FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between	**Grievance: Arbitrability**
U.S. Department of HUD	**FMCS No: 03-07743**
and	**Remanded at 59 FLRA 630**
National Council of HUD Locals 222	

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

APPEARANCES:

For Management:

James L. Keys, Esquire
Human Resource Specialist
U. S. Department of HUD
451 Seventh Street, S.W., Room 3166
Washington, D.C. 20410

For Union:

Michael J. Snider, Esquire
Law Offices of Snider & Associates, LLC
104 Church Lane, Suite 201
Baltimore, Maryland 21208

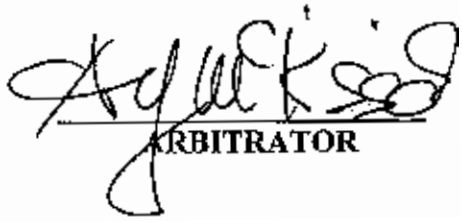
DATES AND PLACE OF HEARING: **June 23, 2006**
U. S. Department of HUD
451 Seventh Street, S.W., Room 2150
Washington, D.C. 20410

POST HEARING BRIEFS: **September 1, 2006**

CLARIFICATION OF AWARD ON REMAND:

This Arbitrator finds that this grievance is alleging a right to be placed in previously-classified positions and thus is arbitrable. Pursuant to Section 22.11, Exceptions, of the Agreement, alternative remedies should be considered as a just form of relief, consistent with the Federal Labor Relations Authority (FLRA) decision. In addition, this Arbitrator shall retain jurisdiction where exceptions are taken, as here.

DATE OF AWARD: **January 24, 2007**



ARBITRATOR

BACKGROUND AND PROCEDURAL POSTURE

On June 23, 2003, an award was issued by this Arbitrator sustaining this grievance on the issue of arbitrability. On February 11, 2004, the Federal Labor Relations Authority (FLRA) remanded the matter back to this Arbitrator for clarification. At that juncture, the Union requested a hearing on the matter to offer additional evidence and argument.

On June 23, 2006, a hearing was held after several postponements. At that time, the Union called one (1) witness, Carolyn Federoff, Esquire and President of the Council of HUD Local 222. The record reflects that the Agency called none.

RE-STATEMENT OF FACTS

On November 13, 2002, President Federoff filed a grievance and requested information regarding "Failure to Treat Employees Fair and Equitably". Essentially, the Agency advertised a few positions with a maximum grade potential to GS-13. There were two (2) vacancy announcements per position: one (1) for the "general public" and other open to "current federal employees".

The thrust of this grievance is that persons were hired at a GS-9 only, thus requiring any current GS-12 employee, in the same position, seeking promotion potential to take a downgrade to the GS-9 position. Additionally, the record reflects that the Union also asserts that employees in some offices, but not others, have career ladder potential to GS-13, though they occupy the same positions. The Union reasons that employees were harmed by this practice, as they did not have an opportunity to be promoted to the GS-13 without competition.

Based on that reasoning, the Union contends that Sections 4.01, 4.06, 9.01, and 13.01 of the Agreement as well as the Federal Service Labor Management Statute, other laws, rules, and regulations were violated.

PERTINENT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions of the Agreement between the Agency and Union (CBA - Joint Exhibit I), effective 1998.

COLLECTIVE BARGAINING AGREEMENT
(CBA - Joint Exhibit I)

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 any 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.

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 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 22
GRIEVANCE PROCEDURES

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 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 FLRA decision. The arbitrator shall specifically retain jurisdiction where exceptions are taken and shall retain such jurisdiction until the exception is disposed.

STIPULATED ISSUE

Whether the matter is arbitrable?
If so, how is it arbitrable?

POSITIONS OF THE PARTIES ON REMAND

It is the Agency's position that there is no appropriate remedy because the remedy requested is illegal and contravenes the Office of Personnel Management Regulation (OPM), 5 CFR §335.102(f) and Article 13.06(5) of the Agreement. Most importantly, the Agency

reiterates its position that this grievance clearly is a classification issue and is not grievable, citing Section 7121(c)(5) of the Federal Service Labor Management Relations Statute.

In response to this Arbitrator's ruling on arbitrability, the Agency retorts that this issue is beyond the Arbitrator's jurisdiction, as this matter is again not grievable. In response to the Arbitrator's ruling on the Memorandum of Understanding, dated February 24, 1995, being congruent with the Agreement, dated 1998, the Agency retorts that the MOU is moot.

In response to the issue of fairness advertisements, the Agency maintains that the Agency advertised at least 33 vacancies that were restricted to the HUD only bargaining unit candidates with promotion potential to GS-13. Moreover, the Agency asserts that it has always considered bargaining unit employees for merit promotions to be fair as it has allowed the Agency to meet its hiring goals. Based on all the above, the Agency requests that the Arbitrator deny arbitrability, based upon the 5 USC §7121(c)(5) statutory exclusion of classification.

On the other hand, it is the Union's position that the central issue of the grievance is not about classification. Instead, the Union asserts that the grievance is about fairness, equity, and consistency. In response to the Agency's view that the remedy requested is illegal, the Union retorts that the remedy does not require reclassification of employees presently at the GS-12 level. Instead, the Union's contends the remedy requires that Management reassign employees to the reclassification position. Moreover, the Union maintains that reassignment would result in a consistent application of the classification standards.

In addition, the Union points out that this possible remedy of reassignment was addressed in the HUD-AFGE Memorandum of Understanding, dated February 24, 1995. Specifically, the

Union asserts that at that time the Agency agreed to the reassignment of employees to reclassified positions.

Although other alternative remedies would also be acceptable, the Union contends that there are other just remedies. For example, it can include reassignment of work classified as higher graded to employees at the GS-12 level and subsequent changes to their position descriptions. Based on these changes, employees could pursue a reclassification audit or other appropriate action. The Union points out that these described changes in and of themselves would not require reclassification. The Union maintains that a finding that the Agency failed to properly consider internal candidates for promotion and thereby violated 4.01 and 13.01 of the Agreement would also be another just remedy. Based on all the above, the Union requests that this Arbitrator specifically incorporate such options available under Section 23.11, Exceptions, of the Agreement, for the reasons stated.

FINDINGS AND DISCUSSION

Based upon additional evidence presented at the hearing as well as the decision reached by the Authority for clarification, this Arbitrator makes the following findings.

First, to clarify any ambiguity, this Arbitrator finds that this grievance involves a right to be placed in previously-classified positions. In accordance with U.S. Department of Health and Human Service, Region X, Seattle, Washington, 52 FLRA 710 at 715 (1996), our grievance is requesting a determination of the Grievants' entitlement to a temporary, career ladder, or other noncompetitive promotion based on the performance of previously-classified duties. Stated differently, our grievance does not concern classification matters. Accordingly, this Arbitrator finds that this grievance is arbitrable. A hearing on the merits shall be forthcoming. Thus, this

Arbitrator is also ordering the Agency to supply the Union with helpful information to identify potential grievants, as requested.

Second, in response to the Authority's inquiry regarding the remedy of reassignment, this Arbitrator also finds that the possible remedy of reassignment to the newly classified positions with promotion potential to GS-13, is but one (1) possible remedy. That is, alternative remedies which would attain fairness and equity are also equally viable and are not excluded. However, congruent with the Memorandum of Understanding, dated February 24, 1995, the remedy of reassignment "allows an employee who is reassigned to a reclassified position with greater promotion potential to attain new career ladder potential without competition".

Third, pursuant to Section 23.11 of the Agreement, where an Exception is taken to the arbitrator's award, the arbitrator is specifically empowered to provide "alternative relief consistent with the Federal Labor Relations Authority (FLRA) decision". In addition, this same provision also allows an arbitrator to retain jurisdiction, even if the Authority sets aside all or a portion of the award. In concurrence with this provision, this Arbitrator shall retain jurisdiction to provide a just remedy, should substantive evidence presented at a hearing on the merits of this grievance prevail for the Union.

Fourth, should a preponderance of evidence on the merits of this grievance prevail and this Arbitrator finds unjustified or unwarranted personnel action, then this Arbitrator is required to provide retroactivity with back pay and interest in accordance with the National Association of Government Employees, Local R4-45 and U.S. Department of Defense, Defense Commissary Agency, Fort Lee, Virginia, 55 FLRA 695 (July 31, 1999).

Fifth, if the evidence justifies a finding of violation of Sections 4.01 and 13.01 of the Agreement for failing to treat the Grievants fairly and equitably, then the "but for" formula shall be applied, as case law provides.

CLARIFICATION OF AWARD ON REMAND

This Arbitrator finds that this grievance is alleging a right to be placed in previously-classified positions and thus is arbitrable. Pursuant to Section 22.11, Exceptions, of the Agreement, alternative remedies should be considered as a just form of relief, consistent with the Federal Labor Relations Authority (FLRA) decision. In addition, this Arbitrator shall retain jurisdiction where exceptions are taken, as here.

ARBITRATOR