64 FLRA No. 128

PENSION BENEFIT
GUARANTY CORPORATION
(Agency)

and

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R3-77
(Union)

0-AR-4416

DECISION

April 28, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to two awards (the merits award and the remedy award, respectively) of Arbitrator Robert T. Moore 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 grievant's representative (the Representative) filed an opposition to the exceptions. [1]

The Arbitrator found that the Agency violated the Agency's Directive on Professional Courtesy (Directive), the Agency's Workplace Violence Policy (Policy), § 7116(a)(4) of the Statute, and Title VII of the Civil Rights Act of 1964 (Title VII), and he awarded the grievant compensatory damages under Title VII.

For the reasons that follow, we remand the award of damages and deny the remaining exceptions.

II. Background

As relevant here, the Union filed a grievance that challenged the Agency's assignment of labor-relations and personnel-management employees to positions involved in the Agency's internal equal employment opportunity (EEO) complaint resolution procedure. In April of 2002, [2] the grievant testified on behalf of the Union at arbitration proceedings (the EEO structure arbitration) held in connection with the grievance. Merits Award at 2. The arbitrator in that case ruled in favor of the Union. *Id.*

On November 13, the grievant and a supervisor with whom she was working for the day (the temporary supervisor) had a meeting (the meeting) with some visitors to the Agency. At the end of the meeting, as the visitors began to leave, the grievant returned to her office. Subsequently, the temporary supervisor confronted the grievant in her office.

Shortly after the confrontation, the grievant e-mailed the Agency's General Counsel (GC), complained about the confrontation, and asked to meet with the GC to discuss it. *Id.* at 9. The next morning, after learning that the GC was out of the office that week, the grievant redirected the e-mail to the individual who had been designated to act as the GC in the interim (the Acting GC). *Id.* The Acting GC responded by stating that the GC would return to the office that afternoon, and that the matter could wait until then. *Id.* at 11. Upon his return to the office that afternoon, the GC discussed the matter separately with the temporary supervisor and then with the grievant and her Union representative. *Id.* at 11-12. By that point, the grievant had filed an EEO complaint regarding the confrontation, as well as a grievance concerning both the confrontation and the GC's alleged "dereliction of responsibilities" in responding to the grievant's allegations regarding the confrontation. *Id.* at 18.

Subsequently, the Agency conducted two internal investigations (the grievance investigation and the management investigation, respectively). *Id.* at 18. At the end of those investigations, the Agency concluded that no further action was warranted by management. *Id.*

1. We note that the Union, the National Association of Government Employees (NAGE), Local R3-77, previously was affiliated with the National Treasury Employees Union, but that, in 1999, NAGE was certified as the exclusive representative of the bargaining unit. *See* Merits Award at 27-28 & Remedy Award at 44. Subsequently, the national office of NAGE placed Local R3-77 under an emergency trusteeship. *See* Merits Award at 28. In 2007, as discussed further below, the national office of NAGE filed a representation petition with the Authority, waiving interest in the bargaining unit and requesting rescission of the 1999 certification. *See* Remedy Award at 44. The Arbitrator found that, for the arbitration proceedings at issue here, the national office of NAGE "left [the grievant] to proceed on her own wits and at her own expense, [and] except for Local R3[-]77's token presence, this case has been one between the grievant and the Agency." *Id.* at 45. There is no dispute that the opposition is properly before the Authority.

2. All dates are in 2002 unless otherwise indicated.

at 24-25. The grievance was then submitted to arbitration.

III. Merits Award

In the merits award, the Arbitrator stated the issues as follows:

> Whether the Agency, through the actions of [the temporary supervisor] on November 13 . . . violated any provisions of the parties' Labor Agreement, internal rules, regulations or policies of the Agency, or of the laws, rules or regulations of the United States, and if so, what should the remedy or remedies be?
>
> Whether the Agency, through the actions and/or inactions of the [GC] and the [OGC] or other components of the Agency, in response to the grievant's complaint about [the temporary supervisor's] conduct on November 13 . . . failed to comply with or violated any Labor Agreement provisions, internal rules, regulations or policies of the Agency, or of the laws, rules or regulations of the United States, and if so, what should the remedy or remedies be?

Id. at 1.

The Arbitrator found that, during the confrontation, the temporary supervisor and the grievant exchanged words over the grievant's departure from the meeting. The Arbitrator also found that the temporary supervisor entered the grievant's small office and that the grievant stood up from her chair because she was uncomfortable with his tone and proximity. *Id.* at 7. The Arbitrator determined that it was "clear from the claustrophobic nature of the windowless confines of the space, [that the temporary supervisor's] agitated advance toward her was physically threatening." *Id.* at 7-8. The Arbitrator found that the temporary supervisor also "angrily repeated several times in [the grievant's] face, 'keep pushing it[.]'" *Id.* at 8. Although the Arbitrator concluded that the temporary supervisor's actions did not violate Title VII, he found that they did violate the Directive [3] and the Policy, noting that the Policy prohibits not only "actual physical aggression," but also "oral or written statements, gestures or expressions that communicate a threat of physical harm." *Id.* at 37.

The Arbitrator addressed whether the manner in which the Agency conducted the grievance investigation and the management investigation violated § 7116(a)(4) of the Statute. The Arbitrator found that this issue was properly before him because one of the stated issues was whether the Agency had violated "any law of the United States[.]" *Id.* at 70.

With regard to the merits of that issue, the Arbitrator applied the standards set forth in *Letterkenny Army Depot*, 35 FLRA 113, 117-18 (1990) (*Letterkenny*). The Arbitrator found that the grievant engaged in protected activity of testifying against the Agency in the EEO structure arbitration and that her testimony was a motivating factor in the Agency's conduct of the investigations. Merits Award at 73. In this connection, the Arbitrator found that the senior labor-relations manager (the senior LR manager) who ordered the investigations was aware of the grievant's testimony and resented the grievant for it, as demonstrated by his "open hostility" toward the grievant during the hearing, which the Arbitrator "considered in the context of other witness testimony and documents in evidence[.]" *Id.*

The Arbitrator also found that the grievant demonstrated "a reasonably close proximity in time" between the EEO structure testimony and the conduct of the investigations. In this regard, the Arbitrator found that: the grievant testified in April; the Managing Human Resources Director (HR Director) who was in charge of assigning the investigations gave a "disparaging assessment" of the grievant's testimony on August 30; and the HR Director received the grievant's current grievance "[w]ithin five months" thereafter. *Id.* at 74.

Further, the Arbitrator determined that the HR Director failed to assign the investigations to "a hard-nosed, no holds barred, investigator as had been done in" other investigations. *Id.* at 50. The Arbitrator found that, instead, the HR Director assigned the investigations to a human resources investigator (the HR investigator) – and assigned a particular labor-relations attorney (the LR attorney) to oversee the investigations – because they were individuals whose investigations likely would exonerate the Agency. *Id.* at 50-51. Specifically, the Arbitrator stated that the HR Director, "no doubt with the participation of" the senior LR manager, selected "the investigation team which purposefully bore no resemblance in quality to the investigative resources previously unleashed on" the Union's chief steward, "who faced . . . [a] less serious complaint[.]" *Id.* at 75. In this connection, the Arbitrator noted that the complaint against the chief steward involved only an alleged violation of the Directive, while the grievant's

3. The Directive states, in pertinent part, that the Agency "will not tolerate discourteous behavior and other forms of incivility which constitutes unprofessional behavior and unacceptable conduct." Merits Award at 36.

grievance involved alleged breaches of not only the Directive, but also the Policy. *Id.*

With regard to the Agency's rebuttal burden under *Letterkenny*, the Arbitrator found that the Agency would have taken the same action even absent the grievant's protected activity – insofar as the Agency would want to protect the GC from his "pronouncement of a 'communications failure'" – but this could not constitute a "legitimate justification" within the meaning of *Letterkenny* because "[i]t would place members of Management (such as the [GC]) and supervision (such as [the temporary supervisor]) above Agency policies otherwise applicable to all."[4] *Id.* at 76-77. Accordingly, the Arbitrator found that the Agency's conduct of the investigations violated § 7116(a)(4) of the Statute.

The Arbitrator also found that the conduct of the investigations violated Title VII because it was in reprisal for the grievant's testimony during the EEO structure arbitration. *Id.* at 86.

IV. Remedy Award

In the remedy award, the Arbitrator framed the issue as follows: "What appropriate remedies are available and should be awarded for the [violations found in the merits award]?" Remedy Award at 2.

The Arbitrator stated that, "[t]o understand the damage and relief portions of this arbitration requires considering in tandem two triggering incidents," specifically: (1) the confrontation between the grievant and the temporary supervisor; and (2) the Agency's treatment of her allegations regarding that confrontation. *Id.* at 32. With regard to the confrontation, the Arbitrator stated that its "damaging emotional effects on the grievant . . . were immediately evident" after the confrontation. *Id.* With regard to the Agency's treatment of the grievant's allegations, the Arbitrator stated that "[t]he emotional and psychological impact on the grievant . . . [was] not as immediate as her [Post Traumatic Stress Disorder (PTSD)]-like symptoms that followed" the confrontation, but that, "following the [GC's] pronouncement that the [confrontation] was just a case of mis-communications, the grievant became severely distressed with the realization that the official she had turned to for help was not going to vindicate the trust she had in him." *Id.* The Arbitrator further stated that she then "lost her appetite and ability to sleep, consequences which can be ascribed in part to the impact of [the confrontation] but [exacerbated] by" the Agency's treatment of her allegations. *Id.* at 32-33.

The Arbitrator then stated that, "because of the close proximity in time" between the confrontation and the GC's "cursory rejection two days later of the seriousness of her" allegations, it was "clear that her severe depression and anxiety caused by the refusal of Management to conduct a serious investigation" was "fortified and intensified by the PTSD-like reaction she suffered as a result of the" confrontation. *Id.* at 33. In this connection, the Arbitrator stated that "[t]he emotional distress of the one was built on that of the other[]" and that, "under the doctrine of *respondeat superior*[,] the Agency bears the blame for [the temporary supervisor's] conduct and its proximate cause of harm to the grievant." *Id.* The Arbitrator also stated that the Agency's treatment of her allegations "caused the grievant to suffer" a variety of "additional or new anguish producing symptoms beyond those typically associated with PTSD, while at the same time causing an intensifying of the symptoms that had followed immediately after" the confrontation. *Id.* The Arbitrator found that the violations of the Directive and Policy, and the retaliation, "in combination [were] the proximate cause of the grievant's mental and emotional sufferings." *Id.* at 34. The Arbitrator also found that the Agency had not demonstrated that other "stressors" in the grievant's life had caused her symptoms. The Arbitrator awarded the grievant compensatory damages.

In addition, the Arbitrator noted that the Agency had brought to its attention, after the close of the hearing regarding remedies, that the national office of NAGE was "waiv[ing] interest" in the local bargaining unit, but he found that this had no effect on the arbitration proceedings. *Id.* at 44. In so finding, the Arbitrator stated that the national office had "left [the grievant] to proceed on her own wits and at her own expense[.]" *Id.* at 45. The Arbitrator retained jurisdiction to provide correction or clarification of the award on joint motion of the parties, and to consider a petition for attorney fees. *Id.* at 47. He also stated that he "[e]xpects both parties to exert good faith to resolve this issue before jointly notifying me tha[t] my further intervention will be necessary." *Id.*

4. As noted further below, the Agency's exceptions do not address the Arbitrator's discussion of its failure to meet its rebuttal burden.

V. Positions of the Parties

A. Agency Exceptions [5]

The Agency contends that the Arbitrator's finding of a violation of the Policy is based on a nonfact. *See* Exceptions at 5-6, 15-16. The Agency also contends that the finding of retaliation in violation of Title VII is based on a nonfact. *Id.* at 6. In addition, the Agency challenges, as nonfacts or as otherwise unsupported by the evidence, the Arbitrator's findings that: (1) the HR Director was aware of, and had animus against, the grievant for participating in the EEO structure grievance; (2) the HR Director selected the HR investigator "because of her inability to comprehend or investigate cases of this type;" (3) the HR Director required the HR investigator to conduct two separate investigations when only one was needed; (4) the HR Director frequently dealt with the Union's chief steward; (5) the HR Director made it obvious that, during the investigations, it was urgent for the HR investigator to resolve any questions in a manner that would exonerate the GC; (6) the LR attorney was a natural skeptic and cynic; (7) the HR Director and the LR attorney were acting with a determination to "break" and "emotionally torment" the grievant; (8) the grievant was emotionally fragile at the time of her meeting with the GC; (9) the investigations were conducted under the "watchful eyes" of the HR Director and the LR attorney; (10) the LR attorney was assigned to guide the investigations because she made a higher salary than the HR investigator; (11) an HR specialist's failure to promptly respond to an email from the grievant demonstrated animus; (12) the temporary supervisor sent an "over the top" e-mail regarding the grievant out of a sense of reprisal against the grievant; and (13) the grievant had PTSD. *See id.* at 16-18 & Attachs. 15 & 16. Further, the Agency asserts that the Arbitrator erroneously found that the HR investigator and the LR attorney intentionally mishandled the investigations because of the grievant's Union activities, and that, in an August 8, 2008 letter (the post-arbitration letter), the Arbitrator repudiated that finding. [6] *Id.* at 17.

The Agency also contends that the Arbitrator exceeded his authority and failed to conduct a fair hearing because he: (1) failed to provide notice that he intended to address an unfair labor practice (ULP) claim, as such a claim was not in the grievance; (2) allowed the admission of, and relied on, evidence concerning other investigations that were distinguishable from the disputed investigations; and (3) "examined the issue of alleged past hostility between the [U]nion, its factions, and [the Agency]" and "attempted to anticipate and enjoin future disputes between [the grievant] and the National and Local [U]nion and its factions." Exceptions at 6, 18-19. In addition, the Agency asserts that the Arbitrator ignored certain record evidence, including evidence that: both the HR investigator and the GC left the Agency; that the HR Director was selected for a different position in the Agency, in which he no longer did labor-relations work; and the Agency took "other actions . . . to prevent or minimize future, similar actions and to improve its investigation practices/standards." *Id.* at 14.

The Agency contends that "no evidence" supports the Arbitrator's finding that Agency animus against the Union resulted in the handling of the disputed investigations, or his ultimate conclusion that this constituted a ULP. *Id.* at 6, 18. In this connection, the Agency contends that the grievant's allegations were those "of an employee who had been chastised by her temporary supervisor[,]" and "[i]n that light," the disputed investigations were adequate. *Id.* at 6. Also in this connection, the Agency asserts that the comparison of the disputed investigations to other investigations — which involved "completely different facts and allegations[]" and were "conducted by different investigators[]" — demonstrates that the Arbitrator erred in finding a ULP. *Id.*

The Agency asserts that the Arbitrator's finding of a Title VII violation is contrary to law because such a violation cannot be based on an alleged failure to thoroughly investigate a complaint, absent some "tangible impact upon an ultimate employment decision[.]" *Id.* at 20. For support, the Agency cites*: Runkle v. Gonzales*, 391 F. Supp.2d 210 (D.D.C. 2005) (*Runkle*); *Ginger v. D.C.*, 477 F. Supp.2d 41 (D.D.C. 2007) (*Ginger*); and *Foster v. Dep't of Transp.*, EEOC Appeal No. 0120063673 (2007) (*Foster*).

Finally, the Agency contends that the award of compensatory damages is contrary to law. The Agency argues that the Arbitrator relied on the confrontation "as the 'triggering event' to support his award of damages[,]" and that he acknowledged that other factors, including certain "stressors[]" such as additional litiga-

5. As relevant here, the Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed as untimely filed. The Agency filed a response in which it submitted evidence that the remedy award had been served by mail on July 22, 2008. Consequently, the Agency's exceptions were required to be filed by August 25, 2008. As the Agency's exceptions were filed by personal delivery on August 22, 2008, we find that the exceptions were filed timely.

6. The pertinent wording of the post-arbitration letter is set forth *infra*.

tion initiated by the grievant, caused the grievant's problems. *Id.* at 7. According to the Agency, the Arbitrator failed to apportion the grievant's damages among these various other causes. *Id.* The Agency also challenges the specific amounts awarded for various damages, and contends that the award of damages is based on nonfacts.

B. Representative's Opposition

The Representative argues that the Arbitrator did not err by finding that the Agency violated the Policy and that the award is not otherwise based on nonfacts. Opp'n at 12-14. The Representative also argues that the Arbitrator did not deny the Agency a fair hearing or exceed his authority. *Id.* at 20-22.

In addition, the Representative claims that the Arbitrator did not err by addressing whether the Agency committed a ULP because the Agency initially submitted to the Arbitrator, and the Arbitrator expressly framed, the issue of whether the Agency violated "any law, rule, or regulation of the United States." *Id.* at 14. The Representative also claims that the Arbitrator properly found a ULP. *Id*. at 15-16.

Further, the Representative asserts that the failure to investigate the grievant's complaints constitutes retaliation under Title VII, and asserts that the United States Supreme Court has expressly rejected the Agency's position that such failure, without an additional employment action, is insufficient. *Id.* at 22-23 (citing *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-68 (2006) (*Burlington Northern*)). The Representative also asserts that the grievant "lodged a serious complaint against the Agency involving workplace violence and the Agency knew that [the grievant] was already emotionally distraught about the Agency's handling of her complaint[,]" but that the Agency then "intentionally conducted sham investigations that it reasonably should have known would place [the grievant] in further emotional distress." Opp'n at 25. Under those circumstances, the Representative claims, a reasonable employee would be dissuaded from engaging in protected activity. *Id.*

Finally, the Representative argues that the remedies award should be sustained and that the Agency "misconstrues" the remedy award when it argues that the Arbitrator relied on the confrontation in awarding damages. *Id.* at 26, 30.

VI. Analysis and Conclusions

A. The awards are not based on 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. *See U.S. DHS, Customs & Border Prot. Agency, N.Y., N.Y.*, 60 FLRA 813, 816 (2005). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed at arbitration. *See id.* An exception that challenges an arbitrator's legal conclusions does not demonstrate that an award is based on a nonfact. *See, e.g., AFGE Local 3690*, 63 FLRA 118, 120 (2009)).

As noted previously, the Agency challenges numerous alleged findings of the Arbitrator. *See supra* section V.A. However, even assuming that the Arbitrator made all of the enumerated findings (or implied that he was doing so), the Agency provides no basis for concluding that these findings render the awards deficient. In this regard, the Agency's challenges are based primarily on claims that the disputed findings were not sufficiently supported. *See* Exceptions at 16-18 & Attachs. 15 & 16. Such claims do not demonstrate that a central fact underlying the awards is clearly erroneous, but for which the Arbitrator would have reached a different result. *See, e.g., U.S. DOD Educ. Activity, Arlington, Va.*, 56 FLRA 836, 842 (2000) (claim that "no evidence has been presented" to support alleged factual finding did not demonstrate that a central fact underlying the award was clearly erroneous, but for which arbitrator would have reached a different result); *NAGE, Local R4-45*, 55 FLRA 695, 697, 700 (1999) (Chairman Cabaniss dissenting in part on other grounds) (noting agency argument that "[n]o evidence" supported finding, and holding that an "absence of facts" does not demonstrate that award is based on nonfact). Accordingly, we deny the nonfact exceptions regarding these findings.

The Agency also asserts that the Arbitrator erroneously found that the HR investigator and the LR attorney intentionally mishandled the investigations because of the grievant's Union activities, and that, in the post-arbitration letter, the Arbitrator repudiated this finding. In the post-arbitration letter, the Arbitrator states, in pertinent part, that he had not meant to "leav[e] the impression" that the HR investigator or the LR attorney was "individually motivated to retaliate" against the grievant for engaging in protected activities; merely that they "had their [naïveté] and ignorance or innocence manipulated by others[.]" Exceptions, Attach. 3. This state-

ment does not detract from his finding of animus, which was based not on any finding that these two employees bore such animus, but on his determination that the HR Director selected them because he believed that they would likely conduct the investigations in a manner that would exonerate the Agency. Thus, the post-arbitration letter does not provide a basis for finding that, but for the alleged factual errors, the Arbitrator would have reached a different conclusion regarding animus. Accordingly, we deny this exception.

With regard to the Agency's claim that the finding of a Title VII violation is based on a nonfact, as noted above, an exception that challenges an arbitrator's legal conclusion does not demonstrate that an award is based on a nonfact. *AFGE, Local 3960*, 63 FLRA at 120.

For the foregoing reasons, we deny the nonfact exceptions.

B. The Arbitrator did not exceed his authority.

An arbitrator exceeds his or her authority when the arbitrator fails to resolve an issue submitted to arbitration, resolves an issue not submitted to arbitration, disregards specific limitations on his or her authority, or awards relief to persons who are not encompassed by the grievance. *See U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1378 (1996).

With regard to the Arbitrator's decision to address a ULP, one of the issues before the Arbitrator was whether the Agency violated "the laws, rules or regulations of the United States[.]" Merits Award at 1. As § 7116(a)(4) of the Statute is a law of the United States, there is no basis for finding that the Arbitrator exceeded his authority by addressing that specific statutory provision. Further, the parties were on notice that this statutory provision was at issue, as it is undisputed that, in two letters prior to the arbitration hearing, the Arbitrator requested the parties to address whether the Agency's conduct "would constitute an Unfair Labor Practice under 5 USC Chapter 71." Exceptions, Attach. 6 at 5 (Agency Post-Hearing Brief) (quoting Arbitrator letters). Thus, there is no basis for finding that the Arbitrator exceeded his authority by addressing this issue.

With regard to the Agency's claim that the awards "attempted to anticipate and enjoin future disputes between [the grievant] and the National and Local [U]nion and its factions[,]" Exceptions at 18-19, there is no basis for finding that the Arbitrator exceeded his authority in this regard.

Accordingly, we deny the exceeded-authority exceptions.

C. The Arbitrator did not fail to conduct a fair hearing.

The Agency argues that the Arbitrator failed to conduct a fair hearing in certain respects, and that he failed to consider certain evidence, which we construe as a fair-hearing exception. The Authority will find an award deficient on the ground that an arbitrator failed to conduct a fair hearing when a party demonstrates that the arbitrator refused to hear or consider pertinent or material evidence, or that other actions in conducting the proceeding so prejudiced a party as to affect the fairness of the proceeding as a whole. *See, e.g., GSA, Region 9, L.A., Cal.*, 56 FLRA 978, 979 (2000). The mere fact that an arbitrator does not mention evidence in his or her award does not demonstrate that the arbitrator failed to consider it or conduct a fair hearing. *AFGE, Local 3615*, 57 FLRA 19, 22 (2001).

With regard to the Agency's claim that the Arbitrator erred by allowing evidence regarding the Union's perspectives of other investigations, the Agency provides no basis for finding that the Arbitrator refused to hear or consider pertinent or material evidence, or that his admission of evidence on this issue so prejudiced the Agency as to affect the fairness of the proceeding as a whole. With regard to the Agency's claim that the Arbitrator failed to provide notice that he intended to address a ULP, as discussed above, that claim is incorrect. As such, the Agency does not demonstrate that it was prejudiced by the Arbitrator's decision to address that claim. With regard to the Agency's assertion that the Arbitrator ignored certain record evidence, as stated above, the mere fact that the Arbitrator may not have discussed certain evidence in his awards does not demonstrate that he failed to consider it. *See AFGE, Local 3615*, 57 FLRA at 22.

Accordingly, we deny the fair-hearing exceptions.

D. The Agency's contrary-to-law exceptions are denied in part, and the award of damages is remanded.

The Authority reviews questions of law raised by exceptions to an arbitrator's award *de novo*. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995). In applying a standard of *de novo* review, the Authority determines whether the award is consistent with the applicable standard of law. *See NFFE Local 1437*, 53 FLRA 1703, 1710 (1998). In making this determination, the Authority defers to the arbitrator's underlying factual findings. *See id.*

1. Section 7116(a)(4) of the Statute

In determining whether an agency violated § 7116(a)(4) of the Statute, the Authority applies the analytical framework set forth in *Letterkenny*, 35 FLRA at 117-18. *See FEMA*, 52 FLRA 486, 490 (1996). Under that framework, the complaining party must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. If the required prima facie showing is made, then an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity. *Letterkenny*, 35 FLRA at 118. In assessing an arbitrator's analysis of *Letterkenny*, as with other arbitral applications of law, the Authority defers to an arbitrator's underlying factual findings. *See NTEU, Chapter 90*, 58 FLRA 390, 393 (2003).

As an initial matter, and as noted above, the Agency does not except to the Arbitrator's finding that the grievant was engaged in protected activity when she testified in the EEO structure arbitration, or that the Agency failed to demonstrate a legitimate justification for its actions. Rather, the Agency excepts only to the Arbitrator's finding that the grievant's testimony in that arbitration was a motivating factor in the conduct of the investigations, and his comparison of the investigations to other investigations. *See* Exceptions at 16-18.

The Arbitrator found unlawful motivation based on: (1) differences between the investigations into the grievant's allegations and the investigation of the Union chief steward for alleged conduct that the Arbitrator found to be less serious than the alleged conduct of the temporary supervisor; (2) management's dislike of the chief steward, on whose behalf the grievant had testified during the EEO structure arbitration; (3) open hostility displayed toward the grievant during the hearing, "considered in the context of other witness testimony and document in evidence[;]" and (4) the "reasonably close proximity in time" between the grievant's testimony and the investigations. Although the Agency claims that the Arbitrator erred in his comparison of investigations, the Agency provides no basis for concluding that the Arbitrator erred in finding that: the conduct complained of in the investigations at issue here was more serious than the conduct alleged in the investigation against the Union steward; and the Agency conducted less serious investigations with regard to the grievant's allegations. Moreover, the Agency provides no basis for finding that the other grounds for the Arbitrator's ULP finding are erroneous. Accordingly, we deny the exceptions regarding § 7116(a)(4) of the Statute.

2. Title VII

a. Finding of Retaliation

As relevant here, the antiretaliation provision of Title VII prohibits employer acts that "discriminate against" an employee because that employee "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII "investigation, proceeding, or hearing[.]" 42 U.S.C. § 2000e-3(a). *Accord Burlington Northern*, 548 U.S. at 61. The antiretaliation provision "is not limited to discriminatory actions that affect the terms and conditions of employment[]" but requires only that an employee suffer "an injury or harm[]" from the retaliation. *Id.* at 64, 67 n.2. [7] "[P]etty slights or minor annoyances that often take place at work and that all employees experience[]" are not sufficient. *Id.* at 68. Rather, the test is whether "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* "[T]he significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69.

Applying these standards, and as relevant here, one court has stated that an employer may be found to violate the antiretaliation provision of Title VII when, after an employee complained about threatening behavior of another employee, the employer "responded to the . . . complaints so inadequately that the response manifest[ed] indifference or unreasonableness under the circumstances." *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 347 (6th Cir. 2008) (*Hawkins*). In

7. *Runkle*, cited by the Agency, predated *Burlington Northern* and is inconsistent with *Burlington Northern* insofar as *Runkle* held that "[a]bsent a reduction in pay or benefits, only those actions creating 'materially adverse consequences affecting the terms, conditions, or privileges of [his] employment or [his] future employment opportunities' amount to adverse actions[]" within the meaning of the antiretaliation provision of Title VII. 391 F. Supp.2d at 222. In addition, *Foster*, cited by the Agency involved sex discrimination, not reprisal. *See* EEOC Appeal No. 0120063673. Reprisal claims and sex-discrimination claims involve different standards for adverse actions. *See Burlington Northern*. Finally, *Ginger*, cited by the Agency, applied the standard set forth in *Runkle*, and thus also is inconsistent with *Burlington Northern*. We note, in the latter connection, that in *Rattigan v. Holder*, 604 F. Supp.2d 33 (D.D.C. 2009), the court "disagree[d]" with the judge's decision in *Ginger* "because it employed pre-*Burlington* standards." *Id.* at 53 n.7.

Hawkins, the employee complained of another employee setting fire to her car and threatening to kill her if the former employee reported the latter employee's harassment. The court found sufficient evidence on which a jury could find unlawful retaliation, noting that the employer "never bothered to investigate the incident, monitor [the threatening employee], or create a safe environment for harassment complaints." *Id.* at 348.

Although the conduct of the temporary supervisor in the instant case differs from the relevant conduct in *Hawkins*, *Hawkins* demonstrates that an employer's failure to investigate an employee's claim of threatening behavior can constitute unlawful retaliation under Title VII. Accordingly, it is necessary to consider whether, under the standards set forth in *Burlington Northern*, "a reasonable employee would have found the [substandard investigations by the Agency] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 68.

Here, the Arbitrator found that the Agency failed to properly investigate the grievant's claim that the temporary supervisor stood over her in her small office and uttered threatening words. The Arbitrator also found that, as a result of the Agency's failure to properly investigate the grievant's claim, the grievant was presented with a situation in which the temporary supervisor would go unpunished. The Arbitrator determined that the failure to properly investigate had a "chilling effect not only on her but any other employee who might be called on to testify against the Agency[.]" Merits Award at 88. The Agency does not demonstrate that the Arbitrator erred in making these findings, which support his conclusion of unlawful retaliation under the legal standards set forth above. Accordingly, we conclude that the Arbitrator did not err in finding that the Agency's conduct of the investigations constituted unlawful retaliation under Title VII, and we deny the exception.

b. Remedies

When an employer has been found to have violated Title VII, the employer is "liable only for those damages directly or proximately caused by" the employer's unlawful act. *Terrell v. Cisneros*, EEOC Doc. 01961030 (1996). Where an employer's unlawful action is only partially responsible for an employee's damages, "damages must be reduced accordingly." *Merriweather v. Family Dollar Stores*, 103 F.3d 576, 581 (7th Cir. 1996). In this regard, where an employee "has a pre-existing condition, the [employer] is liable only for the additional harm or aggravation caused by the discrimination." *Durrant v. West*, EEOC Doc. 01971885 at 14.

There is no basis in the remedy award or the record for finding that the Arbitrator complied with the above-cited precedent by reducing the grievant's damages to account for the confrontation, which he found not to violate Title VII. In this regard, the Arbitrator expressly found that the confrontation and the Title VII violation, "*in combination[,]*" were "the proximate cause of the grievant's mental and emotional sufferings." Remedy Award at 33-34 (emphasis added). Moreover, the record does not provide a sufficient basis for the Authority to determine the extent to which the grievant's damages were caused solely by the Title VII violation. Accordingly, we remand the remedial issues to the parties for resubmission to the Arbitrator, absent settlement, to clarify whether and to what extent the damages suffered by the grievant were related to the confrontation, and if they were so related, the extent to which the damages should be reduced. In so remanding, we note two additional principles that the Arbitrator should take into account on remand.

First, the award of nearly $300,000 is similar to or greater than amounts that have been awarded in cases involving violations that were significantly different, in terms of severity or their ongoing nature, from the failure to investigate that is at issue here. *See, e.g., Fellows-Gilder v. Dep't of Homeland Sec.*, EEOC Appeal No. 0720070046 (January 31, 2008) (complainant was unlawfully terminated, resulting in hospitalization for writing a suicide note and developing plan to commit suicide, as well as need to seek public assistance and move to remote location); *Burton v. Dep't of the Interior*, EEOC Appeal No. 0720050066 (March 6, 2007) (complainant was subjected to a hostile work environment over several years and unlawfully removed from work projects, resulting in major depression and panic attacks); *Cook v. Postmaster Gen.*, EEOC Appeal Nos. 01950027, et al. (July 17, 1998) (constant harassment over extended period of time caused complainant to become physically ill with recurring severe headaches, stomach cramps, diarrhea, and severe nervousness with uncontrollable shaking). Unlike the complainants at issue in those cases, the grievant was subjected to a discrete event that had a less significant impact on her employment conditions, specifically, an Agency failure to investigate an incident involving the temporary supervisor, with whom the grievant did not have an ongoing relationship. The Arbitrator should take this factor into account when reassessing damages on remand.

Second, with regard to the award for loss of future employment opportunities, the EEOC "requires that the impairment of earning capacity be shown with reasonable certainty or reasonable probability, and there must be evidence which will permit the fact finder to arrive at a pecuniary value for the loss." *Ghazzawi v. Postmaster Gen.*, EEOC Appeal No. 01A15327 at 6 (April 23, 2002) (citation omitted). It is unclear from the record what facts the Arbitrator relied on to determine that the grievant has been made less competitive for promotions and alternative employment. Accordingly, the Arbitrator should consider the above-quoted EEOC requirement on remand as well. [8]

VII. Decision

The award of damages is remanded, and the remaining exceptions are denied.

8. Given our remand, and our guidance to the Arbitrator on remand, we find it unnecessary at this time to resolve the Agency's remaining exceptions regarding the calculation of damages.