U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-0500

OFFICE OF GENERAL COUNSEL

October 23, 2014

Transmitted via Personal Delivery

Federal Labor Relations Authority
Office of Case Intake and Publication
Docket Room, Suite 200
1400 K Street, NW
Washington, DC 20424-0001

Re: National Council of HUD Locals 222 & Dep't of Housing & Urban Development

To Whom It May Concern:

This letter transmits one original and four (4) copies of Agency's Response to Show Cause Order, dated September 9, 2014.

With regards,

Tresa C Rice

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cc: Arbitrator McKissick via Regular, First Class Mail
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FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 20424-0001

National Council of HUD Locals 222, AFGE, AFL-CIO, Union	
v.	Case No: O-AR-4586
U.S. Department of Housing and Urban Development, Agency.	

AGENCY RESPONSE TO ORDER TO SHOW CAUSE

Pursuant to the Order to Show Cause (Show Cause Order) issued by the Authority on October 9, 2014, regarding the Agency's Exceptions to Arbitrator Modification of September 4, 2014, the U.S. Department of Housing and Urban Development ("Agency or HUD") files the following Response.

For the reasons set forth below, the Agency timely filed its Exceptions with the Authority based upon a modification in an August 2, 2014, Order by the Arbitrator, and respectfully requests that its Exceptions be accepted for consideration by the Authority.

ARGUMENT

I. The Agency's Exceptions Were Timely Filed Before the Authority.

The Federal Labor Relations Authority's Order To Show Cause, dated October 9, 2014, has ordered the Agency to file with the Authority its response as to whether its Exceptions are timely filed. The time limit for filing exceptions to an arbitration award is

30 days "beginning on the date the award is served on the [filing] party." 5 U.S.C. §7122(b). The date of service is the date the award is deposited in the United States mail, delivered in person, received from commercial delivery, or, in the case of facsimile transmission, the date transmitted. *See* 5 C.F.R §2425.2. If, as in this case, the award is served by mail, five days are added to calculate the period of time for filing exceptions to an award. *See* 5 C.F.R. §2425.2; *see also* 5 C.F.R. §2429.21.

The Arbitrator's Award is dated August 2, 2014, and was served on the parties by mail. *See* Agency Exceptions, Exh. 17. Therefore, exceptions had to be filed with the Authority by September 8, 2014. The Agency filed its exceptions, via personal commercial delivery to the Authority, on September 4, 2014. The statement of service that accompanied the Agency's exceptions also indicates that the exceptions were served September 4, 2014. *See* Agency's statement of service. The Union's submission does not refute or otherwise contend that the Agency's filing of exceptions was served within the 30 day regulatory time limit from the August 2, 2014, Order. In addition, there is nothing in the record which disputes that the August 2, 2014, Implementation Summary constitutes an Order issued by Arbitrator McKissick. As such, the Authority's regulations are clear that the time limits for filing an exception are thirty (30) days from the date of service of the award. *See* 5 C.F.R. §2425.2 (b). The record before the Authority clearly demonstrates that the Agency's Exceptions were filed in a manner consistent with the Authority's regulations.

II. The Arbitrator First Made The Modification in the August 2, 2014 (Third) Order.

The Show Cause Order requests a response as to whether a modification was

made by the Arbitrator in her second order, as opposed to the Agency's position that the August 2, 2014, (Third) Order constitutes a modification. *See* Show Cause Order at p. 6. The second order, dated May 17, 2014, states, in relevant 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 award, and therefore will serve as the basis for the next round of grievants to be promoted with back pay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. *Although the award covers all GS-1101 employees who were not promoted to the GS-13 level* (among others), the PHRS group is discrete and therefore *the parties are 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 pay and interest, among other relief. The parties were directed to then move on to the CIRS (Contract Industrial Relations Specialist) employees in the GS-236 series, the other GS-1101 employees, and then others in other applicable job series, until implementation is complete. *See* Second Order at p. 5.

While the Third Order, dated August 2, 2014, states, in relevant part:

> As stated in prior summaries, this Arbitrator has instructed the parties to make substantial progress on identifying class members. The parties were instructed that, based upon this Arbitrator's award, as an example, *all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted ... with back pay and interest, as of their earliest date of eligibility.* As a simple subset that should be easily identifiable, this Arbitrator instructed the parties to identify all PHRS employees who would comprise the first set of class members. *See* August 2, 2014 (Third) Order at pg. 1.

The Second Order specifically makes reference to the Award, which covers employees in the GS-1101 series who were not promoted to the GS-13 level, even though there were positions established with a journeyman to the GS-13. This language is important because it relates back to not only the Opinion and Award, but also the initial grievance filed, which dealt with the alleged posting of new positions to the grade 13 with identical job responsibilities of employees who encumbered similar positions with a career ladder of grade 12. *See* Agency Exceptions, Exh. 2. Therefore, eligible class

members, or grievants, related back to the Opinion and Award, which was defined by the Arbitrator as: All bargaining unit employees in a career ladder (including at the journeyman level), where that career ladder lead to 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. *See* Agency Exceptions, Exh. 5. The plain language of the May 17, 2014, Order directs the parties to determine employees employed in positions in the GS-1101 series who qualify as eligible class members (i.e., who are employed in positions with a lower journeyman grade than similar positions subsequently posted with a higher journeyman grade).

The August 2, 2014, Order reveals that Arbitrator McKissick no longer requires that the parties work through the GS-1101 to identify eligible class members. Instead, in the August 2, 2014, Order, Arbitrator McKissick establishes an absolute requirement that eligible class members are based solely upon encumbering a position in the GS-1101 series, and with no related requirement to identify eligible class members. *See* August 2, 2014 (Third) Order at p. 1. This is in spite of the fact that eligible class members were previously identified as those in positions with a career ladder at a lower journeyman grade than the target grade of a position with the same job series. *See* Opinion and Award at p. 4. In particular, by stating that "all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted," the Arbitrator impermissibly modified the original Opinion and Award. *See* August 2, 2014 (Third) Order at p. 1. Despite the Arbitrator's assertion in the August 2, 2014, 'Implementation Summary,' that "nothing should be construed as a new requirement or modification of the existing award," the language of the order nevertheless constitutes a modification. Specifically, it directs the

Agency to provide the remedy of a retroactive promotion to the GS-13 level to all employees in the GS-1101 series, regardless of whether employees employed in the GS-1101 series encompasses a position with a career ladder at a lower journeyman grade than the target grade of a position with the same job series. *See Health Care Financial Admin., Dep't of Health and Human Serv.*, 35 FLRA 274 (1990). (Authority concluded that arbitrator was *functus officio*, and determined that arbitrator's "clarification" constituted a revision of previous award, as opposed to mere correction or computation error).

III. The Union's Timeliness Argument Has No Merit.

The Union contends that in an Order issued by Arbitrator McKissick, dated the May 17, 2014, all employees encumbering positions in the GS-1101 series were deemed eligible class members for the remedy outlined in her January 10, 2012, Opinion and Award; and further, that the Agency should have filed exceptions to the May 17, 2014, Order to be considered timely. *See* Motion to Show Cause at p. 4. The Union's argument serves as the basis for the Authority's Show Cause Order. *See* Show Cause Order at pp. 5-6. However, the Union's argument does not withstand scrutiny to rebut the Agency's timely filing of exceptions before the Authority.

In support of its position, the Union highlights language in the May 17, 2014, Order, which states: "Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others)...." *See* May 17, 2014, (Second) Order, at p. 5; *see also* Union's Motion to Show Cause at p. 4. However, the Union has failed to provide the full language of this portion of the Order, which continues by stating: "... the PHRS group is discrete and therefore the Parties are directed to work through the GS-

1101 series to identify all eligible class members in the PHRS position...." *See id.* Taken as a whole, language in the May 17, 2014, Order directs the Parties to *work through* the GS-1101 series, and to *then* identify eligible class members. *See* May 17, 2014, (Second) Order, at p. 5.

The language highlighted by the Union, read in context of the Order as a whole, is not similar to the Arbitrator's August 2, 2014, Order in the following ways:

1. The May 17, 2014, Order directs the Parties *work through the GS-1101 series to identify eligible employees*;
2. The August 2, 2014, Order *instructs the Agency that all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted as of their earliest date of eligibility*; and
3. The August 2, 2014, Order further instructs *the Agency that any use of location, vacancies or any other limiting factor would not comport with the Award.*

The language highlighted by the Union in the May 17, 2014, Order is tailored to the final and binding Opinion and Award, while the most recently issued August 2, 2014, Order *expands* the definition for the class of eligible employees, along with the method for determining eligibility for the remedy. It is because of this modification that the Agency has filed exceptions over the blanket entitlement identified in the August 2, 2104, Order, which grants the remedy to all employees encumbering positions in the GS-1101 series, with no determination on whether these employees are eligible class members pursuant to the Opinion and Award.

The plain language of the August 2, 2014, Order constitutes a modification and properly triggered the timeframe for filing exceptions with the Authority. Further, because the modification challenged by the Agency is directly related to the Arbitrator's specific ruling in her August 2, 2014 (Third) Order, the exceptions were timely filed. *See generally U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Texas*, 58 FLRA 77 (2002) (when an arbitrator issues several awards or orders, timeliness of an exception is judged from date of the award or order where the alleged deficiency arose).

CONCLUSION

For the foregoing reasons, because the Order of August 2, 2014, modified the remedial award, and because the Order of August 2, 2014, contained language distinguishable from the language in the Order of May 17, 2014, with significant effect, the Agency requests its Exceptions be deemed timely.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The Agency's Response to Show Cause Order has been served on all parties on the date below, and via the method indicated:

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Oct. 23, 2014
(Date)

Tresa A Rice
TRESA A. RICE
Agency Representative

Oct. 23, 2014
(Date)

T. Rice for Kevin McEvoy
KEVIN MCEVOY
Agency Representative