IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL of HUD LOCALS 222 Grievant	)	ISSUE: ARBITRABILITY
and	)	FMCS Case no. 03-07743
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	)	Remanded at 59 FLRA 630
_____	)	Arbitrator: Dr. Andree Y. McKissick

Union's Closing Brief

Background

The matter before the Arbitrator (again) concerns arbitrability.

Management alleged that the matter which is the subject of the instant **Grievance of the Parties** is not arbitrable. On the briefs, the Arbitrator held that the matter was arbitrabile, in a **Decision** dated June 23, 2003. In a **Decision** dated February 11, 2004, the Federal Labor Relations Authority (FLRA) remanded the matter to the Arbitrator for clarification.

The Union requested a hearing in this matter to present evidence and argument to the Arbitrator. While the Agency objected, the Arbitrator ruled that, in order to be able to clarify her **Decision**, she needed additional evidence and Argument. The Parties agreed to hold the hearing on November 22, 2005 at the Agency's headquarters in Washington, DC., commencing at 10:00 a.m. The hearing was postponed and rescheduled for March 2006, and then rescheduled again due to the alleged unavailability of Management's main witness, and reset for June 23, 2006. The Union called one witness and management called none.

We incorporate herein the Union's Opening Statement and the testimony of Ms. Federoff at the hearing.

Statement of the Issue

The Union's **Proposed Statement of the Issue** is:

1. Whether the matter is arbitrable?
2. If so, how is it arbitrable?

We explain the **Issue** and our **Argument** herein.

Material Facts

Grievance of the Parties

On November 13, 2002, Carolyn Federoff, President, Council of HUD Locals 222 filed a Grievance of the Parties ("GoP") and Request for Information regarding "Failure to [treat] Employees Fair and Equitably." In it, she stated:

> Please accept this Grievance of the Parties and Request for Information. We believe the HUD/AFGE Agreement has been violated, employees harmed, and that a remedy is necessary.

(**Joint Exhibit 1**)(Found at http://afgecouncil222.com/G/gop930.htm).

Also in the GoP, the Union stated, in a section entitled "Facts," that the Agency advertised a number of positions with, generally, a maximum grade potential to GS-13. The positions were advertised in two vacancy announcements per position, with one open to "current federal employees" and the other to the "general public." The Union stated that:

> In each of these instances, the potential is to hire a person at an entry level (GS-9/11) to work side by side with and to be mentored and/or trained by another employee in the same position whose career ladder potential is limited to GS-12. In at least one of these instances, persons were hired at a GS-9 only, thus requiring any current GS-12 employee in the same position who is seeking promotion potential to take a downgrade to the GS-9. Additionally, employees in some offices, but not others, have career ladder potential to GS-13, though they occupy the same positions. Employees are harmed by this practice, in that they do not have an opportunity to be promoted to the GS-13 without competition.

The Union claimed violations of the HUD/AFGE Agreement, law, rule and regulation, including violations of:

> Section 4.01 (". . .employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment . . .")
>
> Section 4.06 (". . . managers, supervisors, and employees shall endeavor to treat one another with the utmost respect . . .")
>
> Section 9.01 ("Classification standards shall be applied fairly and equitably to all positions.")
>
> Section 13.01 ("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 . . ., where feasible, to help promote the internal advancement of employees.")
>
> Additionally, the practice violates the Federal Service Labor-Management Relations Statute, and other law, rule and regulation.

In its **Grievance**, the Union 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.

Union's Brief Before the Arbitrator in Support of Arbitrability

The Union argued, in its Brief (at http://afgecouncil222.com/G/gopfearbbrief.htm) that the matter was arbitrable, and the Arbitrator should find as such.

The Union pointed out that:

> …the Union seeks additional information to establish the possibility of additional violations and grievants. Management has refused to provided this information, based upon their assertion that the matter is not arbitrable. Should the Arbitrator find that the matter is arbitrable, we request that the arbitrator order the agency to provide additional information sought by the Union.

The Union noted that the Agency intentionally crafted the Announcements and timing of cancellation of the internal Announcements so that Bargaining Unit employees would be harmed – essentially, tricked out of applying for job externally, thinking that their internal applications would be considered (as per the HUD/AFGE Agreement), and then finding that the internal Announcements were canceled:

> In some instances, the positions were advertised at entry level only, below a GS-12. To secure the greater career ladder potential, an on-board employee would have to take a downgrade. In other instances, similar positions were advertised for on-board staff, but the vacancy announcements were cancelled after the period of time for application under the external announcement had expired.
>
> We believe that there are additional violations (of the contract and law, rule and regulation). However, Management has refused to provide information in connection with this grievance. Therefore, we have been unable to identify all of the potential grievants and violations.
>
> Nonetheless, we are aware of individuals who have reached the journey level of GS-12 for their career ladders, and who are now mentoring, training, and working side-by-side with entry level GS-9 staff that have career ladder potential to GS-13.

The Union stated clearly that it was not claiming classification in its Grievance:

> The Union believes that the central issue of this case is not about classification or proper classification. Rather, the issues concern fairness, equity and consistency. Based upon the advertisement of the positions with career ladders to GS-13, Management has indicated that it has properly classified the journey level of these positions at the GS-13 level. The remedy does not require reclassification of employees presently at the GS-12 level. Rather, the remedy requires that management reassign employees to the reclassified position. Reassignment would result in a consistent application of the classification standards.

Commenting on the possible remedy of reassignment, the Union noted a critical document, a HUD/AFGE Union/Management MOU dated February 24, 1995, wherein HUD agreed to the reassignment of employees to reclassified positions having greater promotion potential. As set forth in the cover memorandum dated February 27, 1995, from then Deputy Secretary Dwight Robinson,

> "[t]his MOU allows an employee who is reassigned to a reclassified position with greater promotion potential to attain the new career ladder potential without competition."

The Union noted in its Brief that one possible remedy in this case was that agreed to by the Agency in its MOU:

> We are asking that employees be reassigned to the reclassified position with greater promotion potential so that they may attain the new career ladder potential without competition.

Critical to the clarification in this case, however, is the Union's clear and unequivocal statement in its Brief (which was missed by the FLRA) that the Union also sought *alternative* relief:

> Additionally, the Union is seeking all other relief as may be just. Other relief, including substitute relief, can include reassignment of the work classified as higher graded to employees at the GS-12 level and subsequent changes to their position descriptions. Based upon these changes, employees could pursue a reclassification audit or other appropriate action. These changes in and of themselves would not require reclassification.

Thus, the Union presented in the first instance to the Arbitrator a few remedies that could be available as relief in this matter without violating the law. It is important to note that the Arbitrator has not ordered any remedy in this case, nor has she even reached the merits of the case. We are dealing at this time only with the issue of arbitrability. We may bifurcate the later proceedings into liability and damages phases, or we may not. Regardless, the Arbitrator has before her a range of remedies that are available (not just reassignment).

Cases Cited By the Union

In its Brief, the Union cited cases issued by the Federal Labor Relations Authority in which it upheld arbitrators' decisions regarding the fair and equitable distribution of work assignments.

The Union cited **National Association of Government Employees, Local R4-45 and U.S. Dept of Defense, Defense Commissary Agency, Fort Lee, Virginia,** 55 FLRA 695 (July 31, 1999), in which the FLRA upheld an arbitrator's decision that the agency failed to afford employees their right to fair and equitable treatment with respect to details and temporary assignments.

In that case, the FLRA the arbitrator found that the agency passed over certain bargaining unit employees for temporary assignments in violation of the parties'

collective bargaining agreement. Although the Arbitrator ruled in favor of the Union, he denied backpay. Reversing, the FLRA modified the award by remanding to the parties the issue of a remedy, since the Arbitrator's findings that the Agency violated the agreement by failing to keep proper records of details and by failing to give fair treatment to employees with respect to selections for detail assignments satisfied the Back Pay Act requirement of an unjustified or unwarranted personnel action. Therefore, the Authority concluded that the arbitrator erred in **not** awarding a backpay remedy. Therefore, the Authority remanded to the parties for settlement or resubmission to the arbitrator the issue of compensation.

In particular, the Authority held:

> The Arbitrator determined that the Agency violated Article 31 of the parties' agreement by failing to keep proper records of details and, essentially, failing to give fair treatment to employees with respect to selections for detail assignments. This finding satisfies the Act's requirement of an unjustified or unwarranted personnel action. In addition, the Arbitrator expressly found that "if Management had made all assignment decision(s] in a proper manner," then "some of the grievants" Would have received compensation consistent with higher graded duties. Award at B. This finding demonstrates, as required by the Act, that the grievants were affected by a violation of the agreement that "resulted in" lost employee benefits, within the meaning of the Act. See **DHHS**, 54 FLRA at 1219 (explaining that the Act's "resulted in" requirement is met upon demonstration of a causal relationship between an agency's unjustified personnel action and lost pay, allowances, or differentials). In such circumstances, the Arbitrator's findings support an award of backpay.
>
> The Arbitrator, however, did not order a backpay remedy. Instead, he held that backpay would exceed his authority because he could not order the grievants to be compensated for work that they did not perform. Based upon the record, we find that the Arbitrator erred in making this legal conclusion. As relevant here, the Act does not require affected employees to have performed higher-graded work in order to be eligible for compensation. See, e.g., Air Force Flight Test Center, Edwards Air Force-Base, California and American Federation of Government Employees, Local 3854, AFL-CIO, 55 FLRA 116, 124-125 (1999) (Chair Segal, concurring) (unilateral elimination of noncompetitive promotions constituted unwarranted personnel action that was appropriately remedied by retroactive promotions and backpay); U.S. Department of Justice, Federal Bureau of Prisons. Federal Correctional Institution, Sheridan, 0regon and American Federation of Government Employees. Local 3979, 55 FLRA 28 (1998) (FCI Sheridan) (backpay remedy was justified for employees wrongfully denied the opportunity to work overtime); Cf. 54 Comp. Gen. 1071, 1074 (1975) ("an

unjustified personnel action may involve acts of omission as well as commission, whether such acts involve a failure to promote in [a] timely fashion or a failure to afford an opportunity for overtime work . . . ").

Similarly, the Act does not require an arbitrator to identify specific employees in order to support a backpay remedy. FCI Sheridan, 55 FLRA at 29; See also Federal Employees Metal Trades Council, Local 831 and U.S. Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, 39 FLRA 1456, 1459 (1991) (when an arbitrator has found the 1pecific circumstances giving rise to an entitlement to backpay, there is no requirement in the Act or its implementing regulations for the arbitrator to identify the specific employees entitled to backpay as a result of the unwarranted action). In this case, the Agency's failure to comply with its obligation to maintain records of temporary assignments and details made it difficult for the Arbitrator to determine the degree of loss experienced by the grievants.

National Association of Government Employees, Local R4-45 and U.S. Dept of Defense, Defense Commissary Agency, Fort Lee, Virginia, 55 FLRA 695 (July 31, 1999)

Of note was the FLRA's finding therein that the Back Pay Act:

> "does not require affected employees to have performed higher-graded work in order to be eligible for compensation. See, e.g., **Air Force Flight Test Center, Edwards Air Force-Base, California and American Federation of Government Employees, Local 3854, AFL-CIO,** 55 FLRA 116, 124-125 (1999) (Chair Segal, concurring) (unilateral elimination of noncompetitive promotions constituted unwarranted personnel action that was appropriately remedied by retroactive promotions and backpay)"

The Arbitrator's Decision on Arbitrability

The Arbitrator held in her **Decision** that

> 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.

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 ...

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.

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 non-competitively 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?

Position 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 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 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. (*SeeMass. Army Nat'1 Guard and NAGE. Local RI-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.
>
> **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.

We note that the Arbitrator honed in on the main remedy requested by the Union, but did not mention explicitly in the **Decision** the alternative remedies offered by the Union; she did not exclude them explicitly nor include them explicitly. The impact of this is discussed in the section entitled **Argument**, *infra*.

The Agency's Exception and Union's Opposition Thereto

The Agency appealed the **Decision** and the Union filed an **Opposition**, in which it argued that the Agency's **Exceptions** were interlocutory. On the merits of the Agency's claim, the Union argued that

> 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.

In its **Opposition to the Agency's Exceptions**, submitted to the FLRA, the Union brought out the matter of the potential for alternative relief as well:

> In a four page (single spaced) grievance 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.

(**bolded** emphasis added)

The FLRA’s February 11, 2004 Decision

The FLRA quoted the Grievance and the relief it sought:

> The grievance sought as a remedy "full promotion potential for all similarly situated employees to the GS-13 level and other just relief." Award at 4.

The FLRA found that

> The Arbitrator concluded that the grievance was arbitrable because, as relevant here, it did not involve a classification matter. In this regard, the Arbitrator stated that the grievance involves "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." *Id* at 6. The Arbitrator also determined that the remedy requested by the Union -- "reassignment of employees to reclassified positions" -- was consistent with a memorandum of understanding (MOU). *Id.*at 5, 6. As her award, the Arbitrator found the grievance arbitrable and directed the parties to proceed to a hearing on the merits of the grievance. *See id.* at 7.

The FLRA noted the Agency’s positions, in particular:

1. the exceptions are not interlocutory because the issue before, and decided by, the Arbitrator was limited to arbitrability.

2. if the exceptions are interlocutory, then there are extraordinary circumstances warranting review because the exceptions present a plausible jurisdictional defect. In particular, the Agency claims that the award is contrary to § 7121(c)(5) because the grievance involves a classification matter.

The FLRA noted that the Agency also claimed other defects in the Arbitrator’s **Decision**:

> The Agency claims, in this regard, that the grievance sought reclassification of the grievants' positions. The Agency also claims that the Arbitrator's finding that the Union's requested remedy was reassignment constitutes a nonfact because the remedy requested in the grievance was full promotion potential for all similarly situated employees to the GS-13 level. In addition, the Agency asserts that a remedy requiring reassignments would interfere with management's right to assign employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

The FLRA also cited the Union's **Opposition**:

> The Union contends that the exceptions are interlocutory because the Arbitrator provided only an interim ruling on the jurisdictional issue. In this regard, the Union points out that the Arbitrator ordered a hearing on the merits of the grievance. The Union also claims that the exceptions do not present any extraordinary circumstances warranting review. The Union also contends that the award is not contrary to § 7121(c)(5) of the Statute. According to the Union, the Agency's classification exception "merely repeats the argument it unsuccessfully made before the [A]rbitrator." Opposition at 5. Also according to the Union, the award is not based on a nonfact. In this regard, the Union claims that the requested remedy sought not only "full promotion potential for all similarly situated employees," but also "such other relief as may be just" and the Agency has not demonstrated why reassignment may not be considered to be part of the "other relief." *Id.*

The FLRA held that the exceptions were interlocutory, citing **United States Dep't of Defense, Nat'l Imagery and Mapping Agency, St. Louis, Mo.**, 57 FLRA 837, 837 n.2 (2002). It also noted that review of interlocutory exceptions is warranted where the exceptions present a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case, citing **United States Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.**, 55 FLRA 1230, 1232 (2000).

The FLRA noted that there appeared to be **two** possible outcomes before it:

1. A grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute where the substance of the grievance concerns the grade level to which the grievant could receive a noncompetitive career promotion, citing U**nited States Dep't of Agric., Agric. Research Serv., Eastern Reg'1 Research Ctr**., 20 FLRA 508, 509 (1985).

2. In contrast, where an arbitrator determines a grievant's entitlement to a temporary, career ladder, or other noncompetitive promotion based on

> performance of previously-classified duties, the award does not concern classification matters, citing **United States Dep't of Health and Human Servs. Region X, Seattle, Wash.**, 52 FLRA 710, 715 (1996).

The Authority noted that

> The Agency contends that the grievants are seeking reclassification of their permanent positions. As set forth below, there is support in the record for this contention and, if it is correct, then the grievance involves a classification matter within the meaning of § 7121(c)(5). Thus, the Agency's exceptions present a plausible jurisdictional defect.

Further, the Authority indicated that it desired to grant review of this interlocutory exception, to decide whether the exception was meritorious and that review would advance the ultimate disposition of the case. See **Library of Congress**, 58 FLRA 486, 487 (2003) (Member Pope dissenting).

However, the Authority noted that

> the record in this case does not permit us to resolve the jurisdictional issue at this time.

The Authority explained why it was unable to resolve the jurisdictional issue on the merits yet:

> The Arbitrator expressly found that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." Award at 6. The Arbitrator also expressly found that the requested remedy was the "reassignment of employees to reclassified positions." Award at 5, 6. In connection with the latter point, the Arbitrator's reference to "reclassified positions" is unclear: although it may reasonably be read to refer to reclassifying the grievants' permanent positions to have noncompetitive promotion potential to GS-13, it may also be reasonably read to refer to reassigning the grievants to the newly -- established, already -- classified positions with promotion potential to GS-13. The distinction between the two is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions.

While the Union thought that the Arbitrator's Award was clear in that it found the main remedy requested was reassignment to the newly classified positions (with promotion

potential to GS-13, higher than the current positions), the FLRA apparently was not clear on this issue, and remanded for clarification.

The FLRA noted that it "would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions." (Emphasis added).

The FLRA did not explicitly require the Arbitrator to choose between only the two options it presented, but rather

> Absent settlement, the award must be resubmitted to the Arbitrator for clarification of the jurisdictional issue.

The Union brings out this point at this time and explains why in the section titled Argument, *infra*.

June 23, 2006 Hearing

At the hearing held in June 2006, the Union presented arguments and also called as its witness Carolyn Federoff, who ratified all of the points made in the Union's Grievance, Brief and Opposition to Exceptions. She credibly testified as to the Agency's actions, its impact on the bargaining unit and morale, as well as possible remedies the Union was seeking.

Most importantly, she testified (unrebutted) that the Union was not seeking reclassification. Ergo, the Arbitrator has a clean, unrebutted representation that the Union Grievance is arbitrable since it does not seek reclassification.

Applicable Law

§ 335.102 Agency authority to promote, demote, or reassign.
Subject to § 335.103 and, when applicable, to part 319 of this chapter, an agency may:

> (a) Promote, demote, or reassign a career or career-conditional employee;
> (b) Reassign an employee serving under a temporary appointment pending establishment of a register to a position to which his original assignment could have been made by the same appointing officer from the same recruiting list under the same order of consideration;

(c) Promote, demote, or reassign an employee serving under an overseas limited appointment of indefinite duration or an overseas limited term appointment to another position to which an initial appointment under § 301.201, § 301.202, or § 301.203 of this chapter is authorized;

(d) Promote, demote, or reassign (1) a status quo employee and (2) an employee serving under an indefinite appointment in a competitive position, except that this authority may not be used to move an employee:

(i) From a position in which an initial overseas limited appointment is authorized to another position; or

(ii) To a position in which an initial overseas limited appointment is authorized from another position; and

(e) Promote, demote, or reassign a term employee serving on a given project to another position within the project which the agency has been authorized to fill by term appointment;

(f) Make time-limited promotions to fill temporary positions, accomplish project work, fill positions temporarily pending reorganization or downsizing, or meet other temporary needs for a specified period of not more than 5 years, unless OPM authorizes the agency to make and/or extend time-limited promotions for a longer period.

(1) The agency must give the employee advance written notice of the conditions of the time-limited promotion, including the time limit of the promotion; the reason for a time limit; the requirement for competition for promotion beyond 120 days, where applicable; and that the employee may be returned at any time to the position from which temporarily promoted, or to a different position of equivalent grade and pay, and the return is not subject to the procedures in parts 351, 432, 752, or 771 of this chapter. When an agency effects a promotion under a nondiscretionary provision and is unable to give advance notice to the employee, it must provide the notice as soon as possible after the promotion is made.

(2) This paragraph applies to a career, career-conditional, status quo, indefinite, or term employee and to an employee serving under an overseas limited appointment of indefinite duration, or an overseas limited term appointment.

§ 335.103 Agency promotion programs.

…

(c) *Covered personnel actions—*

(1) *Competitive actions.* Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under §335.102 of this part and to the following actions:

(i) Time-limited promotions under § 335.102(f) of this part for more than 120 days to higher graded positions (prior service during the preceding 12 months under noncompetitive time-limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total). A temporary promotion may be made permanent without further competition provided the temporary promotion was originally

made under competitive procedures and the fact that might lead to a permanent promotion was made known to all potential candidates;

(ii) Details for more than 120 days to a higher grade position or to a position with higher promotion potential (prior service during the preceding 12 months under noncompetitive details to higher graded positions and noncompetitive time-limited promotions counts toward the 120-day total);

(iii) Selection for training which is part of an authorized training agreement, part of a promotion program, or required before an employee may be considered for a promotion as specified in § 410.302 of this chapter;

(iv) Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction- in-force regulations);

(v) Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

(vi) Reinstatement to a permanent or temporary position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(2) *Noncompetitive actions.* Competitive procedures do not apply to:

(i) A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error; and

(ii) A position change permitted by reduction-in-force procedures in part 351 of this chapter.

(3) *Discretionary actions.* Agencies may at their discretion except the following actions from competitive procedures of this section:

(i) A promotion without current competition of an employee who was appointed in the competitive from a civil service register, by direct hire, by noncompetitive appointment or noncompetitive conversion, or under competitive promotion procedures for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan);

(ii) A promotion resulting from an employee’s position being classified at a higher grade because of additional duties and responsibilities;

(iii) A temporary promotion, or detail to a higher grade position or a position with known promotion potential, of 120 days or less;

(iv) Promotion to a grade previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under § 6.7 of this chapter) from which an employee was separated or demoted for other than performance or conduct reasons;

(v) Promotion, reassignment, demotion, transfer, reinstatement, or detail to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under § 6.7 of this chapter) and did not lose because of performance or conduct reasons; and

(vi) Consideration of a candidate not given proper consideration in a competitive promotion action.
(vii) Appointments of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any grade or salary level, including Senior-Level positions established under 5 CFR Part 319—Employment in Senior-Level and Scientific and Professional positions.

U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services and American Federation of Government Employees, Local 1923, 60 FLRA No. 860-AR-3817, November 23, 2004:

Finding that the agency violated the agreement when it failed to select the grievant by use of priority consideration, the arbitrator ordered the agency to (1) place the grievant in the GS-7 position, "with all of the rights that would have been applicable had she been selected" initially, (2) evaluate her after one year for the GS-9 level position and promote her if she is qualified, and (3) grant back pay for the GS-9 position if the grievant is promoted after one year at the GS-7 position.

The Authority (Member Pope dissenting in part), rejected all but one of the agency's exceptions. In rejecting the agency's claim that the award excessively interfered with the agency's right to select, it noted, e.g., that FLRA has consistently held that "contractual provisions affording [priority] consideration constitute appropriate arrangements under ' 7106(b)(3)[.]"

However, it set aside the part of the award ordering back pay contingent on the grievant's promotion to the GS-9 level after one year.

In this case, the Arbitrator acknowledged that not everyone in a career ladder position will reach the top of the ladder . . . Given the above, the Arbitrator awarded back pay based on the possibility that the grievant may receive a promotion in the future, not on a finding that the Agency's actions actually caused the grievant to suffer a loss in pay, allowances or differentials. Accordingly, as the **Arbitrator never made a finding, implicitly or explicitly, that, but for the Agency's failure to follow the agreement, the grievant suffered a loss of pay, allowances or differentials**, the award does not satisfy the second requirement of the Back Pay Act.

National Association of Government Employees, Local R4-45 and U.S. Dept of Defense, Defense Commissary Agency, Fort Lee, Virginia, 55 FLRA 695 (July 31, 1999):

The Arbitrator determined that the Agency violated Article 31 of the parties' agreement by failing to keep proper records of details and, essentially, failing to give fair treatment to employees with respect to selections for detail assignments. This finding satisfies the Act's requirement of an unjustified or unwarranted personnel action. In addition, the Arbitrator expressly found that "if Management had made all assignment decision(s] in a proper manner," then "some of the grievants" Would have received compensation consistent with higher graded duties. Award at B. This finding demonstrates, as required by the Act, that the grievants were affected by a violation of the agreement that "resulted in" lost employee benefits, within the meaning of the Act. See **DHHS**, 54 FLRA at 1219 (explaining that the Act's "resulted in" requirement is met upon demonstration of a causal relationship between an agency's unjustified personnel action and lost pay, allowances, or differentials). In such circumstances, the Arbitrator's findings support an award of backpay.

The Arbitrator, however, did not order a backpay remedy. Instead, he held that backpay would exceed his authority because he could not order the grievants to be compensated for work that they did not perform. Based upon the record, we find that the Arbitrator erred in making this legal conclusion. As relevant here, the Act does not require affected employees to have performed higher-graded work in order to be eligible for compensation. See, e.g., **Air Force Flight Test Center, Edwards Air Force-Base, California and American Federation of Government Employees, Local 3854, AFL-CIO**, 55 FLRA 116, 124-125 (1999) (Chair Segal, concurring) (unilateral elimination of noncompetitive promotions constituted unwarranted personnel action that was appropriately remedied by retroactive promotions and backpay); **U.S. Department of Justice, Federal Bureau of Prisons. Federal Correctional Institution, Sheridan, 0regon and American Federation of Government Employees. Local 3979**, 55 FLRA 28 (1998) (FCI Sheridan) (backpay remedy was justified for employees wrongfully denied the opportunity to work overtime); Cf. 54 Comp. Gen. 1071, 1074 (1975) ("an unjustified personnel action may involve acts of omission as well as commission, whether such acts involve a failure to promote in [a] timely fashion or a failure to afford an opportunity for overtime work . . . ").

Similarly, the Act does not require an arbitrator to identify specific employees in order to support a backpay remedy. **FCI Sheridan,** 55 FLRA at 29; See also **Federal Employees Metal Trades Council, Local 831 and U.S. Department of the Navy, Long Beach Naval Shipyard, Long Beach, California**, 39 FLRA 1456, 1459 (1991) (when an arbitrator has found the specific circumstances giving rise to an entitlement to backpay, there is no requirement in the Act or its implementing regulations for the arbitrator to identify the specific employees entitled to backpay as a result of the unwarranted action). In this case, the Agency's failure to comply with its obligation to maintain records of temporary assignments and details made it difficult for the Arbitrator to determine the degree of loss experienced by the grievants.

HUD/AFGE Agreement, ARTICLE 23 -- ARBITRATION

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.

Argument

The Arbitrator at this time has to make a finding, in order to comply with the FLRA's remand **Decision**, as to what exactly this case is all about. The Union has asked for the opportunity to provide the Arbitrator with more evidence and argument than she had before her previously, and this opportunity is appreciated. We will address the Agency's likely argument, and our response to that argument.

Agency's Likely Argument to the Arbitrator Regarding Arbitrability In This Case

The **Agency is most likely to argue** that the following conundrum applies here:

> "This case is going to be found non-arbitrable no matter what the Arbitrator finds. The FLRA found that there were only two options: 1) reclassifying the grievants' permanent positions to have noncompetitive promotion potential to GS-13, or 2) reassigning the grievants to the newly-established, already-classified positions with promotion potential to GS-13. As the FLRA has noted, the distinction between the two is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions.
>
> Here is the conundrum: If the Arbitrator finds that the Grievance applies to the promotion potential of employees' permanent positions (Option #1), we are forced to all agree that the Arbitrator would not have jurisdiction. Now, if the Arbitrator finds that the Grievance alleges a "right to be placed in previously-classified positions," (Option #2), then the Union is essentially claiming (as it did in it's **Brief** and **Opposition to Agency's Exceptions**) that the relief being sought is reassignment from career ladder positions with promotion potential to the GS-12 level to career ladder positions with promotion potential to the GS-13 level. And we all know that 5 CFR §335.103 states that "Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service" must be made by "competitive procedures." Since the Union is asking the Arbitrator to order non-competitive reassignment, that would conflict with 5 CFR §335.102 or .103 and

> any Award giving such relief would be contrary to law. Either way, the Agency wins. There is no legal, lawful relief the Arbitrator can order in this case. Oh, and by the way, that MOU from 1995 is contrary to law, too."

That is the argument we expect to hear from the Agency. Now, we may be giving the Agency too much credit, but better safe than sorry. It is true that OPM's regulations regarding competitive actions state that "Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service" must be done by way of "competitive procedures:"

> **§ 335.103 Agency promotion programs.**
> …
> (c) *Covered personnel actions—*
> (1) *Competitive actions.* Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply to all promotions under §335.102 of this part and to the following actions:
> …
> (iv) Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction- in-force regulations);

Union's Response to Agency's Likely Argument – There **is** Legal Relief Available

However, as we have taken pains to point out above, not only has the Union requested that the Arbitrator consider alternative relief, and not only is there alternative, legal and lawful relief available to the Arbitrator, but the Parties' CBA explicitly states that the Arbitrator must specifically retain jurisdiction in order to exhaust all possible alternative relief, to accomplish the intended relief to any violation found:

> **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.

As we've stated above, all of this is quite premature since we have not reached the merits of the case, let alone decided liability or a remedy. Nevertheless, since the Agency and FLRA have made a big deal out of what relief has been requested, or could be awarded, we are forced to address it at this juncture.

Possibility No. 1: Finding of Arbitrability and Fight it Out Later

To be entirely fair, the Arbitrator could find that her initial Decision was in accordance with Option #2 of the FLRA, and therefore it is arbitrable and she has jurisdiction. Any Exceptions then filed by the Agency alleging non-arbitrability would likely be denied since the FLRA explicitly held that the Arbitrator "would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions." The case would then proceed to a hearing on the merits, the Arbitrator may find for the Union, and if she did, may order the relief that was offered as one option by the FLRA – ie, "placement" in "previously-classified positions" with promotion potential to GS-13. The Agency would then file additional Exceptions and we would battle it out before the FLRA.

The Union believes that there is a better way to deal with this situation.

Possibility No. 2: Findings of Alternative Remedies by the Arbitrator

The Union proffers that the Arbitrator, in accordance with Section 23.11, could in the first instance fashion a **Remand Decision** that allows for the possibility of alternative forms of relief. We understand it is premature, but necessary, in order to survive the inevitable Exceptions from the Agency.

For instance, the Union suggested in its **Brief** that one possible remedy in this case was that agreed to by the Agency in its MOU:

> We are asking that employees be reassigned to the reclassified position with greater promotion potential so that they may attain the new career ladder potential without competition.

The Union also noted the possibility that it was also seeking *alternative* relief:

> Additionally, the Union is seeking all other relief as may be just. Other relief, including substitute relief, can include reassignment of the work classified as higher graded to employees at the GS-12 level and subsequent changes to their position descriptions. Based upon these changes, employees could pursue a reclassification audit or other appropriate action. These changes in and of themselves would not require reclassification.

The Union, therefore, has always proffered that alternative forms of relief should be considered.

Conclusion

The Union understands that Arbitrator's decisions are sometimes overturned, vacated, modified or otherwise reversed by the FLRA, but the Parties negotiated a provision in the HUD/AFGE Agreement that appears to be unique:

> **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.

This Contract provision, agreed to by the Agency, provides the Arbitrator with the power and the responsibility to "provide alternative relief" and to "specifically retain jurisdiction."

We believe that the 1995 MOU supports a finding that reassignment would be an acceptable remedy in this case. Nevertheless, there are other remedies that the Union had in mind when it filed the Grievance which should be considered, ***such as*** a finding that the Agency failed to properly consider internal candidates for promotion and thereby violated Sections 4.01 and 13.01. **If** the Arbitrator found that the Agency violated the CBA and that, **but for** the violation, some (or all) employees would have been selected for the positions in question (with promotion potential to the GS-13 level), then an award of retroactive promotions with backpay and interest would be in strict accordance with FLRA precedent. See **National Association of Government Employees, Local R4-45 and U.S. Dept of Defense, Defense Commissary Agency, Fort Lee, Virginia,** 55 FLRA 695 (July 31, 1999).

We therefore and respectfully proffer that the following **Decision** could be issued, will be supported by the evidence provided at the Hearing in this matter, and should satisfy the FLRA's Remand Decision and any potential problems the Agency may raise, as explained above:

First, one of the remedies requested, that of “reassignment,” is explicitly found to be reassignment to the previously-classified positions noted in the Grievance;
Second, this Grievance does not concern the promotion potential of employees' permanent positions;
Third, the remedy of 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;"
Fourth, I specifically retain jurisdiction in the event my Decision is set aside in whole or in part;
Fifth, I retain jurisdiction to provide alternative relief, in the event that the relief provided is found to be inconsistent with law or otherwise not available, and if my Decision is set aside in whole or in part on that basis;
Sixth, if the remedy of reassignment is not available or found to be acceptable, I find that there are other legal remedies which could apply in this case. If reassignment is not available or acceptable, I find, in the alternative, that the employees at issue could have the legal remedy available to them of a finding as follows:

> “The Agency violated Sections 4.01 and 13.01 of the CBA by failing to treat the Grievants fairly and equitably and failing to properly consider them for selection to the positions in question. But for the violation, some (or all) employees would have been selected for the positions in question (with promotion potential to the GS-13 level). An award of retroactive promotions with backpay and interest is in order.”

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Respectfully Submitted,

NATIONAL COUNCIL OF HUD LOCALS 222,

_____/s/_____

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