

Michael J. Snider, Esq.  
Keith Kauffman, Esq. \* \*  
James L. Fuchs, Esq. \* \* \* \*



LAW OFFICES OF  
**SNIDER & ASSOCIATES, LLC**  
**JUSTICE IN THE WORKPLACE®**

Jason I. Weisbrot, Esq. \*  
Allan E. Feldman, Esq. \* \*  
Jacob Y. Statman, Esq. \*

\* admitted in the District of Columbia  
\* admitted in Florida  
\* admitted in New York  
\* admitted in Massachusetts  
\* admitted in Illinois  
\* admitted in West Virginia

October 24, 2012

**SENT VIA FACSIMILE & CERTIFIED MAIL**

Barbara Kraft  
Regional Director  
Federal Labor Relations Authority  
1400 K Street, NW; 2<sup>nd</sup> Floor  
Washington, D.C. 20424-0001  
Fax: (202) 482-6724

**Re: ULP in the matter of *AFGE Council 222 v. U.S. Department of Housing & Urban Development***

Dear Regional Director Kraft:

Attached you will find a completed FLRA Form 22 (Charge Against an Agency) with exhibits, in the above referenced matter. If you require any additional information please do not hesitate to contact us at the information shown below. Thank you for your attention to this matter.

Sincerely,

SNIDER & ASSOCIATES, LLC

Michael J. Snider, Esq.

Cc: Norman Mesewicz (with enclosures, via Email)  
Carolyn Federoff (with enclosures, via Email)

|                                                                                                                                                                                                               |                          |  |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------|--|
|  <p><b>UNITED STATES OF AMERICA</b><br/> <b>FEDERAL LABOR RELATIONS AUTHORITY</b></p> <p><b>CHARGE AGAINST AN AGENCY</b></p> | <b>FOR FLRA USE ONLY</b> |  |
|                                                                                                                                                                                                               | Case No. _____           |  |
|                                                                                                                                                                                                               | Date Filed _____         |  |

Complete instructions are on the back of this form.

|                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>1. Charged Activity or Agency</b><br>Name: U.S. Department of Housing & Urban Development<br>Address: 451 7th Street SW<br>Washington, D.C. 20410<br>Tel.#: (202) 708-1492 Ext. 2859<br>Fax#: _____                       | <b>2. Charging Party (Labor Organization or Individual)</b><br>Name: AFGE Council 222<br>Address: 451 7th Street, SW<br>Washington, D.C. 20410<br>Tel.#: (410) 653-9060 Ext. _____<br>Fax#: (410) 653-9061                                                                |
| <b>3. Charged Activity or Agency Contact Information</b><br>Name: Norman Mesewicz<br>Title: Chief, Labor Relations<br>Address: 451 7th Street SW<br>Washington, D.C. 20410<br>Tel.#: (202) 708-1492 Ext. 2859<br>Fax#: _____ | <b>4. Charging Party Contact Information</b><br>Name: Michael J. Snider, Esq.<br>Title: Counsel for AFGE Council 222<br>Address: Snider & Associates LLC<br>600 Reisterstown Road, 7th Fl Baltimore, MD 21208<br>Tel.#: (410) 653-9060 Ext. _____<br>Fax#: (410) 653-9061 |

5. Which subsection(s) of 5 U.S.C. 7116(a) do you believe have been violated? [See reverse] (1) and 2, 5, & 8

6. Tell exactly WHAT the activity (or agency) did. Start with the DATE and LOCATION, state WHO was involved, including titles.

Please see the attached write-up with Exhibits.

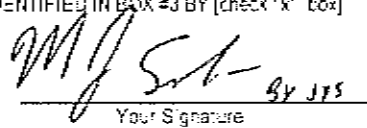
Exhibit List:

Exhibit A - Arbitrator Remedy Award  
 Exhibit B - Agency's Exceptions  
 Exhibit C - Union's Opposition to Agency's Exceptions  
 Exhibit D - Email communication between Agency and Union

7. Have you or anyone else raised this matter in any other procedure? ☒ No ☐ Yes If yes, where? [see reverse] \_\_\_\_\_

8. I DECLARE THAT I HAVE READ THIS CHARGE AND THAT THE STATEMENTS IN IT ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT MAKING WILLFULLY FALSE STATEMENTS CAN BE PUNISHED BY FINE AND IMPRISONMENT, 18 U.S.C. 1001. THIS CHARGE WAS SERVED ON THE PERSON IDENTIFIED IN BOX #3 BY [check "x" box] ☒ Fax ☐ 1st Class Mail ☐ in Person

☐ Commercial Delivery ☒ Certified Mail

Michael J. Snider, Esq.  10/16/2012

Type or Print Your Name Your Signature Date

ATTACHMENT FOR ULP IN THE MATTER OF:  
AFGE COUNCIL 222  
v.  
U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

At all times since August 8, 2012, the Agency, by and through its representative Norman Mesewicz, Supervisory Personnel Management Specialist, has refused to implement the final and binding Remedy Award of Arbitrator Andree McKissick, ("the Award" attached as **Exhibit A**). The facts are as follows:

On January 10, 2012, Arbitrator Andree McKissick issued a Remedy Award ("the Award") in response to the Authority's decision in 59 FLRA 630. In that decision the Authority left the underlying violation found by the Arbitrator intact, but remanded the case to determine an appropriate remedy. Specifically, the Authority upheld the Arbitrator's determination that the Agency violated the CBA, and law, rule or regulation in not treating employees fairly and equitably in its hiring process for positions with higher promotion potential than current employees, among other violations of contract and law.

The Award included one remedy, entitled "Remedy No. 1." The Award also included three *alternative* remedies which were clearly explicitly "alternative" and defined as being applicable if – and only if – the Authority vacated the initial remedy. However, the Award is clear that the first remedy is the only applicable remedy, absent vacation of the first remedy by the FLRA, and that the second, and all subsequent remedies are to be implemented: "only in the event the FLRA vacates Order No. 1." Award, p. 3.

Remedy No. 1 ordered:

That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to GS-13 level.

Affected BLUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to the next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002.

*Id.*

In response to the Award, the Agency filed Exceptions (**Exhibit B**) and the Union filed an Opposition thereto (**Exhibit C**). On August 8, 2012, the Authority dismissed the Agency's Exceptions. See 66 FLRA 867. Pursuant to both the Parties CBA and FLRA regulations, the dismissal of the Agency's Exceptions renders the Arbitrator's Award a final and binding order. As such, it is clear that the Agency's only option is to implement the Award at Remedy No. 1,

*Infra.*

The Agency, however, has refused to implement the Award at Remedy No. 1.

On October 9, 2012 - more than thirty days after the Authority issued its decision - Agency Representative Norman Mesewicz sent an email to counsel for the Union indicating that the Agency had no intention to comply with the Award and subsequent FLRA Decision and implement Remedy No. 1. (**Exhibit D**).

Specifically, Mr. Mesewicz stated:

Below is the Department's position regarding compliance with arbitrator McKissick's order in case FMCS No: 03-07743 (Attached).

In her order, the arbitrator enumerates four potential remedies. A fair reading of the order reveals that the implementation of three of those remedies, #1, #2 and #4 would cause management to violate the Code of Federal Regulations and/or the Federal Labor-Management Relations Statute.

Specifically, remedies #1, #2 and #4 direct that management non-competitively promote affected employees which may not be done. In this regard, please see 5 C.F.R. Section 335.1033(c)(v). Additionally, remedy #2 cannot be legally implemented since it directs management to classify certain positions at the GS-13 level in violation of Section 7121(c)(5) of the Federal Service Labor-Management Relations Statute.

With respect to remedy #3, I can state the following. Management is working to identify, to the extent possible, the incumbents at the time of the positions identified in the November 13, 2002 Grievance of the Parties. Next, of that group, those who currently remain HUD staff will be identified. This then will constitute the group of employees eligible for relief pursuant to remedy #3 of the order.

Lastly, HUD retains its right to advertise positions consistent with law, rule, regulation and the HUD/AFGE Agreement. *Id.*

The Agency's refusal to implement the final and binding Award with regard to Remedy No. 1 is an unfair labor practice pursuant to 5 U.S.C. §7116(a)(1), (2), (5) and/or (8).

# EXHIBIT

A

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

**In the Matter of Arbitration:**

**U.S. DEPARTMENT of HOUSING  
and URBAN DEVELOPMENT**

**and**

**AMERICAN FEDERATION of GOVERNMENT  
EMPLOYEES, AFL-CIO**

**Re: Fair and Equitable Remedy**

**FMCS No: 03-07743**

**Remanded from: 59 FLRA 630  
65 FLRA 90**

**Remanded for Remedy: Dr. Andrée Y. McKissick, ARBITRATOR**

**APPEARANCES:**

**For Management:** Norman Mesewicz, Deputy Director, LER  
James Reynolds, Deputy Director  
U.S. Dept. of Housing & Urban Development  
451 7<sup>th</sup> Street, SW  
Washington, D.C. 20410

**For Union:** Michael Snider, Esquire  
Jason I. Weisbrot, Esquire  
Jacob Y. Statman, Esquire  
Snider & Associates  
104 Church Lane, Suite 100  
Baltimore, MD 21208

Carolyn Federoff, Esquire, Former President  
AFGE Council 222  
108 Ashland Street  
Melrose, MA 02176

**DATE OF REMEDY ORDERED: January 10, 2012**

**RE: Article 23, Section 11 of the Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees AFL-CIO, effective 1998-present. Exceptions: Where exception is taken to an arbitration award and the Federal Labor Relations Authority (FLRA) sets aside all or a portion of the award, the arbitrator shall have the jurisdiction to provide alternative relief, consistent with the FLRA decision. The arbitrator shall specifically retain jurisdiction where exceptions are taken and shall retain such jurisdiction until the exception is disposed.**

## PREFACE

Since a settlement was not reached by the parties, this Arbitrator is now formulating an alternative remedy as directed by 65 FLRA, No. 90, dated January 26, 2011.

## ORDER

Having read and reviewed all prior submissions of the parties, and FLRA rulings, in light of this Arbitrator's prior findings and rulings, including that the Agency violated Article 4, Sections 4.01 and 4.06. These Grievants were unfairly treated and were unjustly discriminated against, that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied. The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees, and that but for these violations. The Grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level (See Merits Award (MA) at 15). This Arbitrator finds that all of the below are appropriate remedies and that, if the FLRA finds that any are not appropriate, the next numbered remedy shall apply, and therefore this Arbitrator hereby ORDERS:

1. That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to the GS-13 level. Affected BUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met

time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002.

2. In the alternative, and only in the event the FLRA vacates ORDER No. 1 above, and pursuant to my finding that "but for" the Agency's violations, the Grievants would have been selected for the subject vacancy for which they applied, this Arbitrator ORDERS that the Agency retroactively select the affected GS-12 employees into the subject vacant career ladder positions with retroactive grade increases. The Agency shall process such selections within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002.
3. In the alternative, and only in the event the FLRA vacates ORDER No. 1 and 2 above, this Arbitrator hereby ORDERS that the violative Agency selections from 2002 to present be set aside, that the Agency provide each Grievant with one priority consideration and that the Agency must re-run all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. The Agency should process such selections within sixty

(60) days, and calculate and pay affected employees all back pay and interest due since 2002.

4. In the alternative, and only in the event the FLRA vacates ORDER No. 1, 2 and 3 above, that the Agency retroactively place all affected BUE's into 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 this Arbitrator ORDERS the Agency to classify and grade those PD's, retroactively placing the Grievants in them effective 2002, with back pay and interest.

The Agency is hereby ORDERED to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. Such action was termed constructive demotion (See MA at 13 and 14). This portion of the Order does not apply to non-status vacancy announcements.

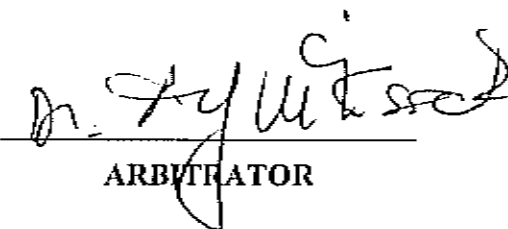
The Class of Grievants subject to the Remedy addressed herein is defined as follows: All Bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present. These include BUE's in positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1 and 9. Pursuant to Article 23, Section 11

of the Agreement, this Arbitrator hereby retains 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 this decision is set aside or in whole or in part on that basis.

This Arbitrator retains jurisdiction over an award of Attorney Fees upon petition by the Union, which shall be entertained within a reasonable time following receipt of this Award. The Agency shall have a reasonable opportunity to respond.

IT IS SO ORDERED

Date: January 10, 2012

  
\_\_\_\_\_  
ARBITRATOR

Cc: Michael J. Snider, Esq.  
Jason I. Weisbrot, Esq.  
Jacob Y. Statman, Esq.  
Snider & Associates, LLC  
Counsel for the Union

Norman Mesewicz, Deputy Director, LER  
Counsel for the Agency

Carolyn Federoff, EVP  
AFGW Council 222  
Union Representative

# EXHIBIT

B

FEB 10 2012

**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) January 10, 2012 and served the Parties by regular mail. There is no legible postmark. Accordingly, pursuant to Section 2425.2 of the Authority's regulations, exceptions to the award are to be served on the Authority by February 14, 2012.

**ANALYSIS OF DEFICIENCIES**

The arbitrator's award does not comply with the Authority's decision remanding the case, 65 FLRA NO. 90 (A-2). In that decision, the Authority's direction, in pertinent part, was to "...set

aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.” Rather than formulating one alternative remedy as ordered by the Authority, the Arbitrator rendered four potential alternative remedies each of which is deficient in its own right (A-1 pp 2-4). As the analysis contained below demonstrates, this award is *ultra vires* in that it (1) directs non-competitive promotions, (2) interferes with management rights preserved by the Federal Labor-Management Relations Statute (Statute), (3) improperly expands the authority of the arbitrator, (4) is incomplete, ambiguous and/or contradictory so as to make implementation of the award impossible and (5) does not draw its essence from the Agreement.

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 Government-wide regulations, and existing and future decisions of outside authorities binding on the Department.” This is instructive, initially, with respect to the first paragraph of the arbitrator’s Order in this matter. Therein, the arbitrator states that “The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees....” The language of Article 13, Section 13.10 does not contain the term “promoting” which the arbitrator quotes in her order (A-1 p 2). Here, then, the arbitrator exceeded her authority as defined by the Agreement in Article 23, Section 23.10 (A-3) which states in pertinent part “The arbitrator shall not have the authority to add to, subtract from or modify any of the terms of this Agreement or any supplement thereto.” The arbitrator, exceeding her authority, clearly added to the Agreement giving the reader the impression that

Article 13 requires the Agency to promote from within rather than recruit from without. Thus, the Order is deficient in that it does not draw its essence from the Agreement. Moreover, the Order is contrary to law in that it restricts managements rights under Section 7106(a)(1)(C) (i) and (ii) of the Statute to make selections for appointments from any appropriate source, which is another deficiency.

These exceptions demonstrate that the arbitrator, by issuing the Order, blatantly flaunted this Article 3, Section 3.01 of the Agreement, and the obligation of all arbitrators, in all cases, to honor the terms of the agreements under which they are employed.

**Non-competitive Promotions:** The award directs non-competitive promotions to the grievants retroactive to 2002. Each of the four alternative remedies, as demonstrated below, produces that same result (A-1 pp. 2-4). Thus it violates 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-4). 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-5 pp. 8-9, 12-13, 15-16). Thus, the award conflicts with applicable Federal regulations. The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor relations cases. *Defense Mapping Agency and NFFE Local 1827, 43 FLRA No. 14 (1991).* (A-6) In light of the foregoing, the award cannot be allowed to stand.

**Alternative Remedy #1:** This requires the placement of employees into existing, but unidentified, career ladder positions with promotion potential to the GS-13 level without competition. As noted above, this remedy violates the Code of Federal Regulations (A-4). The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor-management relations. *Delaware National Guard and Assn. Of Civilian Technicians, 5 FLRA No. 9 (1981) (A-7)*

---

**Alternative Remedy #2:** This directs the grievants to be selected for unidentified vacancies for which they applied and given retroactive grade increases (A-1 p 3). This aspect of the Order, read in conjunction with the arbitrator's defined class of grievants (A-1 p 4) equates to nothing but nonsense. The defined class of grievants is "All bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series , which was posted between 2002 and present. This includes BUE's (sic) In positions referenced in Joint Exhibits 2, 3, 4, 7G and Union Exhibits 1 and 9." This definition expands the class to an undefined scope beyond employees occupying positions referenced in the record. Neither does the record nor the arbitrator in this matter identify the employees who applied for the positions with GS-13 promotion potential. In her original decision, the arbitrator identified only three employees who applied for the positions with greater promotion potential (A-5 pp 12-13). Thus, this alternative remedy is incomplete to the extent

that it makes implementation of the award impossible. *Delaware National Guard supra.* (A-7)

Accordingly, this alternative remedy is deficient.

**Alternative Remedy #3:** This remedy directs the Agency to set aside selections for positions it made in 2002 and rerun all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. Again, the vacancy announcements are not identified, and, again, the arbitrator exceeded her authority. Here, the arbitrator directs that the original selections be set aside. She did not find, however, that the original selectees could not have been selected if the Agency had followed proper procedures. Thus, the arbitrator exceeded her authority, and, accordingly, this alternative remedy is deficient. *U.S. DOL Mine Safety and AFGE Local 2519, 40 FLRA No.76 (1991).* (A-8)

**Alternative Remedy #4:** This alternative remedy is nothing more than a reiteration of Alternative Remedy #1. The direction to place unidentified affected BUE's (sic) into unclassified position descriptions is a distinction without a difference in regard to Alternative Remedy #1. It must be noted that both Alternative Remedy #1 and Alternative Remedy #2 direct the placement of employees into positions with greater promotion potential than that for which they ever competed. The only distinction, which is not a difference, is that #1 directs placement into existing career ladder positions while #2 directs the Agency to establish positions and promote employees. As noted above, this is a violation of the Code of Federal Regulations and renders both remedies deficient. The additional deficiency of Alternative

Remedy #4 is that it violates management's rights to determine the organization, numbers, types and grades of positions under Section 7106(a)(1) and (b)(1) of the Statute.

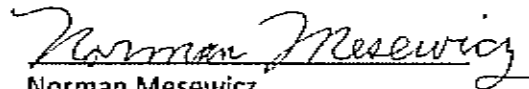
Lastly, the arbitrator exceeded her authority by resolving an issue not before her. The issue in question was an alternative remedy to her initial remedy in this matter which the Authority found to be contrary to law. (A-2) The arbitrator went well beyond that scope, and ordered the Agency to stop advertising positions that require employees to take downgrades to secure greater promotion potential characterizing such as a "constructive demotion". It is well established that an arbitrator exceeds his or her authority by, among other things, resolving an issue not submitted to arbitration. *INS and AFGE, 43 FLRA No. 73 (1992)*. (A-9) The Authority's Order referenced nothing regarding the issuance of prospective vacancy announcements by the Agency. Moreover, the concept of "constructive demotion" is nonexistent in Federal Sector personnel law/labor-management relations and the arbitrator cites no authority for creating that alien notion. In this regard, it must be noted that employees must apply for such lower graded positions, and, in so doing seek voluntary downgrades. Accordingly, it must be concluded that the arbitrator based this portion of her award on a nonfact. Thus, this aspect of the arbitrator's Order is deficient and cannot stand. This part of the Order is also based on a nonfact since Agency employees who apply for and are placed in positions at a lower grade in order to acquire greater promotion potential are always granted the "maximum payable rate", and, thus, are never "constructively demoted". *5 C.F.R. 531.221-223* (A-10)

## CONCLUSION

The foregoing analysis clearly demonstrates that the Order and "Alternative" remedies issued by the arbitrator are replete with deficiencies and must be overturned. Specifically, the arbitrator rendered four remedies while the Authority directed that she only render one. The arbitrator directed non-competitive promotions, in violation of the Code of Federal Regulations. The Order herein interferes with management's reserved rights under the Statute, and the arbitrator improperly expanded her authority by adding to the Parties' Agreement, and deciding an issue which was not before her. Lastly, the Order is incoherent to the extent that its implementation is impossible and did not draw its essence from the Agreement.

In light of the above, the Agency requests that the Authority vacate the Order and multiple remedies issued by the arbitrator in their entirety and order this case finally closed.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Norman Mesewicz".

Norman Mesewicz  
Agency Representative

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

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the Agency Exceptions to the above-captioned arbitration decision were served on this 10<sup>th</sup> day of February 2012, upon the following in the manner indicated:

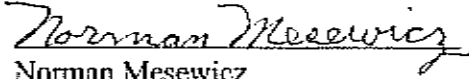
**By Us Mail:**

Gina K. Grippando  
Chief, Office of Case Intake and Publication  
Federal Labor Relations Authority  
1400 K Street, NW Suite 201  
Washington, DC 20424-0001

Michael J Synider, Esq.  
Ari Taragin, Esq.  
Snider & Associates, LLC  
104 Church Lane, Suite 100  
Baltimore, MD 21208

Carolyn Federoff, Esq., Executive Vice President  
AFGE Council 222  
108 Ashlaud Street  
Melrose, MA 02176

Dr. Andree McKissick, Arbitrator  
2808 Navarre Drive  
Chevy Chase, MD 20815-3802

  
Norman Mesewicz,  
Agency Representative

# EXHIBIT

C

IN THE MATTER OF ARBITRATION BETWEEN:

|                                                                                       |   |                                  |
|---------------------------------------------------------------------------------------|---|----------------------------------|
| American Federation of Government,<br>Employees (AFGE), Council of HUD<br>Locals 222, | ) |                                  |
|                                                                                       | ) | Issue: Fair and Equitable Remedy |
|                                                                                       | ) |                                  |
| UNION,                                                                                | ) | Case No. 03-07743                |
|                                                                                       | ) |                                  |
| v.                                                                                    | ) | Remanded at: 59 FLRA 630         |
|                                                                                       | ) |                                  |
| US Department of Housing & Urban<br>Development,                                      | ) | FLRA Docket No. 0-AR-4586        |
|                                                                                       | ) |                                  |
| AGENCY.                                                                               | ) | Arbitrator:                      |
|                                                                                       | ) | Dr. Andree Y. McKissick, Esq.    |
|                                                                                       | ) |                                  |

CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Opposition to the Agency's Exceptions in the above-captioned matter were served on this 23<sup>rd</sup> day of March, 2012.

FLRA

Gina K. Grippando  
Chief, Office of Case Intake and Publication  
Federal Labor Relations Authority  
1400 K Street, NW Suite 201  
Washington, DC 20424-0001

***ONE ORIGINAL & FOUR COPIES  
SENT VIA CERTIFIED MAIL***

Agency

Norman Mesewicz, Deputy Director, LER  
U.S. Dept. of Housing and Urban Development  
451 7th Street, SW, Room 2150  
Washington, D.C. 20410

***SENT VIA MAIL***

Arbitrator

Dr. Andree McKissick  
Arbitrator  
2808 Navarre Drive  
Chevy Chase, MD 20815-3802

***SENT VIA MAIL***

  
\_\_\_\_\_  
Jacob V. Statman, Esq.

IN THE MATTER OF ARBITRATION BETWEEN:

|                                                                                       |   |                                              |
|---------------------------------------------------------------------------------------|---|----------------------------------------------|
| American Federation of Government,<br>Employees (AFGE), Council of HUD<br>Locals 222, | ) |                                              |
|                                                                                       | ) | Issue: Fair and Equitable Remedy             |
|                                                                                       | ) |                                              |
| UNION,                                                                                | ) | Case No. 03-07743                            |
|                                                                                       | ) |                                              |
| v.                                                                                    | ) | Remanded at: 59 FLRA 630                     |
|                                                                                       | ) |                                              |
| US Department of Housing & Urban<br>Development,                                      | ) | FLRA Docket No. 0-AR-4586                    |
|                                                                                       | ) |                                              |
| AGENCY.                                                                               | ) | Arbitrator:<br>Dr. Andree Y. McKissick, Esq. |
|                                                                                       | ) |                                              |

**UNION'S OPPOSITION TO AGENCY'S  
EXCEPTIONS TO ARBITRATION DECISION**

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby submits its timely Opposition to the Agency's Exceptions to the Arbitration Decision in the above captioned case and in support thereof states as follows:

**JURISDICTION**

The Federal Labor Relations Authority has jurisdiction over this matter pursuant to 5 U.S.C. § 7105(2)(H) and 5 U.S.C. § 7122. The Remand Award was dated January 10, 2012. The Agency's Exceptions were dated February 10, 2012. On March 12, 2012, the Authority granted the Union's request for extension to file the Opposition to the Agency's exceptions. The Union's Opposition is timely filed.

## BACKGROUND

On January 10, 2012, the Arbitrator issued her Remedy Award (the “Remedy”) in the above captioned case. The Remedy was issued as a result of a remand in 59 FLRA 630. In that decision the Authority left the underlying violation found by the Arbitrator intact, but remanded the case to determine an appropriate remedy. Specifically, the Authority upheld the Arbitrator’s determination that the Agency violated law rule and regulation in not treating employees fair and equitable when it hired external applicants for higher promotion potential than current employees. *Id.* The Authority did, however, set aside the Arbitrator’s remedy in deciding that the proposed remedy – an organizational upgrade - involved classification issues, and the statute does not authorize the Arbitrator to change the promotion potential of employees’ permanent positions. *Id.*

Per the Authority, the remedy was set aside and the merits award of the underlying decision was remanded for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. While the Parties did engage in settlement discussions they were unable to reach settlement. As such, the Arbitrator issued an order requiring the Parties to submit their submission on remedy no later than September 15, 2011. Upon the unsuccessful completion of settlement discussions, however, the Agency ceased its involvement in this case. It failed to provide any type of response to the Arbitrator or Union concerning the Arbitrator’s deadline for submission of a proposed remedy or a reply to the Union’s submission. Exhibit A<sup>1</sup>. It is interesting and important to note, that despite having been given repeated opportunities to be heard by the Arbitrator, the Agency disregarded those opportunities and is only now, for the first time, taking any issue with the Arbitrator’s Remedy.

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<sup>1</sup> Exhibit A contains a detailed log concerning the actions and omissions of the Agency on the remand.

The Remedy Order included four alternative remedies in case the Authority vacated any of the remedies. On February 16, 2012, the Union received the Agency's Exceptions. While it is difficult to fully understand what the Agency's exceptions are, it appears that the Agency is contending that the Remedy Order is deficient because it exceeded the Arbitrator's authority, is contrary to law, and fails to draw its essence from the Agreement<sup>2</sup>. For the reasons that follow the Exceptions should be denied.

### **ARGUMENT & ANALYSIS**

#### **I. The Arbitrator did not exceed her Authority by issuing Alternative Remedies.**

The Agency contends that the Arbitrator exceeded her authority by issuing four remedies, when the Authority directed that she "only render one." Exceptions, p. 2. Such an argument is flawed. As relevant here, the Authority will find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *AFGE Local 695 v. U.S. Dep't of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777 (2005). The Authority, like the federal courts, accords arbitrators substantial deference in the determination of the issues submitted to arbitration. *AFGE Local 2978 v. Veterans Admin.*, 24 FLRA 447 (1986). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.*

Authority precedent has clearly established that Arbitrators may issue alternative remedies in situations where either Party or the Authority finds one of the remedies invalid. *NAIL, Local 5 v. Dept. of Defense, DLA*, 65 FLRA No. 107 (February 14, 2011) (Authority

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<sup>2</sup> It is unclear if the Agency is attempting to include additional Exceptions. However, it is clear that none of their other contentions are valid grounds for review pursuant to 5 CFR § 2425.6

upheld Arbitrator's decision ordering two alternative remedies); *AFGE Local 2814 v. U.S. Department of Transportation*, 14 FLRA 240 (1984) (Authority addressed all multiple alternative remedies ordered by Arbitrator). Further, the Authority has held that when an arbitrator has issued an alternative or additional remedy that is not deficient and that remains after the deficient portion is set aside, the matter is not remanded. *United States Dep't of Agric., Fed. Grain Inspection Serv., Grain Inspection, Packers & Stockyards Admin.*, 58 FLRA 98, 100 (2002).

It is clear that the Arbitrator's written Remedy does not require the Agency to implement more than one remedy. Rather, in the interest of ending almost 10 years of litigation, the Arbitrator issued a thorough and complete decision with numerous alternative remedies in case the Authority struck down any of the other remedies. Contrary to the Agency's Exceptions, the Authority decision at 59 FLRA 630 did not preclude the Arbitrator from issuing more than one remedy and by doing so the Arbitrator did not exceed her authority. This exception, therefore, must be denied.

## **II. Remedy No. 1 is valid, legal, and is supported by Authority precedent.**

In her Remedy Order the Arbitrator ordered Remedy No. 1 as follows:

That the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions with promotion potential to the GS-13 level. Affected BUE's shall be processed into positions at the grade level which they held at the time of the violations noted in my prior findings, and (if they met time-in-grade requirements and had satisfactory performance evaluations), shall be promoted to next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002. **Exhibit B, p. 2-3**

**A. Remedy No. 1 does not require any illegal promotions.**

The Agency argues that Remedy No. 1 is contrary to law, rule or regulation. Under Section 7122(a) of the Federal Service Labor–Management Relations Statute, an award is deficient if it is contrary to any law, rule, or regulation; or it is deficient on other grounds similar to those applied by Federal courts in private sector labor-management relations. As is discussed below, the award in Remedy No. 1 is not contrary to law, rule or regulation.

The Agency claims that Remedy No. 1 requires the placement of employees into existing, but unidentified, career ladder positions with promotion potential to the GS-13 level without competition. Exceptions, p. 4. The Agency further argues that the remedy is in violation of 5 CFR §335.103(c)(v) because “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” requires a competitive procedure. In sum, the Agency’s argument is that the Remedy calls for an unlawful non-competitive promotion.

However, the Remedy clearly does not require any promotions at all. Rather, the Arbitrator is simply requiring the Agency to process retroactive selections to positions for affected Grievants – those Grievants who were adversely affected by the Agency’s violations of the CBA. The Arbitrator’s underlying merits award which was upheld, found that, “but for” the Agency’s violations, the Grievants would have been selected for the career ladder positions at issue. **Exhibit B.** The Remedy is a reconstruction of exactly what would have occurred “but for” the violations noted in the prior merits decisions. Indeed, the Authority has long held that creating a remedy based upon a “but for” proper reconstruction of what an Agency would have done had it not violated the law or contract is appropriate. *AFGE Local 3448 v. Social Security Administration*, 54 FLRA 142, 148 (1998) (finding award ordering agency to select grievant for

next available position properly reconstructed what agency would have done absent violation of parties' priority consideration provision). While it is true that a Grievant will, if all of the other conditions are met, receive a promotion from this retroactive selection, that would only be based on the nature of the Agency's violation -- improperly failing to select the Grievant into career ladder positions, which naturally lead to career ladder promotions. As such, Remedy No. 1 does not include any unlawful competitive or non-competitive promotions and is therefore not contrary to law, rule or regulation.

**B. Non-competitive promotions are appropriate and reasonable where an Agency fails to properly consider an applicant during the competitive procedure.**

Assuming *arguendo* that the Authority reads Remedy No. 1 to include a promotion, the promotion would be a legal and valid non-competitive promotion. As stated above, the Agency relies on 5 CFR §335.103(c)(v) in support of its argument that any promotion requires a competitive procedure. The Agency, however, failed to read or include the exclusion to §335.103(c)(v). Specifically, §335.103(c) states: "except as provided in (c)(2) and (c)(3) of this section, competitive procedures in agency promotion plans apply....." 5 CFR §335.103(c). It is clear, therefore, that there are conditions under (c)(2) and (c)(3) to which the competitive procedures are inapplicable.

The exclusion in §335.103(c)(3)(vi) states that competitive procedures do not apply in a situation where a candidate was not given proper consideration in a competitive promotion action. In this case, the Arbitrator's Remedy No. 1, granting non-competitive promotions includes her finding that the Agency failed to properly consider candidates for promotion. In the underlying Decision, the Arbitrator made a finding of fact, and found that "the evidence supports the Union's case that the Grievants were not considered for selections." Exhibit B, p.15. The

Arbitrator reached this conclusion in part by finding that “bargaining unit employees applied for positions with higher promotion potential that were posted internally and externally, but that the Agency in all cases selected external applicants.” Exhibit B. pp.12-13.

Pursuant to 5 CFR §335.103(c)(3)(vi), and because the Agency failed to properly consider the grievants for the previous vacancy announcement, non-competitive promotions are both legal and valid. *NTEU Chapter 3 v. Internal Revenue Service*, 60 FLRA 742 (2005) (holding that Arbitrators have the authority to compel non-competitive promotions pursuant to 5 CFR §335.103(c)(3)(vi)).

As such, Remedy No. 1 is neither contrary to law, rule or regulation, nor is it deficient on any grounds similar to those applied by Federal courts in private sector labor-management relations<sup>3</sup>. The Agency’s Exception with regard to Remedy No. 1 must be denied.

### **III. Remedy No. 2 is valid, legal, and is supported by Authority precedent.**

In her Remedy Order the Arbitrator ordered Remedy No. 2 as follows:

In the alternative and only in the event the FLRA vacates ORDER No. 1 above, and pursuant to my finding that “but for” the Agency’s violations, the Grievants would have been selected for the subject vacancy for which they applied, this Arbitrator ORDERS that the Agency retroactively select the affected GS-12 employees into the subject vacant career ladder positions with retroactive grade increases. The Agency shall process such selections within thirty (30) days, and calculate and pay affected employees all back pay and interest due since 2002 Exhibit B, p. 3.

The Agency argues that the Arbitrator makes implementation of Remedy No. 2 impossible by defining the class as “All bargaining unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead (sic) to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present.” The Agency contends that this definition expands the class to

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<sup>3</sup> It must be noted that the Agency’s Exceptions fail to describe or explain which Federal decision concerning private sector labor management-relations is at issue here.

an undefined scope beyond employees occupying positions referenced in the record. Exceptions, p. 4.

In order for an award to be found deficient on the basis that it is incomplete, ambiguous, or contradictory so as to make implementation impossible, the appealing party must show that implementation of the award is *impossible* because the meaning and effect of the award is too unclear or uncertain. *AFGE Local 1843 v. U.S. Department of Veterans Affairs, Medical Center, Northport, New York*, 51 FLRA 444, 448 (1995). The Agency takes issue with the definition of the class, yet fails to explain why implementation of Remedy No. 2 is impossible.

Moreover, the Agency is arguing over the merits of the case and its own failures in failing to preserve or produce evidence relevant to the matter. In the underlying Decision, the Arbitrator found an adverse inference against the Agency for failing to properly maintain and record vacancy announcements and applications. As the Arbitrator previously stated: “[C]learly there is a right to an adverse inference because there is duty to preserve and protect pertinent and relevant documents.” Exhibit B, pp. 10-14 (finding that an adverse inference is appropriate due to the Agency’s failure to keep and maintain proper records).

If there is any doubt as to which employees are affected, the fault lies with the Agency. The Union’s position is that there is no doubt about which employees are affected and in any case can identify the class of affected employees through Agency documents which are in the Union’s possession and/or in Agency data systems. It is premature to conclude that the Remedy is not able to be implemented. Indeed, the Agency is aware of affected employees, as some of them testified in the case already. Others are easily identifiable through the Agency’s data since the Vacancy Announcements have been provided and the records exist which tie those Vacancy Announcements to applicants and selectees. Further, the Agency’s pay records reveal precisely

which employees in the affected job series are stagnated at the GS-12 level, and which “leapfrogged” over stagnated employees.

The Arbitrator’s adverse inference, which has already been upheld by the Authority, included changing the scope of the class based on the Union’s attempts to amend the grievance. The Agency must not be permitted to destroy evidence and then complain that the evidence does not exist. Further, when as here, an arbitrator has found the specific requirements giving rise to entitlement to backpay, there is no requirement for the arbitrator to identify the specific employees entitled to backpay and calculate the amount of backpay. *NATCA v. Federal Aviation Administration*, 55 FLRA 322 (1999). While implementing Remedy No. 2 might be difficult or expensive for the Agency, it is not impossible; as such Remedy No. 2 is not deficient and the Exception must be denied.

#### **IV. Remedy No. 3 is valid, legal and is supported by Authority Precedent.**

In her Remedy Order the Arbitrator ordered Remedy No. 3 as follows:

In the alternative, and only in the event the FLRA vacates ORDER No. 1 and 2 above, this Arbitrator hereby ORDERS that the violative Agency selections from 2002 to present be set aside, that the Agency provide each Grievant with one priority consideration and that the Agency must re-run all of the vacancies which were found to have been in violation of the CBA between 2002 and the present. The Agency should process such selections within sixty (60) days, and calculate and pay affected employees all back pay and interest due since 2002. Remedy, p. 3-4.

The Agency argues that Remedy No. 3 is deficient because by failing to identify the vacancy announcements, and failing to find that the original selectees could not have been selected if the Agency had followed proper procedures, the Arbitrator exceeded her authority. The Authority will only find that arbitrators exceed their authority when they resolve an issue that was not submitted to arbitration. *AFGE Local 695 v. U.S. Dep’t of the Treasury, U.S. Mint, Denver, Colo.*, 60 FLRA 777 (2005). The Authority, like the federal courts, accords arbitrators

substantial deference in the determination of the issues submitted to arbitration. *AFGE Local 2978 v. Veterans Admin.*, 24 FLRA 447 (1986). In cases in which the parties have stipulated the issue for resolution, arbitrators do not exceed their authority by addressing any issue that is necessary to decide the stipulated issue or by addressing any issue that necessarily arises from issues specifically included in the stipulation. *Id.*

As is discussed *supra*, the Arbitrator's Remedy is not deficient as it requires the Agency to conduct legal non-competitive promotions to a class of grievants defined by the Arbitrator as a result of an adverse inference ruling.

With regards to the portion of Remedy No. 3 requiring the original selections be set aside, such a decision is in accordance with Authority precedent. 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); *SSA Chicago*, 56 FLRA 274 (same). As such, in issuing Remedy No. 3, the Arbitrator did not exceed her authority and the remedy is valid and legal. The Agency's Exception to Remedy No. 3 must be denied.

**V. Remedy No. 4 is valid, legal and is supported by Authority Precedent.**

In her Remedy Order the Arbitrator ordered Remedy No. 4 as follows:

In the alternative, and only in the event the FLRA vacates ORDER No. 1, 2 and 3 above, that the Agency retroactively place all affected BUE's into 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 this Arbitrator ORDERS the Agency to classify and grade those PD's, retroactively placing the Grievants in them effective 2002, with back pay and interest. Remedy, p. 4.

The Agency argues that Remedy No. 4 is deficient for the same reason as Remedy No. 1. As is discussed *supra*, Remedy No. 1 is not deficient. The Agency further argues that Remedy No. 4

is deficient in that it violates management's rights to determine the organization, numbers, types and grades of positions under Section 7106(a)(1) and (b)(1). Exceptions, p. 6.

In resolving whether an arbitrator's award violates management's rights under § 7106 of the Statute, the Authority applies the framework established in *NTEU Chapter 201 v. Department of Treasury, Bureau of Engraving and Printing*, 53 FLRA 146 (1997). Upon finding that an award affects a management right under § 7106(a), the Authority applies a two-prong test to determine if the award is deficient. Under prong I, the Authority examines whether the award provides a remedy for a violation of either applicable law, within the meaning of Section 7106(a)(2) of the Statute, or a contract provision that was negotiated pursuant to Section 7106(b) of the Statute. Under prong II, the Authority considers whether the arbitrator's remedy reflects a reconstruction of what management would have done had it not violated the law or contractual provision at issue. See *BEP*, 53 FLRA at 151-154. (internal citations omitted).

Under Authority precedent, an award requiring an agency to make a selection for an appointment affects management's right to make selections under § 7106(a)(2)(C) of the Statute. See, e.g., *Soc. Sec. Admin., Woodlawn, Md.*, 54 FLRA 1570, 1577 (1998). In this case, the Arbitrator ordered the Agency to select grievants for promotion. In doing so she found that but for the Agency's violations of law, rule and regulation the grievants at issue would have been selected for the positions at issue. The Agency fails to explain how or why Remedy No. 4 violates management's rights in light of the holding in *BEP*. Indeed, under Authority precedent, an arbitrator's interpretation of a priority consideration provision as requiring an agency to select a candidate who meets the minimum standards for a job does not excessively interfere with management's right to make selections. *United States Dep't of Health and Human Serv., Centers for Medicare and Medicaid Serv.*, 60 FLRA 437 (2004). While Remedy No. 4 does not include

the priority consideration factor found in Remedy No. 3, the same test applies and would support a finding that the Remedy does not unlawfully interfere with Management's rights per the two prong test in *BEP*.

The Authority has long held that creating a remedy based upon a "but for" proper reconstruction of what an Agency would have done had it not violated the law or contract is appropriate. *SSA, Branch Office, East Liverpool, Ohio*, 54 FLRA 142, 148 (1998) (finding award ordering agency to select grievant for next available position properly reconstructed what agency would have done absent violation of parties' priority consideration provision). As such, Remedy No. 4 is not deficient and should not be set aside. The Agency's Exception with regard to this issue must be denied.

**VI. The Arbitrator did not exceed her authority when she Ordered the Agency to Stop Advertising Certain Positions.**

In addition to the four alternative remedies ordered by the Arbitrator, she further ordered the Agency to stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. Remedy, p. 4.

The Agency argues that the Arbitrator exceeded her authority by resolving an issue not before her. However, such an argument must fail. The Issues before the Arbitrator in the underlying grievance were:

1. Whether the Agency violated the Collective Bargaining Agreement, Law Rule, or other regulation when it failed to treat bargaining unit employees fairly and equitably in posting vacancy announcement from May 2002 until the present?
2. If so, what are the appropriate remedies?

**Exhibit B, p. 3.**

As has been discussed, after finding that the Arbitrator's Award was deficient, the Authority remanded the matter back to the Arbitrator to determine an "alternative remedy." The Arbitrator is thus left with deciding Issue No. 2 of the underlying case; that is "what are the appropriate remedies." The Agency argues that the Arbitrator went "beyond that scope" in issuing this order, but completely fails to explain how or why. The issue of remedies was submitted for arbitration. There is nothing that precluded the Arbitrator from issuing the cease and desist order in the underlying decision, as such, there is nothing that precludes the Arbitrator from issuing this cease and desist order now.

**VII. The Matter must be Remanded if none of the Remedies are Upheld.**

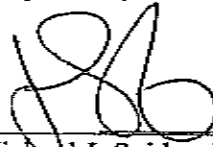
The Agency argues in its conclusion that: "In light of the above, the Agency requests that the Authority vacate the Order and multiple remedies issued by the Arbitrator in their entirety and order this case finally closed." Exceptions, p. 7. It is well established that in cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g. U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). Following this principle, the Authority remanded this case at 59 FLRA 630. Further, the Arbitrator retained jurisdiction to provide alternative relief in the event that any relief provided is found to be deficient. The Arbitrator also retained jurisdiction over an award of attorney fees upon petition from the Union.

In the extremely unlikely event that the Authority vacates all four alternative remedies, the principle must be followed yet again. The underlying violation must be left undisturbed and the matter should be remanded yet again for settlement, or submission to the Arbitrator.

### **CONCLUSION**

For all of the foregoing reasons, the Authority should find that the Remedy Decision was not deficient, and all alternative Remedies therein, No. 1- No. 4, are not deficient. As a result, the Authority should dismiss the Agency's Exceptions.

Respectfully Submitted,



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### **EXHIBITS:**

Exhibit A – Documentation relating to Agency's Failure to Respond

Exhibit B – Arbitrator's Underlying Merit Award

EXHIBIT

D

## Jacob Statman

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**From:** M Snider  
**Sent:** Wednesday, October 10, 2012 3:57 PM  
**To:** Mesewicz, Norman  
**Cc:** Carolyn Federoff; Jacob Statman; Jason Weisbrot; William L Biggs; Jacqueline Mercer-Hollie; James M Reynolds HUD LR  
**Subject:** AFGE 222 v HUD Fair and Equitable Case - McKissick Award (Noncompliance by HUD)  
**Importance:** High

Mr. Mesewicz:

It is apparent from the below email that HUD is refusing to comply with the final, binding FLRA Decision upholding the Arbitrator's Award.

In particular, the Award was clear and unequivocal that Remedy #1 was ordered and that the alternative Remedies would be reached if, and only if, the FLRA vacated Remedy #1.

Since the FLRA did not vacate Remedy #1, it is the remedy that was ordered by the Arbitrator.

If HUD does not state its agreement to timely comply with the FLRA Decision, and Remedy #1 in the Award, we will have no option but to pursue noncompliance and/or a ULP.

Please inform us by COB tomorrow as to whether HUD intends to implement Remedy # 1.

Thanks.

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On Oct 9, 2012, at 3:14 PM, "Mesewicz, Norman" <[Norman.Mesewicz@hud.gov](mailto:Norman.Mesewicz@hud.gov)> wrote:

Mike,

Below is the Department's position regarding compliance with arbitrator McKissick's order in case FMCS No: 03-07743 (Attached).

In her order, the arbitrator enumerates four potential remedies. A fair reading of the order reveals that the implementation of three of those remedies, #1, #2 and #4 would cause management to violate the Code of Federal Regulations and/or the Federal Labor-Management Relations Statute.

Specifically, remedies #1, #2 and #4 direct that management non-competitively promote affected employees which may not be done. In this regard, please see 5 C.F.R. Section 335.1033(c)(v). Additionally, remedy #2 cannot be legally implemented since it directs management to classify certain positions at the GS-13 level in violation of Section 7121(c)(5) of the Federal Service Labor-Management Relations Statute.

With respect to remedy #3, I can state the following. Management is working to identify, to the extent possible, the incumbents at the time of the positions identified in the November 13, 2002 Grievance of the Parties. Next, of that group, those who currently remain HUD staff will be identified. This then will constitute the group of employees eligible for relief pursuant to remedy #3 of the order.

Lastly, HUD retains its right to advertise positions consistent with law, rule, regulation and the HUD/AFGE Agreement.

The Department is available to meet and discuss other avenues of resolving this matter at a mutually agreeable time.

Norman