UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, DC

U.S DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
WASHINGTON, DC
(Agency)

And

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL COUNCIL OF HUD LOCALS 222, AFL-CIO,
(Union)

AGENCY'S EXCEPTIONS TO CLARIFICATION OF AWARD ON REMAND

AGENCY 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 Clarification of Award on Remand of Arbitrator Andree' McKissick concerning the Failure To Treat Employees Fair and Equitably (FMCS No. 03-07743). A copy of the award is attached as Exhibit 1 (see Ex 1). As set forth fully below, the Award is deficient and should be set aside because (1) the award is based on a non-fact and (2) the Arbitrator exceeded her authority in finding the grievance to be arbitrable.

BACKGROUND

This case arose after Management denied the Union's Grievance of the Parties as excluded from the grievance procedure. The denial was based on Section 7121 (c) (5) of the Federal Service Labor Management Relations Statute, which excludes from the negotiated grievance procedures the classification of any position, which does not result in the reduction in grade, or pay of an employee and Article 22, Section 22.05 (5) of the HUD/AFGE Collective Bargaining Agreement (CBA) (Ex. 2). The Union invoked arbitration. Since an issue involving the classification of a position, which does not result in the reduction of grade or pay of any employee, may not be brought before an arbitrator, Management declined to participate in the selection of an arbitrator for this case. The Union then requested the Federal Mediation and Conciliation Service (FMCS) to make a direct designation of an arbitrator. On March 31, 2003, FMCS complied with the request. The Arbitrator concluded the grievance was arbitrable because it did not involve a classification matter and directed the parties to a hearing on the merits of the

grievance. The Agency filed exceptions and the Union filed opposition to exceptions with the FLRA. The FLRA remanded the award to the parties where the award must be resubmitted to the Arbitrator for clarification of the jurisdictional issue. On January 24, 2007, the arbitrator submitted a clarification of award on remand (Ex.1) finding the grievance is alleging a right to be placed in previously-classified positions and thus is arbitrable.

FACTS

The Grievance alleged that Management either advertised or advertised and filled certain positions with promotion potential to the GS-13 level. It also states that the positions were open to current federal employees and the general public while similarly situated HUD staff has promotion potential only to the GS-12 level. The alleged harm committed by such advertisements is that employees do not have the opportunity to be noncompetitively promoted to the GS-13 level. The Grievance alleges that the foregoing violates Sections 4.01, 4.06, 9.01 and 13.01 of the Agreement as well as unspecified sections of the Statute and unidentified law rule and regulation. The remedy sought is " …**that the full promotion potential for all similarly situated employees be GS-13**, and such other relief as may be just." The Grievance does not identify what "such other relief as may be just" may be. The record failed to show where any employee suffered a loss of grade or pay due to Management's alleged action in this case. Yet the **essence of the grievance** and the remedy requires the reclassification of positions with GS-12 promotion potential to that of GS-13 promotion potential. Also important to note, Article 9 Position Classification Section 9.05 of the Agreement (Ex.2) provides ways in which

relief can be granted related to the grading of jobs. However, this grievance does not include any of those methods.

The Federal Labor Relations Authority (FLRA) has consistently held that where as here**, the essence of a grievance concerns the classification of a position** within the meaning of section 7121 (c) (5) of the Statute, and that section 7121(c) (5) precludes such a grievance from coverage by a negotiated grievance procedure when there has been no reduction in the grade or pay of an employee. National Treasury Employees Union, Chapter 73 v. Department of Treasury, Internal Revenue Service 57 FLRA No. 73 (2001), Social Security Administration v. American Federation of Government Employees, Local 1923, 31 FLRA No. 73 (1988), Social Security Administration, Baltimore, Maryland v. American Federation of Government Employees, Local 1923, 20 FLRA No. 82 (1985), Veterans Administration Medical Center v. American Federation of Government Employees, Local 547 19 FLRA No. 129 (1985). The FLRA distinguishes between non-grievable classification matters, and issues regarding the performance of higher graded duties, which are grievable. An objective reading of the Grievance compels the conclusion that it concerns the classification of positions since, as noted above, the remedy seeks that"…the full promotion potential for all similarly situated positions be GS-13…" It must also be pointed out that nowhere in the record is there a claim that any member of the class of grievants should be compensated for the performance of higher graded duties.

ARBITRATION AWARD

The arbitrator stated in the clarification of award that her decision was based upon additional evidence presented at the hearing as well as the decision reached by the Authority for clarification. **The union did not present any additional evidence at the hearing only opening statements and stipulations were made a part of the record**. The arbitrator then proceeded to "clarify any ambiguity" by stating case law that supports her position on why the grievance is arbitrable. The case cited was U.S. Department of Health and Human Service, Region X, Seattle, Washington, 52 FLRA 710 at 715 (1996), it states: "our grievance is requesting a determination of the Grievants' entitlement to a temporary, career ladder, or other noncompetitive promotion **based on performance of previously-classified duties**. She went on to conclude that the grievance was does not concern classification matters and a hearing on the merits should be forthcoming.

Substantive arbitrability

The Agency challenges whether the arbitrator's clarification of award is within the scope of the grievance procedure set in Article 22 of the HUD/AFGE Agreement (see Ex. 2). The grievance filed by the union on November 13, 2002 has **6 paragraphs** which all discuss **in essence**, **the grade potential** of affected employees. It is important to note that the remedy asked for the promotion potential to be changed non-competitively to

GS-13 for affected employees. It is clear from the above information that the essence of the grievance is about the classification of positions.

ARGUMENT

WAS THE ISSUE FAIRNESS OF ADVERTISEMENTS OR CLASSIFICATION

The Union is alleging that the Agency denied similarly situated employees the opportunity to be promoted non-competitively to GS-13 positions advertised in Fiscal year 2002. The arbitrator stated in her decision that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position". The Agency uses both MSH (internal and all federal candidates) and DEU (open to all external candidates) to hire in all positions except where specific skill sets are needed that cannot be found within the Department. In 2002, the Agency advertised at least 33 vacancies that were restricted to HUD only bargaining unit candidates with the promotion potential to GS-13. The Agency has always considered bargaining unit employees for merit promotions that would be fair and meet the hiring goals of the Department. Furthermore, **the grievance by the union shows no evidence that employees applied for the positions and were denied or that any grievants were offered positions at a lower grade. They only speak of 1 instance were it may have happened.**

In addition, bargaining unit employees at the GS-12, who believe they are performing duties commensurate with GS-13, can request a position review to determine if they are performing at the GS-13 level. If the determination is made that the employee is performing duties at the GS-13 level, and there is work or additional duties to support the GS-13 level, the employee can be non-competitively promoted. However, reassigning employees to positions with more promotion potential than the employee's current position are covered by competitive procedures in Article 13.06 of the HUD/AFGE Collective Bargaining Agreement (Ex. 2). In other words, the union's remedy is illegal according to merit promotion and internal placement procedures but does apply to position review (classification procedures). Thus, it is the Agency's position that the remedy granted the union cannot stand because the grievance is beyond the arbitrator's jurisdiction and not arbitrable/grievable.

THE ARBITRATOR'S AWARD IS BASED ON A NON-FACT

To establish that an award is based on a non-fact, the appealing party must demonstrate that the central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *Lowery AFB, Denver, Colorado and NFFE Local 1497 48 FLRA 589 (1993).* The arbitrator ruled that based on additional evidence presented at the hearing and U.S. Department of Health and Human Service, Region X, Seattle, Washington, 52 FLRA 710 at 715 (1996), the grievance is arbitrable and a hearing should be heard on the merits. The award is based on a non-fact because

the arbitrator stated in her decision (Ex. 1) under **restatement of facts "**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." This statement by the arbitrator is false and gives the impression that the union presented evidence to support this claim when they did not include this as fact in their grievance but only mentioned one possible instance under "Harm" in their grievance (Ex. 3). It is important to note that no evidence was presented by the union at the hearing or included with the briefs on this matter.

In addition, the case used by the arbitrator in her ruling is not relevant to this case because it involves employees that presented evidence that they were performing duties at a higher-grade level than their current grade. **This case is not about employees alleging they performed duties at a higher-grade level, which would entitle them to be considered for temporary, career ladder, or other noncompetitive promotion based on performance of previously-classified duties**. The 6 paragraphs in the union grievance (Ex. 3) all focus on the grade level of employees affected. As stated in AFGE, Local 2142 and U.S. Department of the Army, 58 FLRA 102, March 31, 2003 " The main issue of a grievance cannot be the "grade level of the duties assigned to, and performed by, the grievant." These issues are classification matters and can not be grieved using negotiated grievance procedures." The Agency must further note that the positions in question are permanent positions, which are covered in Article 13 of the CBA, Merit Promotion and Internal Placement (Ex. 2).

THE ARBITRATOR EXCEED HER AUTHORITY IN FINDING THE GRIEVANCE ARBITRABLE

The Arbitrator exceeded her authority in finding the grievance arbitrable because the essence of the grievance deals with the classification of positions and is not covered under the grievance procedure. She also failed to clarify what she meant by reassignment of employees to reclassified positions. If we are to use the case that was presented in her ruling, this grievance does not relate to the case she presented. The essence of that case is about employees performing reclassified duties at a higher-grade level. This grievance is not remotely related to the employees **performing higher graded duties but about reclassifying the grade level of employees without competition, which is contrary to law.**

CONCLUSION

The Award is based on a non-fact, and the Arbitrator exceeded her authority in finding the grievance to be arbitrable. Accordingly, the Award is deficient and must be set aside.

Respectfully submitted,

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