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**BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**AGENCY EXCEPTIONS TO ARBITRATION DECISION
FMCS CASE No: 03-07743**

**U.S. Department of Housing and
Urban Development (Agency)**

And

**American Federation of Government Employees
National Council of HUD Locals 222 (Union)**

Arbitrator Dr. Andree McKissick

2808 Navarre Drive

Chevy Chase, MD 20815-3802

Background

The arbitrator dated the award in question (Attachment 1) September 29, 2009, and served the Parties by mail. The Agency received the decision October 8, 2009 (A-2). Pursuant to Section 2429.22 of the Authority's regulations, exceptions to the award are to be served on the Authority by November 2, 2009.

ANALYSIS OF DEFICIENCIES

The arbitrator's award requires the Agency to perform an "organizational upgrade" of unspecified positions to the GS-13 level retroactively from 2002 (A-1 p. 16). As the analysis

contained below demonstrates, this award is *ultra vires* in that it (1) operates to classify positions, (2) directs non-competitive promotions, (3) interferes with management rights preserved by the Federal Labor-Management Relations Statute (Statute) and (4) improperly expands the authority of the arbitrator. At the outset, it is important to note that Article 3, Section 3.01 of the Parties agreement (Agreement) (A-3) states "In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Governmentwide regulations, and existing and future decisions of outside authorities binding on the Department." These exceptions demonstrate that the arbitrator, by issuing the award, blatantly flaunted this provision of the Agreement, and the obligation of all arbitrators in all cases to honor the terms of the agreements under which they are employed.

Requirement of Reclassification: As noted above, the award directs an "organizational upgrade" of positions to the GS-13 level retroactively from 2002. The elevation of the grade of a position, by definition, requires its reclassification. Classification is the process by which Office of Personnel Management (OPM) standards are applied which (1) define the various classes of positions in terms of duties, responsibilities, and qualification requirements; (2) establish the official class titles; and (3) set forth the grades in which the classes have been placed by the Office pursuant to 5 U.S.C. Section 5105 (A-4). OPM classification standards are applied in accordance with 5 U.S.C. Section 5106 (A-5). The Office of Personnel Management, in conjunction with the Agency, not the arbitrator, has the sole authority over the classification of positions in the Federal Sector. In this regard, please see the OPM *Introduction to the*

Position Classification Standards (A-6). The Union stipulated to this fact by the testimony of its co-counsel, Carolyn Federoff, Former President, AFGE National Council of HUD Locals 222, during the hearing over this matter (A-7 pp.165-167).

The arbitrator, in the award, has assigned the grade of GS-13 to certain positions in violation of OPM regulations (A-6). Moreover, the award is in violation of Article 23, Section 23.10 (2) of the Parties agreement (Agreement) (A-3), since it adds arbitral authority to classify positions. This is clearly *ultra vires* and cannot be allowed to stand.¹

Non-competitive Promotions: The award, as written, gives non-competitive promotions to the grievants retroactive to 2002. This is so since the positions the grievants encumber, per the award, are reclassified to the GS-13 level for the specified time period. (A-1 p. 16). This is a violation of the Code of Federal Regulations. Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service can only be done via competitive procedures pursuant to 5 C.F.R. Section 335.103(c)(v) (A-8). The record demonstrates, as admitted by the arbitrator, that the grievants in this case never held a position higher than the GS-12 level (A-1 pp. 8-9, 12-13, 15-16). Thus, the award conflicts with applicable Federal regulations. This is also an additional violation Article 23, Section 23.10(2) of the Agreement (A-2). The Agreement specifies the criteria under which non-competitive promotions are allowed (A-6 Article 13, Section 13.09, A5 p. 21). The

¹ Assuming arguendo that the arbitrator had some sort of authority to classify an Agency's positions, the award would still be deficient since the arbitrator did not rule in accordance with 5 U.S.C. Sections 5105 and 5106. Rather, the arbitrator reclassified the instant (unspecified) positions based on the conclusion that the Agency unfairly applied merit staffing procedures (A-1 pp.15-16). This is a patent breach of the U.S. Code.

facts of this case fit none of those criteria.² In light of the foregoing, the award cannot be allowed to stand.

Interference with Management Rights: Section 7106 (a) of the Statute, in pertinent part, preserves the Agency's right to determine its organization and assign work. This language is also contained in Article 3, Section 3.06 of the Agreement. Section 7106(b)(1), in pertinent part, preserves the Agency's right to determine the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project or tour of duty. The award requires the "organizational upgrade", i.e. reclassification, of the grievants' positions. This constitutes direct interference with the Agency's right to determine its organization, assign work and determine the grades of employees assigned to its organization. In this regard, it must be reiterated that the award, as noted, *supra*, prohibits the Agency from removing duties from the positions encumbered by the grievants. Thus, the award conflicts with both the Statute and the Agreement, and, accordingly, cannot stand.

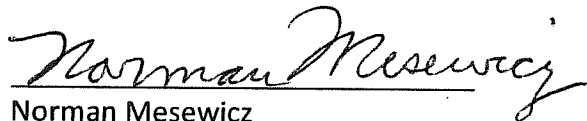
² In this regard, it must be noted that the grievants' positions have not been reclassified to a higher grade, by competent authority, i.e. an Agency classifier, because of additional duties and responsibilities. Assuming *arguendo* that the grievants had been performing additional duties to warrant a higher grade, the award, as will be expanded below, denies management its statutory right to remove those duties in order to maintain the existing classified grade.

CONCLUSION

The foregoing analysis of deficiencies demonstrates clearly that the award in question is replete with deficiencies, and must be overturned. The arbitrator ignored the instructive content of the Agency's post-hearing brief (A-9), and proceeded to render a decision and award egregiously contrary to established law, rule, regulation and the Agreement. Specifically, the arbitrator assumed classification authority for herself in violation of OPM delegations of authority (A-9 pp. 10-12). She also violated the long standing and well known requirement that, in most cases, competition is a prerequisite for promotion (A-9 pp. 16-19). The decision and award also ignored clear terms contained in the Agreement (A-9 pp. 16-17).

In light of the above, it is requested that the Authority overturn the decision and award in this matter in their entirety.

Respectfully Submitted,



Norman Mesewicz
Deputy Director, Labor and Employee
Relations Division

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Agency Exceptions to the above-captioned arbitration decision were served on this 30th day of October 2003, upon the following in the manner indicated:

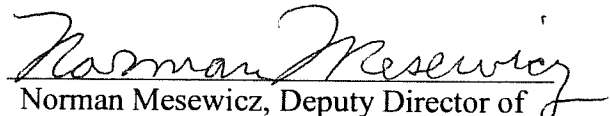
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