green 411 U.S. 792 (1973) that the reason for the settlement not being honored is due to discrimination linked to a protected class. Exhaustive research finds no basis in EEO law to justify this proposition. In fact, to do so would pit an added burden on complainant having to demonstrate that the reason for non-compliance was based on discrimination linked to a particular class. The Arbitrator finds that the only burden of proof Grievant must meet is that he was not given bona fide consideration for his priority consideration. In fact, not withstanding the standard disclaimer of wrong doing by SSA in the EEO Settlement Agreement (non-admission clause) for a complainant to have to do something more lends itself to perpetuation of the discrimination alleged and which allegation resulted in a settlement. Because non-compliance with the EEO settlement, if proved, would result in the perpetuation of discrimination, the issue agreed upon by the parties is construed to be as described in the next paragraph.

5. The Real Issue

It is distressing that all those layers described above have to be peeled away to get to the real issue: Did Grievant receive the priority consideration he was promised in his EEO settlement? To answer this one must determine whether Grievant received a "bonafide" consideration of his application. Although no one has offered a definition of "bona fide" it is probably because the term is so commonly used to mean something done in good faith, or done without deceit or fraud. Put differently, whether it was done honestly.

6. Bona Fide Consideration

a. Standard used to judge what occurred.

SSA appears to be attempting to establish a higher burden of roof for Grievant to meet. In contrast, this Arbitrator believes that the articulation of the reasons for non-selections should be subject to greater scrutiny than they would be under McDonnell Douglas or, alternatively, to not be given the high degree of deference this Arbitrator would give in a non-selection type case because of two reasons.

One reason is that the employee entitled to priority consideration is entitled to only one chance. If the explanation for non-selection are facile and not subject to careful examination, settlements of priority consideration become of little real value. In other words, their worth is illusory if questioning of the reasoning of the selecting officials cannot be probing.

The second reason must be combined with the first. Priority consideration is remedial in nature. Even the MOPP provides that such a selection method can be attributable to a prior non-selection being due to "a procedural, regulatory or program violation." It is basic jurisprudence that matters of a remedial nature are subject to greater scrutiny.

At the same time the Arbitrator finds nothing to support the Union's claim that by virtue of the priority consideration eligible being qualified for the position the issue shall result automatically in selection (See TR p. 92). The Union asserted during the hearing that prior Arbitrators have held that being qualified creates entitlement TR p. 93). However, the Arbitrator is unaware of any arbitration decision applicable to the parties for him to consider. The Arbitrator is also unaware of the parties having agreed to conferring prior decisions with a stare decisis impact. Consequently, a party relying on such a decision should have notified the opposite party on such reliance - to allow counter argument. This was not done.

The Arbitrator accepts the criterion in MOPP Section 17.4.5.2, that the decision to select should be based on judging whether the priority consideration eligible has the potential for successful performance of the duties and responsibilities of the position being filled. However, this judgment must be made according to 17.4.5 "Prior to the referral of the best qualified list and the list of candidates to be considered non-competitively." (Un.Ex. 8).

b. Was Bona Fide Consideration Given to Grievant?

Mr. Brittingham. in his March 23, 1999 memo to Mr. Trickett explained he did not recommend Grievant because Greivant has not worked in the supply field the last six years and during that period many changes have occurred. Mr. Brittingham adds these words (Un.Ex. 6)

> Presently, there are personnel working in the area, with current up to date experience, who also qualify for the position. Therefore, in fairness to an applicants, I believe that equal consideration should be given to all employees who appear on the best-qualified list..

SSA stressed how the selectee was better qualified that Grievant to do the job.

There is no testimony in the record that Grievant could not be very successful in the position in issue. Instead, Mr. Brittingham. wanted to give equal consideration to other employees. He, in fact, identified them: "personnel working in the areas, with current up-to-date experience." To this Arbitrator this indicates he knew who applied for the position - 18 days after the closing date for application - and compared Grievant to them. Otherwise, how did he know others had such "up-to-date experience" and applied? In short, Mr. Brittingham. did not evaluate Grievant on his own worth but instead compared him to other candidates. The

basic principle of Priority-consideration - of not being compared to other candidates was clearly violated. More specifically, the EEOC, Allan R. Bignall-Kreckel v. West, Jr., Secretary, Department of the Army, 98 FEOR 10431, declared bona fide consideration is to be given to all aneligible on his own merit without competition "with other potential candidates-" (emphasis supplied.)

When asked by the Arbitrator what up-to-date knowledge was missing and why was that critical, Mr. Brittingham responded that in the last 3 to 5 years three major systems were installed involving supply transactions (TR P. 237). He added that it would have taken six months to train Grievant and to bring him "up to speed" (TR p.238). It can be a legitimate reason for a manager to not want at a critical time to spend time training someone new and to hope he can get someone he does not need to train. In this case, Mr. Brittingham's response is not convincing.

Mr. Brittingham did not interview Grievant or talk to his prior supervisors (TR. Pp.231,239-40). Since SSA maintains tha Mr .Briftingham could not have engaged in reprisal because he did not know Grievant very well, Mr. Brittingham, had no foundation to judge how quickly Grievant could learn. In fact, upon questioning, Mr. Brittingham. revised his claim to now saying Grievant might be able to learn the new codes, etc., in three months. (TR p.239).

What is more important is that the Selectee had to learn some of the systems after being selected or is just learning them. One of the three new systems was DDOM. It was installed in early 1999 -around the time of selection (TR p.24 1). The Warehouse Management Control System was not fully operative (TR p.242).

Operation of it was not added to the position description until October 1999 (Un.Ex.2). Mr. Brittingham selected Judy Dickenson for a Grade 14 position although she was still learning the remaining new system, the XLN, after she had been on the job for a year (TR pp.245-246).

These statements and other credibility problems (such as Mr. Brittingham testifying the selectee having had experience on the systems which would take too long for Grievant to learn when others had not yet had the experience) cause the Arbitrator to disbelieve Mr. Brittingham's claim the only reason for non-selection of Greivant was lack of experience (TR pp.228). To the extent that there was something which the Arbitrator did not appreciate of which would put this in a different light. SSA did not present testimony to that effect or discuss it in its post hearing case. Instead, SSA appeared to expect the Arbitrator to accept Mr. Brittingham 's explanation merely because he said it. Instead SSA fibcused on matters not relevant to the central issue.

CONCLUSION

It should be obvious that Grievant's lack of recent computer experience was not a bona fide reason for rejecting Grievant's priority consideration. In other words, the evidence is so clear that one does not have to closely scrutinize the rationale used by Mr. Brittingham to explain his action. He did not apply the same standard to the selectee or to other selection such as Ms. Dickerson. His rationale was that the selectee was a better choice. He did not declare he did not believe the Grievant would be successful. Instead, he compared Greivant to other potential candidates. In fact, it appears he compared Greivant to other known candidates. It does not matter whether or not he did so based on Grievants's age, Grievant's sex, or whether Greivant's prior EEO complaint denoted to him the Grievant was a troublemaker. It does not matter whether or not there really was a pre-selection. What does matter is that there was not bona fide consideration of Grievant there was comparison of him to other candidates. Consequently, the Arbitrator must believe Grievant would have been selected but for SSA's ignoring the obligations under priority consideration under either the MOPP or Article 26. Denial of an EEO settlement must be viewed on its face as an act of discrimination.

AWARD

Based on the foregoing Discussion and Analysis and careful examination of all the evidence of the parties, the Arbitrator finds that SSA did not accord Grievant the priority consideration it had agreed to provide in the May 1, 1996 settlement of Grievant's claim of gender based discrimination when he was not selected for positions under two vacancy announcements. The Arbitrator further finds that if bona fide consideration had been given to Grievant he would have been selected on March 23, 1999. Consequently, SSA shall retroactively provide Grievant with back pay and interest, and all such emoluments associated with this (such as within grade increases) retroactive to said date of non-selection. However, to minimize workplace disruption he shall not occupy a Grade 13 position until SSA places him in such a position for which he is qualified provided that Grievant does not have a justifiable and reasonable basis to object to such placement. Such placement shall be effectuated within six months from this decision, absent good cause shown or mutual agreement of the parties.

In addition because the Grievant was affected by an unwarranted personnel action, the services of the Union's attorney were rendered with respect to remedying this action and the Union was the prevailing party, the award of Attorney's fees is in the interest of justice. Therefore, SSA shall pay reasonable attorney fees upon timely application consistent with the practice of the parties.

The Arbitrator shall retain jurisdiction limited to any disputes which arise in either or both of two situations:

1. Placement of Grievant in a Grade 13 position;

2. Payment of reasonable attorney fees.

However, if such dispute(s) arise and cannot be resolved by the parties jurisdiction shall be invoked only by timely request for such, detailing with narrow specificity the matter which needs to be adjudicated.

Hugh D.Jascourt
Arbitrator
Date: July 7, 2000