

IN THE MATTER OF ARBITRATION BETWEEN:

_____)	
American Federation of Government,)	Issue: Fair and Equitable Remedy
Employees (AFGE), Council of HUD)	
Locals 222,)	
)	Case No. 03-07743
UNION,)	
)	Remanded at: 59 FLRA 630
v.)	
)	
US Department of Housing & Urban)	
Development,)	
)	
AGENCY.)	Arbitrator: Dr. Andree Y. McKissick, Esq.
_____)	

UNION’S MEMORANDUM ON REMEDY AND PROPOSED ORDER

AFGE Council of Locals 222 (the “Union”), by and through its undersigned counsel hereby submits its Memorandum on Remedy and Proposed Order in the above captioned case and in support thereof state as follows:

BACKGROUND

On November 13, 2002, the Union filed a Grievance regarding “Failure to Treat Employees Fairly and Equitably.” The Agency denied the Grievance on the ground that it was not arbitrable under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute. The Grievance was submitted to arbitration on the stipulated issue of whether or not the Grievance was arbitrable. The Arbitrator found the subject matter of this Grievance to be arbitrable in an Opinion and Award dated June 23, 2003 (“2003 Award”).

The Agency filed exceptions with the Federal Labor Relations Authority (“FLRA”) on June 23, 2003. In a Decision dated February 11, 2004, the FLRA remanded the award to the parties and ordered that it be resubmitted to the Arbitrator for clarification of the jurisdictional issue.

The Union then requested a hearing on the matter to offer additional evidence and argument. After several postponements, a hearing was held on June 23, 2006. At the hearing, the Union called Ms. Federoff as its sole witness. The Agency did not call any witnesses. The Arbitrator clarified the award on remand in a decision, dated January 24, 2007 (2007 Award) and found that the Grievance alleged a right to be placed in previously classified positions, was arbitrable, and that there were several possible remedies. The Arbitrator also ruled that pursuant to Section 22.11 of the Parties' CBA, alternative remedies should be considered as a just form of relief, consistent with the Federal Labor Relations Authority decisions.

On March 1, 2007, the Agency filed exceptions to the January 24, 2007 award and the Union filed an Opposition to the Agency's Exceptions on or about March 22, 2007. On April 19, 2007, the FLRA issued an Order to Show Cause as to why the Agency's exceptions should not be dismissed as untimely. On August 3, 2007, the FLRA ruled that the exceptions were untimely and dismissed.

An arbitration hearing was held on July 15, 2008 and was continued and completed on August 28, 2008. The parties submitted post-hearing closing briefs on December 1, 2008. The Arbitrator issued the Arbitration Decision (2009 Award), on September 29, 2009. The Arbitrator found:

Accordingly, the Arbitrator finds that the Agency violated Article 4, Sections 4.01 and 4.06 as these Grievants were unfairly treated and were unjustly discriminated against, as delineated above. In addition, this Arbitrator finds that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied. Lastly, the Arbitrator finds that the Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees.

The Agency filed exceptions to the Arbitration Decision, dated October 30, 2009. The Union filed its Opposition to the Agency's Exceptions, dated February 16, 2010. The FLRA issued a Decision dated January 11, 2011, which while leaving the Arbitrator's findings on the merits of the case (finding fully in favor of the Union), vacated the remedy and remanded to the parties for resubmission to the Arbitrator, absent settlement, for determination of an alternative remedy. The FLRA ruled that the remedy chosen by the Arbitrator - directing the Agency to perform an organizational *upgrade of affected positions by upgrading the journeyman level* for all the subject positions to GS-13 retroactively - involves classification. MA at 16 (emphases added). The Authority held that because the Arbitrator's remedy was to reclassify the Grievants'¹ existing positions by raising their journeyman level it involved a classification issue and was vacated. As the Authority stated in *HUD*, the Statute does not authorize the Arbitrator to change the "promotion potential of employees' permanent positions[.]" *HUD*, 59 FLRA at 632.

The Union has attempted to resolve the matter of an alternative remedy through negotiations with the Agency, but to date, the Agency has not been willing to discuss any alternative remedies. In addition, the Agency continues to violate the CBA and Arbitrator's Award and Order by posting positions in a violative manner.

For the following reasons, the Union requests that the Arbitrator issue the Proposed Order herein.

¹ The Class of Grievants subject to the Remedy addressed herein is defined as follows: Bargaining unit employees in a position in a career ladder (including at the journeyman level), in which that career ladder leads to a lower journeyman grade than the journeyman target grade of a career ladder of a position with the same job series, which was posted between 2002 and present. These include BUEs in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1, 9.

ISSUE

- I. What is the proper and appropriate remedy based on prior findings of fact and law by the Arbitrator in the Fair and Equitable Grievance?

REMEDY

The Parties' CBA provides at **Section 23.11 – Exceptions:**

Where exception is taken to an arbitration award and the Federal Labor Relations Authority (FLRA) sets aside all or a portion of the award, the arbitrator shall have the jurisdiction to provide alternate relief, consistent with the FLRA decision. The arbitrator shall specifically retain jurisdiction where exceptions are taken and shall retain such jurisdiction until the exception is disposed.

The FLRA has remanded the matter to the Arbitrator for imposition of a new, legal and appropriate remedy. The Union proposes the following remedies, in order of preference, which are in accord with the FLRA ruling and other precedent.

1. Make Whole Relief For Violative Failures to Select Grievants

Given the Arbitrator's prior findings that, but for the Agency's violations, the affected employees would have been selected into the currently existing career ladder promotions and promoted up those career ladders to the journeyman level, the **most appropriate and legal remedy** would be to order the Agency to permanently retroactively promote all affected BUEs into currently existing career ladder positions with promotion potential to the higher graded levels. This remedy, to be 'make whole,' would include retroactive back pay and interest. The Union believes that this remedy is the most fitting given the facts proven at arbitration and will provide the best possible relief for the numerous CBA violations.

Another, legal but less preferable remedy (which would be appropriate if Remedy #1 was ruled illegal or otherwise not appropriate by the FLRA), would be to order the Agency to select the affected employees (almost all at the GS-12 level) into the subject vacant career ladder positions with retroactive grade increases. The Union believes that based on the

findings of fact and law, the Agency violated the MOU, CBA and law, rule and regulation and that but for the violation, affected BUEs would have been selected into the subject vacant career ladder positions with promotion potential to the higher graded levels. The Arbitrator should issue an appropriate Order which would direct the Agency to permanently retroactively promote all affected BUEs into those career ladder positions with promotion potential to the higher graded levels. This remedy, to be 'make whole', would include retroactive back pay and interest.

In the alternative, the Arbitrator should order the Agency to provide each Grievant with one priority consideration and to re-run all of the subject vacancies which were done in violation of the CBA between 2002 and the present. It is well accepted that an arbitrator's order to rerun a selection action may include a requirement that the initial selection be set aside. See, e.g., ***Panama Canal Comm'n***, 56 FLRA 451 (2000) (Authority upheld rerun action which included arbitrator's order that initial selectees be removed from their positions); ***SSA Chicago***, 56 FLRA 274 (same).

In the alternative, the Arbitrator can order the Agency to retroactively place all affected BUEs into an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects the affected employees' duties from 2002 to present, and then order the Agency to classify and grade those PD's, retroactively placing the grievants in them effective 2002, with back pay and interest.

2. Cease and Desist from Continuing Violations

The Arbitrator should also order the Agency to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion

potential. (The Arbitrator called this “constructive demotion” in her Award at page 14.) This does not apply to non-status vacancy announcements.

3. Retention of Jurisdiction

The Arbitrator, pursuant to the CBA, must explicitly retain jurisdiction to provide alternative relief, in the event that any relief provided is found to be inconsistent with law or otherwise not available, and if her decision is set aside in whole or in part on that basis.

4. Attorney Fees, Costs and Expenses

The Union also believes that an award of Attorney Fees should be entertained after receipt of a final, binding Decision that satisfies the Back Pay Act.

A Proposed ORDER is attached hereto.

Respectfully Submitted,



Michael J. Snider, Esq.
Jason V. Weisbrot, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
600 Reisterstown Rd., 7th Floor
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061

Counsel for the Union

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AGENCY.)	Arbitrator: Dr. Andree Y. McKissick, Esq.
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PROPOSED ORDER

Having read and reviewed all prior submissions of the parties, and FLRA rulings, in light of my prior findings and rulings, including that the Agency violated Article 4, Sections 4.01 and 4.06 as these Grievants were unfairly treated and were unjustly discriminated against, that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied, and that the Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees, and that but for these violations, the Grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level, I find that all of the below are appropriate remedies and that, if the FLRA finds that any are not appropriate, the next numbered remedy shall apply, and therefore I hereby ORDER:

1. That the Agency process retroactive permanent selections of all affected BUEs into currently existing career ladder positions with promotion potential to the GS-13 level. Affected BUEs shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met time in grade requirements and had satisfactory performance evaluations), shall be promoted to next career ladder grade(s) until the journeyman level. The Agency shall process such

promotions within 30 days, and calculate and pay affected employees all back pay and interest due since 2002.

2. In the alternative, and only in the event the FLRA vacates ORDER No. 1 above, and pursuant to my finding that “but for” the Agency’s violations, the Grievants would have been selected for the subject vacancy for which they applied, I ORDER that the Agency retroactively select the affected GS-12 employees into the subject vacant career ladder positions with retroactive grade increases. The Agency shall process such selections within 30 days, and calculate and pay affected employees all back pay and interest due since 2002.
3. In the alternative, and only in the event the FLRA vacates ORDER No. 1 and 2, above, I hereby ORDER that the violative Agency selections from 2002 to present be set aside, that the Agency provide each Grievant with one priority consideration and that the Agency must re-run all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. The Agency should process such selections within 60 days, and calculate and pay affected employees all back pay and interest due since 2002.
4. In the alternative, and only in the event the FLRA vacates ORDER No. 1, 2 and 3 above, that the Agency retroactively place all affected BUEs into an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects their duties from 2002 to present, and then I ORDER the Agency to classify and grade those PD’s, retroactively placing the Grievants in them effective 2002, with back pay and interest.

The Agency is hereby ORDERED to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. (Called a “constructive demotion” in my prior Award). This portion of the Order does not apply to non-status vacancy announcements.

The Class of Grievants subject to the Remedy addressed herein is defined as follows: all Bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder leads to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present. These include BUEs in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1, 9.

The Arbitrator hereby retains jurisdiction to provide alternative relief, in the event that any relief provided is found to be inconsistent with law or otherwise not available, and if her decision is set aside or in whole or in part on that basis.

The Arbitrator retains jurisdiction over an award of Attorney Fees upon petition by the Union, which shall be entertained within a reasonable time following receipt of this Award.

The Agency shall have a reasonable opportunity to respond.

IT IS SO ORDERED.

Date

Arbitrator: Dr. Andree Y. McKissick, Esq.

Cc: Michael J. Snider, Esq.
Jason I. Weisbrot, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
Counsel for the Union

Norman Mesewicz, Deputy Director, LER
Counsel for the Agency

Carolyn Federoff, EVP
AFGE Council 222
Union Representative

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Union's Remedy Brief and Proposed Order was filed by the method indicated below on the following individuals on September 15, 2011:

SENT VIA EMAIL & FIRST CLASS MAIL

Dr. Andree McKissick
Labor Arbitrator
2808 Navarre Drive
Chevy Chase, Maryland 20815-3802
Email: mckiss3343@aol.com

SENT VIA EMAIL & FIRST CLASS MAIL

Norman Mesewicz, Deputy Director, LER
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410
Email: Norman.Mesewicz@hud.gov


Michael J. Snider, Esq.