FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	)	Issue: Fair and Equitable Case No. 03-07743 FLRA Docket No. 0-AR-4586 Arbitrator: Dr. Andree Y. McKissick, Esq.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Response in Opposition to the Agency's Motion for Reconsideration were served on this 15th day of June, 2015.

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American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	Issue: Fair and Equitable Case No. 03-07743 FLRA Docket No. 0-AR-4586 Arbitrator: Dr. Andree Y. McKissick, Esq.

UNION'S RESPONSE IN OPPOSITION TO AGENCY'S MOTION FOR RECONSIDERATION

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby files this Response in Opposition to the Agency's Motion for Reconsideration. The Motion must be denied because the Agency has failed to demonstrate the existence of any extraordinary circumstances, as the Authority did not err in any of its factual findings. The Union incorporates by reference its Response in Opposition to the Agency's Response to Show Cause Order and Exceptions to Arbitrator Modification, dated November 10, 2014, including the arguments not addressed by the Authority[1], and in support, thereof, states as follows:

[1] It was not necessary for the Authority to previously consider certain arguments presented by the Union because of the ruling that the Exceptions were untimely. However, even if the Motion for Reconsideration were to be granted, the Exceptions still must be dismissed because there was no impermissible modification of the Remedial Award.

Background

On September 4, 2014, the Agency filed Exceptions to the August 2, 2014, Summary of Implementation Meeting issued by Arbitrator McKissick in the instant matter. The Union subsequently filed a Motion for an Order to Show Cause as to why the Exceptions should not be dismissed as untimely; that Motion was opposed by the Agency. On October 9, 2014, the Authority issued an Order to Show Cause why it should not dismiss the Agency's Exceptions as untimely filed. The Agency responded to the Order and the Union then timely filed, pursuant to a separate order from the Authority, a combined Response in Opposition to the Agency's Response to Show Cause Order and Exceptions to Arbitrator Modification.

On May 22, 2015, the Authority issued an Order dismissing the Exceptions. *AFGE 222 v. U.S. Department of HUD*, 68 FLRA 631 (2015). In doing so, the Authority correctly ruled that the Agency's Exceptions were untimely because they would have had to have been filed within thirty-days of the issuance of Summary No. 2 (dated May 17, 2014) because Summary 3 did not modify Summary 2.[2] *Id.*

The Agency's Motion for Reconsideration incorrectly alleges that the Authority erred in two factual findings. **Agency Motion, p. 2**. Specifically, the Agency's Motion alleges that: (1) the Authority erred in finding that nothing in Summary 3 eliminated the requirement that parties "work through" the GS-1101 series to identify eligible class members; and (2) the Authority erred in finding that the Arbitrator's prior statement that the employees in the 1101 job series were "covered by" the Award translates into a subsequent statement that all 1101s were to be

[2] The Authority's opinion was issued over a dissent. As the majority noted, the dissent contains an attempt at an inappropriate review of final awards and mischaracterizes the events that gave rise to the underlying grievance. It is clear that the Agency's Motion for Reconsideration, is nothing more than an attempt to take a proverbial second bite at the apple.

promoted. *Id.* As is demonstrated *infra*, the Agency's arguments are without merit and must be denied.

Standard of Review

Section 2429.17 of the Authority's Regulations permits a party who can establish extraordinary circumstances to request reconsideration of an Authority decision. *United States Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84 (1995) (*Scott AFB*). In *Scott AFB*, the Authority identified a **limited number** of situations in which extraordinary circumstances have been found to exist. These include situations where a moving party has established that the Authority erred in its remedial order, process, conclusion of law, or factual finding. *Id.* "The party seeking reconsideration of a final decision of the Authority has the **heavy burden** of establishing that extraordinary circumstances exist to justify this unusual action." *Id.* (emphasis added). In this case, the Agency has not established **any** extraordinary circumstances that would warrant the granting of its Motion for Reconsideration. As such, the Motion must be denied.

Argument & Analysis

The Agency's only argument in support of its Motion is that the Authority's decision to dismiss the Exceptions contained two errors of fact. The Agency generally relies on *AFGE Local 12 v. U.S. Department of Labor*, 60 FLRA 737 (2005) and *NAGE Local R14-52 v. U.S. Department of Army*, 46 FLRA 435 (1992) in support of its Motion, however, as discussed below, neither of those cases have any applicability to the facts herein.

I. The Agency's Motion is flawed since it does not allege any "erroneous findings of fact." It only alleges erroneous legal findings.

The only ground under which the Agency seeks reconsideration is that the Authority erred in its finding of fact in two regards. However, a brief review of the arguments plainly demonstrates that the Agency is not actually contesting the **factual findings** by the Authority at all, but rather is contesting the **legal conclusions** of the Authority. Indeed, the Authority rarely makes findings of fact, deferring instead to the factual findings of the Arbitrator - provided they are not nonfacts. *NFFE Local 1497 v. U.S. Department of Air Force,* 48 FLRA 589 (1993). To establish that an award is based on a nonfact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which a different result would have been reached by the arbitrator, or in this case the Authority. *AFGE Local 2431 v. General Services Administration,* 46 FLRA 1039 (1992). Examples of erroneous findings of fact which would warrant reconsideration are discussed *infra.*

Both of the alleged erroneous findings of fact come from two paragraphs in the Authority's decision:

> [t]he Arbitrator specifically identified, in the *second* summary, "all GS-1101 employees" as part of the class of grievants covered by the remedial award. Specifically, she stated: "*Employees encumbering [the GS-1101] job series are clearly within the scope of the [remedial a]ward, . . .* and therefore will serve as the basis for the next round of [g]rievants to be promoted with [backpay] and interest"; and "*the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others).*" In the third summary, she merely reiterated that point: "The [p]arties were instructed that, based upon this Arbitrator's [remedial a]ward, *as an example, all GS-1101 employees at the GS-12 level from 2002 to [the] present were to be promoted . . . with [backpay] and interest, as of their earliest date of eligibility.*" Therefore, even assuming that the Arbitrator modified the remedial award by including all GS-1101 employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that alleged modification in the second summary.
>
> Relatedly, the Agency argues that the Arbitrator modified the remedial award in the third summary because, unlike the second summary, the third summary no

> longer requires the parties to "*work through*" the GS-1101 series to identify eligible class members. However, nothing in the third summary eliminates this requirement. Rather, in the third summary, the Arbitrator repeatedly directs the parties to work together to identify, and agree upon, eligible class members. Moreover, nothing in the third summary eliminates the eligibility requirements, set forth in the remedial award, that class members meet "time-in-grade requirements" and have "satisfactory performance evaluations" in order to recover.

***AFGE 222*, 68 FLRA 631** (footnotes and citations omitted)

The Agency takes issue with the legal conclusions set forth by the Authority; specifically, that (1) the language in Summary 3 did not eliminate the requirement that the Parties work through the GS-1101 series to identify eligible class members and, (2) that the "Award covers" language in Summary 2 was simply reiterated in Summary 3. However, those arguments pertain to the Authority's legal conclusions. The Agency, therefore, has failed to establish the extraordinary circumstances that, as set forth in *Scott AFB,* are necessary to warrant reconsideration of the decision published at 68 FLRA 631. *NTEU Chapter 208 v. U.S. Nuclear Regulatory Commission*, 55 FLRA 666 (1999).

It is interesting to note that in *NTEU Chapter 208*, which was a decision denying a Motion for Reconsideration, even Member Wasserman who had issued a dissent in the underlying case issued a concurring opinion in the decision denying the Motion for Reconsideration, noting that:

> Reconsideration is available when the Authority has misapplied the law, but it was not intended to permit a party to relitigate the merits of its case. For the reasons stated in my dissent in *NRC*, I maintain the view that the case was wrongly decided, but do not think that the Union has stated grounds for reconsideration.

NTEU Chapter 208, 55 FLRA 666.

Because the Agency does not allege any erroneous findings of fact, extraordinary circumstances do not exist and the Agency's Motion must be denied.

II. The Agency's reliance on *AFGE Local 12 v. U.S. Department of Labor*, 60 FLRA 737 (2005) (*Local 12*) and *NAGE Local R14-52 v. U.S. Department of Army*, 46 FLRA 435 (1992) (*NAGE)* are misplaced.

The Agency relies on two cases in general support of its Motion for Reconsideration. *AFGE Local 12 v. U.S. Department of Labor*, 60 FLRA 737 (2005); *NAGE Local R14-52 v. U.S. Department of Army*, 46 FLRA 435 (1992). However, other than two cursory and conclusory parentheticals, the Agency does not explain why either case is applicable. **Agency Motion, p. 2, 5.** Indeed, the Union proves below that **neither** case is applicable – as in both of those cases, erroneous findings of fact were actually present.

In *Local 12*, the Authority noted the extremely high burden that a party moving for reconsideration bears. *Local 12*, 60 FLRA 737. However, in that case, the Authority found that a Motion for Reconsideration was warranted because the Authority had erred in its assumption that the Agency had previously had the opportunity to contest the applicability of a certain Article within the Parties' CBA. *Id.* However, the Agency explained that it did not previously have the opportunity to contest the applicability because the Union raised the argument for the first time in its post-hearing brief, which was filed simultaneously with the Agency's post-hearing brief. *Id.* Citing to the grievance and the hearing transcript, the Agency had argued that it "would have been impossible for the Agency to argue to the Arbitrator that Article 16 did not apply, since neither party, nor the Arbitrator, had ever mentioned Article 16 at the grievance stage or during the hearings." *Id.* As such, the Authority granted the Motion for reconsideration (while still denying the Exceptions on the merits). *Id.*

In *NAGE*, the Authority granted a Motion for Reconsideration filed by the Union because the Union had submitted an otherwise legible exhibit which inadvertently had the left margin missing. *NAGE*, 46 FLRA 435. The Authority there had erred in its factual finding which was

based upon the incomplete document. The Agency did not dispute that the Authority's decision was based upon the incomplete document and, therefore, had erred; thus extraordinary circumstances were present to grant the Motion for Reconsideration. *Id.*

To the contrary, here, there has been no allegation by the Agency that it was not provided with sufficient opportunity to present its case or any specific argument. Indeed, both the Arbitrator and Authority provided multiple opportunities for the Agency to raise any arguments, and it has not been alleged that the Union has raised any arguments for the first time. Furthermore, the Agency has not presented any missing evidence nor has it demonstrated that the Authority's alleged factual errors were the result of an incomplete record. Rather, the Agency simply disagrees with the Authority's legal conclusions. Because no extraordinary circumstances exist, the Agency's Motion must be denied. *Scott AFB*, 50 FLRA 84.

III. The Authority did not err in its legal conclusion that nothing in Summary 3 eliminated the requirement that the parties "work through" the GS-1101 series in order to identify eligible class members.

The Agency's argument that the Authority erred in a factual finding, that nothing in Summary 3 eliminated the requirement that the parties "work through" the GS-1101 series in order to identify eligible class members, is without merit. The Agency does not raise any **new** arguments or present any **new** evidence in this regard. Rather, the Agency simply reiterates the same arguments that the Authority has already ruled are without merit.

The Union previously demonstrated, and the Authority properly ruled, that nothing in Summary 3 eliminated the requirement that the Parties "work through" the GS-1101 series. In its response to the Order to Show Cause and in its Motion for Reconsideration, the Agency argues that Summary 3 no longer requires that the parties work through the GS-1101 to identify eligible class members; rather, Summary 3 establishes an absolute requirement that eligible class

members are based solely upon encumbering a position in the GS-1101 series, and with no related requirement to identify eligible class members. *Id.* As previously set forth by the Union, this argument is without merit and is not a reasonable interpretation of the Arbitrator's clarifying comments on the subject.

The Arbitrator defined the class in the Remedial Award. The Arbitrator reiterated her Award in Summary 1 (dated March 14, 2014) and Summary 2 (dated May 17, 2014). Specifically, in Summary 2 the Arbitrator noted that "[A]lthough the Award **covers all GS-1101 employees** who were not promoted to the GS-13 level (among others), the PHRS group is discrete and therefore **the Parties were directed to work through the GS-1101 series** to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with back pay and interest, among other relief. The Parties were directed to then move on to the CIRS (Contract Industrial Relation Specialist) employees in the GS-246 series, **the other GS-1101 employees**, and then others in other applicable job series, until implementation is complete." **Summary 2 (**emphasis added). This language further supports the language in the First Summary in which the Arbitrator stated that "…**The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits." Summary 1** (emphasis added)**.** Neither the First Summary nor the Second Summary were appealed and are final and binding upon the Parties**.** The Agency (as one of the Parties), in Summary 2 was **"directed to work through the GS-1101 series** to identify all eligible class members . . . **and to work to have them retroactively promoted** with back pay and interest, among other relief.

The Arbitrator's Summary 3 (August 2, 2014) similarly states: "[T]he Parties were instructed that based upon this Arbitrator's award, as an example, all GS-1101 employees at the

GS-12 level from 2002 to present were to be promoted, per the Back Pay Act and CBA, with backpay and interest, as of their earliest date of eligibility. . .” **Summary 3**. The “absolute requirement” alleged by the Agency in the Third Summary was **already found** in the Remedial Award, the First Summary and the Second Summary, but was **always** subject to a further methodology to identify the class members. That methodology was, in part, composed of applying the eligibility requirements – namely, time in grade and satisfactory performance. Other requirements included being a member of the bargaining unit, as well as being within the applicable job series during the relevant damages period.

When the Arbitrator required the Parties to “work through” the employees in the GS-1101 series, she was simply ensuring that the employee met the definition noted in the Remedial Award. The Remedial Award contained that requirement, and that requirement is implicit in all subsequent Summaries. Indeed, the Union **agrees** that class members, to be promoted, must have met time-in-grade requirement and must have had satisfactory performance evaluations – that is the “working through” to which the Arbitrator refers.

In its Motion, the Agency references the May 16, 2015, Summary of Implementation Meeting (Summary 6) in support of its arguments. **Agency Motion, p. 4, fn. 4**. Any reliance on the May 16, 2015 Summary is improper as it was filed long after the matters currently at issue were raised and briefed. The Union requests that the Authority strike the inclusion of Summary 6 from the record. That Summary was issued **after** subsequent Implementation Meetings, was not included in any briefing relevant to the instant Motion and has no relevance to the dispute concerning the GS-1101 employees. Indeed, the Arbitrator even notes: “[T]his Summary only relates to the Award and Summaries 1, 2, 4, and 5. This Summary does not relate to the August 2, 2014 Summary (Summary 3).” **Agency Motion, Exhibit 1, p.1**.

The Agency's argument that the Authority erred in a factual finding that Summary 3 did not preclude further efforts to work through the identification of eligible GS-1101 employees is without merit and must be denied.

IV. The Authority did not err in finding that employees within the GS-1101 series are within the scope of the Award, because of the Authority's legal conclusion that the Arbitrator's statement that GS-1101 employees "are covered by the Award" is equivalent to her later statement that all 1101s "were to be promoted."

The Agency similarly argues that the Authority erred in a factual finding that the language that GS-1101 employees are covered by the award is equivalent to the Arbitrator's statement that all GS-1101s were to be promoted. **Agency Motion, p. 5.** This argument must fail because the Agency is not attacking a factual finding by the Authority, but rather, a legal conclusion. Assuming *arguendo,* that this was a factual finding, the argument must still fail because the Authority did not err. The Agency's argument repeats its prior argument that the Arbitrator's statement in Summary 3 eliminates the need to work through identification of eligible GS-1101 employees. But again, the Authority did not err in its interpretation of the plain language of the Summaries, finding that:

> [t]he Arbitrator specifically identified, in the *second* summary, "all GS-1101 employees" as part of the class of grievants covered by the remedial award. Specifically, she stated: "*Employees encumbering [the GS-1101] job series are clearly within the scope of the [remedial a]ward, . . .* and therefore will serve as the basis for the next round of [g]rievants to be promoted with [backpay] and interest"; and "*the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others).*" In the third summary, she merely reiterated that point: "The [p]arties were instructed that, based upon this Arbitrator's [remedial a]ward, *as an example, all GS-1101 employees at the GS-12 level from 2002 to [the] present were to be promoted . . . with [backpay] and interest, as of their earliest date of eligibility.*" Therefore, even assuming that the Arbitrator modified the remedial award by including all GS-1101 employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that alleged modification in the second summary.

> Relatedly, the Agency argues that the Arbitrator modified the remedial award in the third summary because, unlike the second summary, the third summary no longer requires the parties to "*work through*" the GS-1101 series to identify eligible class members. However, nothing in the third summary eliminates this requirement. Rather, in the third summary, the Arbitrator repeatedly directs the parties to work together to identify, and agree upon, eligible class members. Moreover, nothing in the third summary eliminates the eligibility requirements, set forth in the remedial award, that class members meet "time-in-grade requirements" and have "satisfactory performance evaluations" in order to recover.

***AFGE 222*, 68 FLRA 631** (footnotes and citations omitted)

It is important to highlight the last part of the Arbitrator's statement in Summary 3: "*as of the earliest date of eligibility.*" It is crystal clear, therefore, that the Arbitrator's example in which all GS-1101 employees at grade 12 are to be promoted is subject to the **very same** eligibility requirements as the GS-1101 employees "covered by" the award, per Summary 2. Furthermore, the Agency incorrectly asserts that Summary 3 contains a new Order to promote the GS-1101 employees without regard to meeting eligibility requirements. The Agency's contention errs in two respects. First, the eligibility requirement as noted above is contained in that same sentence, albeit tied to the eligibility date. Second, Summary 3 does not contain any new orders "to promote." Rather, the Arbitrator simply clarifies her prior Award and Summaries, and notes that as an example, these [GS-1101-12] employees "were to be promoted" pursuant to her prior Orders and Summaries. It is clear therefore, that the Arbitrator's example was not intended to create any **new** obligation, but was rather intended to clarify the scope of coverage for the prior Award and Summaries, and must be read in light of the Award and prior Summaries.

The Agency does not raise any specific legal argument in support of its Motion for Reconsideration. The Agency also does not dispute any finding of fact by the Authority. Instead,

it simply disagrees with the Authority's legal conclusions, without any basis. As such, the Motion must be denied.

V. Contrary Arguments presented in the Agency's Motion to Stay and the Agency's Motion for Reconsideration prove fatal to both.

Simultaneous with its filing of its Motion for Reconsideration, the Agency filed a Motion to Stay the Authority's Order. ***Agency Motion to Stay***. In its Motion to Stay the Agency argues:

> "Based upon a cursory review of Agency records, absent a stay of the Authority's Order, the Agency will have to consider whether approximately 2,500 current and former GS-12 employees are entitled to a retroactive promotion without due consideration of the Agency's argument that additional eligibility criteria were contemplated by the Arbitrator at the time of IM Summary 2 and 3, that the Arbitrator directed the parties to develop these criteria, which the Arbitrator subsequently disregarded in Summary 3…
>
> . . .In the event the Motion to Stay is not granted, Agency staff and resources would have to be unnecessarily expended **on the determinations** for **potentially** 2,500 individuals.

***Id.* at pp. 6-7 (emphasis added)**.

It is critical to note that the Agency previously argued, in its Exceptions (dated September 4, 2014) and instant Motion for Reconsideration (dated June 8, 2015) that the Arbitrator's Summary improperly required the Agency to summarily promote every GS-1101-12 bargaining unit employee represented by the Union. Yet, in its Motion to Stay, the Agency argues that a **determination process** would be required to determine eligibility in the class and that such a determination would require the expenditure of significant Agency resources. If the Agency truly believed that the Arbitrator's order required retroactive upgrades for **every single** GS-1101-12 without **any other** eligibility requirements, then there would be **no determination process** and promotions would be a simple matter of going into the system and promoting every GS-1101-12.

Rather, the Agency clearly recognizes that the Arbitrator's order **did** contain eligibility factors and those factors must be applied as a methodology to the entire bargaining unit in order to determine eligibility in the class. Indeed, the Union believes, based upon data provided by the Agency to date, that there are far fewer, by hundreds upon hundreds, than the 2,500 eligible GS-1101 class members alleged by the Agency.

The Agency's argument in its Motion to Stay, that a determination process is required to determine class membership, proves that the Arbitrator, and therefore the Authority, did not disregard any previously ordered methodology.

Conclusion

The Agency's Motion for Reconsideration must be denied. The Agency failed to meet its extremely heavy burden of proving that extraordinary circumstances exist which would warrant reconsideration. The Authority did not err in any of its factual findings; rather, the Agency simply disagrees with them. As such, the Agency's Motion must be denied.

Respectfully Submitted,

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