

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

**UNITED STATES DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT
(Agency)**

and

**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD LOCALS 222
(Union)**

**0-AR-4586
(65 FLRA 433 (2011))
(66 FLRA 867 (2012))**

ORDER TO SHOW CAUSE

October 9, 2014

This matter is before the Authority on exceptions filed by the Agency on September 4, 2014, to an implementation-meeting summary issued by Arbitrator Andrée Y. McKissick on August 2, 2014. The Union requests that the Authority issue an order directing the Agency to show cause why its exceptions should not be dismissed as untimely, and, in the alternative, requests an extension of time to file its opposition. For the reasons that follow, the Authority directs the Agency to show cause why the Authority should not dismiss its exceptions as untimely filed.

I. Background

This case has an extensive procedural history. It originates from a grievance filed by the Union, alleging that the Agency violated the parties' agreement by failing to promote the grievants. In a merits award (merits award), the Arbitrator sustained the grievance and awarded an "organizational upgrade" to the grievants.¹ But, in *U.S. Department of HUD (HUD I)*,² the Authority set aside that award, as contrary to law, and remanded the matter to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.³

¹ *U.S. Dep't of HUD*, 65 FLRA 433, 433 (2011) (*HUD I*) (citation omitted).

² *Id.*

³ *Id.* at 436.

In the remedial award on remand (remedial award), the Arbitrator “provided four alternative remedies and directed the Agency to stop advertising positions in a manner that violates the parties’ [agreement].”⁴ The Arbitrator directed the Agency to implement the highest-priority remedy that was not “found to be inconsistent with law or otherwise [un]available.”⁵ The remedy with the highest priority was:

That the Agency process retroactive permanent selections of all affected [bargaining-unit employees (BUEs)] 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 [the] next career ladder grade(s) until the journeyman level. The Agency shall process such promotions within thirty . . . days, and calculate and pay affected employees all back[p]ay and interest due since 2002.⁶

The Arbitrator further defined the “[c]lass of [g]rievants” subject to the remedy as:

All [BUEs] in a position in a career ladder (including at the journeyman level), where that career ladder le[d] 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 [the] present.⁷

The Agency filed exceptions to the remedial award, and the Authority dismissed those exceptions in *U.S. Department of HUD (HUD II)*, because the Agency could have, but did not, present those arguments in the proceedings before the Arbitrator.⁸

Following the Authority’s dismissal of the Agency’s exceptions to the remedial award in *HUD II*, the Arbitrator held a series of “implementation meetings” with the parties.⁹

In a March 13, 2014, summary of the first meeting (first summary), which was held on February 4, 2014, the Arbitrator explained that the purpose of that meeting was to “clarify the members of the class [of grievants] that was defined in the [remedial a]ward,” and its “inten[t] [was] solely to clarify with specificity which [BUEs] are eligible class members.”¹⁰ She stated that “[n]othing [in the first summary] should be construed as a new requirement or modification of the existing [remedial a]ward,” because that award is

⁴ *U.S. Dep’t of HUD*, 66 FLRA 867, 867 (2012) (*HUD II*).

⁵ *Id.* at 868 (quoting Remedial Award at 5) (internal quotation marks omitted).

⁶ Remedial Award at 2-3.

⁷ *Id.* at 4.

⁸ 66 FLRA at 869.

⁹ See Exceptions, Attachs. 16-17.

¹⁰ First Summary at 2.

“clear and unambiguous.”¹¹ As an “example,” the Arbitrator stated that, based on the remedial award, all six Union witnesses who testified at the arbitration hearing are eligible class members.¹²

In a May 17, 2014, summary of the second meeting (second summary), which was held on March 26, 2014, the Arbitrator explained, in pertinent part:

It became apparent through discussion that the [six Union] witnesses who testified at the hearing were in two job series, *GS-1101* and *GS-236*. *Employees encumbering those job series are clearly within the scope of the [remedial a]ward*, although they comprise a small portion of the job series covered by the [remedial a]ward, and therefore will serve as the basis for the next round of [g]rievants to be promoted with back[p]ay and interest. A subset of the *GS-1101* series is the PHRS (Public Housing Revitalization Specialist) job title. Although *the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others)*, the PHRS group is discrete and therefore the [p]arties were directed to work through the *GS-1101* series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with back[p]ay and interest, among other relief. The [p]arties were directed to then move on to the CIRS (Contract Industrial Relation Specialist) employees in the *GS-246* series, the other *GS-1101* employees, and then others in other applicable job series, until implementation is complete.¹³

The Arbitrator held a third implementation meeting on June 12, 2014, and issued an implementation summary (third summary) on August 2, 2014. In the third summary, the Arbitrator reiterates her instructions from the second summary:

As stated in prior [s]ummaries, this Arbitrator has instructed the [p]arties to make substantial progress on identifying class members. The [p]arties were instructed that, based upon this Arbitrator’s [remedial a]ward, *as an example, all GS-1101 employees at the GS-12 level from 2002 to [the] present were to be promoted . . . with back[p]ay and interest, as of their earliest date of eligibility*. As a simple subset that should be easily identifiable, this Arbitrator instructed the [p]arties to identify all PHRS employees who would comprise the first set of class members.¹⁴

The Arbitrator further stated that, “[a]s noted on prior occasions, this [a]ward is to be interpreted broadly so as to include the maximum amount of class members as possible,”¹⁵ and the parties “shall continue working to identify additional class

¹¹ *Id.*

¹² *Id.*

¹³ Second Summary at 5 (emphasis added).

¹⁴ Third Summary at 1 (emphasis added).

¹⁵ *Id.* at 3-4.

members as set forth in the [remedial a]ward and as stated in the meeting.”¹⁶ She concluded that “[n]othing . . . in this [s]ummary should be construed as a new requirement or modification of the existing [remedial a]ward.”¹⁷

Here, the Agency has filed exceptions to the third summary, which it alleges constitutes a “[m]odification” to the “final and binding” remedial award.¹⁸ Specifically, the Agency alleges that the third summary modifies the remedial award by: (1) “[r]edefining the class of grievants to include all employees in the GS-1101 series, regardless of whether the employees encompass a career ladder at a lower journeyman grade than the target grade of a position with the same job series”;¹⁹ and (2) “[r]edefining the application of factors used to identify grievants eligible for the remedy of a retroactive promotion to the GS-13 level.”²⁰ According to the Agency, the third summary “direct[s] the Agency to promote all employees in the GS-1101 series from . . . grade 12 to . . . grade 13,” which “modifie[s] the class of grievants to include all employees at . . . grade 12 in the GS-1101 series, regardless of whether a higher target grade exists.”²¹

In response, the Union has requested permission from the Authority to file, and has filed, a motion (Union’s motion) requesting that the Authority issue to the Agency an order to show cause why its exceptions should not be dismissed as untimely. In the alternative, the Union requests that the Authority grant it an extension of time to file its opposition to the Agency’s exceptions.

In support of its motion for an order to show cause, the Union states that, it is “clear and undisputed” that, in the second summary, “the Arbitrator intended, and ordered, that all employees that encumbered the *entire* GS-1101 series were eligible class members.”²² Even assuming that the second summary constituted a modification to the remedial award, the Union argues that the Agency should have filed exceptions to that second summary, but it did not. And, as the third summary contains only a restatement of the second summary, asserts the Union, the Agency’s exceptions to the third summary are untimely.²³

The Agency has requested permission from the Authority to file, and has filed, a response (Agency’s response) opposing the Union’s motion for an order to show cause and request for an extension of time to file its opposition. The Agency asserts that the Union has failed to establish good cause to support its motion for an order to show cause and that the Union’s alternative request for an extension of time to file its opposition fails

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ Exceptions at 1.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ *Id.*

²² Union’s Motion at 4.

²³ *Id.* at 4-5.

to comply with the Authority's Regulations because the Union neither solicited nor identified the Agency's position on the request in its motion.²⁴

In response to the Agency's response, the Union has requested permission from the Authority to file, and has filed, a motion for an extension of time to file its opposition, in which it states that the Agency opposes the motion.

II. Discussion

The time limit for filing exceptions to an arbitration award is thirty days "after the date of service of the award."²⁵ The date of service is the date the arbitration award is deposited in the U.S. mail, delivered in person, deposited with a commercial delivery service that will provide a record showing the date the document was tendered to the delivery service or, in the case of e-mail or facsimile transmissions, the date transmitted.²⁶ Absent evidence to the contrary, an arbitration award is presumed to have been served by mail on the date of the award.²⁷ The time limit for filing exceptions may not be extended or waived by the Authority.²⁸

Further, under Authority precedent, only where an arbitrator modifies an award in such a way as to give rise to the deficiencies alleged in the exceptions does the filing period begin with the date of service of a supplemental award.²⁹

For the reasons that follow, it appears that the Agency's exceptions are untimely, because it does not appear that the third summary modifies either the remedial award – or the second summary – in a way that gives rise to the deficiencies alleged in the Agency's exceptions.³⁰

The third summary does not appear to modify the remedial award in a way that gives rise to the exceptions. As noted above, the remedial award identifies the class of grievants as "[a]ll [BUEs] in a position in a career ladder (including at the journeyman level), where that career ladder le[d] to a lower journeyman grade than the journeyman (target) grade of a career ladder of a position with the same job series"³¹ In the third summary, the Arbitrator states that, under the remedial award, "*as an example*, all GS-1101 employees at the GS-12 level . . . were to be promoted . . . with back[p]ay and interest, as of their earliest date of eligibility."³² To the extent the Arbitrator cites one series of employees who are covered by the explicit terms of the remedial award, this appears to be a clarification – and not a modification – of the remedial award. And, absent a modification that gives rise to the exceptions, they appear to be untimely.

²⁴ *Id.* at 4 (citing 5 C.F.R. § 2429.23(a)).

²⁵ 5 C.F.R. § 2425.2(b); *see also* 5 U.S.C. § 7122(b).

²⁶ 5 C.F.R. § 2425.2(c).

²⁷ *See Okla. City Air Logistics Ctr., Tinker Air Force Base, Okla.*, 32 FLRA 165, 167 (1988).

²⁸ 5 U.S.C. § 7122(b); 5 C.F.R. § 2429.23(d); *see also U.S. Info. Agency*, 49 FLRA 869, 871-73 (1994).

²⁹ *See, e.g., U.S. Dep't of the Navy, Mare Island Naval Shipyard, Vallejo, Cal.*, 52 FLRA 1471, 1474 (1997).

³⁰ *Id.*

³¹ Remedial Award at 4.

³² Third Summary at 1 (emphasis added).

Even assuming, without deciding, that the foregoing statement in the third summary constitutes a modification to the remedial award, the Arbitrator first specifically identified “all GS-1101 employees” as part of the class of grievants covered by the remedial award in the second summary.³³ In this connection, she states: “*Employees encumbering th[e GS-1101] job series are clearly within the scope of the [remedial a]ward, . . . and therefore will serve as the basis for the next round of [g]rievants to be promoted with back[p]ay and interest*”;³⁴ and “*the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others) . . .*”³⁵ And the third summary appears only to reiterate this point in the context of the remedial award: “The [p]arties were instructed that, based upon this Arbitrator’s [remedial a]ward, as an example, all GS-1101 employees at the GS-12 level from 2002 to [the] present were to be promoted . . . with back[p]ay and interest, as of their earliest date of eligibility.”³⁶ Therefore, even assuming that the Arbitrator modified the remedial award by including all GS-1101 employees in the class of grievants, the Agency should have filed exceptions when the Arbitrator first made that modification in the second summary. As the Agency waited to file its exceptions until after the Arbitrator reiterated this point in the third summary, which was well beyond thirty days after the Arbitrator issued the second summary, it appears that the Agency’s exceptions are untimely.³⁷

Based on all the foregoing, the Authority directs the Agency to show cause why the Authority should not dismiss the Agency’s exceptions as untimely filed.

The Agency must file with the Authority, by **October 23, 2014**, five copies, one of which contains an original signature, of its response to this order to show cause. The Agency’s response must also include five copies, one of which contains an original signature, of a statement of service that complies with the Authority’s Regulations showing that the Agency has served its response to this order on all counsel of record or other designated representatives.³⁸ The Agency should direct its response to Gina K. Grippando, Chief, Office of Case Intake and Publication, Federal Labor Relations Authority, 1400 K Street, NW, Suite 201, Washington, DC 20424-0001.

The Agency’s failure to comply with this order to show cause by **October 23, 2014**, may result in dismissal of the Agency’s exceptions.

The Union may respond to the Agency’s response to this order to show cause and file any opposition to the Agency’s exceptions within fourteen days from the date of the Union’s service of its response on the Agency. The Union must provide the Authority with five copies, one of which contains an original signature, of any response or

³³ Second Summary at 5.

³⁴ *Id.* (emphasis added).

³⁵ *Id.* (emphasis added).

³⁶ Third Summary at 1 (emphasis added).

³⁷ 5 C.F.R. § 2425.2(b).

³⁸ *Id.* § 2429.27(a) & (c).

opposition. Any Union response or opposition must also comply with the service requirements of the Authority's Regulations.³⁹

For the Authority:

A handwritten signature in black ink, appearing to read "Gina K. Grippando", written over a horizontal line.

Gina K. Grippando, Chief
Office of Case Intake and Publication

³⁹ *Id.*

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STATEMENT OF SERVICE

I hereby certify that copies of the Order to Show Cause of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL – RETURN RECEIPT REQUIRED

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Dated:

October 9, 2014
WASHINGTON, DC

Belinda Stevenson
Belinda Stevenson
Legal Assistant