65 FLRA No. 198

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WAGE AND INVESTMENT DIVISION
AUSTIN, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 72
(Union)

0-AR-3977
(64 FLRA 39 (2009))

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DECISION

June 27, 2011

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

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator LeRoy R. Bartman filed by the Agency under § 7122 of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In *United States Department of the Treasury, Internal Revenue Service, Wage & Investment Division, Austin, Texas*, 64 FLRA 39 (2009) (*IRS, Austin*), the Authority remanded an award to the Arbitrator for further findings. On remand, the Arbitrator awarded $200,000 in compensatory damages and restoration of the grievant's leave. For the reasons that follow, we deny the Agency's exceptions in part and grant them in part, and remand the award in part to the parties for further action consistent with this decision.

II. Background and Arbitrator's Award

A. Original Award

In his initial award (Original Award), the Arbitrator sustained a grievance claiming that the Agency violated the Rehabilitation Act (the Act) of 1973, as amended, 29 U.S.C. § 791, the parties' collective bargaining agreement (parties' agreement), and other laws, rules, or regulations by discriminating against the grievant based on his disability, creating a hostile work environment, and retaliating against the grievant for filing an Equal Employment Opportunity (EEO) complaint. The Arbitrator awarded the grievant $200,000 in compensatory damages and restoration of his leave.

B. Authority's Decision in *IRS, Austin*

In *IRS, Austin*, the Authority found that the record did not permit it to determine whether: (1) the amount of compensatory damages awarded was consistent with law or (2) the Arbitrator erred in restoring the grievant's leave. As a result, the Authority remanded these portions of the award to the parties for resubmission to the Arbitrator, absent settlement. 64 FLRA at 57.

With respect to the award of compensatory damages, the Authority found that the Arbitrator failed to cite any evidence as the basis for his award or make the necessary findings to substantiate his award. *Id.* at 55-56. Specifically, the Authority found that the Arbitrator "did not rely on any of the testimonial or documentary evidence in the record that establishes that the grievant is entitled to compensatory damages or to the amount of those damages." *Id.* at 55. The Authority noted that, although the Arbitrator did not set forth specific findings as required, his findings and the size of his award suggested that part of the sum may be punishment for the Agency's conduct toward the grievant and for his loss of future earnings. *Id.* The Authority further noted that punitive damages are not available in discriminatory conduct cases brought against federal agencies and that proof of entitlement to loss of future earnings involves evidence suggesting that an individual's injuries have narrowed the range of economic opportunities available to him. *Id.* (citations omitted). Stating that the record did not permit it to determine whether the amount of compensatory damages awarded was consistent with law, the Authority remanded this portion of the award to the parties for resubmission to the Arbitrator, absent settlement, for his clarification of the grievant's entitlement to compensatory damages based on the proper legal framework. *Id.* at 55-56 (citation omitted).

As to the restoration of the grievant's leave for the period 2002-2003, the Authority found that the Arbitrator made no findings linking the scope of the leave awarded and the scope of the Agency's illegal activity. *Id.* at 56. Because the record did not permit the Authority to make this determination, the Authority remanded this part of the award to the parties, instructing that, on remand, the Arbitrator should specify the amount of leave awarded and the manner in which the Agency's illegal actions are responsible for its use. *Id.*

C. Arbitrator's Award on Remand

On remand (remand award), the Arbitrator awarded the grievant a non-punitive compensatory award of $200,000 and restoration of lost benefits (sick leave and annual leave) for the years 2002-2003. Remand Award at 12-13, 15-16. The Arbitrator stated that, in so deciding, he had "reviewed all 831 pages of the . . . transcript, the joint exhibits, the Union's 130 exhibits and the Agency's 30 exhibits[,]" case law submitted by the parties, and testimony of witnesses. *Id.* at 10-11.

In awarding compensatory damages, the Arbitrator found that an award of $200,000 was supported by Equal Employment Opportunity Commission (EEOC) case law. *Id.* at 15-16 (citing *Franklin*, EEOC Appeal Nos. 07A00025 & 01A03882 (2001); *Rivers*, EEOC Appeal No. 01992843 (2002); *Ellis*, EEOC Appeal No. 01A13314 (2003); *Munno*, EEOC Appeal Nos. 01A01734 & 01A03001 (2001); *Mack*, EEOC Appeal No. 01983217 (2000), *recons. denied*, EEOC Appeal No. 01983217 (2000); and *Santiago*, EEOC Appeal No. 01955684 (1998)). For instance, the Arbitrator noted that, in *Franklin*, $150,000 in non-pecuniary damages was "based upon . . . evidence of emotional distress and the proven disability discrimination based upon a lack of reasonable accommodation." *Id.* at 15. The Arbitrator found that the record here "showed a lack of any good faith by the Agency to make any reasonable accommodation to prevent the stress which, according to testimony, was increased by" the grievant's supervisors. *Id.* Moreover, the Arbitrator stated that, in *Ellis*, the complainant's supervisor, like the grievant's supervisor here, "'picked apart her work[,]'" "'ostracized her in the work place'" and "'insinuated publicly that she was abusing sick leave.'" *Id.* (quoting *Ellis* at *2). The Arbitrator stated that this "treatment made the complainant's [medical condition] much worse, caused her intense physical and emotional pain and ultimately, compelled her to take disability retirement from the agency." *Id.* The Arbitrator found that record evidence shows that, like the grievant in *Ellis*, the grievant here "was forced into an approved medical retirement by the actions of the Agency." *Id.*

The Arbitrator further found that one physician's (Dr. 2's) examination of the grievant "provided the medical nexus between the increased severity of the [g]rievant's physical impairment to the increased stress he experienced at work." *Id.; see also id.* at 16 (finding that the medical assessment of Dr. 2, "in and of itself, substantiates . . . that the [g]rievant was entitled to the compensatory award of $200,000"). In this regard, the Arbitrator found that Dr. 2 determined, among other things, that:

- At the time of the examination, the grievant "'ha[d] not been able to work for several months. Each time he goes [back] to work, he develops increased wheezing and dyspnea which he attributes to the stress of his job'";

- "'[T]he pattern of deterioration'" that he observed in the grievant's condition from when he first saw him in September 2002 until May 2003 "'is consistent with his report of unrelieved stress, and he related that stress to what was happening to him at his job'"; and

- "'Had the amount and consistency of [the grievant's] stress been eliminated or greatly reduced, it is likely that the degree and rate of deterioration in [the grievant's] condition that precipitated Dr. [1's] referral of [the grievant] to [him] and that continued . . . would have been lessened or prevented altogether."

Id. at 13-15 (quoting Dr. 2's Letters dated May 18, 2003 (May 18 Letter) & April 6, 2004 (April 6 Letter)); *see also* Opp'n, Attach., Union Exs. 105 (May 18 Letter) & 128 (April 6 Letter).

In awarding restoration of the grievant's leave, the Arbitrator noted that the EEOC has held that a claim for restoration of sick leave hours allegedly taken because of discriminatory actions is recoverable under Title VII as a request for equitable damages and that, if an employee takes leave "'to avoid or recover from discriminating harassment, sick leave must be treated as excused leave in order to make the appellant whole and place [the employee] in a position [he/she] would have been absent the discrimination.'" Remand Award at 13 (quoting *Merriell*, EEOC Appeal No. 01890072 (1989)). After reviewing the evidence, including the medical findings of Dr. 2 described above and an audit of the grievant's leave forms, the Arbitrator found that the grievant took sick leave "to avoid or recover from discriminating harassment." *Id*. at 15. The Arbitrator noted that the record indicates that the grievant's leave usage increased from 37% in 2002 to over 70% in 2003. *Id.* at 13. As a result, the Arbitrator found that the grievant's "sick leave must be treated as excused leave in order to make the [grievant] whole or in the position [he] would have been absent the harassment." *Id.* at 15 (internal quotations omitted). Accordingly, the Arbitrator found that the grievant "was to receive an award of all lost benefits or other concurrent benefits of employment he would have earned." *Id.*

III. Positions of the Parties

A. Agency's Exceptions

The Agency asserts that the $200,000 award, which is "solely compensation for non-pecuniary damages" and is not for "loss of future earnings" or punitive damages, is contrary to law. Exceptions at 10 (citing Remand Award at 12 (emphasis omitted)).

The Agency asserts that the award of $200,000 in non-pecuniary damages is contrary to law because the harm suffered by the complainants in the cases relied upon by the Arbitrator differed significantly from the harm suffered by the grievant. *Id.* at 9-11. In this regard, the Agency contends that the Arbitrator does not explain why the harm suffered by the grievant was comparable to the harm suffered by the complainant in *Mack*, arguing that the Arbitrator identified no evidence that showed that the grievant suffered harm that "totally incapacitated" him for work or in his personal life. *Id.* at 15. The Agency also contends that the harm suffered by the grievant is dissimilar to the harm suffered by the complainants in *Franklin* and *Munno*. The Agency contends that the "remaining cases cited by the [A]rbitrator" -- i.e., *Ellis, Rivers,* and *Santiago* -- "have no relevance to the damages suffered by the [g]rievant . . . ." *Id.* at 14.

Further, the Agency asserts that, while it believes that the grievant "did not suffer catastrophic emotional damages and should not receive an award" greater than $100,000, the awards granted in *Ellis*, *Rivers*, and *Santiago*, which averaged about $122,000, "are more similar to the harm sustained by the [g]rievant . . . ." *Id.* at 15. The Agency contends that the case of *Carpenter*, EEOC Appeal No. 01945652 (1995), is even more similar. In that case, the Agency notes, the complainant, who suffered from asthma, was awarded $75,000 in compensatory damages for emotional distress. *Id.* at 15-16.

The Agency contends that the award does not address causation. The Agency asserts that the Arbitrator "did not cite any evidence to establish a connection between [its] discrimination and the harm" to the grievant. *Id.* at 17-18 (citing *Leperi*, EEOC Appeal No. 01964107 (1998)). The Agency further contends that the Arbitrator "disregarded the testimony" of a physician (Dr. 1), who testified that other factors beyond the grievant's working environment "contributed to the exacerbation of [his] asthma problems." *Id.* at 17 (citing Tr. at 465).

The Agency also contends that the grievant failed to prove that the delay between June 2002, when the grievant first requested a reasonable accommodation, and November 2002, when the Agency processed his request, was the "direct or proximate cause" of his "'fixed obstructive changes' consistent with [COPD]." *Id.* at 18 (quoting Opp'n, Attach., Union Exs. 105 & 128). The Agency further asserts that the Arbitrator based his finding that a "nexus existed between 'the increased severity of the [g]rievant's physical impairment' and the 'increased stress he experienced at work'" on evidence relating to Dr. 2 alone, but that Dr. 2 did not address the severity of his breathing impairment. *Id.* at 19 (quoting Remand Award at 14-16).

Concerning restoration of leave, the Agency asserts that, contrary to the Authority's decision in *IRS, Austin*, the Arbitrator did not make any findings linking the scope of the leave awarded to its actions, but, rather, "attribute[d]" the leave usage to its discriminatory conduct. *Id.* at 21. The Agency contends that, because the Arbitrator found that the Agency had subjected the grievant to discrimination from "May to November 2002[,]" the Arbitrator determined that the Agency ceased discriminating against the grievant in November 2002. *Id.* at 22 (citing Original Award at 23). As a result, the Agency contends, the Arbitrator had no basis to order the restoration of leave after November 2002. *Id.*

The Agency asks the Authority to reduce the award to an amount that is not "monstrously excessive" and is consistent with amounts awarded in similar cases, and that the Authority "not remand this case to the [A]rbitrator . . . ." *Id.*

B. Union's Opposition

The Union contends that the record "contains significant evidence of prolonged, serious and substantial harm to the [g]rievant stemming from the Agency's actions." Opp'n at 5. Relying on a number of cases, including *Franklin*, *Rivers*, *Ellis*, *Mack*, *Santiago*, and *Glockner*, EEOC Appeal No. 07A30105 (2004), the Union asserts that, contrary to the Agency's claim, the amount awarded by the Arbitrator is consistent with the amount awarded in similar cases. Opp'n at 7-12. Moreover, the Union contends, a pattern of discriminatory events, as occurred in this case, will generally lead to higher non-pecuniary compensatory damages than would be awarded in a case involving only one or two events. *Id.* at 5 (citing *Flythe*, EEOC Appeal No. 01972258 (2000)).

The Union further asserts that the EEOC has noted that "'the more inherently degrading or humiliating the agency action, the more reasonable it is to infer that [a] complainant[] would suffer humiliation or distress from the agency action.'" *Id.* at 12 (quoting *Heffley*, EEOC Appeal No. 07A40138 (2005) (citing *Glockner*)). The Union contends that the evidence shows that the grievant's supervisors sought to "increase rather than decrease [his] stress." *Id.* (citing Tr. at 181-82 (Union President testified concerning conversation where grievant informed her that his supervisor visited him in the hospital and discussed his performance)).

The Union contends that the Arbitrator addressed causation because the Arbitrator found a "direct nexus between the harm suffered by the [g]rievant and the Agency's unlawful conduct." *Id.* at 12. The Union further asserts that the Agency has not satisfied its burden of proof that the harm suffered by the grievant was caused by external factors. Opp'n at 14. The Union contends that "[a]t no point" during Dr. 1's testimony does he assert that "external factors" played "a role in exacerbating the [g]rievant's asthma" and that the Agency can "point to no . . . evidence" from Dr. 1 or any witness that supports this claim. *Id.* at 15 (citing Tr. at 465).

Finally, the Union contends that the evidence supports restoration of the grievant's leave for 2002-2003 and that the Agency has failed to present any "official leave records or other evidence" that rebuts the award. *Id.* at 21; *see also id*. at 16-21.

IV. Analysis and Conclusions

In remanding the original award, the Authority stated that the record did not permit the Authority to determine whether the amount of compensatory damages is consistent with law. *IRS, Austin*, 64 FLRA at 57. The Authority noted that the Arbitrator's "findings and the size of the award suggest that a part of this sum may be punishment for the Agency's conduct toward the grievant and for his loss of future earnings." *Id.* at 55. In the remand award, the Arbitrator indicated that the award of $200,000 is for "non-punitive compensatory" damages. Remand Award at 12; *see also id.* at 16. Based on the Arbitrator's award, we find that the award of $200,000 is limited to non-pecuniary compensatory damages. As set forth above, the Agency asserts that the award of $200,000 in non-pecuniary compensatory damages is contrary to law.

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) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). 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.* When evaluating exceptions to an arbitration award, the Authority considers the award and record as a whole. *See, e.g.*, *Soc. Sec. Admin.*, *Office of Disability Adjudication & Review*, *Region 1*, 65 FLRA 334, 336 (2010) (citing, among other cases, *AFGE, Local 2328*, 62 FLRA 63, 65 (2007) (consistency with law "clear from the record as a whole")).

A. The portion of the award encompassing non-pecuniary damages is not contrary to law.

In a claim for compensatory damages, a grievant must demonstrate, through appropriate evidence, the harm suffered as a result of the agency's discriminatory action; the extent, nature, and severity of the harm suffered; and the duration or expected duration of the harm. *See IRS, Austin*, 64 FLRA at 54. The amount of compensatory damages awarded should reflect the extent to which the Agency's discriminatory action directly or proximately caused harm to the grievant and the extent to which other factors may have played a part. *See id.* and authorities cited therein. An award of compensatory damages should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. *Id.* at 55. Awards of non-pecuniary damages in excess of $100,000 have resulted when the emotional damage has been catastrophic, leaving an employee unable to work for years to come, if ever. *See id.* at 54 (citing *Mack*).

Based on the evidence presented, the Agency has not demonstrated that the Arbitrator erred in awarding non-pecuniary damages. Medical and testimonial evidence show that the cumulative effect of the Agency's discriminatory actions resulted in the deterioration of the grievant's health and led to his developing COPD. Remand Award at 14 (quoting April 6 Letter) (noting that, in diagnosing the grievant's condition, Dr. 2 stated that "anxiety leads to flare-ups; flare-ups make controlling the asthma extremely difficult or impossible; poor control of severe asthma leads to COPD; COPD results in irreversible lung damage"); *see also* April 6 Letter (letter from Dr. 2 concerning the relationship between stress experienced at work by the grievant and the exacerbation of his medical condition). Further the record shows that, because of the increased deterioration of the grievant's health that resulted from the Agency's discriminatory actions, the grievant "was forced into . . . medical retirement" at approximately age forty-five, with irreversible lung damage. Remand Award at 15; *see also* Original Award at 22; *IRS, Austin*, 64 FLRA at 43.

In cases where victims of discrimination have suffered harm similar in degree to the grievant, the EEOC has awarded compensatory damages ranging from $100,000 to $200,000. *See, e.g.*, *Mack* ($185,000 in non-pecuniary damages where, as a result of agency discrimination, complainant was left homeless for two years and suffered depression, emphysema, migraines and insomnia, and harm to family relationships); *Franklin* ($150,000 in non-pecuniary damages where, as a result of agency's discriminatory actions, complainant experienced extensive symptoms of emotional distress, resulting in changes in complainant's personality, the ending of his marriage, severe strains in his relationships with those close to him, including his children, and diminished enjoyment of life); *Glockner* ($200,000 in non-pecuniary damages where complainant suffered migraines, irritable bowel syndrome, depression, and stress that caused her to bite her cheeks so badly that surgery was required); and *Blount*, EEOC Appeal No. 0720070010 (2009), *recons. denied*, EEOC Appeal No. 0720070010 (2010) ($200,000 in non-pecuniary damages where agency failed to accommodate complainant resulting in his inability to work; complainant suffered from severe depression, for which he had taken medication).

The Agency contends that the Arbitrator does not explain why the harm suffered by the grievant is comparable to that suffered by the complainant in *Mack* and argues that the Arbitrator identified no evidence that showed that the grievant suffered harm that totally incapacitated him for work or in his personal life. Exceptions at 11-15. As stated above, awards of non-pecuniary damages in excess of $100,000 have resulted when the emotional damage has been catastrophic, leaving an employee unable to work for years to come, if ever. Here, the Arbitrator found that the Agency's discriminatory actions caused the grievant's health to deteriorate to the point where he was "forced into . . . medical retirement" at age forty-five. Remand Award at 15; *see also* Original Award at 22. Medical evidence also showed that the grievant's increased stress at work resulted in irreversible lung damage. Remand Award at 14 (citing April 6 Letter); *see also* May 18 Letter at 2 (stating that he believed that "much of [the grievant's] lung disease is fixed and not reversible" and that he did "not expect significant recovery in the future").

The Agency's contention that the harm suffered by the grievant is more similar to the harm suffered by the complainant in *Carpenter* also does not provide a basis for finding the Arbitrator erred. In that case, the EEOC, in awarding the complainant a lower amount of damages than he had sought, found that much of the damages about which he complained pre-dated the Civil Rights Act of 1991.

Accordingly, we find that the Agency has not demonstrated that the amount of damages awarded is contrary to law.

The Agency also contends that award is contrary to law because the Arbitrator "did not cite any evidence to establish a connection between the Agency's discrimination and the harm" to the grievant and, thus, the grievant did not meet his burden of proof. Exceptions at 18. Contrary to the Agency's contention, the Arbitrator examined the record regarding the nature, severity, and duration of the harm suffered by the grievant as a result of the Agency's discriminatory actions and found that the medical evidence provided a "nexus between the increased severity of the [g]rievant's physical impairment to the increased stress he experienced at work." Remand Award at 15; *see also id.* at 16 (finding that the medical assessment of Dr. 2, "in and of itself, substantiates . . . that the [g]rievant was entitled to the compensatory award of $200,000").

In addition to the medical evidence, the Arbitrator also found that the "record showed a lack of any good faith by the Agency to make any reasonable accommodation to prevent the stress, which according to testimony, was increased by [the grievant's] supervisors . . . ." *Id.* at 15. In this regard, the record shows, among other things, that: (1) the grievant requested a reassignment from supervisor 2 because of stress and was instructed by that supervisor to revise the letter, leaving out any references to his health, and resubmit it to supervisor 1; (2) the grievant's supervisors put pressure on him through "negative performance reviews despite his known medical problems"; (3) the grievant's appraisals were based upon a review of all the work he produced, instead of random samples; and (4) supervisor 1 shared the grievant's comments about on-the-job instructions he received from fellow workers with employees. *See* Original Award at 23; Remand Award at 6-7.

The Agency asserts that the Arbitrator "disregarded the testimony" of Dr. 1, who testified that "other factors beyond the [g]rievant's working environment contributed to the exacerbation of [his] asthma problems[,]" such as mold in his home and a seriously ill mother. Exceptions at 17 (citing Tr. at 465). However, there is nothing in the testimony referenced by the Agency that shows that Dr. 1 testified that the external factors mentioned increased the severity of the harm suffered by the grievant. The testimony shows that Dr. 1 responded to specific questions asked of him, but did not state that such external factors actually exacerbated the grievant's health problem.

Further, the Agency's contention that the grievant did not provide any proof that the delay between June 2002, when the grievant first requested a reasonable accommodation, and November 2002, when the Agency ultimately processed his request, was the direct or proximate cause of his health impairment also provides no basis for finding that the Arbitrator erred. During the period of June 2002 through November 2002, the Agency subjected the grievant to discrimination and harassment and created a hostile work environment. *See* Original Award at 23; *see also IRS, Austin,* 64 FLRA at 57. Moreover, evidence in the record shows that the cumulative effect of the Agency's actions resulted in the deterioration of the grievant's health. For example, Dr. 2 stated "'the pattern of deterioration'" that he observed in the grievant's condition "'from when [he] first saw him in September 2002 until . . . May 2003 is consistent with his report of unrelieved stress, and [that the grievant] related that stress to what was happening to him at his job.'" Remand Award at 14 (quoting April 6 Letter). Dr. 2 further stated that, "[h]ad the amount and consistency of [the grievant's] stress been eliminated or greatly reduced, it is likely that the degree and rate of deterioration in [the grievant's] condition . . . would have been lessened or prevented altogether." *Id.* at 15 (quoting April 6 Letter).

In these circumstances, the Agency has not established that the Arbitrator failed to address causation. Accordingly, we find that the Agency has failed to establish that the Arbitrator erred in awarding the grievant $200,000 in non-pecuniary compensatory damages and deny this exception.

B. A remand of the portion of the award restoring leave to the grievant is necessary.

The Agency asserts that, contrary to *IRS, Austin*, the Arbitrator did not make any findings linking the scope of the leave awarded to its actions, but "attribute[d]" such usage to its discriminatory conduct. Exceptions at 20, 21.

In *IRS, Austin*, the Authority directed the Arbitrator to specify the amount of leave awarded the grievant and the manner in which the Agency's illegal actions are responsible for the use of that leave. 64 FLRA at 56; *see, e.g., Harrison*, EEOC Appeal No. 01A14848 (2002) (complainant provided sufficient documentation showing hours requested related to discrimination). "Whenever an agency is liable for unlawful employment discrimination, it must provide complainant with full, 'make-whole' relief to restore the complainant as nearly as possible to the position he or she would have been in absent the discrimination." *Ellis* at *2 (citation omitted). In the "federal sector, the agency's efforts in this regard should include (where appropriate) equitable relief . . . ." *Id.* (citation omitted). Restoration of leave taken because of discrimination suffered is a legitimate form of equitable relief. *Id.* (citation omitted).

As the Arbitrator found, the record establishes that the grievant took leave to "avoid or recover from discriminating harassment." Remand Award at 15. The Arbitrator directed the Agency to restore the grievant's leave for the "years 2002-2003." *Id.* at 13; *see also* Original Award at 23. However, while the evidence presented by the Union shows that the grievant used leave during the period that he was discriminated against by the Agency, the Arbitrator did not specify the amount of such leave or indicate when such leave was required because of the Agency's illegal activities. Moreover, the evidence submitted by the Union does not indicate clearly whether the grievant used leave for such purpose. *See, e.g.,* Opp'n, Attachs., Union Exs. 70(2) & 77 (notes from Dr. 1 requesting that the grievant be excused for certain days due to flu); Exs. 68, 69 (leave audit forms show grievant's leave usage, but do not explain reason for leave); Exs. 71-104 (medical certifications for grievant's use of sick leave include some pre-dating Agency's unlawful actions).

Accordingly, we remand this portion of the award to the parties for resubmission to the Arbitrator, absent settlement. On remand, the Arbitrator should specify the amount of leave awarded the grievant and the manner in which the Agency's illegal actions are responsible for the use of that leave.

The Agency requests that the award not be remanded to the Arbitrator. In *Alabama Association of Civilian Technicians*, 56 FLRA 231, 235 (2000) (Chairman Wasserman dissenting), the Authority noted "that a new arbitrator may be appointed to hear a matter where the original arbitrator resigns, dies, or is otherwise unable to act upon the issue." *Id.* at 235 (citing *Elkouri and Elkouri, How Arbitration Works*, 188 (5th Ed. 1997)); *see also How Arbitration Works*, 175-176 (6th Ed. 2003)). Here, the Agency has not explained why the award should not be remanded to the Arbitrator. Because the Agency has not provided any specific reasons why the award should not be remanded to the Arbitrator, there is no basis to conclude that this matter should be submitted to a new arbitrator.

Accordingly, we deny the Agency's request.

V. Decision

The Agency's exceptions are denied to the extent that the exceptions challenge the portion of the award granting $200,000 in non-pecuniary damages. With respect to the award of restoration of leave for the "years 2002-2003," this portion of the award is remanded to the parties for resubmission to the Arbitrator, absent settlement, for further findings consistent with this decision.