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

CASE No. BW-99-R-0031
101 FLRR 2-1004

May 31, 2000

Arbitrator: Irwin R. Kaplan

In the Matter of Arbitration between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1923, UNION,

and

SOCIAL SECURITY ADMINISTRATION, AGENCY

CASE No. BW-99-R-0031

ISSUE: Hiring and Promotions

Before: Irwin Kaplan, Impartial Arbitrator

APPEARANCES:

For the American Federation of Government Employees AFL-CIO, Local 1923:

Michael J. Snider, Esq., Staff Attorney and Samuel Berkowitz, Vice President.

For the Social Security Administration

Michelle Maxwell. Labor Relations Specialist.

Appealed (O-AR-3336)(Upheld)

The Arbitrator Found The Agency Violated The Parties' Agreement In Its Selection And Promotion Processes.

The Union filed a grievance that the Agency had "violated the internal and external hiring provisions as well as certain promotion practices of the [1996]

National Agreement." The Agency argued it was following Office of Personnel Management regulations and the merit promotion principles of the 1993 National Agreement, since no agreement had been reached between the parties about assessment criteria for the 1996 NA. The Arbitrator found the Agency wrongfully delayed an employee's promotion, failed to promote an employee at the first pay period after selection, did not inform employees who exercised priority consideration of the bona fide reason for their non-selection for a vacancy, and used additional criteria in the selection process. The Arbitrator awarded backpay, interest, priority considerations, and ordered the Agency to cease and desist from future violations.

OPINION AND AWARD

STATEMENT OF THE CASE

This arbitration hearing was held at the Social Security Administration (herein "SSA" or "Agency') headquarters, in Baltimore, Maryland, on November 17 and 18, 1999, and December 15, 1999, pursuant to the parties' arbitration panel procedures. The American Federation of Government Employees, AFL-CIO, Local 1923 (herein "Union' or "AFGE'), filed the underlying grievance on May 7, 1998 (Joint Exhibit 2), Pursuant to the provisions of Article 24, Section 10 and Article 25 of the National Agreement (Joint Exhibit 1) between AFGE and the SSA 1 In essence, it is alleged that the Agency has variously violated the internal and external hiring provisions as well as certain promotion practices of the National Agreement (also "NA"),

The various provisions of the National Agreement relied on by the parties in Pertinent Part will be set forth infra. as applied to the Benefit Authorizer (BA) position in the Office of Central Operations (OCO). The Union relies largely on the National Agreement, which became effective March 5, 1996.

On the other hand, the Agency maintains that the disputed hiring and promotion practices vis-al-vis BA's are consistent with principles of merit promotion, as set forth in the 1993 National Agreement, as well as rules and regulations established by the Office of Personnel Management (OPM) and Title 5, Chapter 71, Section 7106. According to the Agency, the provisions in question that are operative in OCO are contained in the 1993 National Agreement and not in the 1996 NA, as contended by AFGE. (Transcript Volume ("'Tr. Vol.") L p. 12)

The parties noted their positions on the record, adduced testimony, cross-examined witnesses and introduced exhibits. Post- hearing briefs were timely submitted on March 8, 2000, which tune the hearing closed.

PRINCIPAL ISSUES

At the hearing, the parties stipulated to submissions as follows: Whether the Agency violated the National Agreement, law, rule or regulation in its hiring, selection and/or promotion in the benefit authorizer position at Agency headquarters by:

1. Failing to provide external hires the proper grade at time of hire or at the earliest
possible date;

2. Failing to effectuate internal promotions in a timely manner;

3. Failing to give proper consideration to employees who used priority consideration;

4. Improperly using additional criteria in the hiring or selection process;

5. Improperly placing non-bargaining unit employees on the first best qualified list and/or

6. Improperly limited the area of consideration, and, if so, what shall be the remedy? (Tr.

Vol. I. pp. 5-6)

BACKGROUND

Patricia Johnson has been employed by the Agency for approximately 26 years. In
January 1997 the Agency posted announcements of vacancies for the BA career ladder
Grade 5 to 9 positions in OCO. (Tr. Vol. 11, pp. 145, 148) At the time, and for the previous two years, Ms. Johnson was employed as a Grade 5 Disabilities Support Examiner (DSE).Mrs. Johnson applied for the position through outside recruitment (also
referred to as the external selection process). (Tr. Vol. II, p. 146; Union Brief p. 10) Ms.
Johnson testified that the Personnel Officer, Melvin Willingham, told her at an interview in March 1997, that she would be picked up as a GS-5 but would have to wait 90 days before receiving a GS-7. (Tr. Vol. II, p. 147) According to Mrs. Johnson, she was notified in May 1997 that she was promoted to the GS-7 BA position and that it would be effective August 31, 1997 but that the effective date of the promotion did not actually occur until October 1997. (Ld. at 151-152) The Union noted that Ms. Johnson waited well beyond the 3 month period for the

promotion to the higher grade to kick in, as required by 5 CFR Ch. 1, Subpart E, S 330.501. (Tr. Vol. L pp. 70-71; Union Brief p. 10)

The Agency introduced a Notification of Personnel Action (Standard Form "SF" 50-B - Agency Exhibit 5) through Mr. Willingham that revealed that the effective date of the appointment from an OPM certificate for the BA position for Ms. Johnson was May 25, 1997 and that the effective date of her promotion to GS-7 was August 31, 1998. Thus, Mr. Willingham noted that that Ms. Johnson waited "roughly 90 days!' and her promotion to GS-7 was timely. (Tr. Vol. II, pp. 273-274).

As explained by Mr. Willingham, SSA works in conjunction with OPM to fill vacancies through external means. OPM will announce vacancies primarily through the internet and also solicit interest by posting & through various sites. Next, OPM will compile certain employment information about the candidates, including the eligible grade level. A register is compiled by OPM that may contain as many as 1000 names.

However, SSA may only need one to ten names to fill a particular vacancy. In turn, OPM will forward to SSA a certified list of candidates with their corresponding scores called a certificate from which the Agency will select the number of applicants it needs. In connection with the external BA postings in the instant case, SSA received two such certificates, one for grade level 5 and one for grade level 7. (See, Tr. Vol. 11, pp. 230-233)

According to Mr. Willingham, if an employee is eligible at both the GS-5 and GS7 levels but only certified by OPM at the GS-5 level, that employee could only be hired by SSA at the GS-5 level.

Generally, an employee certified by OPM for both Grades 5 and 7 will be selected by the Agency at the higher grade.(Id. at 234-235) An employee hired at the GS-5 level who is eligible at the GS- 7 level could be promoted in 90 days, provided qualifications in time and grade were met. If the candidate was hired at Grade 5 but did not meet qualifications for Grade 7, it would take that individual 52 two weeks to be promoted to GS-7. In this connection, Mr. Willingham made reference to time-in grade as se forth in 5 CFR Subpart F, 300.604(b) (Tr. Vol. pp. 240-241 - Agency Exhibit 2)

Linda Wright, an external hire, also applied for the GS-5-7-9 BA career ladder position in OCO in response to the 1997 announcement. (Tr. Vol. H, pp 177, 189-190 Union Exhibit 8) Prior to being picked up as a BA GS-5 in OCO for the Agency, Ms. Wright had been a Management Assistant GS-7, Step 9, at Fort Meade. According to Ms. Wright, she had received a letter from OPM stating that she was qualified for both a GS-5 and GS-7 position. She asserted that Agency

officials including, Mr. Willingham, had represented that SSA would match the salary she had at Fort Meade. (Id. at 187-188) However, Ms. Wright was hired as a GS-5, Step I; the effective date of the BA position was May 27, 1997 (Id. at 179-179). Ms. Wright testified that when she received her first paycheck as a BA, she discovered that she had been hired as a GS-5, Step 1, and, as such, the Agency had not matched her previous salary, as promised.

In or around June 1997, Ms. Wright contacted Personnel to inquire about her grade as it appeared on Form SF-50 and was told that it would be re-adjusted GS-5, Step IO and that her salary would be compatible to what she earned at Fort Meade. Ms. Wright also testified, that she was told by Personnel officials, Mr. Willingham and Ms. Debbie Jones, that within 90 days she would be promoted to a GS-7. (Tr. at 179) However, she was not promoted within 90 days but had to wait an entire year, until June 1998, to be promoted to a Grade 7. (Id. 179-182).

Ms. Wright had also filed a grievance concerning her salary that the Agency set for her when she was hired as a BA GS-5. The grievance was denied on the basis that the Agency had matched her salary as best it could. (Id. at 19 1) The Union does not now take issue with the fact that Ms. Wright was picked up by OCO as a GS-5. Instead, the Union contends that the Agency wrongly withheld Ms. Wright's promotion to a GS- 7 for one year, noting, that she had been told by Agency officials at around the time she was picked up as a GS-5, that she was qualified and would be promoted to a GS-7 in 90 days. ad. 205) The Agency contends that Ms. Wright was not qualified at a GS-7 level until 52 weeks later. (Id.)

The Union also adduced testimony form Rhonda Lowery, an internal hire. Ms. Lowery testified that she became a BA GS-5 pursuant an announcement of vacancies in June 1997. For approximately 2 1/2 years prior thereto, Ms. Lowery was employed as a GS-5 Development Support Examiner. Although she was picked up as a BA in June 1997, she continued to work as a DSE until her class started in September 1997. According to Ms. Lowery, she was under the impression that she was going to be promoted to a GS- 7 in June 1997, when she had been picked up as a BA, as reflected 'in the announcement in her module. (Tr. Vol. II, pp. 211-212, 21 8) However, when she spoke to her manager, Bill Knutson about the timing of her promotion, he told her that it was effective August 3 1, 1997 2(Id at 211- 212) She did not actually receive any salary increase until October 1997. (Id. at 218)

In addition to employee testimony3, the Union adduced testimony from Union President, John Gage, Union Vice President, Samuel Berkowitz and Union officer and negotiator, Witold Skwierczynski. They testified regarding the various provisions in the National Agreement 4 and past practice relied on by the Union and challenged the application of said provisions by the Agency. According to Gage and Skwierczynski the operative provision with regard to merit promotions

is contained in the 1996 National Agreement and not in the 1993 NA, as maintained by the Agency. (Tr. Vol. I, pp.44-5, 59-9, 121) Included in the sharp disagreements by the parties relative to Article 26, is the meaning of the term "selected," as it relates to internal hires. As testified by Mr. Skwierczyski the notice of selection to a BA position is tantamount to the actual selection of the candidate. Thus, such candidate should be promoted at the beginning of the first pay period after the selecting official decides on a particular candidate from a "best qualified list" for the vacancy in question. (Tr. Vol. III, pp. 469472)

Another major area of disagreement between the parties vis-a-vis Article 26 involves the application of priority consideration as set forth in Section 13. There, "priority consideration" is defined as follows:

> A. Definition. For the purposes of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of previous failure to properly consider the employee for selection

Mr. Gage and Mr. Skwierczynski. were qualified as expert witnesses on the National Agreement (Tr Vol. I, pp.43,116-7) because Of Procedural, regulatory, or Program violation. (Joint Exhibit 1, P. 143) Pamela Williams utilized a priority consideration for a BA vacancy in 1997. She was never given a reason for her non-selection. Ms. Williams testified that her supervisor, Denzel Cutler, told her that he had given her a high recommendation. (Tr. Vol. E[Lpp.463-464) The Agency's practice is to check one of two boxes indicating whether or not the employee exercising his/her priority is being selected for the vacancy position in question with no stated reason advanced by the Agency for its action. (See Union Exhibit 3) According to Mr. Gage and Mr. Skwierczynski, given the contractual definition of priority consideration, management is required to provide a bona fide reason to employees for non-selection. Merely checking a box, without more, to the Union witnesses, violates the National Agreement (Tr. Vol. I, pp. 52-53, 121-125). While Donald Girdner, the current executive officer for OCO maintains, that fill consideration is given the priority consideration by OCO, he denied that the Agency has to provide any justification for non- selection (Tr. Vol. IIL 332). Mr. Girdner also noted that OCO receives the list of "priority considerations" before it receives and considers the Best Qualified List &d. at 331-332). Also in dispute is whether the Agency is improperly resorting to checklists, winch the Union maintains, constitute a secret evaluation system in violation of a long-standing Memorandum of Agreement (IN40U). (Union Brief P. 9) The MOU is in the form of a Settlement Agreement executed by the parties in 1987, whereby the Agency agreed, inter " "that selecting officials will discontinue the use of checklists." (Union Exhibit 4)

Currently, the Agency provides a Selection Worksheet for supervisors to note information about candidates that, as testified by Mr. Skwierczynski, are outside

the weights and factors of the vacancy announcement. (See e.g., Union Exhibit 5; Tr. Vol. L pp. 128-129) The weights and factors measure experience on the job and the education of candidates. In other words, it is a scoring system used by the Agency to determine the best qualified candidates. In addition the supervisor is expected to signify whether the candidate is "highly recommended," "recommended" or "not recommended " in the space provided on the Selection Worksheet. Mr. Skwierczynski testified that the current National Agreement does not contain any provision that would allow supervisors to so judge employees already on the best qualified list. According to Mr. Skierczynski in effect, the name of any employee not rated highly recommended would not be forwarded to the selecting official thereby violating the NA- (Tr. Vol. I, p. 13 1)

According to Mr. Girdner, and contrary to the Union's position, the 1996 NA does not apply to management's practice of using additional means to determine and select the best qualified candidates. Thus, the assessment criteria that is referred to in Article 26, Section 9 of the NA is inoperative because said criteria has not been developed and assessment panels are not yet in place. (See, Joint Exhibit 1, p. 139) Mr. Girdner, with corroboration from Team Leader Richard Matthews, asserted that the old national promotion plan procedures that were applicable under the 1993 NA (Agency Exhibit 3), with factors and weights, is still operative. (Tr. Vol. III, pp. 349-355, 421-422) In September 1996, The Agency's Office of Personnel issued instructions to that effect (Tr. Vol. III, pp. 353-54; Agency Exhibit 8) and also notified the Union's General Committee (Agency Exhibit 9).

According to Mr. Matthews, the Union did not respond. (Tr. Vol. Ell, p. 423). With regard to the Settlement Agreement of 1987 (Union Exhibit 4), Mr. Matthews5 indicated that it pertained principally to the Program Service Center (PSQ, one of six components that comprise the General Committee and not to OCO. (Tr. Vol. III, pp. 426-429) Another issued raised by the Union is the alleged improper consideration by the Agency of non-bargaining unit employees, in response to vacancy announcements, before considering for selection internal candidates, as required by Article 26, Section 7 B of the National Agreement. There, the NA provides: "For a period of IO workdays prior to consideringcandidates from outside the AFGE bargaining unit, the Employer agrees to first consider for selection internal candidates." (Joint Exhibit 1, p. 134) According to the Agency, given the usually large number of candidates for BA positions - - the selection sometimes takes up to 90 days, well beyond the I O-day requirement of the National Agreement, no bargaining unit employees were disadvantaged. (Agency Brief pp. 24-25)

Mr. Matthews testified that he served as an advisor to the Agency negotiating team but it does not appear that he was at the negotiating table that led to the Settlement Agreement (Tr. Vol. III, P 432). Finally, the Union contends that the Agency improperly limited the area of consideration. Mr. Berkowitz testified that the Agency improperly limits employees from appearing on more than one BQL

although they may be qualified for vacancies at multiple grade levels (GS-5, 7, 9). He asserted that the Agency is thereby effectively reducing the chances of employees to be considered and selected at certain grades levels for which they are qualified (Tr. Vol. L pp. 7879). According to W Gage and h4r. Skwierczynski the Agency cannot reduce the area of consideration unilaterally. (Tr. Vol. 1, pp. 56-57, 134). Mr. Skwierczynski asserted, that only the spokesperson for the Union's General Committee could agree to such action by the Agency and that did not occur.

(TR. Vol. I, p. 137) The Agency maintains that the Union's position is unfounded and a misinterpretation of the meaning of the Area of Consideration (AOC). (Agency Brief p. 26) Thus, the Agency asserts that AOC has nothing to do with which candidates are qualified or which are recommended. According to the Agency, the AOC refers to the designated geographical area(s) from which personnel will solicit and accept employee applications. (Ld. at 25) In this connection, the Agency noted that the language in both the 1993 and 1996 National Agreements are identical regarding optional reduction and maintains that such language supports its view that AOC refers to the area where applicants are solicited. (Id. at 26)

There, the provision states as follows:

When solicitation throughout the normal area would be clearly unpractical because exterminating and unique circumstances exist, the promotion record must contain complete documentation justifying the smaller area, which shall only be instituted by mutual consent of the parties. (See, Joint Exhibit 1, Article 26, Section 5b, p. 13 5; Agency Exhibit 3, Article 26, Section 5b, p. 1 16)

RELEVANT CONTRACT PROVISIONS

Article 26

Merit Promotion

Section 1 - Purpose and Policy

It is the intent of the parties to redesign the merit promotion process as a coronary to the two tier appraisal system created in Article 21 and to assure openness and objectivity in merit promotions.

The parties agree that the purpose and intent of the provisions contained herein are to ensure that merit promotion principles are applied in a consistent manner with equity to all employees and without regard to political, religious, or labor organization affiliation or non-affiliation, marital status, race color, sex, national origin, disabling condition, age, or sexual orientation and shall be based solely on job-related criteria. This article sets forth the merit promotion system, policies, and procedures applicable to bargaining unit positions.

Section 4 - - Career ladder Advancement

A. At the time the employee reaches his/her earliest date of promotion eligibility, the Administration will decide whether or not to promote the employee.

I. If an employee is certified as successful and is meeting the promotion criteria in the career ladder plan, the Administration will certify the promotion which will be effective at the beginning of the first pay period after the requirements are met.

2. If an employee is not meeting the criteria for promotion, the employee will be provided with a written notice at least 60 days prior to earliest date of promotion eligibility. The written notice will state what the employee needs to do to meet the promotion plan criteria.

a. If the employee is making progress, the supervisor will ensure that he/she has the opportunity to acquire pertinent skills and knowledge and to demonstrate that he/she meets promotion requirements as soon as is feasible.

b. If the employee is experiencing problems, the provisions in (B) are applicable.

3. In the event that the employee met the promotion criteria but the appropriate management official faded to initiate the promotion timely, the promotion will be retroactive to the begaining of the first pay period after the pay period in which the requirements were met.

Section 7 - Vacancy Announcements and Areas of Consideration

A. Positions and training to be announced. AD actions requiring the use of competitive Procedures under tins Agreement will be announced and posted throughout the area of consideration.

B. For a period of 10 workdays prior to considering candidates from outside the AFGE bargaining unit, the Employer agrees to first consider for selection internal candidates.

C. Areas of Consideration - The area of consideration for a position vacancy is that area in which the administration should reasonable expect to locate enough well-qualified candidates. Employees within an area of consideration are given the opportunity to be considered by means of the vacancy announcement and application procedures and/or by being automatically considered without having to submit an application. Unless otherwise indicated, in this article areas of consideration applicable when filing unit position vacancies are as follows:

1. For all positions at GS-14 and GS-15,SSA-wide;

2. For all other positions as GS-8 and above, SSA region-wide;

3. For all other positions at GS-7 and below, SSA commuting area-wide.

4. In applying the above-designated areas of consideration, the following

criteria will be applied:

a.

b. The term "region-wide includes those installations within all components within the geographical regional area.

The following relationships exists between SSA/0HA Region HI (Philadelphia): For positions in the Philadelphia Region, the term "region-wide' includes SSA Headquarters in Baltimore, and OHA Headquarters in Falls Church, Virginia.

5. Reducing the Area of Consideration.

a. Mandatory Reduction - - Where a position is re-engineered to a higher grade, the area of consideration must be restricted to those employees performing the duties that form the basis for the higher grade. (In filling such positions, competitive procedures must be used and candidates usually are identified by the Serving Personnel Office rather than through a vacancy announcement and application procedure.) The term "Re-engineered Position" means a new position from the restructuring of the duties of one or more already established positions through planned management action.

b. Optional Reduction - When solicitation throughout the normal area would be clearly unpractical because extenuating circumstances exist, the promotion record must contain complete documentation justifying the smaller area, which shall only be instituted by mutual consent of the parties.

6. Extending the area of consideration. When the area of consideration is not expected to produce an adequate number of well-qualified candidates for the selecting official's consideration, it may be extended. The vacancy announcement will identify the extended area of consideration.

E. Announcing Career Ladder Vacancies and Vacancies covered by Training Agreements. Career ladder vacancies and vacancies covered by training agreements may be announced at any or all grades. The Union will be provided with written notice of any changes in the posting of these announcements, prior to being posted.

Section 10- - Assessment Panel

A. Panel Membership Requirements - Assessment Panels will be established for all competitive actions. Panel members shall be instructed in the tasks necessary to perform the panel's function

B. Members of the Assessment Panel should be familiar with the job requirements of the position(s) being filled.

C. Assessment Panel materials - The Administration will provide the Assessment Panel with all of the necessary information for completing its function.

D. Assessment Panel Responsibilities - The Assessment Panel will:

1. Develop assessment criteria.

2. Develop an application tailored to the assessment criteria for the position;

3. Verify applicant information, if necessary;

4. Apply assessment criteria;

5. Identify well-qualified candidates within time frame set by the selecting official; and

6. Provide input to the selecting official, if requested. The panel may use interviews as a tool in evaluating candidates. The panel's working notes and/or work sheets will be made a part of the promotion package. The notes will serve as reference material to document the process by which the well-qualified candidates were identified. The list of well-qualified candidates will not be based on a predetermined number if candidates per vacancy unless agreed to between the parties at the component level.

E. If an announcement pertains to more than one grade level or geographic location, a separate group of well-qualified candidates will be developed for each grade level and location unless agreed to between the parties at the component level. The panel will work by consensus. The panel will use consensus reaching techniques, and facilitators will be provided as needed.

G The assessment panel's actions will be treated confidentially and in accordance with provisions of the Privacy Act.

Section 11 -Selection

A. Once a-well-qualified list has been established by the Assessment Panel, there will be no other candidate information gathered by the selecting official. However, this does not preclude the selecting official from re-contacting the Assessment Panel and/or interviewing all well-qualified candidates.

B. The selecting official will make selection (s) within 60 calendar days of receipt of the Assessment Panel's well-qualified package.

C. If the vacancy is one for which an under representation exists and is a targeted occupation as identified in the Affirmative Employment Plan, and there are well qualified candidates who would reduce the under representation, then

the selecting official will give serious consideration to those individuals who would reduce the under representation. if an under representation is not present, then the selecting official will seriously consider providing upward mobility for those well-qualified candidates who have been stagnated in grade.

D. In the event of unanticipated vacancy(s) in the same position and location as the posted vacancy occurring within 90 days of the selection, the selecting officer may make additional selections from the well-qualified candidates.

E. When a selection has been made, the Administration will arrange a release date, notify the employee, and ensure that the appropriate personnel forms are processed. The effective date of a promotion action, other than promotion within a career ladder, will be the first day of the pay period in which the employee is scheduled to report. if an employee has been selected for promotion, has accepted the offer, and a reporting date has been established, and the resultant request for personnel action (SF-52) is not timely received and/or acted upon by the appointing official (SPO), the action shall be made retroactive to the reporting date.

F. Employees selected for career ladder positions will be promoted to the next higher-grade level at the beginning of the first pay period after selection, provided time in grade and any other legal promotion requirements are met.

G. Competitive selections will be announced throughout the area of consideration by posting announcements on designated bulletin boards. Normally, such announcements will be made within 10 workdays after the close of the pay period during which the selection)s_ was/were made effective.

H. The union president of each component will also receive notice.

I. Any other Union official who has received vacancy notices will continue the past practice and also receive this notice as well.

Section 13 - Priority Consideration

A. Definition. For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of previous fare to properly consider the employee for selection because a procedural, regulatory, or program violation.

B. Eligibility. The following employees will receive priority consideration in accordance with the procedures set forth.

1. Where the erroneous selection was allowed to stand, those employees who were not properly considered (as identified below) because of the violation win receive priority consideration. An employee is entitled to only one priority consideration for noncompetitive promotion for each instance in which he/she was previously denied proper consideration.

2. If the action taken to correct an erroneous promotion was to require that the position be vacated, employees who were not promoted or given proper consideration because of the violation (that is, employees in the well-qualified group who were not selected or employees who should have been in this group but were not) will be considered for promotion to the vacated position before candidates are considered under a new promotion or other placement action.

C. Processing. The procedures for processing a priority consideration(s) shall be:

1. Employees will be notified in writing by the authorized management official of entitlement to each priority consideration. Such notice will advise employees that if a vacancy is announced and posted and the employees wish to exercise their priority consideration they should submit the necessary application to the Servicing Personnel Office with written request that they wish priority consideration for the vacancy.

2. Priority consideration is to be exercised by the selecting officer at the option of the employee for an appropriate vacancy (s). An appropriate vacancy is one for which the employee is interested, is eligible, and which leads to the same grade level of the vacancy for which proper consideration was not given, or for which an employee was denied.

3. Prior to the referral of eligible candidates to the assessment panel, the name(s) of the employee(s) requesting to exercise priority consideration will be referred to the selecting officer. The selecting officer will make a determination on the requests prior to the assessment panel's evaluation of any other candidates for the vacancy.

4. The fact that the employee chooses to exercise a priority consideration, does not preclude that employee from also filing an application as specified in the vacancy announcement.

D. Union Notification. In order to assure compliance with this section, the Union will be finished statistics on priority considerations granted, exercised, and the results. Statistics will be kept and provided to the Union on a quarterly basis. The Union will also be notified in writing of each individual priority consideration completed.

PRINCIPAL CONTENTIONS OF THE PARTIES THE UNION'S CONTENTIONS

First, the Union contends that the Agency filled to provide external hires the proper grade at the time of hire or at the earliest possible date. In this connection, the Union maintains that it demonstrated through expert witnesses as well as case law that the Agency is obligated to promote external hires 90 days after hire into career ladder position, upon satisfactory performance. The Union also noted that under the National Agreement, the Agency has an obligation to inform employees of their performance level and of any deficiencies. In the absence of such notice or employee deficiencies, the promotion should be automatic 90 days after selection. The Union maintains that the Agency has belatedly promoted employees beyond the 90 days in violation of clear regulatory provisions and contract language. 6 (Union Brief pp. 23-

With regard to the second issue, the Union also contends that the Agency failed to effectuate internal promotions in a timely manner. The Union noted that contractually, career ladder promotions must be effectuated at the beginning of the pay period following selection. According to the Union, selection takes place that the time the employee is identified for the position; it does not turn on whether or the employee has changed offices or has entered a training class. The Union noted that some employees had to wait months after notification of their selection until the effectuation of their promotion. (Union Brief, p. 23)

The Union contends that the Agency has also contravened the National Agreement by Wing to give proper consideration to employees who used priority consideration. In evidence is a form used by the Agency to check a corresponding box to a statement of selection or non selection (see Joint Exhibit 3). Nowhere on the form does the Agency provide a bona fide reason for not selecting the employees as required by the NA- Employee Pamela Williams expressed her interest for a position in Announcement Number B-2457. According to the Union, Ms. Williams testified credibly that the Agency never told her why she was not selected. According to the Union, the Agency improperly relies on "checklists" or additional criteria in the hiring or selection process (Issue No. 4), thereby additionally violating the National Agreement, as well as violating MOU and arbitration awards. The Union not a Settlement Agreement executed by the parties back in 1987 (Union Exhibit 4), abolished checklists of the land that the Agency used in this case.

This improper practice, the Union In December 1998, the Union requested certain information of the Agency, including a ha of all employees who requested to use the priority consideration, copies of external list of employees given to SSA from OPM with documentation as to the grade qualification of such

employees and, a HRMIS list divided into internal and external him. (Union "Whit I(a)). in June 1999, the Union requested additional information of the Agency in order to process the instant grievance. There, the Union requested: "Recommendation shears for all employees on the Best Qualified list and locations as where they are maintained." Additionally, the Union requested : "List of names that were sent to the selecting official and transmitting letter that accompanied." (Union Exhibit I(b). At the mount bearing, the Union moved for an adverse difference to be drawn against the Agency on the basis that all such information had not been provided (Tr. Vol. I, p. 3 1) maintains, causes "real harm " to employee- applicants because they were unaware of the artificial super-selection process whereby employees who are not rated "highly Tecomme3nded" are effectively excluded from consideration of being selected. (Union Brief pp. 25-26).

The Union maintains that the Agency also failed to adhere to the terms of the National Agreement by not enabling bargaining unit employees "first shot" at vacancy announcements over non-bargaining unit employees (Issue No. 5). As contented by the Union' "By including non-bargaining unit members during the first ten business days of consideration of the vacancy announcement, the Agency not only committed a technical violation of the National Agreement, but in fact prejudiced and harmed individual Grievants." (Union Brief, p. 26)

Finally, the Union contends that the Agency unilaterally reduced the area of consideration thereby still further violating the contract as well as constituting an unwarranted personnel action. In this connection, the Union pointed to prior decisions and awards that have put the Agency on notice that such conduct is violative of the National Agreement. (Union Brief P. 26)

THE AGENCY'S CONTENTIONS

First, the Agency denies that it faded to provide external hues the proper grade at the time of hire or at the earliest possible date. The Agency characterized its practices vis-a-vis the hiring and promotion of external candidates as "proper and in accordance with the National Agreement, law, rules and regulations." (Agency Brief. P. 9) In this connection, the Agency relied, inter alia, on the testimony of Personnel Management Specialist Willingham to show that "that when (external) candidates are hired from OPM registers of eligibles, they are promoted as son as regulations will allow the agency to do so." (Ld.) According to SSA, an individual hired from the OPM register at the grade 5 level who is also eligible for the grade 7 level but not reachable on the OPM certificate at the latter level, that individual must wart until at least 90 days have passed before a promotion can

take place citing, 5 CFR, Subpart E, Restrictions to Protect Competitive Principles, Subsection 330.501. - Union Exhibit 2 (Agency Brief pp 9-10).

With regard to the testimony of Ms. Pamala Johnson, hired as a BA pursuant to the external selection process, the Agency relies of the notification of personnel Action SF-50 Agency Exhibit 5) to establish that she was promoted to the grade 7 level effective August 3 1, 1997, the first pay period after 90 days had passed, consistent with Subsection 330.501 referred to above. As such, the Agency takes issue with Ms. Johnson's assertion that she was not promoted until October 1997. Stiff relying on the testimony of W Willingham, the Agency noted that an individual who is certified at the grade 5 level but not yet eligible at the grade 7 level - - such individual would have to meet the basic qualification requirements for promotion to the grade 7 level which is 52 weeks (one year) of specialized experience equivalent to the Grade 5 level.

Also denied by the Agency is that it failed to effectuate internal promotions in a timely manner (Issue No. 2). First, the Agency questions the credibility of Ms. Rhonda Lowery who testified that she was first notified of her selection to the BA position in June 1997. In this regard the Agency noted that a Union Exhibit (Union Exhibit 6), a notification of selections from the Vacancy Announcements in question dated August 6, 1997, indicates that Ms. Lowery was selected for the BA position effective August 17, 1997, the first pay period after selections were made. According to the Agency, it is a government-wide practice to effect most personnel actions at the beginning of the pay period. The Agency pointed to Agency Exhibit 6, which disclosed that Ms. Lowery was promoted to a GS-7 on August 31, 1997, the first pay period after she was reassigned into the BA position, in accordance with the National Agreement.

Accordingly, the Agency maintains that the promotion of Ms. Lowery was timely. (Agency Brief, pp. 14-15) Additionally, the Agency noting the testimony of I& Willingham and Mr. Girdner, contends that its practices are consistent with the National Agreement that is specific in regard to effectuating promotions at the beginning of the next pay period. ad. at 15 -16)According to the Agency, the Union faded to prove that the Agency did not give proper consideration to employees who availed themselves of their priority (Issue No. 3). The Agency noted that merely exercising a priority consideration does not entitle an employee to automatic selection for an existing vacancy. While the National Agreement covers eligibility for priority consideration as well as procedures for processing them, the Agency points out that nowhere therein does it state that management must supply an explanation to the candidate for non-selection.

The Agency acknowledges that in order to give a bona fide consideration, the selecting official must determine why an individual is not being selected, but denies that there is a requirement that the reason for non-selection has to be in

writing. With regard to Ms. Williams' testimony that she was denied a priority although her supervisor told her that he had given her "a high recommendation," this, to the Agency, has no relevance. In this connection, the Agency noted that the majority of applicants receive a "highly recommended" recommendation, but due to the high number of candidates versus the number of vacancies filled, most of theses candidates are not selected. Ms. Williams was not the only employee who used their priority consideration, some of the others were selected.

The Agency also denies that it improperly uses additional criteria in the hiring selection process, as alleged (Issue No. 4). First, the Agency noted the large number of candidates in the instant case that were referred to the selecting official in OCO (total of 490) and that OCO employs 7,000 employees. Given such numbers, the selecting official could not possibly know all of the employees on the best-qualified lists. Thus, a process was developed and has been used by OCO to aid in selecting the most qualified candidates for the BA position. According to the Agency, this process is viable and not in contravention of the 1996 NA because assessment criteria and assessment panels have not been established. As such, the sections of the 1996 NA dealing with assessment criteria are inoperative. Accordingly, the Agency maintains that only the 1993 NA is in effect that allows the Agency to continue to use standard weights and factors to rate and rank candidates for positions in OCO. In this regard, the Agency also noted that the 1993 NA does not prohibit reliance on supervisory recommendations, which are mere deliberations to aid in selection decisions. (Agency Brief pp. 19-22)

With regard to the Settlement Agreement of 1987 relied on by the Union that eliminated checklists, the Agency contends that said agreement pertained to only the PSC component in SSA and not to OCO. In addition, the Agency, rely* of Mr. Matthews' testimony, contends that the settlement agreement in question was not incorporated in either the 1990 or 1993 National Agreements and as such, such settlement agreements are not normally carried over. In any event, the Agency argues that there is a distinct difference between a formal checklist, which was the subject of the 1987 settlement, and the disputed supervisory

referrals in the instant case. (Agency Brief pp. 22-23)

Still further, the Agency denies that it improperly places non-bargaining unit employees on the first best-qualified list (Issue No. 5) According to the Agency, because of the unusually large number of candidates for BA positions, selection for the BA position sometimes take up to 90 days. This, the Agency points out is well beyond the 10-day requirement of the National Agreement. Of the 82 vacancies in the instant case, 77 of the selectees were bargaining unit employees and only five were non-bargaining unit employees. According to the Agency, assuming arguendo two separate lists had been sent to the selecting

official, it is likely the results would have been the same. The Agency asserted that no bargaining unit employees were disadvantaged.

Finally, the Agency denies that it improperly limited the area of consideration (Issue No.6). According to the Agency, the siren of consideration within the context of the National Agreement ran only mean the designated geographical area(s) from winch personnel will solicit and accept employee applications. The Agency noted that the applicable contractual provision is entitled "Vacancy Announcements and Area of Consideration." In the instant case, the area of consideration appears in the vacancy announcement as: "SSA in the Baltimore/Washington/Falls Church Headquarters and Region III: Applicants form the 41 00 File." Contrary to the Union, the Agency denies that the Agency reduced the area of consideration by its utilization of the recommendation process. SSA argues that if the area of consideration were so reduced, some reference would appear in the vacancy posting. In short, the Agency maintains that the area of consideration has nothing to do with which candidates are qualified or which are recommended, as alleged 7. 7 With regard to the Union's request that an adverse inference be drawn against the Agency for failure to provide information requested by the Union under 5 USC 7114 (b (4) (see footnote 6 supra), the Agency contends that it has

DISCUSSION AND CONCLUSIONS

The Union alleged that the Agency has variously violated the internal and external hiring practices, as well as certain promotion practices of the 1996 National Agreement, as applied to the Benefit Authorizer position in the Office of Central Operations." According to the Agency it has complied with the terms and conditions set forth in the 1996 NA insofar as applicable. Thus, the Agency contends that where, as here, the parties had not yet reached agreement on the

assessment criteria referred to in Article 26 of the 1-996 NA, such provision is inoperative. Instead, the Agency maintains that the old national promotion plan procedures that were applicable under the 1993 NA, with factors and weights, continues to be in effect. As noted previously, the stipulated submission comprised six principal issues as to whether the Agency violated the National Agreement in its hiring, selection and/or promotion in the benefit authorizer position. These issues are treated below seriatim.

Issue 1: Whether the Agency failed to provide external hires the proper grade at earliest date? The Office of Central Operation selects its external hires to fill vacancies for the BA position through the use of registers from OPM. Patricia Johnson, a long-time SSA employee, applied for the career ladder BA position

through the OPM outside recruitment. As such, she was treated as an external lure. Prior to being picked-up as a BA, she worked for two years as a Grade 5 Disabilities Support Examiner. According to Ms. Johnson, she was notified in May 1997 that that she was promoted to the GS-7 and that it would be effective August 31, 1997 but that said promotion did not actually occur until October 1997. (Footnote 7, cont'd) made such information available to the Union. According to the Agency, the same requested information is contained in promotion packages that Union Official Berkowtiz had reviewed. (Agency Brief pp. 27- 28)

8 As noted previously, the Union moved at the hearing for an adverse inference be drawn against the Agency on the basis that certain requested information had not been provided (see, n6, supra. The Agency noted and the record supports am it had made the requested information available to the Union in so-called promotion packages see, n. 7, supra). As it appears that the Agency has substantially complied with the request for information, I am not persuaded that an adverse inference is warranted.

Under government regulations, an Agency is restricted from promoting employees hired externally, from an OPM register, as Ms. Johnson, until at least 90 days have past. (See, CFR Subpart E-Restrictions to Protect Competitive Principles, 330.501 - Union Exhibit 2, p. 203) Here, the record disclosed that the effective date of Ms. Johnson's appointment from the OPM certificate for the BA position was May 25, 1997 and that the effective date of her promotion to the Grade 7 position was August 31, 1997 (Agency Exhibit 5). In the absence of any probative or other corroborative evidence showing that Ms. Johnson's promotion was belatedly upheld until October 1997, as she asserted, I find that the evidence falls short of establishing that Ms. Johnson was not promoted to the proper grade at the earliest date, as alleged.

In May 1997, the Agency also hired Linda Wright off the OPM register for a BA position in OCO. Prior thereto, Ms. Wright was employed as a Management Assistant, Grade 7- 9. She had held that position since 1991 while working at Fort Meade, Maryland. According to Ms. Wright, she had received a letter from OPM informing her that she was
qualified at both the GS5 and GS-7 levels but entered duty in OCO as a GS-5 on May 27, 1997. Ms. Wright testified that when she was picked up in OCO as a Grade 5, she was told by SSA officials, Melvin Willingham and Debbie Jones, that she would receive her Grade 7 in 90 days. It is undis puted that Ms. Wright was not promoted to Grade 7 until June 1998, some 52 weeks later.

According to Mr. Willingham, an employee hired at the GS-5 level who is also eligible at the GS-7 level could be promoted in 90 days, provided, qualifications in time and grade were met. On the other hand, if a candidate was hired as a GS-5 but did not meet the qualifications for Grade 7 position, it would take that person 52 weeks to be promoted to GS-7, citing 5 CFR Subpart F, 300.605 (b) - Agency Exhibit 2)

In the instant case , Ms. Wright testified, without contradiction, that she was informed by OPM, in response to her application for the BA position, that she was qualified for both, a GS-5 and GS-7 position. She also testified without contradiction that when she was picked up as a GS5, that she was told by management that she would be promoted to a GS-7 in 90 days. Still fin-ther, it is noted relative to time and grade, that Ms. Wright was a GS-7, Step 9 for two years before being picked-up by SSA as a GS-5. Thus, all the necessary elements for a promotion in 90 days are in place.

While the Agency contends that Ms. Wright was not eligible to be promoted to a GS-7 until June 1998, the record is devoid of any probative evidence to support that position. On the state of this record, it appears and I find that SSA wrong fully delayed Ms. Wright's promotion to a GS-7 level, as alleged.

Issue 2 Whether the Agency failed to effectuate internal promotions in a timely manner?

Under the National Agreement, internal promotions in career ladder positions are to be effectuated at the beginning of the pay period following selection (Joint Exhibit 1, Article 26, Section I 1, Paragraph F). The parties are in dispute as to when selection actually occurs within the meaning of said provision. According to the Union, selection takes place at the time the employee is identified for the position. The Agency contends that the selecting official establishes the

date of selection, which appears in a memorandum announcing the names of individuals selected to fill certain vacancies. Here, the memorandum issued by Selecting Official, Mr. Hurt, dated August 6, 1997, noted that he "[is] pleased to announce that the individuals on the attached listings have been selected to the position of Benefit Authorizer." There, Mr. Hurt also advised: "The effective date for these actions is August 17, 1997." (Union Exhibit 6).

One of the employees who was selected and named in Mr. Hurts's memorandum dated August 6, 1997, is Rhonda Lowery, an internal hire. As noted previously, prior to being picked up as a BA GS-5, Ms. Lowery was employed as a

DSE for approximately 2 1/2 years. Ms. Lowery testified that she learned of her selection as a BA GS-5 in June 1997, as reflected in the announcement in her module. It appears that Mrs. Lowery was mistaken as to the date. Rather, it is likely that the announcement that Ms. Lowery referred to was actually the August 6, 1997 memorandum from A&. Hurt.

(Union Exhibit 6) Still, the effective date of her promotion was not until August 31, 1997 and beyond the pay period following August 6, 1997. I am persuaded that the selection date is August 6, 1997, as contended by the Union rather than August 17, as contended by the Agency. The record disclosed that the contract language in question was arrived at to address "significant delays" in the past between selection and conditions subsequent, such as attending a training session or actually performing the new job. As testified by Union negotiator Skwierczynski, the Union proposed the instant agreed upon contract language to ensure a quick effective date for promotion and for pay to begin with selection. Thus, there is no contractual language requiring that the selected individual be in class or actually be working at the selected job to be entitled to pay at the higher grade starting with the next pay period. (Tr. Vol. pp. 468-470) The Union's contention that the announcement of selection is, in fact, selection, is both plausible and supported by the record. In the circumstances of this case, I find that the Agency violated the NA, by declaring the effective date for promotions as August 31, 1997 for employees selected on August 6, 1997.

In addition, the Union contends that the Agency also improperly posted vacancies under the Career Opportunities Training Agreement (COTA) to select employees internally, and by doing so delayed their promotions (Union Brief p.

5). The COTA is an OPM-established training agreement that allow employees who do not possess the basic qualification requirements in the vacancy announcement (X-1 18), an opportunity to be considered for the position.

According to the Union, employees with the same job were selected under the COTA as well as under the X-1 18 factors for promotion. The Union maintains that such employees should be on either the X-1 18 list or the COTA fist

but not both. On the state of this record, without more, I am not persuaded that all employees in the same job position possess the identical qualifications called for under X- I I 8. Accordingly, I find that the Union has not satisfied it burden of establishing that the Agency improperly posted vacancies under COTA.

Issue 3: Whether the Agency failed to give proper consideration to employees who used priority consideration Under Article 26, Section 13 A of the National Agreement, a priority consideration is defined as follows:

For the purpose of this article, a priority consideration is the bona fide consideration for noncompetitive selection given to an employee on account of Previous failure to properly consider the employee for selection because a Procedural, regulatory, or program violation. (Underscoring added). In dispute is the Agency's responsibility to disclose the reason for not selecting an employee who has exercised his/her priority consideration under the NA. in essence, other than certain statistical results, all that the Agency provides is a notice with a check in a box indicating whether the employee is or is not selected for the particular vacancy announcement (Union Exhibit 3). It is undisputed that selection of employees who exercise their "priority" is not automatic. Employee Williams utilized a priority consideration for a BA position in 1997 and was never given a reason for her non-selection. Ms. Williams testified, without contradiction, that her supervisor, Daniel Cutler, told her that she had been highly recommended.

According to the Union, the Agency has an affirmative obligation to state why an eligible priority consideration candidate was not selected. While the Agency has acknowledged that it has an obligation to state why a prior consideration candidate was or was not selected in the event of a challenge, it denied that it is obligated to do so at the time of selection or that its reason for not selecting such candidate be in writing. (Agency Brief, P. I 8) In the instant case, the Agency maintains that the Union Wed to that the Agency has not given "bona fide consideration7 to the candidates for the BA positions in question. (Agency Brief P. 19).

1 find that where, as here, there is a dearth of evidence showing that the Agency has, in fact, provided its reason for non- selection, it is unreasonable to expect the Union to prove the negative. For example, Ms. Williams, in effect, has challenged the Agency's decision by testifying that she had been highly recommended by her supervisor but was never given a reason for not for not being selected. Clearly, the Agency had the opportunity at the arbitration hearing to respond to Ms. Williams' assertion but did not do so. It is illusory to rely merely on the Agency's unverified conclusion that it did not select a candidate for a bona-fide reason. In the circumstances of this case, I interpret the contractual provision in question as requiring the Agency to provide its bona fide reason to employees properly exercising their priority consideration. In short, I find the Agency's failure to do so is in violation of the National Agreement.

Issue 4: Whether the Agency improperly used additional criteria in the hiring of selection process?

The record disclosed that included in the Agency's selection process are "Selection Worksheet[s]" made out by supervisors that show how they regard the skills of employees on the Best Qualified List (BQL) for purposes of selection. (Union Exhibit 5). There, the supervisor also indicates whether the employee is "highly recommended," recommended," or not "recommended." (Ld.) It is undisputed that employees who are not highly recommended on these worksheets have virtually no chance of being selected for the vacancy notwithstanding that their names appear on the BQL. According to the Union, the use of such material in rating employees on the BQL for selection is proscribed by Article 26, Section I IA of the 1996 National Agreement as well as a long-standing Settlement Agreement. Article 26, Section I IA of the 1996 NA provides as follows:

Once a well-qualified fist has been established by the Assessment Panel, there will be no other candidate information gathered by the selecting official. However, this does not preclude the selecting official from re-contacting the Assessment Panel and/or interviewing all well-qualified candidates.

The Agency concedes "that if assessment panels /criteria had been in place," the provision in question would apply and bar the disputed procedure. (Agency Brief p. 23) However, the Agency maintains that because assessment criteria and assessment panels have not been established, the Agency is free to revert to the National Promotion Plan procedures contained in the predecessor 1993 NA. That contract does not contain any express prohibition against the Agency reaching out to supervisors for the disputed additional information about employees already on the BQL. Agency witness Ted Girdner, executive officer for OCO, testified that supervisors are also permitted to make recommendations in accordance with the 1993 NA (Tr. Vol. III, pp. 349-350) Mr. Girdner referred to an e-mail he received dated September 17, 1996 from Deputy Commissioner for Human Resources Roger McDonnell, with instructions not to proceed with the new contract language in the 1996 NA until assessment criteria have been developed by assignment panels. (Tr. Vol. III, pp.352-53; Agency Exhibit 7) The record also 27 disclosed that the Agency sent a letter dated September 27, 1996 to the Union setting forth essentially the same position. (Agency Exhibit 9) It is noted that this letter was sent after the 1996 NA had already been signed by the parties.

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2 Counsel for the Agency represented that MS. Lowery was reassigned from a GS-5 DSE to a GS-5 BA on August 17, 1997 and was promoted to a GS-7 one pay period law, on August 31, 1997. (rr. Vol. IL p. 215; see also Agency Exhibit 6).

3. The parties stipulated that there were some 400 employees involved in this class proceeding and if they were to test, they would testify in substantially the same manner as employees Johnson, Wright, and Lowery(Tr.Vol.II, pp. 219-220)

According to the Union, the position that the Agency had conveyed to the Union was that absent assessment criteria, the Agency had to have some mechanism to fill vacancies through merit promotion, and the only mechanism that existed was the previous mechanism, the use of weights and factors. As testified by Union negotiator Witold Skwierczynski the Union only agreed to the use of weights and factors as a "temporary measure" while the parties continued in efforts to reach an agreement on assessment criteria. Mr. Skwierczynski denied and the record supports that the parties did not intend to put the entire Article 26 on hold until such agreement was reached. (Tr. Vol. III, pp. 494-95) Thus, according to the Union, that segment of Article 26, Section I I A that provides that once a well qualified fist has been established "there will be no other candidate information gathered by the selecting -official," is still viable and does not turn on whether or not the parties have reached agreement on assessment criteria.

As noted above, the Union also relies on the Settlement Agreement of 1987 that resolved the General Committee-Union/Management Grievance dealing with the Agency's use of checklists for employees already on best qualified lists

(Union Exhibit 4). The thrust of the underlying grievance was to stop the Agency from improperly soliciting information from supervisors outside the scope of the factors and weights assigned to the position in the vacancy announcement. (Tr. Vol. L PP. 128-129). Clearly, there is a high degree of internal consistency between the settlement agreement and the disputed contractual provision. Thus, under the settlement agreement the Agency agreed to "discontinue the use of checklists, i.e., written questionnaires completed by supervisors" and, similarly, the first sentence in Article 26, Section I IA of the 1996 NA reads, "there will be no other candidate information gathered by the selecting official." Both provisions expressly protect candidates already on the BQL. This is particularly noteworthy given the absence of any evidence tending to show that the Union had abandoned the underlying reason for its grievance that culminated in the settlement agreement.

Agency witness Richard Matthews, who assisted the Agency in the 1987 settlement,
acknowledged as much. (Tr. Vol. EII, p. 452).

The Agency raised several other factors in challenging the viability of the settlement agreement and, in any event, also argued that it was not applicable to OCO. First, the Agency noted that neither the 1990 nor 1993 National Agreements included language regarding the settlement in question. The

Agency, relying on the testimony of Mr. Matthews, contends, that the failure to include such language in successive contracts "normally" means that the terms of the settlement are not carried over. (Agency Brief p. 22) On the other hand, according to Union negotiator Skwierczynski unless the parties expressly agree to discard such agreement, it is treated as past practice (Tr. Vol. III, pp. 479-480) On the state of this record, I find the view expressed by I-Ar. Skwierczynsld is more tenable. Mr. Skwierczynsld was qualified as an expert witness on contract matters and his view is contractually supported by Article 5, Section 3 in both the 1993 and 1996 National Agreements. There, "provisions of written memoranda of understanding that preexisted this Agreement which are not specifically covered by tins Agreement and do not detract from it shall be treated as past practices."

Similarly, I credit Skwierczynski's testimony that the settlement applies to all six components of SSA, including OCO.

The underlying grievance was a General Committee grievance and filed at the highest level. (Tr. Vol. 111, pp. 492-493). As such, and consistent with Article 24, Section IO, I am persuaded that the settlement agreement applies to the entire bargaining unit.

I also reject the notion (as contended by the Agency), that the selection worksheet is not the type of information encompassed by the settlement agreement or by the 1996 National Agreement. As to said NA, it is noted that the Agency admitted that but for an agreement on assessment criteria, the contractual language would preclude it from using such material against employees already on the best qualified fists. In view of the foregoing and the entire record, I am persuaded, and I find that the Agency, by using selection worksheets, has improperly used additional criteria in the selection process, as alleged.

Issue 5: Whether the Agency improperly Placed non-bargaining ask employees on the first best-qualified list?

The Union relying on Article 26, Section 7B, contends that the Agency improperly included names of non-bargaining unit employees on the first BQL. Section 7B provides: "For a period of IO workdays prior to considering candidates from outside the AFGE-bargaining unit, the Employer agrees to first consider for selection internal candidates." The record disclosed that the selecting official received the names of bargaining unit and non-bargaining unit employees on one list at the same time. (Tr. Vol. R pp. 370-71). Included in this latter group were supervisors and some of them were selected. (Ld., Union Exhibit 9). The Agency noted that because of the usually large number of candidates for BA positions, selection for the BA position may take up to 90 days, well beyond the 10 day requirement of Section 7B.

With regard to the vacancies in question, the notice announcing the selections took 60 days. In any event, the Agency maintains that no bargaining unit employees were disadvantaged as only 5 of the 82 selectees were non-bargaining unit employees.

While including bargaining unit and non-bargaining unit employees on the same list after the 10-day waiting period understandably raises doubts on the part of the Union as to whether the Agency had actually considered the former group in accordance with Section 7B, I cannot find, without more, on the state of this record that the Agency did not do so. Compare, SSA. North Office and AFGE. Local 1346, 56 FLRA No. 37 (April 28, 2000) (where the Arbitrator made a definitive finding that the Selecting official did not first consider AFGE unit members prior to making his selection). In the total circumstances of this case, I am not persuaded that the Union has satisfied its burden of showing that the Agency improperly included non-b unit employees on the first best-qualified list, as alleged. Accordingly I shall deny this allegation.

Issue 6: Whether the Agency improperly limited the area of consideration?

The Union, relying largely on the testimony of Mr. Berkowitz, contends that the Agency improperly limited the area of concentration by not permitting employees the option of appearing on more than one best qualified list. According to the Union, under the NA, an employee who is qualified to fill a vacancy at both the GS 5 and GS-7 levels, should be allowed to have his/her name placed separately on the respective BQL's. The Union argues that by only permitting an employee to appear on a single BQL "reduced the chances that employee had to be selected for the position." (Union Brief, p. 7) The record disclosed that typically, when a candidate is qualified for more than one position vis-i-vis, a vacancy announcement, that individual's name would appear on only one BQL and at the higher graded level.

The Agency characterized the Union's position as "unfounded and a misinterpretation of the meaning of area of consideration." (Agency Brief p. 26) According to the Agency, the area of consideration in the NA refers to the designated geographical area (s) from which personnel will solicit and accept employee applications. (Ld. at 25) I interpret the applicable contract language, as set forth in Article 26, Section TC of the NA, as supportive of the Agency's position. There, the Area of Consideration (AOQ is defined as "that area in which the Administration should reasonably expect to locate enough well-qualified candidates." Additional support for the Agency's view is found in Section 7. C 5b. There, the NA provides for an optional reduction of the AOC as follows:

When solicitation throughout the normal area would be clearly impractical because extenuating and unique circumstances exist, the promotion record must contain complete documentation justifying the smaller area, which shall only be instituted by mutual consent of the parties.

In the instant case, the AOC, as reflected in the vacancy announcements, cover "SSA employees in the Baltimore/Falls Church Headquarters, Region IH; Applicants from the 4 1 00 File. (Joint Exhibit 3; see also Article 26, Section 7. C. 4b.) The record is devoid of any evidence showing that the Agency had limited the scope of the AOC as identified in the vacancy announcements. Similarly, there is a dearth of evidence showing that the Agency had departed from any past practice by including candidates on only one BQL. As the Union has failed to satisfy its burden of showing that the Agency unilaterally limited the AOC, or otherwise violated law, rule, regulation or contractual term relative to said AOC, as alleged, I find that this allegation is without merit.

THE AWARD

Having found that the Agency wrong fullly delayed employee's Linda's Wright's promotion to a GS-7 level for 52 weeks, in violation of government regulations and the National Agreement, I hereby direct the Agency make Ms. Wright whole, with interest. The Agency is also directed to provide the same remedy for other similarly situated external hires that can establish that they had been informed by OPM that they were qualified at multiple grade levels relative to the vacancy announcements in question (Joint Exhibit 3).

Having found that the Agency failed to promote employee Rhonda Lowery at the beginning of the first pay period following selection, as required by Article 26, Section I IF of the National Agreement, I hereby direct the Agency to make Ms. Lowery whole, with interest, as well making other similarly situated internal hires whole, with interest. In this connection, I have determined that the announcement of selection is deemed to signify actual selection, as contended by the Union.

Having found that the Agency is under an affirmative duty to inform employees who have properly exercised their priority consideration, the nature of the bona fide consideration that was given to them for not being selected to fill a vacancy, the Agency is hereby directed to reveal such bona fide considerations to said employees. As I am unable to discern from the instant record whether employee Pamala Williams or other similarly situated employees would have been selected, I cannot direct the Agency to promote these employees to the next available vacancy, as requested by the Union. However, Ms Williams and other similarly situated employees are to retain their initial priority considerations to exercise in the manner se forth in Article 26, Section 13 B. 1.

Having found that the Agency improperly used additional miens such as worksheets of supervisors in the selection process, in violation of Article 26, Section I IA of the 1996 National Agreement and a Settlement Agreement of 1987, the Agency is hereby directed to cease and desist therefrom and to provide a priority consideration for all employees who were on the best qualified fists for the vacancy announcements in question.

Having found that the Union failed to satisfy its burden of showing that the Agency otherwise violated the National Agreement, law, rule, or regulation, in its hiring, selection and/or promotion in the Benefits Authorization position, I hereby deny the Grievance regarding those allegations not specifically found to be meritorious.

The Arbitrator herein retains jurisdiction for a period of ninety (90) days for purposes of resolving any differences between the parties having to do with the directed remedies, including money payments and for such other relief as provided under the Back Pay Act. The ninety (90) day period ma y be extended, upon the written request of either
party for good cause shown, for purposes of effectuating this Award.

Irwin Kaplan
Impartial Arbitrator
Dated: May 31, 2000