UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

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| U.S. Department of Housing and Urban Development, Washington, DC | ) | |
| (Agency), | ) | 0-AR-3718 |
| and | ) | |
| American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO | ) | |
| (Union) | ) | |

## OPPOSITION TO ARBITRATION EXCEPTIONS

In a document titled Agency's Exceptions to Arbitration Award the U.S. Dept. of Housing and Urban Development, Washington, D.C. (hereinafter referred to as "Exceptions") the U.S. Dept. of Housing and Urban Development, Washington, D.C. (hereinafter referred to as "HUD" or "the Agency") filed interlocutory exceptions to an arbitration decision issued on June 23, 2003, by Arbitrator Andree Y. McKissick in The Matter of U.S. Department of HUD and Council of HUD, Local [sic] 222, FMCS No. 03-07743 (hereinafter referred to as the "Decision"). [1]

In an order dated August 7, 2003, the Authority required corrected service of the Agency's Exceptions and authorized a Union response, if any, to be filed within thirty (30) days of the Agency's corrected service of the Exceptions. United States Department of Housing and Urban Development Washington D.C. and American Federation of Government Employees, Council of HUD Locals 222, 0-AR-3718 (August 7, 2003). The Agency properly served a copy of its Exceptions on the AFGE, National Council of HUD Locals, C-222 (hereafter referred to as the "Union") on August 14, 2003, making the Union's response due on or before September 15, 2003. 5 CFR §2425.1(c)

There is no question that the Decision at issue in the Agency's Exceptions is not a decision on the merits of the grievance. Indeed, the arbitrator ordered a hearing on the merits of the grievance to commence on July 24, 2003. Decision, pg. 7, Exhibit A. Hence, the Exceptions filed by the Agency without a final decision on the merits, is an interlocutory appeal. AFGE, General Committee and Dept. of Health and Human Services, Social Security Administration, 32 FLRA 173 (1988).

By regulation, the Authority has specifically precluded consideration of interlocutory appeal of arbitration decisions.

> **§2923.11 Interlocutory appeals.**
> **Except as set forth in part 2423 [ULPs], the Authority and the General Counsel ordinarily will not consider interlocutory appeals.**

5 CFR §2923.11 (2002)

The Authority has long held that it will only entertain exceptions after a final decision has been rendered by the arbitrator on the entire matter. Hawaii FEMTC and Pearl Harbor Naval Shipyard, 6 FLRA 667 (1981). When, as here, the arbitrator provides an interim ruling on a specific area but maintains jurisdiction over the rest of the case, exceptions to the initial decision amount to an interlocutory appeal that will not be addressed by the Authority. Patent and Trademark Office and POPA, 32 FLRA 572 (1988).

In a one paragraph argument the Agency argues, citing to United States Information Service and AFGE Local 1812, 32 FLRA 739(1988) and Defense Logistics Agency and AFGE Local 916, 53 FLRA 460 (1997), that the Authority will decide an interlocutory appeal that deals with the issue of grievability/arbitrability. Exceptions, pg. 4. Both cases cited by the Agency fail to support its argument regarding the Authority entertaining interlocutory appeals.

In USIA the Authority found that the arbitrator had completely decided the sole issue placed before him via a stipulation of the parties. USIA, 32 FLRA at 743-44. In the current case, by the contract between the parties, the jurisdictional issue is merely addressed first by the arbitrator, as noted by the arbitrator (Decision, pg. 6); standard practice in federal employment arbitration.

> **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.**

HUD/AFGE Contract, See, Exhibit 2, pg. 117 (appended to the Exceptions filed by the Agency)

As noted, *supra*, the arbitrator in the current case retained jurisdiction over the subject matter of the grievance and actually ordered a grievance hearing to take place.

Similarly, the DLA case cited by the Agency also involved an arbitration where the sole issue submitted to the arbitrator was the issue of arbitrability. DLA, 53 FLRA at 462, fn. 1.

The actual standard for interlocutory appeal is that established by the Authority in United States Dep't of Interior, Bureau of Indian Affairs and NFFE L-341, 55 FLRA 1230 (2000). In BIA the Authority held that interlocutory review "[s]hould only be undertaken" when: (1) the arguments challenging an award in fact present a plausible jurisdictional defect; and (2) the resolution of the exception will advance the ultimate disposition of the case. BIA, 55 FLRA at 1232. The Authority in BIA explicitly modified its earlier holding in U.S. Department of the Treasury, Internal Revenue Service and NTEU, Los Angeles Joint Council, 34 FLRA 116 (1990) and held that an interlocutory appeal from an arbitration decision would be entertained by the Authority not by the "mere assertion of a controlling jurisdictional issue by a party", but, rather, such: "interlocutory review should be reserved for those extraordinary situations where it is necessary. " BIA, 55 FLRA at 1332 (emphasis added).

In the present case, not only is no "extraordinary" situation present, but the matter is not even ripe for review. In her initial decision on arbitrability the arbitrator specifically held that the record needed further development on issues that involved her decision on jurisdiction.

> **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 arbitrarily, 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)**

Decision, pg. 6.

To support an "extraordinary" situation to allow an interlocutory appeal in the present case, the Agency makes a one paragraph conclusory "argument" that the grievance filed by the Union in this case seeks "[r]eclassification of certain positions absent the reduction in grade or

pay of any employee…" Exceptions, pg. 6. The Agency seeks to label the grievance as one considering "classification" and, hence, non-arbitrable under 5 U.S.C. §7121(c)(5). The Agency merely repeats the argument it unsuccessfully made before the arbitrator. See, Exception, attachment Exhibit 8. Citing no case law, the Agency merely repeats its same conclusory assertion of non-arbitrability before the Authority. The arbitrator, however, rather than viewing the Union's grievance as a classification issue, clearly states that the grievance is one involving the fairness of advertisements and vacancy announcements.

> 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.

Decision, pg. 6.

Thus, the Agency's claim that the grievance involves "classification" is mere wishful thinking and amounts to nothing more than mere disagreement with the arbitrator. This argument, is, of course, not a cognizable ground for review of the arbitrator's decision by the Authority. VA Hospital, Perry Point and AFGE Local 331, 3 FLRA 235 (1980).

Lastly, the Agency claims the Decision in this case must be reversed as it is based on a "non-fact". The Agency's claim that the arbitrator's interpretation of the grievance to include "reassignment" as a possible remedy is a "non-fact". The Agency's argument is non-sense. In a four page (single spaced) grievance[2] the Union, *inter alia*, sought as a remedy: "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". Exhibit B, pg. 3. (emphasis added) The Agency makes absolutely no argument, factual or legal, why "reassignment" may not be considered by the arbitrator to be part of the "other relief" sought by the Union. Rather than a "non-fact", reassignment may specifically be authorized as a remedy by the February 27, 1995, Memorandum of Understanding cited by the arbitrator at page 6 of her Decision.

Thus, neither of the "legal" arguments made by the Agency provides either a legal or factual basis for the "extraordinary" interlocutory review sought in this case. The Union respectfully suggests, in agreement with the arbitrator, that the grievance needs to be fully heard by the arbitrator and the facts, law, and contract, applied before the underlying grievance is

decided. An interlocutory review at this stage would frustrate the arbitration process for no good end and unduly delay the arbitration process.

Respectfully Submitted,

Joe Goldberg, Esq.
For the Union

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[1] A copy of the Decision is appended to this brief as Exhibit A.
[2] Appended to this document as Exhibit 2.