70 FLRA No. 135

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
AUSTIN, TEXAS
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 52
(Union)

0-AR-5209

_____

DECISION

July 3, 2018

_____

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

I. Statement of the Case

In this case, we are called upon to determine whether an employee, who pleaded guilty to manslaughter in the death of her granddaughter, should have received an outstanding performance rating after she was returned to duty by an arbitrator's award that overturned the Agency's removal for the grievant's criminally negligent behavior.

The facts in this tragic story are long and have involved three arbitration awards. First, the grievant challenged her indefinite suspension and removal, and alleged a hostile work environment and reprisal under Title VII of the Civil Rights Act of 1964 (Title VII) and the parties' collective-bargaining agreement. After two arbitration awards by Arbitrator Marsha C. Kelliher, and a resulting settlement, the grievant then complained in a third grievance that a "not[-]ratable" performance appraisal for 2012-13[1] should instead be "outstanding."[2] Following a hearing on the third grievance, Arbitrator I. B. Helburn found that the issuance of a not-ratable performance appraisal for 2012-13 contributed to an unlawful hostile work environment and showed unlawful reprisal so that the Agency violated Title VII and the parties' agreement. As remedies, and as relevant here, Arbitrator Helburn awarded compensatory damages; restoration of leave; the "revalidat[ion]," for the 2012-13 performance year, of the grievant's 2008-09 outstanding performance appraisal;[3] and a retroactive, monetary performance award for the 2012-13 performance year. There are three main questions before us.

The first question is whether Arbitrator Helburn exceeded his authority when he considered the Agency's general compliance with the Kelliher awards, rather than limiting himself to the issue of the grievant's appraisal. Because Arbitrator Helburn did not respect the limits that a settlement agreement between the parties placed on his authority, we grant the Agency's exceeded-authority exception and set aside those portions of his award that do not concern the 2012-13 performance appraisal.

The second question is whether the Arbitrator's direction to revalidate the grievant's 2008-09 outstanding performance appraisal for the 2012-13 performance year fails to draw its essence from the parties' collective-bargaining agreement. Because the parties' agreement requires all appraisals to be based on actual, observable work performance, and the revalidation remedy conflicts with that requirement, the answer is yes. Consequently, we set aside that remedy and the accompanying retroactive performance award.

The third question is whether the findings that the Agency retaliated against the grievant and subjected her to a hostile work environment are contrary to Title VII. Because Arbitrator Helburn's determinations do not show that the Agency's actions were sufficiently materially adverse to prove retaliation, or sufficiently severe or pervasive to establish a hostile work environment, we vacate the remainder of the award as contrary to law.

II. Background and Arbitrator's Award

In 2007, the grievant filed an Equal Employment Opportunity (EEO) complaint alleging that the Agency did not promote her due to unlawful discrimination.

In 2008, while off duty, the grievant drove into a concrete barrier, and the resulting car accident killed her granddaughter. Though she returned to work at the Agency only in 2009, she was then indicted for recklessly causing the death of her granddaughter. Shortly thereafter, the Agency indefinitely suspended the grievant on the basis that it had reasonable cause to believe that she had committed a crime for which imprisonment could be imposed.

[1] Helburn Award at 43.
[2] *Id.* at 34.
[3] *Id.* at 44.

In 2010, the grievant pleaded guilty to a second-degree felony charge of manslaughter, for which she was sentenced to ten years' confinement, probated for ten years, and fined $2000.00. The Agency removed the grievant, finding that her conduct in connection with the accident was unbecoming an Agency employee.[4]

The Union filed separate grievances contesting both the indefinite suspension and the removal, and those grievances were consolidated.

In February 2012, Arbitrator Kelliher overturned the disciplinary actions because the Agency failed to prove a nexus between the off-duty misconduct and the efficiency of the service. She directed the Agency to rescind the suspension and removal actions; restore the grievant "to duty pay and status";[5] provide the grievant with sufficient "refresher and other training";[6] and refrain from holding against the grievant any evaluations of her performance before she completed her refresher training.

The grievant returned to duty in April 2012.

In August 2012, Arbitrator Kelliher issued a second award addressing the grievant's discrimination claims. In that award, she found that discrimination and retaliation did not contribute to the Agency's decisions to suspend and remove the grievant. She concluded, however, that the Agency engaged in a "pattern and practice" of retaliation, after the filing of the grievant's 2007 EEO complaint until 2012, which created a hostile work environment.[7] The Agency was ordered to engage in settlement discussions to determine an appropriate amount of compensatory damages, and those discussions continued for two years.

While the settlement discussions continued, the Agency gave the grievant a not-ratable performance appraisal in February 2013 for the 2012-13 performance year because the grievant had not completed sufficient observable work to support a performance rating. In April 2013, the Union filed this grievance to contest the grievant's appraisal, and also argued that the Agency had failed to return the grievant to meaningful work, to give her equipment and training, or to reassign her away from the work group where she experienced the hostile work environment. In September 2013, the grievant accepted a voluntary reassignment to another work group.

In July 2014, the parties concluded the settlement discussions that had been directed by Arbitrator Kelliher to resolve the remedies for her awards. The settlement agreement, however, excluded "annual appraisal grievances covering all years between and including 2010 and 2014; . . . and compliance with this or any related settlement agreement."[8]

The grievance concerning the 2012-13 performance year proceeded to arbitration before Arbitrator Helburn, who held hearings in June and September 2015. It is Arbitrator Helburn's May 2016 award that is at issue here. He framed the issues as:

> (1) Whether the Agency violated law, rule, regulation, and/or [the first and second awards] when it failed to timely and fully return the [g]rievant to meaningful work, give her necessary equipment, training[,] and authorizations[,] . . . refused to reassign her[,] and then issued her a not[-]ratable annual appraisal . . . [for 2012-13]? If so, what shall the remedy be?
>
> (2) Whether the Agency continued a hostile work environment and reprisal against the [g]rievant and otherwise continued to discriminate against her in violation of applicable laws by failing to timely and fully return the [g]rievant to meaningful work, give her necessary equipment, training[,] and authorizations, . . . refusing to reassign her[,] and then issuing her a not[-]ratable annual appraisal . . . [for 2012-13]? If so, what shall the remedy be?[9]

The Agency argued that the 2014 settlement agreement precluded any consideration of Arbitrator Kelliher's awards and limited the issue solely to the 2012-13 appraisal. Contrary to these arguments, Arbitrator Helburn found that the not-ratable appraisal "continu[ed] . . . a hostile work environment" and constituted reprisal.[10]

[4] Member Abbott observes that, though seemingly permitted by the Statute, the multiple grievances filed and pursued by the grievant are indicative of a federal employee who has succeeded by filing grievances – in being promoted, having performance ratings and bonuses awarded even though she was not working (because of criminal conduct), and avoided losing her job despite felonious behavior. Simply put, an employee who pled guilty to the crime of voluntary manslaughter should not be able to benefit because her supervisors could not rate her because of lengthy absences which occurred because of those charges.

[5] Opp'n, Attach., Union Ex. 10, First Kelliher Award at 13.

[6] *Id.*

[7] Opp'n, Attach., Union Ex. 11, Second Kelliher Award at 20.

[8] Exceptions, Attach., Union Ex. 12, Settlement Agreement (Settlement Agreement) at 2.

[9] Helburn Award at 18-19.

[10] *Id.* at 19.

As to the merits of the grievance, Arbitrator Helburn held that "the [not-ratable] appraisal violated" Arbitrator Kelliher's awards and the parties' collective-bargaining agreement.[11] On that point, Arbitrator Helburn found that those awards required the Agency to give the grievant an outstanding rating because, absent the unwarranted suspension and removal, she would have continued to receive outstanding performance ratings. Accordingly, he concluded that the Agency should have "revalidated" the grievant's 2008-09 outstanding appraisal "indefinitely," including for 2012-13.[12]

Arbitrator Helburn also found that the Agency continued to create a hostile work environment and retaliated against the grievant in violation of Title VII.

As relevant here, Arbitrator Helburn awarded $150,000 in compensatory damages, a 30% enhancement to "cover any tax consequences,"[13] restoration of leave, and an outstanding rating and performance award for 2012-13.

The Agency filed exceptions to Arbitrator Helburn's award on June 27, 2016, and the Union filed an opposition on July 29, 2016.

III. Preliminary Matter

On September 28, 2016, the Authority's Office of Case Intake and Publication ordered the Agency to show cause why the Authority should not dismiss its exceptions for lack of jurisdiction. As relevant here, the Authority does not have jurisdiction over exceptions to an award that "resolves, or is inextricably intertwined with," a removal action.[14] On October 13, 2016, the Agency filed a response to the order.[15]

The Agency argues that the grievant's performance appraisal for 2012-13 was the "sole personnel action at issue" in this grievance and that the Authority, therefore, has jurisdiction over the exceptions.[16]

The claims that the Union advanced in this arbitration concerned only the grievant's 2012-13 appraisal. And the settlement agreement, which the parties entered into in July 2014 to resolve the outstanding compliance issues for the indefinite suspension and removal grievances, specifically excluded the grievant's 2012-13 appraisal "and ***compliance*** with this or any related settlement agreement."[17] Accordingly, the facts are clear that the matters in this grievance are distinct and different from those asserted in the prior grievances and are not inextricably intertwined or concerned with her previous removal.[18]

Our dissenting colleague's assertion − that the instant grievance, which was filed in April 2013, is inextricably intertwined with the grievances challenging the September 2009 indefinite suspension and the December 2010 removal – relies upon a bald misrepresentation of the facts.[19]

Accordingly, we have jurisdiction to review the exceptions.

[11] *Id.* at 34.

[12] *Id.* (quoting Exceptions, Attach., Joint Ex. 1, Collective-Bargaining Agreement (CBA), Art. 12, § 2.H.); *see also id.* at 38 (making same finding that Agency can revalidate appraisals "indefinitely").

[13] *Id.* at 44.

[14] Order to Show Cause at 1 (quoting *AFGE, Local 1013*, 60 FLRA 712, 713 (2005) (*Local 1013*)); *see* 5 U.S.C. §§ 7121(f), 7122(a).

[15] In addition, on October 20, 2016, the Union requested leave to file, and did file, a reply to the Agency's response. The Authority has, in similar circumstances, granted leave to reply to a response to a show-cause order, so we grant the Union's request to file its reply and consider the reply here. *U.S. Dep't of the Treasury, IRS, Nat'l Distribution Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (citing 5 C.F.R. § 2429.26(a); *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 999 (2004)) (because supplemental reply responded to timeliness arguments first raised in response to Authority's order, Authority considered reply's timeliness arguments).

[16] Agency's Resp. at 1.

[17] Settlement Agreement at 2 (emphasis added).

[18] *See Local 1013*, 60 FLRA at 713 (when determining whether an award relates to a matter described in § 7121(f), the "Authority looks not to the outcome of the award, but to whether the claim advanced in arbitration is one reviewable by the Merit Systems Protection Board" and, on appeal, by the U.S. Court of Appeals for the Federal Circuit).

[19] It is ironic indeed that our dissenting colleague describes the facts which led to the grievant's indefinite suspension and removal as "irrelevant details" when the premise of our colleagues' dissent is that this grievance is "inextricably intertwined" with the disciplinary actions imposed by the Agency as a consequence of those same facts. Our references to the egregious conduct which caused the Agency to indefinitely suspend and then to remove the grievant is a recitation of fact, not a "personal attack." Contrary to the dissent's assertions, it is no more possible to "fairly adjudicate" this case without referring to the grievant's egregious conduct than it would be to ignore the grievant's allegations that the Agency "created a hostile work environment" after the grievant filed her 2007 EEO complaint.

IV. Analysis and Conclusions

A. Arbitrator Helburn exceeded his authority.

As relevant here, an arbitrator exceeds his or her authority by resolving an issue not submitted to arbitration or disregarding specific limitations on his or her authority.[20] The Agency argues that Arbitrator Helburn exceeded the limitations that the previous settlement agreement placed on his authority when he considered the Agency's general compliance with Arbitrator Kelliher's awards, rather than limiting himself to the issue of the grievant's appraisal.[21]

Consistent with the settlement agreement, the issue before Arbitrator Helburn concerned only the "*annual appraisal grievance*[]."[22] The Authority applies the essence standard to review an arbitrator's interpretation of a settlement agreement[23] because "a settlement agreement constitutes a contract . . . , to which ordinary rules of contract construction apply."[24]

There is no dispute that Arbitrator Helburn had the authority to decide the grievance concerning the 2012-13 appraisal. However, he determined that the Agency had not complied with Arbitrator Kelliher's awards even though the parties' settlement agreement had "complete[ly] and final[ly]" resolved "all matters left" from those awards.[25]

Accordingly, Arbitrator Helburn disregarded specific limitations on his authority.[26] Thus, we grant the Agency's exceeded-authority exception and set aside those portions of the Helburn award that concern the Agency's general compliance with, or purported violations of, Arbitrator Kelliher's awards.

B. The direction to revalidate the grievant's 2008-09 outstanding performance appraisal for 2012-13 fails to draw its essence from the collective-bargaining agreement.

The Agency argues that the direction to revalidate the grievant's 2008-09 outstanding performance appraisal for 2012-13 fails to draw its essence from the collective-bargaining agreement because it is not based on the grievant's actual, observable work performance.[27]

Arbitrator Helburn found that the grievant's actual work performance was immaterial.[28] Thus, his direction to revalidate the grievant's 2008-09 outstanding appraisal was not based on an evaluation of her work performance. Further, the only wording from the parties' collective-bargaining agreement upon which he expressly relied to support his revalidation remedy was a sentence indicating that "[a]ppraisals may be revalidated indefinitely."[29]

However, the agreement also requires that all appraisals "measure *actual work performance*."[30] Further, it states that an appraisal "can be revalidated as many times as the supervisor determines that the *appraisal is still accurate and reflects the employee's current performance.*"[31] Arbitrator Helburn relied on the testimony of certain Agency witnesses to find that the agreement permitted revalidating the grievant's 2008-09 outstanding appraisal without considering her actual work performance,[32] but that testimony cannot overcome the agreement's plain wording.[33] Consequently, we find that the direction to revalidate the grievant's 2008-09 outstanding appraisal, without any consideration of her actual work performance, fails to draw its essence from the parties' collective-bargaining agreement. Thus, we grant the Agency's essence exception and set aside

---

[20] *NAGE, SEIU, Local 551*, 68 FLRA 285, 286 (2015) (citing *AFGE, Local 1617*, 51 FLRA 1645, 1647 (1996)).

[21] Exceptions at 37 ("He clearly exceeded his authority when he disregarded the [s]ettlement [a]greement . . . .").

[22] Settlement Agreement at 2 (emphasis added).

[23] *AFGE, Local 12*, 61 FLRA 507, 508 (2006) (citing *U.S. Dep't of the Navy, Naval Weapons Station, Yorktown, Va.*, 57 FLRA 917, 920 (2002)).

[24] *Id.* (quoting *SSA, Balt., Md.*, 57 FLRA 181, 184 (2001)). Under this standard, the Authority will find that an arbitrator's interpretation fails to draw its essence from a settlement agreement when the excepting party establishes that the interpretation: (1) cannot in any rational way be derived from the settlement agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the settlement agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the settlement agreement; or (4) evidences a manifest disregard of the settlement agreement. *Id.* (citing *U.S. DOL (OSHA)*, 34 FLRA 573, 575 (1990)).

[25] Settlement Agreement at 1.

[26] *See, e.g., U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 301, 303-04 (2011) (where parties limited arbitrator to two stipulated questions and, after answering those questions, arbitrator made additional findings that (1) grievant's coworkers harassed her and (2) she was "constructively discharged," arbitrator resolved issues not before him).

[27] Exceptions at 15-18.

[28] Helburn Award at 34.

[29] *Id.* (quoting CBA, Art. 12, § 2.H.).

[30] CBA, Art. 12, § 4.C. (emphasis added).

[31] *Id.* § 4.N.2. (emphasis added).

[32] Helburn Award at 35.

[33] *Cf. U.S. Small Bus. Admin.*, 70 FLRA 525, 528-29 (2018) (Member DuBester concurring and dissenting in part) ("[A]rbitrators may not look beyond a collective-bargaining agreement – to extraneous considerations such as past practice – to modify an agreement's clear and unambiguous terms.").

the revalidation remedy.[34] And because the direction to pay the grievant a retroactive performance award depended on the revalidation remedy, we likewise set aside the retroactive performance award.

C. Arbitrator Helburn's retaliation and hostile-work-environment findings are inconsistent with Title VII.

As relevant here, to assess an allegation of unlawful retaliation under Title VII, the question 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."[35] And, as relevant here, to establish the existence of an unlawful hostile work environment, a grievant must demonstrate that harassment was sufficiently severe or pervasive to alter the conditions of the grievant's employment and to create an abusive working environment.[36]

We note that, as a result of our resolution of the Agency's exceeded-authority and essence exceptions, we have already set aside most of the determinations upon which Arbitrator Helburn based his retaliation and hostile-work-environment findings.[37]

Thus, the only remaining determinations supporting the conclusion that the Agency violated Title VII are that: (1) without evaluating the grievant's work, the grievant's third-level manager told his subordinates that he did not want the grievant to receive an outstanding performance rating;[38] (2) Agency witnesses testified that the grievant did not perform sufficient observable work to receive a performance rating, but those officials were not aware of the work that the grievant performed;[39] (3) the grievant did not receive the contractually required mid-year performance review or written explanation for her not-ratable annual appraisal;[40] and (4) the Agency's grievance denials did not address the Union's discrimination and reprisal allegations.[41] Arbitrator Helburn faulted the Agency for these instances of "[b]usiness as usual [that] became neglect," and he posited that such treatment proved "discrimination."[42]

We find that these four examples were not sufficiently "materially adverse" that they "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[43] Even if the circumstances were personally unpleasant to the grievant, they are more akin to "annoyances that often take place at work and that all employees" experience.[44] Moreover, they were not sufficiently severe or pervasive that a reasonable person would find them "objectively" so "hostile or abusive" that they altered the conditions of the grievant's employment.[45] Consequently, these examples do not adequately support the Arbitrator's reprisal or hostile-work-environment findings.

For the foregoing reasons, we set aside, as contrary to law, the findings that the Agency violated Title VII and the corresponding remedies.[46]

V. Decision

We set aside Arbitrator Helburn's award.

[34] Because we are setting aside the revalidation remedy on this basis, we need not address the Agency's argument that the remedy violated government-wide regulations, Exceptions at 18-20; the Back Pay Act, *id.* at 20-23; and Title VII, *id.* at 23.

[35] *Pension Benefit Guar. Corp.*, 64 FLRA 692, 698 (2010) (*PBGC*) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

[36] *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 64 FLRA 39, 53 (2009) (*IRS*) (citing *Walton v. Mental Health Ass'n of Se. Pa.*, 168 F.3d 661, 667 (3d Cir. 1999)).

[37] Specifically, in resolving the exceeded-authority exception, we set aside the determinations that the Agency failed to: inform the grievant's manager about remedial obligations under Arbitrator Kelliher's awards; provide the grievant sufficient training; timely effectuate the grievant's transfer; discipline the discriminating officials identified in Arbitrator Kelliher's second award; and address an anonymous, unpleasant letter that the grievant received. Those determinations related to the Agency's general compliance with Arbitrator Kelliher's awards, rather than relating only to the 2012-13 appraisal. Further, in resolving the Agency's essence exception, we set aside the determination that the Agency should have revalidated the grievant's 2008-09 outstanding appraisal, rather than giving her a not-ratable appraisal for the 2012-13 performance year.

[38] Helburn Award at 34-35.

[39] *Id.* at 16, 37.

[40] *Id.* at 38.

[41] *Id.*

[42] *Id.*; *see also id.* at 37 (finding that "business as usual and neglect . . . contributed to the hostile work environment" identified in the second award).

[43] *PBGC*, 64 FLRA at 698 (quoting *Burlington*, 548 U.S. at 68).

[44] *Id.* (quoting *Burlington*, 548 U.S. at 68).

[45] *IRS*, 64 FLRA at 53.

[46] Helburn Award at 44. Because we are setting aside the compensatory damages and tax-related enhancement on this basis, we need not address the Agency's other contrary-to-law challenges to those remedies. *See* Exceptions at 28-34.

Member DuBester, dissenting:

The Authority does not have jurisdiction over the Agency's exceptions. The majority's determination to resolve the exceptions on their merits fails to consider pertinent facts, and is contrary to law.

The Authority's Case Intake and Publication office (CIP) issued an order directing the Agency to show cause why its exceptions should not be dismissed.[1] Specifically, CIP ordered the Agency to explain why the award did not relate to a matter over which the Authority lacks jurisdiction under §§ 7122(a) and 7121(f) of the Statute.[2] For reasons discussed below, I would find that the Authority lacks jurisdiction in this case.

Under § 7122(a), the Authority does not have jurisdiction to review an arbitration award "relating to a matter described in § 7121(f)."[3] The matters described in § 7121(f) include serious adverse actions such as removals under 5 U.S.C. § 4303 or § 7512.[4] The Authority will determine that an award relates to a matter described in § 7121(f) when the award resolves, or is inextricably intertwined with, a § 4303 or § 7512 matter.[5] In making that determination, the Authority considers whether the claim advanced in arbitration is one reviewable by the Merit Systems Protection Board (MSPB) and, on appeal, by the U.S. Court of Appeals for the Federal Circuit (Federal Circuit).[6]

It is well-settled that if "an employee chooses to file a grievance over a removal rather than appeal the removal to the MSPB, the eventual arbitration award is a substitute for a decision of the MSPB."[7] Further, consistent with MSPB and Federal Circuit precedent, when an arbitration award resolves a dispute over a removal, and there is alleged noncompliance with that award, a subsequent award resolving the noncompliance allegation is inextricably intertwined with a § 4303 or § 7512 matter.[8] Although an agency's noncompliance with an award is not a matter expressly covered under § 4303 or § 7512,[9] the agency's noncompliance is, as the Federal Circuit has expressed it, "inextricably linked" to the original personnel action that was covered under those provisions.[10]

In its abbreviated analysis, the majority simply adopts, with little discussion, the Agency's claim that the Authority has jurisdiction in this case. The Agency claims that the Authority has jurisdiction because "[t]he sole personnel action at issue" here is the grievant's "not-ratable" (NR) appraisal, not the grievant's removal.[11] The Agency's claims lack merit.

The 2016 award before the Authority in this case is inextricably intertwined with the grievant's removal. The parties agreed to arbitrate the grievant's removal, resulting in the 2012 Awards. After the 2012 Awards issued, the Agency gave the grievant an NR appraisal. Because the 2012 Awards resolve the matter of the grievant's removal, the Arbitrator's 2016 Award, examining whether the NR appraisal complied with the 2012 Awards,[12] is inextricably intertwined with the original removal action that gave rise to the 2012 Awards.[13] And because the 2016 Award serves as a substitute for an MSPB decision on a petition for enforcement,[14] the award is reviewable only by the Federal Circuit[15] – not the Authority.

Further, and contrary to the Agency's claims,[16] the discrimination issue before the Arbitrator is inextricably intertwined with the grievant's removal action and, therefore, does not provide an independent basis for the Authority to assert jurisdiction over the Agency's exceptions. The Union's claims of discrimination were raised in its challenge to the original removal action. Moreover, the same Agency actions that form the basis of the Union's noncompliance claims

---

[1] Order to Show Cause at 1.
[2] *Id.* at 1-2.
[3] *Id.* at 1 (quoting 5 U.S.C. § 7122(a)).
[4] *See* 5 U.S.C. § 4303 (pertaining to "[a]ctions based on unacceptable performance"); 5 U.S.C. § 7512 (pertaining to adverse actions); *see also U.S. EPA, Narragansett, R.I.*, 59 FLRA 591, 592 (2004).
[5] *AFGE, Local 1633*, 69 FLRA 637, 638 (*Local 1633*); *U.S. Dep't of Transp., FAA*, 57 FLRA 580, 581 (2001) (*FAA*).
[6] *Local 1633*, 69 FLRA at 638; *see U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Miami, Fla.*, 57 FLRA 677, 678 (2002) (*DOJ*).
[7] *AFGE, Local 2094*, 51 FLRA 1612, 1616 (1996) (*Local 2094*).
[8] *See* 5 U.S.C. § 1204(a)(2) (The Board has the authority to order any federal agency or employee to comply with decisions and orders issued under its jurisdiction and the authority to enforce compliance withits orders and decisions.); *see also Miller v. Dep't. of Air Force*, 27 MSPR 593, 594 (1985) (MSPB will issue a compliance and enforcement decision resolving allegations of noncompliance); *cf. U.S. Dep't of the Interior, Nat'l Park Serv., Gettysburg, Nat'l Military Park*, 61 FLRA 849 (2006) (grievance concerning revocation of grievant's law enforcement commission not inextricably intertwined with separate grievance involving grievant's removal).
[9] *King v. Reid*, 59 F.3d 1215, 1218 (Fed. Cir. 1995).
[10] *See Amin v. MSPB*, 951 F.2d 1247, 1253 (Fed. Cir. 1991) (MSPB compliance action "inextricably linked" to original personnel action, and is reviewable by Federal Circuit under provisions of § 7703.)
[11] Agency's Resp. at 1, 6; *see also* Majority at 5.
[12] The parties "specifically excluded" this matter from their settlement agreement. Majority at 5.
[13] *See Local 1633*, 69 FLRA at 638; *see also Local 2094*, 51 FLRA at 1616.
[14] *See Local 1633*, 69 FLRA at 638; *Local 2094*, 51 FLRA at 1616.
[15] *See DOJ*, 57 FLRA at 678.
[16] Agency's Resp. at 6.

resolved in the 2016 Award also form the basis of the Union's discrimination allegation. These include actions such as, the grievant not being reassigned as she should have been, not being properly trained, and not being properly evaluated. Thus, by showing that the Agency continued a pattern of discrimination – that is, by not complying with the 2012 Awards – the Union also established that the Agency's actions constitute bad-faith noncompliance. Therefore, the Union's discrimination claims resolved in the 2016 Award are inextricably intertwined with the Union's allegation that the Agency failed to comply with the 2012 Awards, which concerned the grievant's removal.

I would therefore dismiss the Agency's exceptions for lack of jurisdiction.

Finally, on a different note, the majority's use, in its opening paragraph, of tragic, and irrelevant, details from the grievant's personal life has no place in Authority decision-making.[17] The majority's use of these irrelevant details, to set the tone for their decision ruling against the grievant, is a personal attack on the grievant. This is inconsistent with the Authority's responsibility under the Statute to fairly adjudicate the cases brought before it based on the pertinent legal considerations, not on opinions about irrelevant aspects of a party's conduct.

[17] What is relevant is that the grievant was removed, not the reasons for the removal.