

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

**In the Matter of the Arbitration**

**Between  
Grievance**

**Class Action**

**U.S. Department of HUD**

**And  
07743**

**FMCS No: 03-**

**Council of HUD, Local 222**

**OPINION AND AWARD:** Dr. Andree Y. McKissick, ARBITRATOR

**APPEARANCES:**

**For Management:** Norman Mesewiez, Deputy Director  
Labor and Employee Relations Division  
U.S. Department of HUD  
451 Seventh Street, S.W., Room 2150  
Washington, D.C. 20410

**For Union:** Carolyn Federoff, President  
Council of HUD Local 222  
P.O. Box 5961  
Boston, Massachusetts 02114

**DATES OF CONFERENCE CALLS:** April 7 and May 25, 2003

**AWARD:** This Arbitrator finds that the subject matter of this grievance is arbitrable. The Agency is ordered to provide the data requested to allow the complete identification of all potential grievants. A hearing on the merits is scheduled for July 24, 2003.

**DATE OF AWARD:** June 23, 2003

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(arbitrator's signature is here on original

**BACKGROUND**

This is an arbitration determination pursuant to the arbitrability provision of Article 22, Section 22.14 of the Collective Bargaining Agreement (CBA) between the American Federation of Government Employees, AFL-CIO, (hereinafter "Union") and the U.S. Department of Housing and Urban Development (HUD) (hereinafter "Agency"). Conference calls were held on April 7 and May 25, 2003. The hearing on the merits of this grievance is scheduled for July 24, 2003.

## **PERTINENT PROVISIONS**

The central controversy of this class action grievance lies within the applicability of the contractual provisions of the aforementioned Agreement between Agency and Union, effective 1998.

### **COLLECTIVE BARGAINING AGREEMENT (CBA)**

#### **ARTICLE 22 - GRIEVANCE PROCEDURES**

**Section 22.14 - Questions of Arbitrability.** An unresolved question shall be considered as a threshold issue should the grievance go to arbitration. Questions of arbitrability shall be submitted to the arbitrator in writing and be decided prior to any hearing unless mutually agreed otherwise. The moving party shall have the affirmative in going forward with the demonstration that the matter is not grievable.

**Section 22.05 - Exclusions.** Excepted from these negotiated procedures coverage are on the following:

5. The classification of any position which does not result in the reduction in grade or pay of any employee...

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#### **ARTICLE 13 - MERIT PROMOTION AND INTERNAL PLACEMENT**

**Section 13.01 - General.** This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are evaluated and selected solely on the basis of merit in accordance with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/or upward mobility positions, where feasible, to help promote the internal advancement of employees.

#### **ARTICLE 9 - POSITION CLASSIFICATION**

**Section 9.01 – General.** Classification standards shall be applied fairly and equitably to all positions. Each position covered by this Agreement that is established or changed must be accurately described, in writing, and classified as to the proper title, series, and grade and so certified by an appropriate Management official. A position description does not list every duty an employee may be assigned but reflects those duties which are series and grade controlling. The phrase "other duties as assigned" shall not be used as the basis for the assignment to employees of duties unrelated to the principal duties of their position, except on an infrequent basis and only under circumstances in which such assignments can be justified as reasonable.

#### **ARTICLE 4 - EMPLOYEE RIGHTS/STANDARDS OF CONDUCT**

**Section 4.01 – General. Employees have the right to direct or to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in the policies and practices concerning conditions of employment, and may grieve and matter relating to employment.**

**Section 4.06 - Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.**

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### **STATEMENT OF FACTS**

Pursuant to Article 22, Section 22.14 of the Agreement, the sole question of substantive arbitrability was submitted to the Arbitrator, as required. This provision also requires that this determination be made prior to a hearing on the merits of this controversy.

Since an agreement on the selection of an Arbitrator was not determined by the parties; a direct designation was made by the Federal Mediation and Conciliation Service (FMCS) on March 13, 2003.

The grievance, dated November 13, 2002, alleges that the Agency advertised or filled certain positions with promotion potential to the GS-13 level around Fall, 2002. It further alleges that those particular positions were open to current federal employees and the general public while similarly situated HUD staff have promotion potential only to the GS-12 level. Thus, the effect of such alleged harm is that employees do not have the opportunity to be noncompetitively promoted to the GS-13 level. Based on these allegations, the remedy sought is full promotion potential for all similarly situated employees to the GS-13 level and other just relief.

### **STIPULATED ISSUE:**

**Whether or not this grievance is arbitrable?**

### **POSITIONS OF THE PARTIES**

It is the Agency's position that this dispute is not arbitrable because the subject matter of the grievance deals with a classification issue. The Agency points out that Section 5 USC §7121(C)(5) of the Federal Service Labor-Management Statute precludes arbitrability on its face

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from the grievance procedures. Moreover, the Agency notes that the remedy sought by the grievance would require the reclassification of certain positions from GS-12 to GS-13. In addition, the Agency asserts that there was no loss of grade or pay by anyone in this grievance. Based on all the above, the Agency requests that this Arbitrator find this

grievance not to be arbitrable.

On the other hand, the Union rebuts that the subject matter of the grievance is not a classification issue. Moreover, the Union asserts that the remedy does not involve reclassification. Instead, the Union points out that issues of this grievance involve the lack of: fairness, equity and consistency based upon advertisements of positions with career ladders to GS-13. Presently, the Union points out that individuals who have reached the journey level of GS-12 for their career ladders, are now mentoring, training and working side by side with entry level GS-9 staff who have career ladder potential to GS-13. Specifically, the Union asserts that the remedy requires reassignment of employees to reclassified positions. Based on all the above, the Union requests that the Arbitrator find this grievance to be arbitrable. In addition, it also requests that the Arbitrator issue an order to require the Agency to supply the needed data requested to identify all the potential grievants.

## FINDINGS AND DISCUSSION

After a careful review of the record, Statute, and Agreement on the issue of substantive arbitrability, this Arbitrator finds this grievance to be arbitrable for following reasons.

First, the subject matter of this grievance does not involve a classification issue, prohibited by Section 5 USC §7121(C)(5) of the Federal Service Labor-Management Relations

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Statute and Article 22 Section 22.05 of the Agreement. The substance and nature of this grievance involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties.

Second, the remedy requested, reassignment is consistent with the Memorandum of Understanding (MOU), dated February 27, 1995, which "allows an employee who is reassigned to a reclassified position with greater promotion potential to attain the new career ladder potential without competition."

Third, the subject matter of this remedy is also congruent with Article 4, Section 4.01, General, which states that "Employees shall be treated fairly and equitably."

Fourth, the allegations of the grievance should be allowed to develop and be proven by evidence adduced via hearing on the merits of the controversy. Moreover, this analysis squares with the strong presumption toward arbitrability, espoused by Ernest C. Hadley's "A Guide to Federal Sector Labor Arbitration", Dewey Publications, Inc. (2d Ed. 1999) as well as, other arbitrators. (See Mass. Army Nat'l Guard. and NAGE, Local R1-154, LAIRS 14178 (Arbitrator Grossman, 1982)

Fifth, pursuant to Article 22, Section 22:14, this Arbitrator finds that the Agency has not met its burden in showing that this grievance is not arbitrable.

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## AWARD

**This Arbitrator finds that the subject matter of this grievance is arbitrable.**

**The Agency is ordered to provide the data requested to allow the complete identification of all potential grievants. A hearing on the merits is scheduled for July 24, 2003.**

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**ARBITRATOR** (signature