IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222,	)	Issue: Merits
UNION,	)	Case No. 03-07743
v.	)	Remanded at: 59 FLRA 630
US Department of Housing & Urban Development,	)	
AGENCY.	)	Arbitrator: Dr. Andree Y. McKissick, Esq.

UNION'S CLOSING BRIEF

The Union, by and through its attorneys, Snider & Associates, LLC, hereby submits its closing brief in the above captioned matter.

Respectfully Submitted,

Michael J. Snider, Esq.
Ari Taragin, Esq.
Jason I. Weisbrot, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Counsel for the Union

IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222,	)	Issue: Merits
UNION,	)	Case No. 03-07743
v.	)	Remanded at: 59 FLRA 630
US Department of Housing & Urban Development,	)	
AGENCY.	)	Arbitrator: Dr. Andree Y. McKissick, Esq.

UNION'S CLOSING BRIEF - TABLE OF CONTENTS

IN THE MATTER OF ARBITRATION BETWEEN:

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	)	Issue: Merits Case No. 03-07743 Remanded at: 59 FLRA 630 Arbitrator: Dr. Andree Y. McKissick, Esq.

UNION'S CLOSING BRIEF

The Union, by and through its attorneys, Snider & Associates, LLC, hereby submits its closing brief in the above captioned matter and in support thereof states as follows:

Issues

I. Whether the Agency violated the Collective Bargaining Agreement, law, rule, or other regulation when it failed to treat bargaining unit employee fairly and equitably in posting vacancy announcements from May 2002 until the present?

II. If so, what are the appropriate remedies?

Summary of the Argument

On November 13, 2002, Carolyn Federoff, President of Council of HUD 222, filed a Grievance and Request for Information regarding the Agency's failure to treat employees fairly and equitably. In the Grievance, the Union stated that employees were being harmed and that a remedy was necessary. Specifically, the Union had become aware that the Agency had advertised a number of positions with a maximum grade potential to GS-13. Current employees, however, who occupied these exact same positions had, and have, a maximum grade potential to the GS-12 level.

These positions were usually advertised in two vacancy announcements per position; one open to current federal employees, and the other to the general public (internal and external announcements). The Union alleged that for many of these vacancies, The Agency would hire somebody at the entry level (GS-7, 9 or 11). These new employees were trained and mentored by other existing employees in the same position. However, these trainers and mentors only had career ladder potential to the GS-12 level, and were training employees that would eventually become a GS-13 level employee.

In at least one of these instances, persons were hired at the GS-9 level only. Therefore, some GS-12 employees in the same position were required to take a downgrade to a GS-9 (or even a 7) only to re-climb the ladder to reach the GS-13 level. Additionally, employees in some offices, but not others, have career ladder potential to GS-13, even though they occupy the same position and do the same work.

The Union alleged violations of the contract, including posting positions at the Grade-7 level only, posting positions externally only, posting internal or external vacancy announcements and then canceling the internal vacancy (for which the current HUD employees were more likely to apply), discouraging employees from applying or telling them that their applications would be thrown out, telling employees they were not eligible to apply for vacancies, assigning GS-12 employees to training and mentoring leapfrog employees who were going to a GS-13 journeyman level, and assigning the same work to GS-12 and GS-13 employees.

The Union provided live testimony from actual witnesses; the Agency failed to rebut these allegations so the Union's testimony stands as unrebutted. The Agency's failure to call a single supervisor, manager or other individual that should have been called as a witness must result in an adverse inference, in addition to the adverse inference already won by the Union due to the Agency's failure to provide relevant and material documents.

The Union has proven that the Agency failed to produce the vast majority of information that it was ordered to produce. This is information that existed, which the Agency did not maintain or produce. Many of the documents were shown to Ms. Federoff *in camera*, but were not given to her, and were later lost or destroyed. The Agency's failure to produce this documentation requires an adverse inference against it that will be discussed *infra.*

Procedural History

On November 13, 2002, the Union filed a Grievance regarding "Failure to Treat Employees Fairly and Equitably." The Agency denied the Grievance on the ground that

it was not arbitrable under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute. The Grievance was submitted to arbitration on the stipulated issue of whether or not the Grievance was arbitrable. The Arbitrator found the subject matter of this Grievance to be arbitrable in an Opinion and Award dated June 23, 2003.

The Agency filed exceptions with the Federal Labor Relations Authority ("FLRA") on June 23, 2003. In a Decision dated February 11, 2004, the FLRA remanded the award to the parties and ordered that it be resubmitted to the Arbitrator for clarification of the jurisdictional issue. The Union then requested a hearing on the matter to offer additional evidence and argument. After several postponements, a hearing was held on June 23, 2006. At the hearing, the Union called Ms. Federoff as its sole witness. The Agency did not call any witnesses.

The Arbitrator clarified the award on remand in a decision dated January 24, 2007, and found that the Grievance alleged a right to be placed in previously classified positions, was arbitrable, and that there were several possible remedies. The Arbitrator also ruled that pursuant to Section 22.11 of the Parties' CBA, alternative remedies should be considered as a just form of relief, consistent with the Federal Labor Relations Authority decision.

On March 1, 2007, the Agency filed exceptions to the January 24, 2007 award and the Union filed an Opposition to the Agency's Exceptions on or about March 22, 2007. On April 19, 2007, the FLRA issued an Order to Show Cause as to why the Agency's exceptions should not be dismissed as untimely. On August 3, 2007, the FLRA ruled that the exceptions were untimely and dismissed them.

On March 14, 2007, the Union filed a Motion to Compel documents with the Arbitrator. The Union explained the following history of the request for documents going back to October 2002:

- October 19, 2002, Carolyn Federoff, Council 222 President, forwarded a Request for Information pursuant to 5 USC 7114, drafted on October 3, 2002 by Gary Mongelli, RVP for the Council of Region VIII.
- The Union, in a Grievance dated November 13, 2002, alleged that the Agency advertised or filled certain positions with promotion potential to the GS-13 level during the fall of 2002.
- In a December 16, 2002 memo for Priscilla Lewis, Acting Chief, Labor Relations Branch, from Carolyn Federoff, President, AFGE Council of HUD Locals, 222, subject: Follow-up to parties meeting of December 12, 2002 regarding Fair and Equitable Treatment of Employees Grievance of the Parties, the Union stated:

  > In order to avoid multiple amendments to the Grievance, we will wait for receipt of the information requested. Because of the holidays and scheduled leave, I do not anticipate being able to review and respond to the requested information until after January 13. Please provide the information by that date, and I will amend the Grievance on or before January 17, 2003.

The Agency failed to provide the information requested. Instead, on January 17, 2003, the Agency denied the Grievance on the ground that it was not arbitrable under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute.

In a memorandum to Norman Mesewicz from Carolyn Federoff dated January 30, 2003 the Union brought up the issue of the information due by the Agency again:

> "With regard to the request for information, we will forego filing an Unfair Labor Practice seeking the information until after resolution of the issue of arbitrability. If the arbitrator agrees that the matter is arbitrable, we reserve our right to seek either a ruling from the arbitrator to compel Management to provide the information of file a ULP."

By March 14, 2008, no response had been received, leading the Union to file a Motion to Compel. On May 29, 2008, the Arbitrator ruled that the Agency "again is ordered to fully comply with information request immediately, but no later than June 30, 2008." The May 2008 order also stated that if the Agency did not fully comply with the order by the above date that "this Arbitrator is compelled to draw an adverse inference that the unreleased information must be adverse to the Agency." As will be explained, *infra*, the Agency did provide a small amount of documents, but nowhere near the amount of documents it was ordered to produce. Therefore, an adverse inference has been granted on all unproduced documents, which the Union described in a chart at hearing.

An arbitration hearing was held on July 15, 2008 and was continued and completed on August 28, 2008.

Facts, Argument & Analysis

I. The Union Has Met Its Burden of Proof that the Agency Violated the CBA and Other Government-Wide Rule and Regulation when it Failed to Treat Bargaining Unit Employees Fairly & Equitably with Regard to Vacancy Announcements Posted Since May 2002.

C. The Union's witnesses provided ample testimonial and documentary evidence that proved the Agency violated the CBA and other rule or regulation.

i. The Testimony of Ms. Carolyn Federoff

Ms. Carolyn Federoff is a HUD employee (attorney advisor) in the Boston Office of Counsel and was, at the time the Grievance was filed, the President of AFGE Council; she now serves as Vice-President for AFGE Local 3258. Tr., pp.30-31[1]. As Council President, she was responsible for representing employees on a national level, focusing on widespread issues that affected employees in multiple offices and multiple locals. Tr., p.31. She frequently traveled to offices around the country and discussed various issues with employee. *Id.*

The AFGE Council represents over 6,000 employees in HUD offices nationwide. It represents employees ranging from GS-1 to GS-15 level, but the highest concentration of represented employees are GS-12 because the journey level was generally established for most occupational series at the GS-12 level. Tr., p.32-33.

Journey level is the grade at which an employee functions in the position with a great level of independence, with very little supervisory oversight in order to accomplish the day-to-day work.

[1] Hereinafter, the Union uses the following paradigm when citing to the hearing transcript for July 15, 2008: "Tr., p. X." When citing to the hearing transcript for August 28, 2008, the Union uses the following paradigm: "Tr. II, p. X."

Ms. Federoff explained that she filed the instant Grievance since in 2002 the Union noticed that positions were being advertised, which were identical to positions encumbered by current HUD employees, at higher graded career ladders. Tr., p.32-33. Then, between July and September 2002, there was a deluge of higher level journeyman vacancy announcements. *Id.* These vacancy announcements posted positions at various levels, up to GS-13. Tr., p.33-34. The overall reaction of employees was negative morale because, while the Agency was finally reinforcing the offices, many of which were working consistently at 60% of necessary staffing levels, the new employees would quickly "leapfrog" over the GS-level of their trainers and mentors. Tr., p.34-36. Ms. Federoff estimates that the Agency practice began in the second quarter of 2002. Tr., 36 and continues to date.

The Union noticed that many of the vacancy announcements to the higher graded GS-13 journeyman level were posted at entry level positions, which meant current employees had to take a demotion in order to get into a career ladder to work back up to the GS-12 level and then to the new GS-13 journey level. Tr., p.37. The Union also learned that there were instances in which the internal vacancy announcements were cancelled, which prevented current employees from competing for the higher journeyman level vacancies. Tr., p.38. Other employees were told by recommending and selecting officials that applying for the vacancies was futile because the Agency intended to hire new employees. Tr., p.38-39.

The practice about which Federoff filed the Grievance persists. Tr., p.38-39. Ms. Federoff received an e-mail from the Deputy Assistant Secretary for Human Resource Management, Barbara Edwards, that it was the Agency's goal to increase its numbers,

and that it is therefore the goal of the Agency to hire/promote people mainly from the outside. Tr., p.40. This statement is in clear violation of the CBA which requires that the Agency consider internal candidates for promotion first; the practice results in a situation where current employees are not treated fairly and equitably as compared to each other and to the general population. Tr., p.40-41. *See also* JE 1.

If the Agency wanted to increase its workforce, and also comply with the CBA, Federoff opined that it could have posted the subject positions with a uniform career ladder of a journey level of GS-12. Additionally, the Agency could also post positions with a career ladder to a GS-12, and then senior positions that are just GS-13. Tr., p.41. Ms. Federoff further testified that in the alternative, the Agency could change the career ladder uniformly for all employees, such as it did in the Office of Departmental of Operations and Coordination[2] (ODOC). Tr., p.41-42. In fact, the CBA specifically provides a set of criteria for the Agency to implement the latter policy; the incumbent employee would have to meet three requirements in order to receive a career ladder promotion: 1) meet time in grade requirements, 2) perform the duties to the satisfaction of their supervisor, and 3) there is sufficient work available in order to secure the career ladder promotion. Tr., p.43; *see also* JE 1, p. 63, Article 13, Section 13.13

The Agency similarly indicated that it was interested in hiring non-retirement eligible employees, or employees that would not be retirement eligible in the

[2] Within one year of filling the higher graded career ladder positions at issue in this case, ODOC changed the journey level for all employees in the Contract Industrial Relations Specialist series. Tr., p.42.

foreseeable future; giving preferential treatment to younger employees, typically under the age of 40[3]. Tr., p.44-45. This is a violation of the ADEA in and of itself.

Ms. Federoff testified that she personally gave the documents contained in JE 2 to the Agency via pouch mail, the inter-Agency mail system, and electronically. Tr., p.46-48. The documents were sent via e-mail to Mr. Norman Mesewicz in October 2002, and contained an Excel spreadsheet listing approximately 400 subject vacancy announcements. Tr., p.47; *see* JE 3. In the e-mail, the Union requested a personnel action document for each individual selected to fill one of the listed vacancy announcements. Tr., p.48-49; *see* JE 3, p.4. The Union similarly requested, via Ms. Federoff, a copy of all vacancy announcements posted with promotion potential to the GS-13 level or above. Tr., p.52-53. The Union made similar requests for the vacancy announcements through a separate Grievance, referred to as Supplement 35. *See* JE 4.

Ultimately, the Agency did not provide copies of the vacancy announcements, but allowed Ms. Federoff to review some of them *in camera*. Tr., p.54-56. Ms. Federoff explained that she was not allowed to review vacancy announcements with the paradigm of six numbers. Tr., p.56-57. The Agency later claimed those announcements were intern positions, but was unable to produce copies of the announcements. *Id.*; *see* JE 7G, p.2. The Agency lied. The Union located two copies of one of these vacancy announcement - one was marked-up – and the vacancy announcements were clearly not intern positions – they were posted to grade levels higher than GS-12 and were not

[3] One employee was denied the opportunity to participate in the Leadership Development Program because, as he was told by the manager, the program was only for employees that were not retirement-eligible. Tr., p.45.

temporary positions. Tr., p.56-57. This negatively impacts on the Agency's credibility in this case.

Ms. Federoff, the author of the Grievance, had discussions with Agency officials regarding the Grievance and specifically explained that the Union believed it had broader scope and breadth, and requested the documents to investigate the scope of the problem. Tr., p.60-61; *see* UE 17. Ms. Federoff even sent a follow-up e-mail to Ms. Priscilla Lewis, Acting Chief of Labor Relations Branch, which stated the Union intended to revise and edit the fact section of the instant Grievance, but needed the requested information to fully determine the scope of the violations. Tr., p.62-64; *see* UE 17.

Specifically, Union Exhibit 17 is a memorandum dated December 16, 2002 from Ms. Federoff to Ms. Lewis. In that memorandum, the Union explicitly mentioned its intent to expand the Grievance. The Union never received the requested information, and as such, was not able to formally amend the Grievance. Tr., p.65. Ms. Federoff sent UE 17 to Ms. Lewis via fax and discussed the contents of the document thereafter. Tr., p.101-103.

Pursuant to the Supplement 35 agreement, the Agency agreed to advertise at least 50% of all vacancy announcements to the GS-13 level and above internally only. Tr., p.100-101. The Union, however, determined that the Agency did not meet the terms of the Supplement 35 agreement and requested information on all vacancy announcements. Tr., p.101. The Agency did not provide a majority of the information requested by the Union, as evidenced by the demonstrative exhibit created by the Union. Tr., p.119-121; *see* UE 1; *see also* JE 7B. In one case, the Agency certified that information was being sent to Washington DC from the Chicago regional office in May

2008, *see* JE 7E, but the information was never delivered. Tr., p.127-128. With regard to Mr. Vick's assertions, he did send a letter to the Union regarding one of the requests for information, which is reflected in the demonstrative exhibit. Tr., p.129-131; *see* JE 7F. The Agency asserted with regard to some vacancy announcements that no selection was ever made, but never provided the requested information for those vacancy announcements. Tr., p.131-132; *see* JE 7I; *see also* UE 7M.

Ms. Federoff compared the information received from the Supplement 35 Grievance and testified that though she was allowed to review *in camera* some of the vacancy announcements requested through the instant Grievance; she was not allowed to keep copies of any of the information. Tr., p.135-136; *see* UE 4. Ms. Federoff further compared all of the vacancy announcements, internal and external, which she received or reviewed *in camera*, and determined that those with promotion potential to the GS-13 level were the cause for concern that were at issue. Tr., p.136-137; *see* UE 5.

It is in response to Ms. Federoff's e-mail requesting resolution of the pending Grievances that Ms. Edwards made **statements against interest** which conceded that current employees were not treated fairly and equitably with regard to the vacancy announcements: "…HUD went into a massive hiring initiative. HUD is currently operating in the same mode. We have to increase the Department's numbers and currently the concentration is on external hires. We really need the Union's support on this effort." Tr., p.105-106, 111-113; *see* UE 10.

In the Grievance, the Union alleged continuing violations between March 2002 and the present based on Agency's violations of sections 4.01, 9.01 and 13 of the CBA regarding fair and equal treatment in the administration of policies and practices

concerning conditions of employment, classification standards and internal advancement of employees. Tr., p.115-118*; see* JE 1; *see also* JE 2.

The Agency blatantly and falsely asserted that the numbered vacancy announcements were intern positions. The Union discovered, through its own due diligence, a copy of a marked-up numbered vacancy announcement, *see* UE 7G, for a full-time permanent position, only open at the GS-7 level with promotion potential to the GS-13 level. Tr., p.138-142; *see* UE 7G, p.4; *see also* UE 3. Intern positions, by contrast, are posted as temporary and cannot be career conditional; intern positions do not have promotion potential to the GS-13 level and even if converted to career conditional cannot go higher than the GS-12 career ladder. Tr., p.142-143.

As an example of the Agency's repeated violations, Ms. Federoff received documentation from Ms. Lynna Schonert showing that her manager recommended that she be non-competitively promoted to the GS-13 level through accretion of duties; she had been "leapfrogged" by a selectee for one of the subject vacancy announcements to which Ms. Schonert applied. Tr., p.149-151; *see* UE 11; *see also* UE 12, 13. The selectee was placed into a higher graded position despite doing the same level work as Ms. Schonert. Tr., p.149-150; *see* UE 11; *see also* UE 12, 13.

Further, Ms. Federoff received documentation from Ms. Julie McGuire, showing that the Agency, by and through the Boston regional office, attempted to resolve the issues outlined in the instant Grievance by creating a uniform career ladder for all employees in that office, regardless of whether they were a new hire or longtime employee. Tr., p.153-155; *see* UE 14. The paradigm utilized by the Boston office does not require the agency to promote GS-12 employees who do not meet the requirements

of the contract and law, i.e. time in grade, satisfactory performance, availability of work at the next higher grade level and proven ability to perform at the next higher grade level. Tr., p.154.

There is an incentive to managers to hire external applicants because if they promote an employee internally, then the vacancy is lost and the manager must go back in the queue for the Office of Administration to approve a new vacancy announcement. Tr., p.160-161. Consequently, the Union and Agency entered into an agreement regarding internal upward mobility whereby a manager could promote a support staff employee at GS-12 level or below into a higher graded position and then fill the support staff vacancy without going back in the queue. Tr., p.160-162. Another factor is the FTE (Full Time Equivalent) ceilings, instituted by Congress, which regulates how many funded vacant positions can exist in any Agency cylinder. Tr., p.161-163; *see* UE 9.

While Ms. Federoff is not a staffing or classification specialist, she has experience with those issues through her long time incumbency in the position as President of the Council. Tr., p.166. The Union does not contest that Agency classifiers in the Office of Operations and Office of Administration have the authority to determine title, series and grade of Agency positions, but maintains that the CBA calls for current employees to be treated fairly and equitably as compared to external applicants. Tr., p.166-167. The posting of positions with career ladder promotion potential to the GS-13 level, while similarly situated current employees are limited to the GS-12 level, is inherently a violation of the contract and government wide rule and regulation.

ii. The Testimony of Ms. Bonnie Lovorn

Ms. Bonnie E. Lovorn is employed at the Jackson Field Office of HUD, where she works as a Public Housing Revitalization Specialist (PHRS), GS-1101-12; she has been a GS-12 since 1994. Tr., p.70-71. She has worked at HUD since 1986 and in Public Housing since 1989. Tr., p.71-72.

Ms. Lovorn applied for both the internal and external vacancy announcement for the GS-9/13 Public Housing Revitalization Specialist. Tr., p.71-72; *See* UE 7J. The same vacancy announcement was open internally to federal government employees and externally to the general public. Tr., p.72. Ms. Lovorn explained that she was not selected for the subject position, but performed the identical work as the selectee, Ms. Gloria Smith, after the selection. Tr., p.73-74.

Ms. Lovorn testified that she did not apply for the GS-7/7 Public Housing Revitalization Specialist announcement 152702, *See* UE 7H, which had promotion potential to the GS-13, because she asked a management official in the Atlanta Regional Office that she would have to take a downgrade to the GS-7 level in order to work back up to the GS-12 level, and then to the GS-13 journey level. Tr., p.75-77. The position was not an intern position, but was instead a career conditional vacancy posting. Tr., p.76; *see* UE 7H. The selection was made from the external posting; the selectee, Ms. Beverly Williams, was trained and mentored by Ms. Lovorn and other higher graded employees. Tr., p.78-79. Ms. Williams was eventually promoted into the GS-13 level position, despite having the same EPPES and duties in the job description as Ms. Lovorn, who has been a GS-12 since 1994. Tr., p.79-81; *see* UE 15.

Ms. Lovorn explained that it was evident from the vacancy announcement that the Agency intended to hire an employee from outside the federal government, rather than promote an internal applicant. Tr., p.86-87. Additionally, Ms. Lovorn applied for the Public Housing Revitalization Specialist GS-9/13 announcement. Tr., p.92; *see* UE 7J. Ms. Lovorn was not selected for this job; instead Ms. Gloria Smith was the selectee hired at the GS-13 level. *Id.* Ms. Lovorn has suffered financial losses because the Agency's policy and practice kept her from receiving a GS-13 position. Tr., p.96-97.

iii. The Testimony of Ms. Lynna Schonert

Ms. Lynna Schonert is a GS-12 Public Housing Revitalization Specialist in the Arkansas Office of Public Housing; she has been a GS-12 since approximately 1995. Tr., p.172-173. She received a GS-12 position when the entire staff was upgraded and rolled into a higher graded career ladder; the prior career ladder was to the GS-11 level[4]. Tr., p.173. Ms. Schonert applied for two internal vacancies in 2002 for which she was qualified - Facilities Management Specialist and Financial Analyst but was not selected for either position. Tr., p.174, 178. The vacancy announcements were posted internally and externally, as well as in multiple offices. *Id.*

Prior to, and during the application process, Ms. Schonert spoke to her supervisor, Mr. Jess Westover. Tr., p.174-175. Her former supervisor, Ms. Catherine Lamberg previously recommended Ms. Schonert for a promotion to the GS-13 level based on her performance and job duties, which remain the same even today. Tr., p.176-178. In fact, one of the GS-13 selectees inherited one of Ms. Schonert's primary

[4] This is yet another example of how the Agency can do what it claims it cannot do – or is unwilling to do: create grade parity for employees, recognizing that the new journeyman level of work is now at a higher grade due to the maturity of the Agency and increasing complexity and volume of the work.

GS-12 duties, the Little Rock Housing Authority development project; Ms. Lamberg stated the project was GS-14 level work. Tr., p.177-178. The EPPES for the GS-12 position and GS-13 position are identical. Tr., p.181-182.

Ms. Schonert explained that two other GS-12 co-workers applied for the subject vacancies – Ms. Edna Sue Davis and Ms. Jamie Allen. Tr., p.179. Ms. Schonert was ***informed by management*** that it was in the best interests of the Agency to make external selections, rather than internal. Tr., p.179-180. When Ms. Allen was Acting Director at the time the selections were made (and was therefore privy to internal Agency management meetings and discussions), she told Ms. Schonert that the Agency management stated that HUD management had the choice to promote internal applicants or "add to the staff" by hiring new hires externally. Tr., p.180-181. This choice clearly was designed to entice management to "add to the staff" – by hiring externally – rather than promoting internally and not gaining an FTE. In other words, by hiring externally the agency would grow – and by promoting internally the Agency would not grow.

The three applicants, consequently, filed a Grievance that was incorporated into the instant matter. *Id.* Ms. Schonert explained that not all five vacancies were filled by the Agency; her supervisor told her headquarters **took back** the two unfilled vacancies. Tr., p.181, 186-187. But for the Agency's violations, Ms. Schonert would have been a GS-13 for the last six years and going forward. Tr., p. 183.

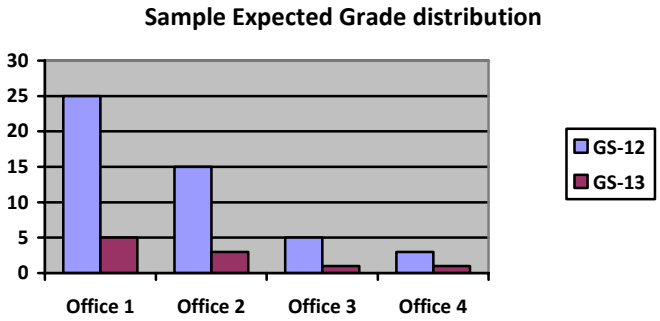
iv. The Testimony of Ms. Marcia Randolph-Brown

Ms. Marcia Randolph-Brown is currently retired; prior to her retirement, since 1997, she was a GS-12 Public Housing Revitalization Specialist in the Public and Indian

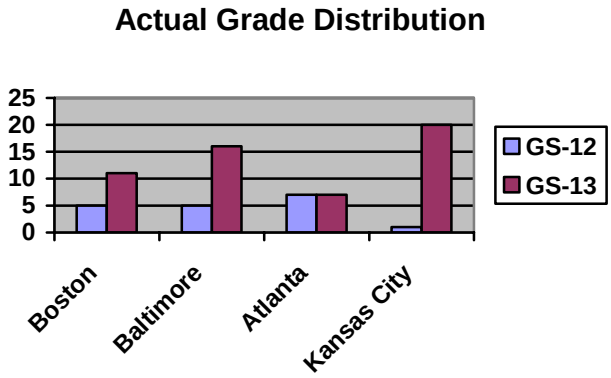
Housing Office in Baltimore, Maryland. Tr., p.194-195. Ms. Randolph-Brown applied for GS-13 level positions in 2002. Tr., p.195; *see* UE 7J. Ms. Randolph-Brown explained that she discussed the vacancy and application with her Director, Ms. Candice S. Simms, who informed her she should apply to positions outside of Public and Indian Housing. Tr., p. 198. Ms. Randolph-Brown, who was not selected for the position, explained that she understood that to mean she would not be selected for the vacancy because she was retirement-eligible. Tr., p.198-199. This also tended to support the Union's belief and argument that intra-cylinder promotions were discouraged since they would lose an FTE, and that inter-cylinder promotions were discouraged since the employee could carry the FTE with them, and so the releasing cylinder was reluctant to have the employee be promoted.

Ms. Randolph-Brown trained the actual selectees. The Agency made three total selections; two externally to the GS-7 level and one internal selectee at the GS-7 level, the latter of whom was subsequently promoted to the GS-9 level. Tr., p.199-200. Ms. Randolph-Brown explained that the Agency did not select the most qualified applicant, but rather used an alternate method based on "other" factors. Tr., p.201-202. Ms. Randolph-Brown was fully qualified for the positions, already performed the higher graded work and received fully successful performance appraisals, yet was the only GS-12 employee in the office at the time of her retirement. Tr., p.202-204. All of the others were GS-13s. This tended to support the Union's observation, supported also by statistical evidence compiled by Ms. Federoff (**Union Exhibit 9**), that the distribution of GS-13 positions vs. GS-12 positions after this hiring initiative was not the normal, expected, pyramid-shaped distribution (where the journeyperson level is highly

populated at the GS-12 and the expert level consists of a few selected GS-13s), but rather was a seemingly random ratio of GS-12 : GS-13. This chart shows the expected grade distribution (about 5:1 ratio) in a normal Agency where the GS-12 level is the journeyman level and the GS-13 is the lead, or expert level:



This chart shows the seemingly random and senseless (ie unfair and inequitable) distribution of positions at the GS-12 and 13 level at HUD after this hiring initiative:



The Union has raised these issues the first day of hearing, raising the inference that the Agency did not measure the amount of available work at the various GS levels and post jobs accordingly, but rather carried out this emergency hiring initiative without forethought, planning or equality (as required by the CBA). The result was a disaster. Further, the Agency did not put on any testimony or provide any evidence explaining

this distribution or showing how it was fair and/or equitable. The Union's testimony and evidence shows that the end result, which resulted from the vacancy announcements, was not fair and equitable.

Ms. Randolph-Brown testified that she would have continued her employment with the Agency instead of retiring had she rightfully received her GS-13 level position. Tr., p.204-205. There were other employees that performed similar work as GS-13 employees, but were stuck in limited career ladder positions with promotion potential maxed out at the GS-12 level. Tr., p.205-206.

v. The Testimony of Ms. Victoria Reese Brown

Ms. Victoria Reese Brown has been a GS-12 Public Housing Revitalization Specialist in the Nashville Program Center in the Office of Public Housing for thirteen years. Tr., p.210-211. Ms. Brown was the President of the Local 3980 in Nashville from 2000 to 2006. Tr., p. 212. As President, she was responsible for organizing, representing, and negotiating on behalf of bargaining unit employees in Nashville. Tr., p.212.

Ms. Brown testified that she learned of a hiring initiative in 2002 while canvassing vacancy announcements on USA Jobs to investigate grade disparity issues. Tr., p.213. She noticed that the Agency posted a vacancy announcement for a GS-7 Financial Analyst that had promotion potential to a GS-12 level in Nashville, but the same announcement had a promotion to a GS-13 level for three or four other offices, despite identical duties. *Id.*; *see* UE 7G. She specifically testified that the vacancy announcement was not for an intern position. Tr., p.213-214.

Ms. Brown provided Ms. Federoff a copy of the vacancy announcement with her handwritten notes. Tr., p.214-217. One note indicated that the vacancy announcement discouraged GS-12 employees from applying because they would have to take a constructive **demotion** to the GS-7 level with maximum career ladder potential to the GS-13 level. Tr., p.216-217; *see* UE 7G, p.4. This was confirmed by Ms. Patty Whitehouse, an Administrative Officer and management official for HUD, who informed Ms. Brown that GS-12 employees could not apply for the vacancy. Tr., p.217-218.

Ms. Brown, as part of the group performing public housing revitalization duties, knew that the GS-12 and GS-13 level work was identical. Tr., p.215-216. Ms. Brown was qualified for the position and would have applied if it had promotion potential to the GS-13 level. Tr., p.218-219. There were two other incumbents in the PHRS position; one GS-12 and one GS-13[5]. Tr., p.219. The GS-12 incumbent was a financial analyst; the same as the position posted in the vacancy announcement. Tr., p.219-220. Ms. Brown further explained that the GS-12 and GS-13 financial analyst perform the same duties; the GS-13 analyst performed the same duties that she performed when she was a GS-12. Tr., p.220-221.

In her testimony, Ms. Brown explained that the vacancy announcement did not follow the usual paradigm for Agency postings. Tr., p.221-222. The Agency generally posts two types of vacancy announcement; one internally, MSH, and one externally, DEU. Tr., p.221.

vi. The Testimony of Ms. Melanie Hertel

[5] The GS-13 financial analyst was promoted to the GS-13 level as a public trust officer and then her title was changed to PHRS financial analyst. *Id.*

Ms. Melanie Hertel has been a GS-13 Contractor Industrial Relations Specialist in the Office of Labor Relations (LRS) in Seattle, Washington since 2004. Tr., p.225-226. Ms. Hertel testified that there is one other GS-13 LRS incumbent in her office, Mr. Eugene Harrison, and two GS-13 LRS incumbents in Oregon and Alaska that were hired as part of the 2002 initiative. Tr., p.226-227.

Ms. Hertel explained that in 2002 the Agency posted her same position in a vacancy announcement with promotion potential to the GS-13 level, whereas her position was maxed out at the GS-12 level at that time. Tr., p.227. She even considered moving to Portland, Oregon to apply for the position, but was discouraged by her supervisor, Mr. Jim Herald[6], during a staff meeting, who stated the purpose of the announcement was to hire new recruits externally and if current employees applied for the position it would not be considered. Tr., p.227-228. When she asked if the same promotion potential to the GS-13 level would be offered in Seattle, Mr. Herald responded in the negative - stating the GS-13 level was offered to attract the best candidates from the other program areas and outside the Agency. Tr., p.228-229.

Ms. Hertel did not apply for the subject vacancies because she believed it was futile; her application would be thrown out and not be considered. Tr., p.230. Ms. Hertel did eventually receive a non-competitive promotion to the GS-13 level in 2004 due to a national initiative. Tr., p.230-231. Mr. Herald's reaction to the news of the promotions was surprising and curious[7]. Tr., p.231-232.

[6] Mr. Herald is the Regional Labor Relations Officer who supervises all LRS employees in Washington state, Alaska and Oregon. Tr., p.229. He was also the selecting official for the subject positions. Tr., p.230.

[7] When Mr. Herald learned from Mr. Harrison about the promotions he asked to see the letter from Mr. Ed Johnson. Mr. Herald nearly fell into his chair in surprise and proceeded to call Mr. Johnson to check up on the events. Tr., p.231.

Ms. Hertel stated she performed the same job duties and functions as a GS-12 and GS-13 LRS; there was also no difference in the EPPES. Tr., p.232. In fact, for the year in which she was promoted, the GS-13 performance standards were applied retroactively to the time period in the beginning of the rating year in which Ms. Brown was still a GS-12. Tr., p.232-233. This exemplifies the fact that GS-12 BUEs were performing the exact same duties as those in the subject vacancy announcements with promotion to the GS-13 level.

vii. The Testimony of Ms. Julia A. McGuire

Ms. Julie A. McGuire retired in June 2007 after 34 years of service for the Agency. Tr., p.237. Just prior to her retirement, she was employed as a GS-13 Industrial Relations Specialist (CIRS) in the Labor Relations Office; she was promoted through a nationwide initiative and Agency memorandum, from Mr. Ed Johnson, that changed the journeyman level of her position in 2003. Tr., p.238-239, 245-246; *see* UE 14. Her job duties did not change from the GS-12 position to the GS-13 level position. Tr., p.246.

Ms. McGuire had previously applied for a GS-13 position, but the vacancy announcement was cancelled. Tr., p.239-240. The position was posted internally; Ms. McGuire did not believe it was posted externally because if it was then she would have applied. Tr., p.240-241. Ms. McGuire did not find out her vacancy was cancelled until after the 0153Z vacancy announcement was closed. Tr., p.242-244. The selectees of the 0153Z vacancy announcement were hired at the GS-7 and GS-9 level; Ms. McGuire trained both of the selectees, who also received a GS-13 in 2003. Tr., p.244-245. At the time the vacancy announcements were posted in 2002, Ms. McGuire had met the time

in grade requirement for promotion to the GS-13 level, had performed the duties of her position satisfactorily and demonstrated the ability to perform GS-13 grade work, yet was stalled at the GS-12 career ladder. Tr., p.249-250.

D. Even the Agency's witness's testimonial evidence corroborates the Union's position.

Mr. Gary Lyman has been a Supervisory Human Resources Specialist since 1999; he supervises a staff of seven employees engaged in staffing and classification nationwide. Tr. II, p.8-9. He was a position classifier with the Agency for approximately ten years. Tr. II, p.9-10. Mr. Lyman explained that the program area generally decides to post a vacancy based on someone leaving, new program demands through legislation and/or volume of work. Tr. II, p.10-12. The subject position must be classified and most positions use standardized job descriptions and boilerplate classifications. Tr. II, p.11. The Agency then posts a vacancy announcement that describes the position, grade levels, salary ranges, job responsibilities and qualifications and instructions to apply. Tr. II, p.12-13.

Mr. Lyman testified that the majority of posted vacancy announcements result in a selection; however, some vacancy announcements are not filled. Tr. II, p.14-15. The vacancy announcement will usually define the promotion potential for the position; it is the highest grade level for full performance of the position. Tr. II, p.16-18. Mr. Lyman explained that grade levels are generally based on seniority. Tr. II, p.15-16. The Agency determines the promotion potential for every position; the Union is not involved in the decision, though the Agency must comply with Article 13 of the CBA. Tr. II, p.17-19.

Mr. Lyman explained that even if the job duties differ, the grade levels of two positions should be the same if the complexities and responsibilities are comparable. Tr. II, p.20. When an applicant is selected for a subject position with promotion potential, then the applicant will reach the career ladder promotion grade level, assuming he/she meets the contract requirements for career advancement, i.e. time in grade, satisfactory performance and demonstrated ability to perform higher graded work. Tr. II, p. 22-26.

Mr. Lyman testified that the principal way for employees at the maximum career ladder level to receive promotions is to apply under merit staffing procedures for competitive positions. Tr. II, p.34-35. Management can also initiate an accretion of duties promotion, but the policy is not to initiate such action if there is more than one similarly situated employee[8]. Tr. II, p.35-37; *see* AE M1.

Mr. Lyman testified that the 1995 MOU was not an accretion of duties request. Tr. II, p.64-65; *see* JE 6A. Mr. Lyman explained that he did not have any direct knowledge of the actions giving rise to the instant Grievance. Tr. II, p.66-67. Mr. Lyman's promotion to the GS-14 level in May 2002 was non-competitive. Tr. II, p.67. He received an accretion of duty promotion, despite there being similarly situated incumbents, in violation of the purported policy submitted by the Agency. Tr. II, p.67-69; *see* AE M1. Mr. Lyman conceded that the policy regarding accretion of duties does not apply if there is a reorganization. Tr. II, p.72-74.

Mr. Lyman does have a curriculum vitae or resume in his OPF from the application for his competitive promotion to the GS-13 level in 1999. Tr. II, p.79-80.

[8] Mr. Lyman testified that the policy was issued by the Director of the Office of Human Resources in 1998. Tr. II, p.42-45. He did not know if it was bargained with the Union, but did state it affected terms and conditions of bargaining unit employees. Tr. II, p.44-46. He did not know if it was ever incorporated into the revised merit staffing handbook. Tr. II, p.46-48.

Mr. Lyman explained that a vacancy announcement for an intern position will state so on the announcement. Tr. II, p.87. He further explained that the intern recruitments are done by headquarters, not regional offices, and the vacancy announcement will state the full performance level for the intern position. *Id.*

While Mr. Lyman was familiar with the three pre-requisites for promotion to a higher graded position, he did not if it was statutorily mandated by the CFR. Tr. II, p.91-93. Mr. Lyman is aware of situations where the career ladder level for an entire position series was raised up a grade level. Tr. II, p.96-97. The Agency violated the contract when it posted vacancy announcements both internally and externally, and then cancelled the internal vacancy announcement. Tr. II, p. 98-100.

Mr. Lyman testified that he would never post a vacancy announcement with two ***different*** career ladder promotion potentials. Tr. II, p.104-106. It is inconceivable that the Agency could determine at the time of the selections which applicants would be capable of performing the higher graded work years in the future. Tr. II, p.105-106. Yet, the Agency posted vacancy announcements and made selections of employees who quickly leapfrogged veteran incumbents of the position who performed the same duties and even trained the new employees. Even Mr. Lyman found the Agency practice of posting positions with higher career advancement potential than the current incumbents at GS-7 or GS-9 levels odd because it discouraged current employees from applying for positions that would result in constructive demotions. Tr. II, p.109-115. Mr. Lyman, similarly found fault with the Agency practice of posting vacancy announcements that are eventually cancelled, but failing to transfer the applicants to alternate vacancy announcement postings for the same position that were open before the first vacancy

was closed. Tr. II, p.119-121. The inequity is clear in that applicants for the first vacancy will not apply to the same position for which they already applied, but have no knowledge that the first vacancy will actually be cancelled and the only selection is made from the second announcement.

II. The Union proved that the Agency violated the HUD/AFGE Agreement, law, rule and regulation.

a. Sections 4.01 and 4.06 of the Collective Bargaining Agreement were violated when the employees were not treated fairly or equitably concerning conditions of employment.

The Collective Bargaining Agreement is clear that the employees must be treated fairly and equitably concerning their conditions of employment. As was testified to by the Union witnesses, the employees were not treated fairly and equitably by the Agency. Many GS-12 Grievants performed the same work as those GS-13 employees who were hired and then advanced to the GS-13 position. The Grievant's career ladder only rose to the GS-12 level, while the new employees' ladder rose to the GS-13 level.

1. *The Agency assigned the same work to GS-12 Grievants and GS-13 "leapfroggers."*

At the hearing, the Union presented un-rebutted testimony that the Agency assigned the same work to the GS-12 Grievants and the GS-13 "leapfroggers." Ms. Federoff filed the instant Grievance in 2002 when the Union noticed that positions were being advertised, which were identical to positions encumbered by current HUD employees, at higher graded career ladders. Tr., p.32-33. Between July and September 2002, there was a deluge of higher level journeyman vacancy announcements and these vacancy announcements posted positions at various levels, up to GS-13. Tr.,

p.33-34. The overall reaction of employees was negative morale because, while the Agency was finally reinforcing the offices, many of which were working consistently at 60% of necessary staffing levels, the new employees would quickly "leapfrog" over the GS-level of their trainers and mentors. Tr., p.34-36. Ms. Federoff estimates that the Agency practice began in the second quarter of 2002. Tr., 36 and continues to date.

Ms. Federoff received documentation from Ms. Lynna Schonert showing that her manager recommended that she be non-competitively promoted to the GS-13 level through accretion of duties; she had been "leapfrogged" by a selectee for one of the subject vacancy announcements to which Ms. Schonert applied. Tr., p.149-151; *see* UE 11; *see also* UE 12, 13. The selectee was placed into a higher graded position despite doing the same level work as Ms. Schonert. Tr., p.149-150; *see* UE 11; *see also* UE 12, 13.

Ms. Lovorn applied for both the internal and external vacancy announcement for the GS-9/13 Public Housing Revitalization Specialist. Tr., p.71-72; *See* UE 7J. The same vacancy announcement was open internally to federal government employees and externally to the general public. Tr., p.72. Ms. Lovorn explained that she was not selected for the subject position, but performed the identical work as the selectee, Ms. Gloria Smith, after the selection. Tr., p.73-74.

Ms. Brown, as part of the group performing public housing revitalization duties, knew that the GS-12 and GS-13 level work was identical. Tr., p.215-216. Ms. Brown was qualified for the position and would have applied if it had promotion potential to the GS-13 level. Tr., p.218-219. There were two other incumbents in the PHRS position;

one GS-12 and one GS-13[9]. Tr., p.219. The GS-12 incumbent was a financial analyst; the same as the position posted in the vacancy announcement. Tr., p.219-220. Ms. Brown further explained that the GS-12 and GS-13 financial analyst perform the same duties; the GS-13 analyst performed the same duties that she performed when she was a GS-12. Tr., p.220-221.

Ms. Hertel stated she performed the same job duties and functions as a GS-12 and GS-13 LRS; there was also no difference in the EPPES. Tr., p.232. In fact, for the year in which she was promoted, the GS-13 performance standards were applied retroactively to the time period in the beginning of the rating year in which Ms. Brown was still a GS-12. Tr., p.232-233. This exemplifies the fact that GS-12 BUEs were performing the exact same duties as those in the subject vacancy announcements with promotion to the GS-13 level.

Therefore, it is clear that the GS-12 Grievant's, who's promotion potential was limited to the GS-12 level, performed the very same duties as the GS-13 employees, who's promotion potential was to a GS-13 position, which is not fair and equitable.

2. *The Agency had GS-12 Grievants train and mentor "leapfrog employees" who were then promoted to the GS-13 level.*

Not only did the GS-12 Grievants perform the same activities as the GS-13 employees, the record was clear and un-rebutted that those GS-12 employees trained and mentored the GS-13 employees for their jobs.

[9] The GS-13 financial analyst was promoted to the GS-13 level as a public trust officer and then her title was changed to PHRS financial analyst. *Id.*

The Union and Ms. Federoff testified that the new employees would quickly "leapfrog" over the GS-level of their trainers and mentors. Tr., p.34-36.

Ms. McGuire had previously applied for a GS-13 position, but the vacancy announcement was cancelled. Tr., p.239-240. The position was posted internally; Ms. McGuire did not believe it was posted externally because if it was then she would have applied. Tr., p.240-241. Ms. McGuire trained both of the selectees, who also received a GS-13 in 2003. Tr., p.244-245. At the time the vacancy announcements were posted in 2002, Ms. McGuire had met the time in grade requirement for promotion to the GS-13 level, had performed the duties of her position satisfactorily and demonstrated the ability to perform GS-13 grade work, yet was stalled at the GS-12 career ladder. Tr., p.249-250.

Ms. Lovorn testified that she did not apply for the GS-7/7 Public Housing Revitalization Specialist announcement 152702, *See* UE 7H, which had promotion potential to the GS-13, because she asked a management official in the Atlanta Regional Office that she would have to take a downgrade to the GS-7 level in order to work back up to the GS-12 level, and then to the GS-13 journey level. Tr., p.75-77. The position was not an intern position, but was instead a career conditional vacancy posting. Tr., p.76; *see* UE 7H. The selection was made from the external posting; the selectee, Ms. Beverly Williams, was trained and mentored by Ms. Lovorn and other higher graded employees. Tr., p.78-79. Ms. Williams was eventually promoted into the GS-13 level position, despite having the same EPPES and duties in the job description as Ms. Lovorn, who has been a GS-12 since 1994. Tr., p.79-81; *see* UE 15.

Therefore, it is clear that the GS-13 employees were trained by the GS-12 employees for whom it was impossible to get a GS-13 unless they took a demotion from the GS-12 to the GS-7 position and worked their way back up over several years. This is not fair and not equitable.

b. Section 9.01 of the Collective Bargaining Agreement was violated when classification standards were not applied fairly and equitably to all positions.

1. *The Agency discouraged employees from applying to positions and told them that they were not eligible***.**

The record was clear and un-rebutted that employees were told by recommending and selecting officials that applying for the vacancies was futile because the Agency intended to hire new employees. Tr., p.38-39. The Agency called one witness; Mr. Lyman, and attempted to qualify him as an expert. Due to several concerns mentioned by the Arbitrator, he was not found to be qualified as an expert but he was allowed to testify as the Agency's sole witness in this Arbitration. Tr. II 58-61. Mr, Lyman found the Agency practice of posting positions with higher career advancement potential than the current incumbents at GS-7 or GS-9 levels odd because ***it discouraged current employees from applying*** for positions that would result in constructive demotions. Tr. II, p.109-115.

The Union provided un-rebutted testimony that Ms. Brown provided Ms. Federoff a copy of the vacancy announcement with her handwritten notes. Tr., p.214-217. One note indicated that the vacancy announcement discouraged GS-12 employees from applying because they would have to take a constructive **demotion** to the GS-7 level with maximum career ladder potential to the GS-13 level. Tr., p.216-217; *see* UE 7G,

p.4. This was confirmed by Ms. Patty Whitehouse, an Administrative Officer and management official for HUD, who informed Ms. Brown that GS-12 employees could not apply for the vacancy. Tr., p.217-218.

The Union also had Ms. Hertel testify who explained that in 2002 the Agency posted her same position in a vacancy announcement with promotion potential to the GS-13 level, whereas her position was maxed out at the GS-12 level at that time. Tr., p.227. She even considered moving to Portland, Oregon to apply for the position, but was discouraged by her supervisor, Mr. Jim Herald[10], during a staff meeting, who stated the purpose of the announcement was to hire new recruits externally and if current employees applied for the position it would not be considered. Tr., p.227-228. When she asked if the same promotion potential to the GS-13 level would be offered in Seattle, Mr. Herald responded in the negative - stating the GS-13 level was offered to attract the best candidates from the other program areas and outside the Agency. Tr., p.228-229.

Therefore it is clear that the Agency failed to fairly apply classification standards fairly and equitably to all positions and in fact discouraged the GS-12 employees from applying to the GS-7/13 positions.

[10] Mr. Herald is the Regional Labor Relations Officer who supervises all LRS employees in Washington state, Alaska and Oregon. Tr., p.229. He was also the selecting official for the subject positions. Tr., p.230.

c. Section 13.01 of the Collective Bargaining Agreement was violated when management did not develop or utilize programs to facilitate career development of the Department's employees and did not consider filling positions within the Department and did not promote the internal advancement of employees.

1. *The Agency posted positions externally only and its goal was to hire external candidates to the Agency.*

Ms. Federoff testified that she received an e-mail from the Deputy Assistant Secretary for Human Resource Management, Barbara Edwards, that it was the Agency's goal to increase its numbers, and that it is therefore the goal of the Agency to hire/promote people mainly from the outside. Tr., p.40. This statement is in clear violation of the CBA which requires that the Agency consider internal candidates for promotion first; the practice results in a situation where current employees are not treated fairly and equitably as compared to each other and to the general population. Tr., p.40-41. *See also* JE 1.

Ms. Schonert also testified that she was ***informed by management*** that it was in the best interests of the Agency to make external selections, rather than internal. Tr., p.179-180.

Ms. Hertel testified and explained that in 2002 she considered moving to Portland, Oregon to apply for the position, but was discouraged by her supervisor, Mr. Jim Herald[11], during a staff meeting, who stated the purpose of the announcement was to hire new recruits externally and if current employees applied for the position it would not be considered. Tr., p.227-228. When she asked if the same promotion potential to the GS-13 level would be offered in Seattle, Mr. Herald responded in the negative -

[11] Mr. Herald is the Regional Labor Relations Officer who supervises all LRS employees in Washington state, Alaska and Oregon. Tr., p.229. He was also the selecting official for the subject positions. Tr., p.230.

stating the GS-13 level was offered to attract the best candidates from the other program areas and outside the Agency. Tr., p.228-229. No Agency testimony was offered to contradict any of this testimony.

Therefore, the Agency violated Section 13.01 of the Collective Bargaining Agreement when management did not develop or utilize programs to facilitate career development of the Department's employees and did not consider filling positions within the Department and did not promote the internal advancement of employees.

2. *The Agency posted positions at grade 7 / entry level only which discouraged Grievant's from applying for the positions.*

It is not fair or equitable to tell a GS-12 employee that the only way that they can be promoted to a GS-13 position is to first be demoted to a GS-7 and then work your way back up to the GS-13 level. The evidence showed that Ms. Brown provided Ms. Federoff a copy of the vacancy announcement with her handwritten notes. Tr., p.214-217. One note indicated that the vacancy announcement discouraged GS-12 employees from applying because they would have to take a constructive **demotion** to the GS-7 level with maximum career ladder potential to the GS-13 level. Tr., p.216-217; *see* UE 7G, p.4. Ms. Lovorn testified that she did not apply for the GS-7/7 Public Housing Revitalization Specialist announcement 152702, *See* UE 7H, which had promotion potential to the GS-13, because she asked a management official in the Atlanta Regional Office that she would have to take a downgrade to the GS-7 level in order to work back up to the GS-12 level, and then to the GS-13 journey level. Tr., p.75-77. This was confirmed by Ms. Patty Whitehouse, an Administrative Officer and management official for HUD, who informed Ms. Brown that GS-12 employees could not

apply for the vacancy. Tr., p.217-218. Therefore, announcing the position at a GS-7 level only was not fair to the GS-12 Grievants who had no way of realistically reaching the GS-13. This is not fair or equitable and violated the CBA.

Mr. Lyman the Agency practice of posting positions with higher career advancement potential than the current incumbents at GS-7 or GS-9 levels odd because it discouraged current employees from applying for positions that would result in constructive demotions. Tr. II, p.109-115.

3. *The Agency posted internal and external positions and then cancelled the internal positions while leaving the external positions only.*

The Agency violated the CBA and did not act fair or equitably when they cancelled internal positions while leaving the external positions open. The Union learned that there were instances in which the internal vacancy announcements were cancelled, which prevented current employees from competing for the higher journeyman level vacancies. Tr., p.38. The Agency violated the contract when it posted vacancy announcements both internally and externally, and then cancelled the internal vacancy announcement. Tr. II, p. 98-100. Mr. Lyman, similarly found fault with the Agency practice of posting vacancy announcements that are eventually cancelled, but failing to transfer the applicants to alternate vacancy announcement postings for the same position that were open before the first vacancy was closed. Tr. II, p.119-121.

The Agency violated the contract when it posted vacancy announcements both internally and externally, and then cancelled the internal vacancy announcement. Tr. II, p. 98-100. Therefore, the Agency actions violated the CBA.

4. The Agency posted vacancy announcements with two different career ladder promotion potentials.

Posting vacancy announcements with two distinct career ladder potentials violated the CBA and is not fair or equitable. The Union testified that it did not contest that Agency classifiers in the Office of Operations and Office of Administration have the authority to determine title, series and grade of Agency positions, but maintains that the CBA calls for current employees to be treated fairly and equitably as compared to external applicants. Tr., p.166-167. The posting of positions with career ladder promotion potential to the GS-13 level, while similarly situated current employees are limited to the GS-12 level, is inherently a violation of the contract and government wide rule and regulation. Even the sole Agency witness, Mr. Lyman, testified that he would never post a vacancy announcement with two different career ladder promotion potentials. Tr. II, p.104-106. It is inconceivable that the Agency could determine at the time of the selections which applicants would be capable of performing the higher graded work years in the future. Tr. II, p.105-106. Yet, the Agency posted vacancy announcements and made selections of employees who quickly leapfrogged veteran incumbents of the position who performed the same duties and even trained the new employees. Even Mr. Lyman found the Agency practice of posting positions with higher career advancement potential than the current incumbents at GS-7 or GS-9 levels odd because it discouraged current employees from applying for positions that would result in constructive demotions. Tr. II, p.109-115.

Ms. Brown testified that she learned of a hiring initiative in 2002 while canvassing vacancy announcements on USA Jobs to investigate grade disparity issues. Tr., p.213.

She noticed that the Agency posted a vacancy announcement for a GS-7 Financial Analyst that had promotion potential to a GS-12 level in Nashville, but the same announcement had a promotion to a GS-13 level for three or four other offices, despite identical duties. *Id.*; *see* UE 7G. She specifically testified that the vacancy announcement was not for an intern position. Tr., p.213-214.

Therefore the Agency's actions when posting vacancy announcements with two distinct career ladder potentials violated the CBA and were not fair or equitable.

III. The Effect of the Arbitrator's Prior Adverse Inference Ruling Discredits the Agency Entirely.

I. *Failure to provide documents*.

Courts have long applied, as a sanction to failure to produce documents or testimony, the use of the adverse inference rule--that if the information had been provided, it would have been unfavorable to the Agency and favorable to the opposing party. In 1936, a state court held:

> The failure or refusal to produce a relevant document, or the destruction of it, is evidence from which alone its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference. *In Re: Holmes' Estate***,** 98 Colo. 360, 56 P.2d 1333 (Colo. 1936)

The drawing of an adverse inference is an appropriate remedy for an Agency's failure to produce properly requested and relevant documents, such as that of the Agency here, especially where documents routinely are maintained only for a short period of time and the Agency did not take any steps to preserve the documents upon notice of the Grievance. In the *Zukulake* case, the court held:

> The jury empanelled to hear this case will be given an adverse inference instruction with respect to e-mails deleted…, and in particular, with respect to [records] that were irretrievably lost when [the employer's] backup tapes were recycled. *Zukulake*, supra, 229 F.R.D. at 437.
>
> The party seeking an adverse inference instruction based on spoliation must establish three elements: (1) party having control over evidence had an obligation to preserve it at the time it was destroyed, (2) records were destroyed with a "culpable state of mind," and (3) destroyed evidence was relevant to party's claim or defense such that reasonable trier of fact could find it would support that claim or defense). *Zukulake*, supra, 229 F.R.D. at 430.

The FLRA further noted in 1987 that unfair labor practice cases in the private sector have long recognized that an adverse inference may be raised by the failure of a party to produce available evidence. *Bureau of Engraving and Printing*, 87 FLRR 1-1421; 28 FLRA 796, 802 (1987). *See also Internal Revenue Service, Austin District Office, Austin, TX*, 96 FLRR 1-1034; 51 FLRA No. 95; 51 FLRA 1166 (1996). In that case, the FLRA held that the documents requested were relevant and necessary and it was not improper to draw adverse inferences when the Agency refused to provide said documents, *citing National Oceanic Atmospheric Administration, National Weather Service, Silver Spring, Maryland*, 87 FLRR 1-1613; 30 FLRA 127 (1987).

In *National Park Service, National Capital Region, U.S. Park Service and PADC*, 90 FLRR 1-1643; 38 FLRA No. 86; 38 FLRA 1027 (1990), the FLRA held that proper sanctions for refusal to produce requested documents include striking testimony by refusing party on the issue and/or drawing of adverse inferences. The FLRA determined that if a union requested data ... the agency ... must either produce the data ... or suffer the inevitable consequences of adverse inferences drawn either as to content or the purpose, or both, of unseen documents." *Department of Veterans Affairs, Finance Center, Austin, TX and NFFE, Local 1745*, 93 FLRR 1-1204; 48 FLRA No. 21; 48 FLRA

247 (1993).

In another case, the FLRA judge held that, absent the presentation of such witnesses, it was proper to infer that, if called, the testimony of Respondent's supervisors would have been adverse to Respondent's case. *Department of Justice, Immigration and Naturalization Service, Los Angeles District, Los Angeles, CA and AFGE, Local 505*, 94 FLRR 1-4017 (1994). In that case, the FLRA judge noted that it is well settled that, in such circumstances, an adverse inference may be drawn regarding the factual matters at issue.

If the records requested in the instant case had been provided, it would have shown that the information was extremely damaging to the Agency's position, such that bargaining unit employees are improperly classified as exempt under the FLSA and/or that they are entitled to any unpaid overtime pay and/or unpaid comp time.

In this matter, the Arbitrator *has already concluded that an adverse inference will be drawn* against the Agency based on its failure to comply with the order regarding the Union's motions to compel. The only questions that remain are: what documents did the Agency not produce, and what is the appropriate adverse inference that is to be drawn from the Agency's failure to produce those documents?

The Union proffers that the adverse inferences be drawn include that between May 2002 and the present, the Agency has posted many vacancy announcements with career ladder potential to higher grade levels than the same positions currently incumbered by bargaining unit employees. Furthermore, the Agency posted these positions with starting grade levels as low as GS-7 and GS-9, so as to dissuade current employees from applying for positions; even with the higher grade potential current

BUEs would have to take a demotion and wait to satisfy the time in grade requirements. The limited documents provided by the Agency supports the Union's position with regard to the unknown vacancy announcements.

The Union, additionally, asks for a specific adverse inference regarding the numbered series vacancy announcements that were not provided by the Agency. The Agency proffered that those vacancy announcements were all cancelled and for intern positions. But the Union's testimonial and documentary evidence proved otherwise; the vacancy announcements were for full time positions incumbered by bargaining unit employees with higher promotion potential. The Agency's proffer was false and magnifies the importance of the failure to produce the information requested by the Union, precisely because of its damning nature. And the numbered series vacancy announcements only made up a small portion of all of the vacancy announcements being investigated by the Union. The discrediting effect of those hundreds of other vacancy announcements is multiple times greater than the few numbered series vacancy announcements. The Agency was the custodian of these documents and had a duty to preserve and produce them. Had the Agency provided them, the Union could have identified more violations, could have identified more favorable witnesses and would have prevailed based on those documents alone.

The Union entered its "Adverse Inference Spreadsheet" as **Union Exhibit 1**. In this exhibit, the Union charted the document request made in their Union Request for Information and the response by the Agency. For example, the Union requested documents relating to vacancy announcement PHJT-2-152806SO. The reason the Union requested this information was to show that the positions were created and

offered in violation of the CBA in relation to the maximum promotion potential, as well as if a waiver of qualifications was granted. The hope was to compare those external vacancy announcements with the internal announcements and to prove that the GS-12 Grievants were not treated fairly or equitable. The Agency failed to provide any documents responsive to the request. Because no documents were provided, an adverse inference should be made and the Arbitrator should rule that those responsive un-provided documents would have shown that the Agency's postings violated the CBA and were in fact not fair or equitable. The Arbitrator should reach this same conclusion for each of the unresponsive request relating to the 15 (at the least) categories of information requested by the Agency.

Similarly, the Agency blatantly and falsely asserted that several numbered vacancy announcements were intern positions. The Union discovered, through its own due diligence, a copy of a marked-up numbered vacancy announcement, *see* UE 7G, for a full-time permanent position, only open at the GS-7 level with promotion potential to the GS-13 level. Tr., p.138-142; *see* UE 7G, p.4; *see also* UE 3. Intern positions, by contrast, are posted as temporary and cannot be career conditional; intern positions do not have promotion potential to the GS-13 level and even if converted to career conditional cannot go higher than the GS-12 career ladder. Tr., p.142-143.

Therefore, an adverse inference must be drawn against the Agency on all of these issues. All of the documents listed in the chart at Union Exhibit 1 would have been damaging to the Agency and favorable to the Union. This amounts to thousands of documents which, by the already granted adverse inference, now – as a matter of law and fact – totally support the Union's position, allegations and Grievance.

II. *An adverse inference should be taken against the Agency for failing to call witnesses that could have explained their position or rebutted Union testimony.*

During the arbitration, the Agency failed to call ***any witnesses*** either in support of their claims/defenses or in rebuttal to ***any*** of the Union's testimony (other than one witness with no personal knowledge of the case who was not qualified as an expert). The Agency did not call the individuals who posted the vacancies. The Agency did not call any supervisors of the subject positions. The Agency did not call any supervisors of the Union witnesses. The Agency did not call any management officials. The Agency did not rebut any of the Union's GS-12 witness testimony that they performed the same work as the GS-13 employees and that they trained the employees who then leapfrogged them to the GS-13. The Agency did not offer any testimony rebutting the Union's GS-12 witness testimony that they were told by their supervisors that their applications to the subject positions would be destroyed, not considered and that that should not apply. The Agency did not offer any Agency witness related to their response or lack thereof to the Union requests for information and Motion to Compel.

In general, "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." See *Internal Revenue Service, Philadelphia Service Center and NTEU, 54 FLRA 674 (1998) citing* International Automated Machines, Inc., 285 NLRB 1122, 1123 (1987) (IAM). See also John W. Strong et al., McCormick on Evidence, 184 (4th ed. 1992) (McCormick). See also *United Brotherhood of Carpenters and Joiners of America*, Local Union No. 405, AFL-CIO, 328 NLRB 788, n.2 (1999) where the National Labor Relations Board held

that an adverse inference may be drawn from the failure of an adverse witness to appear. See also *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 708 (1999) where the Authority held that an adverse inference may be drawn from the failure of a witness to testify on a particular factual issue. See also *U.S. Dept. of Commerce, etc.,* 54 FLRA 987, 1017 (1998) in support of the proposition that an adverse inference may be drawn against a party because of its failure to call a witness reasonably assumed to be favorably disposed to that party. See also *Federal Aviation Administration,* 55 FLRA 1271 at 1283 (2000). See also *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 925 (1996). [12] Because the Agency failed to provide any witness testimony on any issues, an adverse inference should be drawn against them, the Union's testimony should stand alone un-rebutted, and any testimony should be found to be adverse to the Agency.

Proposed Remedies

The Union requests that the Arbitrator find in its favor and that a "make whole" remedy be awarded, including but not limited to:

1) A finding that the information the Agency was ordered to provide, but failed to provide, would have been adverse to the Agency and would have corroborated the Union's claims.

[12] Furthermore, the fact that the "missing witness is a member of management" and it can be assumed that the witness would be favorably disposed toward management, an adverse inference is warranted even if the witness was, technically, equally available to be called by either party. See *Internal Revenue Service, Philadelphia Service Center and NTEU, 54 FLRA 674 (1998)*.

2) A finding that the testimony the Agency should have provided would have been adverse to the Agency and would have corroborated the Union's claims.

3) A finding that the Agency violated Sections 4.01, 4.06, 9.01, 13.01 of the CBA and other laws, rules, and regulations by:

A. failing to treat the Grievants fairly and equitably;

B. by failing to properly consider the Grievants for selection to the positions:

C. by dissuading the Grievants from applying for selection;

D. by canceling internal vacancies while maintaining external vacancies or other later posted internal parallel vacancies;

E. by posting vacancies externally only;

F. by having long-time GS-12 journeyman employees train, tutor, and perform the same work as GS-13 journeyman employees in the same position;

G. and/or engaging in other improper practices and policies.

4. A finding that the Agency violated the CBA law, rule, and regulation in its policies and practices from the Spring of 2002 to present, and that, but for the Agency's violations, one or more of the following remedies should be adopted:

Proposed remedies include:

1. The Union believes that pursuant to the 1995 MOU, the Arbitrator should find that the Agency violated the MOU, CBA and law, rule and regulation

and that but for the violation, affected BUEs would have been promoted into currently existing career ladder positions with promotion potential to the higher graded levels. The Arbitrator would then issue an appropriate Order which would direct the Agency to permanently retroactively promote all affected BUEs into currently existing career ladder positions with promotion potential to the higher graded levels. This remedy, to be 'make whole' would include retroactive back pay and interest. The Union believes that this remedy is the most fitting given the facts proven at arbitration and will provide the best possible relief for the numerous CBA violations.

2. In the alternative, the Arbitrator can order the Agency to retroactively place all affected BUEs into a an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects their duties from 2002 to present, and then order the Agency to classify and grade those PD's, retroactively placing the grievants in them effective 2002 with back pay and interest.

3. Another valid remedy is for the affected BUEs is that the Arbitrator should conclude that "but for" the Agency's violations, each grievant would have been selected for the subject vacancy for which he or she applied, and order the Agency to retroactively promote each BUE into a position with GS-13 promotion potential with back pay and interest.

4. Furthermore, the Arbitrator could order the Agency to provide each Grievant with one priority consideration and to re-run all of the subject

vacancies which were done in violation of the CBA between 2002 and the present. It is well accepted that an arbitrator's order to rerun a selection action may include a requirement that the initial selection be set aside. *See, e.g.,* ***Panama Canal Comm'n****,* 56 FLRA 451 (2000) (Authority upheld rerun action which included arbitrator's order that initial selectees be removed from their positions); ***SSA Chicago,*** 56 FLRA 274 (same).

5. Lastly, the Agency can be ordered to carry out an organizational upgrade of affected positions by upgrading the journeyman level for all of the subject positions to GS-13 level retroactively to 2002. Under this approach, the supervisor, pursuant to the CBA, would have the final determination as to whether the affected employee has performed the duties of his or her position satisfactorily.

Regardless of the fair and equitable remedy decided upon by the Arbitrator, the Union respectfully posits that 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, and that a “but for” finding be made. The Agency’s failure to follow the procedures of the CBA resulted in the loss of pay and but for the Agency’s failure the procedures, the Grievants would have been promoted at the GS-13 level.

In the decision rendered in this case by the Arbitrator dated January 24, 2007, the Arbitrator made several findings regarding possible remedies. On remand, the Agency had argued that there was no appropriate remedy because the remedy

requested was illegal and contravened the OPM Regulation 5 CFR §335.102(f) and Article 13.06(5) of the CBA.

The Union responded that the remedy does not require reclassification of employees presently at the GS-12 level and instead requested that management reassign employees to the reclassification position which would result in a consistent application of the classification standards. The Union also pointed out that this remedy was addressed in the HUD-AFGE Memorandum of Understanding, dated February 24, 1995 and that the Agency agreed to the reassignment of employees to reclassified positions.

The Union also suggested several other possible possibilities including:

1) Reassignment of work classified as higher graded to employees at the GS-12 level and subsequent changes to their position descriptions. The employees could then pursue a reclassification audit or other appropriate action;
2) A finding that the Agency failed to properly consider internal candidates for promotion and thereby violated Sections 4.01 and 13.01 of the Agreement.

The Arbitrator ruled that in response to the Authority's inquiry, the possible remedy of reassignment to the newly classified positions with promotion potential to GS-13 is but one possible remedy. Alternative remedies which would attain fairness and equity are not excluded.

The arbitrator also ruled that should a preponderance of the evidence on the merits of this Grievance prevail and this arbitrator finds an unjustified or unwarranted personnel action, then she would be 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 Justice, Defense Commissary Agency, Fort Lee, Virginia, 55 FLRA 695 (July 31, 1999).

Finally, the Arbitrator ruled that if the evidence justified a finding of violation of Sections 4.01 and 13.01 of the Agreement for failing to treat the Grievants fairly and equitably, the "but for" formula shall be applied, as case law provides.

Regardless of the fair and equitable remedy decided upon by the Arbitrator, the Union respectfully posits that 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, and that a "but for" finding be made. The Agency's failure to follow the procedures of the CBA resulted in the loss of pay and but for the Agency's failure the procedures, the Grievants would have been promoted at the GS-13 level.

For an award that grants a promotion and back pay, the arbitrator must establish that "but for" the agency's failure to follow the collective bargaining agreement, the grievants would have been promoted. 103 LRP 44221, *United States Department of Veterans Affairs, Cleveland Regional Office, OH and American Federation of Government Employees, Local 2823 AFL-CIO,* 59 FLRA No. 38, 0-AR-3499 (September 29, 2003).

An award of a retroactive promotion with backpay by an arbitrator is authorized under the Back Pay Act, 5 U.S.C. § 5596, only when: (1) the aggrieved employee was affected by an unjustified or unwarranted personnel action; and (2) the personnel action resulted in a loss of pay, allowances, or differentials by the employee. *See, e.g., United States Dep't of the Air Force, Warner Robins Air Force Base, Ga.,* 56 FLRA 541, 543 (2000).

In determining whether an award of backpay is deficient, the Authority examines whether there has been an unjustified or unwarranted personnel action and whether there is a causal connection between the unwarranted personnel action and the loss of pay, allowances, or differentials. *Id.* With respect to the requirement of a causal connection, the Authority examines whether the arbitrator has found that but for the unwarranted action, the loss of pay, allowances, or differentials would not have occurred. *See United States Dep't of Health and Human Services,* 54 FLRA 1210, 1218-19 (1998) (*HHS*) (an examination of whether a pay loss would have occurred but for the unwarranted action amplifies the causal connection requirement of the Act).

A violation of a collective bargaining agreement constitutes an unjustified or unwarranted personnel action under the Act. *See United States Dep't of Defense, Dep't of Defense Dependents Schools,* 54 FLRA 773, 785 (1998).

Because the Union has proven multiple violations of the CBA and because the violation caused a loss of pay, the “but for” standard should apply and backpay and interest should be awarded. The Union also requests that:

A. The Arbitrator specifically retain jurisdiction in the event her decision is set aside in whole or in part;

B. That the Arbitrator specifically retain jurisdiction to provide alternative relief, in the event that any relief provided is found to be inconsistent with law or otherwise not available, and if her decision is set aside or in whole or in part on that basis;

C. That other relief be awarded as necessary, including reasonable attorney fees upon application after a favorable decision.

Conclusion

Based on the foregoing evidence as well as all of the arguments set forth in the prior pleadings and hearings the Union respectfully requests that the Arbitrator issue an Opinion and Award in accordance with the Remedies section *supra.*

Respectfully Submitted,

Michael J. Snider, Esq.
Ari Taragin, Esq.
Jason I. Weisbrot, Esq.
Jacob Y. Statman, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 100
Baltimore, Maryland 21208
Phone: (410) 653-9060
Fax: (410) 653-9061
Counsel for the Union

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Union's Closing Brief was filed by the method indicated below on the following individuals on December 1, 2008:

SENT VIA EMAIL (without exhibits) & FIRST CLASS MAIL (with exhibits)
Dr. Andree McKissick
Labor Arbitrator
2808 Navarre Drive
Chevy Chase, Maryland 20815-3802
Email: mckiss3343@aol.com

SENT VIA EMAIL (without exhibits)& FIRST CLASS MAIL (with exhibits)
Walter C. Vick, Jr.
JoAnn T. Robinson
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410
Email: Walter_C._Vick@hud.gov
Joann_Robinson@hud.gov

_____
Snider & Associates, LLC