UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. Department of Housing and Urban Development, Washington, DC	)	
(Agency),	)	FMCS-03-07743
and	)	
American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO (Union)	)	

AGENCY'S EXCEPTIONS TO ARBITRATION AWARD

Pursuant to 5 C.F.R., Section 2425.1 (a), the Department of Housing and Urban Development (Agency or HUD) hereby files exceptions to the Award of Arbitrator Andree Y. McKissick concerning the Question of the Arbitrability of the Union Grievance of the Parties, FMCS-03-07743. A copy of the Award is attached as Exhibit 1 (E1)[1]. As set forth fully below, the Award is deficient and should be set aside as it: finds a grievance concerning the classification of a position which does not result in the reduction in grade or pay of an employee to be grievable in violation of Section 7121(c)(5) of the Federal Service Labor-Management Relations Statute (Statute) as well as Article 22, Section 22.05 (5) of the HUD/AFGE Agreement (Agreement) (E2). Because the subject of the grievance is statutorily excluded from the grievance procedure, the arbitrator had no basis upon which to assert jurisdiction in this matter. The Federal

[1] The Award is dated June 23, 2003 and was delivered via U.S. Mail. The address of Arbitrator McKissick is 2808 Navarre Drive, Chevy Chase, MD 20815.

Labor Relations Authority (Authority) holds that issues which, as a matter of law, are not cognizable under a grievance procedure, may not go before an arbitrator, *Director of Administration HQ, USAF and AFGE Council of HQ USAF Locals*, *17 FLRA No. 58 (1985)*. The Award is also based on a non-fact.

BACKGROUND

On November 13, 2002, the Union filed the instant Grievance of the Parties (Grievance) regarding the filling of certain positions at certain grade levels. The stated remedy was "We are seeking as a remedy that the full promotion potential for all similarly situated employees be GS-13, and such other relief as maybe just" (E3). The Agency denied the Grievance noting the remedy required the reclassification of certain positions. The Agency's decision also explained that both Section 7121(c)(5) of the Statute and Article 22, Section 22.05 of the Agreement exclude from the grievance procedure grievances concerning the classification of positions which do not result in the reduction of grade or pay of an employee (E4). The Union invoked arbitration (E5). The Agency initially declined to participate in arbitration proceedings reiterating that the Grievance was barred by Section 7121 (c)(5) of the Statute noting particularly that Authority holds that issues which, as a matter of law, are not cognizable under a grievance procedure, may not go before an arbitrator (E6). Pursuant to the Union's request, the Federal Mediation and Conciliation Service made a direct designation of an

arbitrator in this matter (E7). The Agency decided to participate in the arbitration, and on April 30, 2003 submitted its Question of Arbitrability Argument to the arbitrator (E8).[2]

ARBITRATION AWARD

The issue as stated by the arbitrator was "Whether or not this grievance is arbitrable?" (E1 p.4) The arbitrator found the Grievance to be arbitrable. In so finding, she stated, without rationale, that the Grievance does not involve a classification issue under Section 7121(c)(5) of the Statute. She also stated that the remedy requested was "reassignment" (El pp. 5-6). Inexplicably, the arbitrator reached those two conclusions despite the fact that the requested remedy, as stated on the Grievance is "We are seeking as a remedy that the full promotion potential for all similarly situated employees be GS-13, and such other relief as may be just."[3] Thus, the Award does not address how the elevation of the promotion potential, i.e. reclassification, of certain positions is not a classification matter within the scope of Section 7212(c)(5) of the Statute.[4] Moreover, the assertion that the requested remedy was "reassignment" is patently

false. A review of the Grievance will reveal that nowhere in that document does the word "reassignment" appear (E3). Assuming *arguendo* that requested reassignments were part of the Grievance, granting that remedy would interfere with the Agency's reserved right to assign and assign work under Section 7106(a)(2)(B) of the Statute. Additionally, any

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2 The exhibits which were part of the Agency's Argument are not now included since they are addressed independently in these exceptions. The Authority decisions provided to the arbitrator are included.

[3]The Grievance does not elaborate upon what "such other relief as may be just" may be.

4 The Agency's position regarding the applicability of Section 7121(c)(5) of the Statute to this matter is fully set forth in its initial submission to the arbitrator (E8).

reassignment to a higher graded position absent competition is a violation of 5 C.F.R., Part 335 - Promotion and Internal Placement (E9).[5]

THE EXCEPTIONS ARE NOT INTERLOCUTORY

The Sole Issue Before the Arbitrator was Grievability/Arbitrability

The arbitrator stated that the stipulated issue before the arbitrator was "Whether or not this grievance is arbitrable?" (E1 p.4). The Authority holds that if the sole issue before an arbitrator is whether or not a grievance presents a matter arbitrable under the negotiated agreement, the decision on that issue is not interlocutory, and exceptions lie to that decision, irrespective of the understanding of one party that the case would proceed to the merits if the grievance were found grievable. If the stipulated issue is limited to grievability, that decision is final when it is made. *USIA and AFGE Local 1812, 32 FLRA 739 (1988); DLA and AFGE Local 916, 53 FLRA 460, 462 n.1 (1997).* In this case, the Agency put squarely before the arbitrator the position that the Grievance was excluded from the Parties' grievance procedure by Article 22, Section 22.05 (5) of the Agreement (E8 Management Argument p.2).[6]

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5 Regarding reassignment, the arbitrator refers to a Memorandum of Understanding dated February 27, 1995 without further identification, and establishes no nexus between it and the Grievance.

6 The fact that the Agency also argued lack of jurisdiction under Section 7121(c)(5) of the Statute cannot preclude the taking

of this position since the jurisdictional issue is based on a separate authority, i.e., the Statute and procedurally precedes a contractual bar to grievability. Had the arbitrator acknowledged the statutory bar to jurisdiction, she never would have reached the issue of arbitability under the Agreement.

THE ARBITRATOR LACKED JURISDICTION AS A MATTER OF LAW

Assuming *arguendo* that the Exceptions are interlocutory, they must still be considered because there are extraordinary circumstances warranting their review. Specifically, those circumstances are that the Grievance is excluded from consideration under the grievance procedure by Section 7121(c)(5) of the Statute. As noted above, the remedy of the Grievance requires the reclassification of certain positions and the Grievance fails to allege any loss of grade or pay by any employee (E3). Grievances which, as a matter of law, are not cognizable under a grievance procedure may not go before an arbitrator. *Internal Revenue Service, National Office and NTEU, 21 FLRA 646, 649 n.3(1986).* Thus, there is a statutory bar to the arbitrator's assertion of jurisdiction over the Grievance.

The Authority holds that interlocutory review should only be undertaken where the arguments challenging an award present a plausible jurisdictional defect, the resolution of which will advance the ultimate disposition of the case. *Dept. Of Interior, BIA and NFFE Local 34155 FLRA 1230 (2000), Library of Congress and FOP Labor Committee 58 FLRA No. 120 (2003), U.S. DOD, NIMA and AFGE Local 1827 57 FLRA 837 n.2(2002).* The Agency submits that the facts in this case meet the above-noted test for interlocutory review. Specifically, a finding that the arbitrator improperly asserted jurisdiction would completely dispose of this case. This is so because, once it is established that the Grievance concerns a classification issue under 7121(c)(5) of the Statute, there will no issues, tangential or otherwise, left to resolve. In this regard, it must be reiterated that the only remedy specified in the Grievance requires the reclassification

of certain positions (E3), and that the remedy of reassignment "created" by the arbitrator interferes with

the Agency's right to assign work under Section 7106(a)(2)(B) of the Statute.

ARGUMENT IN SUPPORT OF AGENCY EXCEPTIONS

The Award is Contrary to Law.

The Authority may review arbitrability decisions of arbitrators challenged under Section 7121 of the Statute on the basis that the award is contrary to law, rule or regulation. *AFGE Local 3669 and VAMC, Minneapolis, 3 FLRA 310 (1980).* In this case the arbitrator asserted jurisdiction over a grievance seeking the reclassification of certain positions absent the reduction in grade or pay of any employee (E3). That assertion of jurisdiction violated Section 7121(c)(5) of the Statute.

The Award is Based on Non-Fact

To establish that an award is based on non-fact, 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. *Lowery AFB, Denver, Colorado and NFFE Local 1497 48 FLRA 589 (1993)* In her Award, the arbitrator states that the requested remedy is reassignment (E 1). As was noted above, this is patently false since the remedy, as stated on the Grievance is " We are seeking as a remedy that the full promotion potential for all similarly situated employees be GS-13, and such other relief as may be just.". If the arbitrator had, rather, acknowledged the reality of the

requested remedy she could not have asserted jurisdiction in violation of Section 7212(c)(5) of the Statute. Thus, the central fact of the award is clearly erroneous, and a different result, i.e., a decision of non-arbitrability, would have obtained had the actual remedy not been ignored by the arbitrator. At this point, it must also be reiterated that that the arbitrator's fictional remedy, reassignment, is an interference with the Agency's reserved right to assign and assign work under Sections 7106(a)(2)(A) and (B) of the Statute.

CONCLUSION

The Award is contrary to law, based on non-fact, and proposes a remedy that violates the Agency's reserved right to assign and assign work under Sections 7106 (a)(2) (A) and (B) of the Statute. Accordingly, the Award is deficient and must be set aside.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Norman Mesewicz, hereby certify that on this date the Agency's exceptions to the arbitration award and attachments in the above-captioned matter were filed with the Case Control Office, Federal Labor Relations Authority, and served on the following in the manner indicated:

By Messenger Delivery (Original and 4 copies):
Case Control Office
Federal Labor Relations Authority
Docket Room, Suite 201
1400 K Street, NW
Washington, DC 20424-0001

By Agency Pouch Mail
Carolyn Federoff
President, American Federation of
Government Employees
National Council of HUD
Locals 222, AFL-CIO

Dated this 28`h of July 2003 Norman Mesewicz