68 FLRA No. 100

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 DISMISSING EXCEPTIONS

May 22, 2015

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella dissenting)

I. Statement of the Case

In an award resolving the merits of a Union grievance (the merits award), Arbitrator Andrée Y. McKissick found that the manner in which the Agency posted and filled certain positions violated the parties' collective-bargaining agreement. Subsequently, as relevant here, she issued a remedial award (the remedial award) and then held a series of meetings to discuss with the parties how they would implement the remedy she directed in the remedial award (implementation meetings). After each implementation meeting, the Arbitrator issued a written summary. In the exceptions now before us, the Agency argues that the Arbitrator exceeded her authority because her summary of the third implementation meeting (the third summary) constitutes a "[m]odification" to the "final and binding" remedial award.[1]

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[1] Exceptions at 1.

The question before us is whether the Agency's exceptions are timely. We assume without deciding that the remedy specified in the third summary (the challenged remedy) differs from the remedy in the remedial award. However, the Arbitrator also directed the Agency to implement the challenged remedy in her summary of the parties' second implementation meeting (the second summary). As the Agency waited to file its exceptions until after the Arbitrator reiterated the challenged remedy in the third summary, which was well beyond the deadline for filing exceptions to the second summary, we dismiss the Agency's exceptions as untimely.

II. Background and Arbitrator's Awards

This case has an extensive, and somewhat complex, procedural history. It originates from a Union grievance alleging that the Agency violated the parties' agreement by posting and filling certain positions with promotion potential to general schedule (GS)-13 (the new positions) in a manner that deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13.[2] As a remedy, the Union sought "full promotion potential for all similarly situated employees to the GS-13 level."[3]

In the merits award, the Arbitrator addressed the Agency's argument that the grievance was not arbitrable. Specifically, she found that the grievance did not concern classification under § 7121(c)(5) of the Federal Service Labor-Management Relations Statute (the Statute) because the grievants were alleging "a right to be placed in previously[] classified positions," rather than a right to have their current positions reclassified.[4] Accordingly, the Arbitrator found that the grievance was arbitrable, and addressed its merits.

In her merits determination, the Arbitrator found that the Agency violated the parties' agreement, and sustained the grievance. In particular, the Arbitrator "credited the grievants' unrebutted testimony that they were 'told by their supervisors that their applications to [the new] . . . positions would be destroyed, or not considered, and [that] they should not apply.'"[5] As a result of these and other factual findings, the Arbitrator concluded that, but for the Agency's "inequitable and unfair" conduct, the grievants would have been promoted to the new positions,[6] and she awarded an "organizational upgrade" to the grievants.[7]

When the Agency filed exceptions to the merits award, the Authority addressed the Agency's argument that the grievance was not arbitrable, and upheld the Arbitrator's determination that the grievance did not concern classification within the meaning of

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[2] *See U.S. Dep't of HUD*, 65 FLRA 433, 433 (2011) (*HUD II*); *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 630 (2004) (*HUD I*).
[3] *HUD I*, 59 FLRA at 630 (internal quotation mark omitted).
[4] *HUD II*, 65 FLRA at 433 (quoting merits award) (internal quotation marks omitted).
[5] *Id.* at 436 (quoting merits award).
[6] *Id.* (quoting merits award) (internal quotation marks omitted).
[7] *Id.* at 434 (quoting merits award) (internal quotation marks omitted).

§ 7121(c)(5) of the Statute.[8] In this regard, the Authority noted the distinction between a grievance concerning the promotion potential of *existing* positions – which might concern classification – as compared to a grievance alleging a right to be placed in *previously classified* positions – which would not concern classification.[9] The Authority concluded that the grievance at issue in the merits award did *not* concern classification.[10] In this regard, the Authority held that the Arbitrator's findings "support[ed] [her] determination that the grievance was arbitrable because it did not concern classification within the meaning of § 7121(c)(5)."[11] However, the Authority set aside the Arbitrator's chosen remedy because directing the Agency to "*re*classify the grievants' *existing positions*" *did* involve classification within the meaning of § 7121(c)(5).[12] Accordingly, the Authority remanded the merits award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[13]

On remand, the Arbitrator directed both parties to submit proposed alternative remedies. The Union complied with this directive, but the Agency did not. Specifically, the Union proposed several alternative remedies to the Arbitrator, whereas the Agency neither submitted any remedial proposals to the Arbitrator nor responded to the Union's proposals. As the Agency declined to participate in remedial proceedings on remand, the only proposed remedies before the Arbitrator as she decided upon an alternative remedy were the Union's.

On January 10, 2012, the Arbitrator issued the remedial award, in which she adopted one of the Union's proposed remedies. Specifically, the Arbitrator directed the Agency, in pertinent part, to "process retroactive permanent selections of all affected [bargaining-unit employees] into currently existing career[-]ladder positions with promotion potential to the GS-13 level."[14] This meant, according to the Arbitrator, that "[a]ffected [bargaining-unit employees] shall be processed into positions at the grade level [that] 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."[15]

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

> All [b]argaining[-]unit employees 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

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[8] *Id.* at 436.
[9] *Id.* at 433 (discussing *HUD I*, 59 FLRA at 632).
[10] *Id.* at 436.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Exceptions, Attach. 5, Remedial Award (Remedial Award) at 2.
[15] *Id.* at 2-3.

ladder of a position with the same job series, which was posted between 2002 and [the] present.[16]

The Agency filed exceptions to the remedial award. On August 8, 2012, the Authority dismissed these exceptions. Specifically, the Authority held that the Agency could not challenge the remedy on exceptions because the Agency could have challenged that remedy before the Arbitrator, but failed to do so.[17]

Following the Authority's dismissal of the Agency's exceptions to the remedial award, the parties reached "an impasse regarding the appropriate methodology for identifying" eligible class members.[18] As a result, the Arbitrator met with the parties on February 4, 2014, to facilitate implementation of the remedy directed in the remedial award. In the Arbitrator's memorialization of the parties' first implementation meeting (first summary), issued on March 14, 2014, the Arbitrator explained that the purpose of that meeting was to "clarify the members of the class that was defined in . . . [the remedial a]ward."[19] In this regard, she stated that "[n]othing [in the first summary] should be construed as a new requirement or modification of the existing [remedial a]ward," but, rather, that she intended the first summary "solely to clarify with specificity which [b]argaining[-u]nit [e]mployees are eligible class members."[20] In particular, the Arbitrator rejected a methodology proposed by the Agency for identifying eligible class members. In an effort to resolve ongoing disputes between the parties about the appropriate methodology, the Arbitrator stated that "[t]he [c]lass definition is data driven, not announcement driven."[21] And, 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.[22]

Subsequently, the Arbitrator met with the parties again on March 26, 2014, to discuss their progress in implementing the remedial award. On May 17, 2014, she issued the second summary, in which she reiterated that "[t]he [c]lass definition is data driven, not vacancy[-]announcement driven."[23] And, in order to guide the parties' efforts to identify eligible class members, she 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-2[4]6. *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 [backpay] and interest. A subset of the GS-1101 series is the PHRS (Public Housing

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[16] *Id.* at 4.
[17] *U.S. Dep't of HUD*, 66 FLRA 867, 869 (2012) (*HUD III*).
[18] Exceptions, Attach. 16, Summary of Implementation Meeting Mar. 2014 (First Summary) at 3.
[19] *Id.* at 2.
[20] *Id.*
[21] *Id.* at 3.
[22] *Id.* at 2.
[23] Exceptions, Attach. 16, Summary of Implementation Meeting May 2014 (Second Summary) at 4.

> 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 [backpay] 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.[24]

Because of ongoing delays in the implementation of the remedial award, the Arbitrator met with the parties for a third implementation meeting on June 12, 2014. On August 2, 2014, the Arbitrator issued the third summary, in which she summarized 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 [backpay] 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.[25]

The Arbitrator further stated that the parties should "continue working to identify additional class members as set forth in the [remedial a]ward and as stated in the meeting."[26] Further, the Arbitrator "reminded" the Agency that "any use of location, vacancies[,] or any other limiting factor would not comport with the [remedial a]ward."[27]

In addition to instructing the parties on how to identify class members, the Arbitrator urged the Agency to make "substantial, concrete progress" towards promoting and paying those employees whom the parties had already identified as eligible class members.[28] In this regard, she "reminded" the Agency that it "continue[d] to be in violation of the prior [o]rders requiring that all six [Union] witnesses receive" promotions and backpay, and the Arbitrator "extended" "[t]hese [o]rders" to "the additional eleven . . . employees [whom] the Agency previously identified as eligible class members."[29]

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[24] *Id.* at 5 (emphasis added).
[25] Exceptions, Attach. 17, Summary of Implementation Meeting Aug. 2014 (Third Summary) at 1 (emphasis added).
[26] *Id.* at 5.
[27] *Id.* at 2.
[28] *Id.* at 4.
[29] *Id.*

In conclusion, the Arbitrator stated that "[n]othing . . . in this [s]ummary should be construed as a new requirement or modification of the existing [remedial a]ward."[30]

On September 4, 2014, the Agency filed exceptions to the third summary. Subsequently, the Authority's Office of Case Intake and Publication (CIP) issued an order to show cause why the Agency's exceptions should not be dismissed as untimely (the order). CIP stated that it issued the order because: (1) the third summary appears to clarify – not modify – the remedial award;[31] and (2) "[e]ven assuming" that the challenged remedy modifies the remedial award, the Arbitrator's discussion of the challenged remedy in the third summary "appears only to reiterate" a statement that the Arbitrator made in the second summary.[32] And "[a]s 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," CIP stated, "it appears that the Agency's exceptions are untimely."[33] The Agency filed a response to the order (Agency's response), and the Union filed an opposition to both the Agency's exceptions and the Agency's response.

III. Analysis and Conclusion

In its exceptions to the third summary, the Agency argues that, by directing the challenged remedy in the third summary, the Arbitrator exceeded her authority because she was functus officio – that is, without further authority to modify a resolved matter – after issuing the "final and binding" remedial award.[34] Specifically, the Agency alleges that, in the third summary, the Arbitrator improperly modified 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, posted between 2002 and present;" 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."[35] According to the Agency, "by directing the Agency to promote all employees in the GS-1101 series from . . . grade 12 to . . . grade 13" in the third summary, "the Arbitrator modified the class of grievants to include all employees at . . . grade 12 in the GS-1101 series, regardless of whether a higher target grade exists."[36]

Under § 2425.2(b) of the Authority's Regulations, the time limit for filing exceptions to an arbitration award is thirty days after the date of service of the award.[37] If no exceptions are filed within that thirty-day period, then the award becomes final and

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[30] *Id.* at 5.
[31] Order at 5.
[32] *Id.* at 6.
[33] *Id.*
[34] Exceptions at 1, 7-11.
[35] *Id.* at 9.
[36] *Id.*
[37] 5 C.F.R. § 2425.2(b); *see also* 5 U.S.C. § 7122(b).

binding.[38] As previously discussed, the Agency concedes that the remedial award is "final and binding."[39] And because neither party filed exceptions within thirty days of the second summary, the second summary is also final and binding.[40]

As noted above, in the remedial award, the Arbitrator identified the class of grievants as "[a]ll [b]argaining[-]unit employees 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."[41] In the third summary, the Arbitrator stated that, under the remedial award, "*as an example,* all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted . . . with [backpay] and interest, as of their earliest date of eligibility."[42] To the extent that the Arbitrator cited 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.

Even assuming, without deciding, that the foregoing statement in the third summary constitutes a modification of the remedial award, the Arbitrator specifically identified, in the *second* summary, "all GS-1101 employees" as part of the class of grievants covered by the remedial award.[43] Specifically, she stated: "*Employees encumbering [the 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 [backpay] and interest";[44] and "*the [remedial a]ward covers all GS-1101 employees who were not promoted to the GS-13 level (among others).*"[45] In the third summary, she merely reiterated that point: "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 [backpay] and interest, as of their earliest date of eligibility.*"[46] 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 alleged modification in the second summary.

Relatedly, the Agency argues that the Arbitrator modified the remedial award in the third summary because, unlike the second summary, the third summary no longer requires the parties to "*work through*" the GS-1101 series to identify eligible class members.[47] However, nothing in the third summary eliminates this requirement. Rather,

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[38] 5 U.S.C. § 7122(b); *e.g., U.S. Dep't of VA, Northport VA Hosp., Northport, N.Y.*, 67 FLRA 325, 326 (2014) (*Northport*).
[39] Exceptions at 1.
[40] 5 U.S.C. § 7122(b); *e.g., Northport*, 67 FLRA at 326.
[41] Remedial Award at 4.
[42] Third Summary at 1 (emphasis added).
[43] Second Summary at 5.
[44] *Id.* (emphasis added).
[45] *Id.* (emphasis added).
[46] Third Summary at 1 (emphasis added).
[47] Agency's Resp. at 6 (Agency's emphasis) (quoting Second Summary at 5).

in the third summary, the Arbitrator repeatedly directs the parties to work together to identify, and agree upon, eligible class members.[48] Moreover, nothing in the third summary eliminates the eligibility requirements, set forth in the remedial award, that class members meet "time-in-grade requirements" and have "satisfactory performance evaluations" in order to recover.[49] And, in response to the dissent's assertion that, in the third summary, the Arbitrator "'extended' the remedy to cover an 'additional eleven . . . employees,'"[50] we note, as discussed above, that this statement concerned remuneration for employees – in addition to the six Union witnesses – whom the parties had *already* identified as eligible class members. In other words, while the parties continue to work to identify class members, the Arbitrator directed the Agency to start providing a remedy to at least "the additional eleven . . . employees [whom] *the Agency* previously identified as eligible class members."[51]

Next, in support of its position that the third summary "constitutes a modification" of the remedial award,[52] the Agency cites the Arbitrator's "reminde[r]" that the Agency should not use "vacancies" as a "limiting factor[]" in identifying eligible class members.[53] However, once again, this alleged modification is not unique to the third summary. Rather, the Arbitrator stated in the *first* summary that "[t]he [c]lass definition is data driven, not announcement driven,"[54] and repeated this idea in the second summary when she stated that "[t]he [c]lass definition is data driven, not vacancy[-]announcement driven."[55] Thus, the Agency's modification arguments fail to identify any characteristic of the third summary's challenged remedy that was not in the second summary. And yet, as stated above, the Agency did not file exceptions to the second summary.

Based on the foregoing, even assuming that the challenged remedy differs from the remedy in the remedial award, the Arbitrator also directed the Agency to implement the challenged remedy in the second summary. And the Agency waited to file its exceptions until after the Arbitrator reiterated the challenged remedy in the third summary, which was well beyond thirty days after the Arbitrator issued the second summary. Accordingly, the Agency's exceptions are untimely, and we dismiss them.[56]

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[48] Third Summary at 2 (instructing the parties to compare lists of eligible employees in PHRS and CIRS positions – within the GS-1101 series, and GS-246 series, respectively – and arrive at a stipulated eligibility list); *see also id.* at 5 ("The Union and Agency shall continue working to identify additional class members as set forth in the [remedial a]ward and . . . shall keep the Arbitrator informed of their progress.").
[49] Remedial Award at 3.
[50] Dissent at 16 (quoting Third Summary at 4).
[51] Third Summary at 4 (emphasis added).
[52] Exceptions at 11.
[53] *Id.* at 6 (quoting Third Summary at 2) (internal quotation marks omitted); *id.* at 11 (arguing that Arbitrator was functus officio when she instructed the Agency that using "location, vacancies[,] or any other limiting factors to . . . would not comport with the [remedial a]ward").
[54] First Summary at 3.
[55] Second Summary at 4.
[56] 5 C.F.R. § 2425.2(b); *e.g. Northport*, 67 FLRA at 326.

We note that, although even the Agency acknowledges that the remedial award is "final and binding,"[57] the dissent finds it necessary to reach back and address the merits of the Arbitrator's earlier awards – and the Authority decisions that reviewed them. Even were that appropriate at this stage – which it is not[58] – the dissent also mischaracterizes the events that gave rise to the underlying grievance. In this regard, the dissent asserts that "[the Agency] decided that current employees, as well as outside candidates, should be required to compete for [the new positions]."[59] But the Arbitrator found that, rather than encouraging competition between internal and external candidates, the Agency actively discouraged the grievants from applying for the positions.[60] Specifically, as discussed above, the Arbitrator "credited the grievants' unrebutted testimony that they were 'told by their supervisors that their applications to [the new] . . . positions would be destroyed, or not considered, and [that] they should *not* apply.'"[61] Although the dissent mischaracterizes these findings as being mere Union allegations,[62] that is incorrect. They are arbitral factual findings, to which no nonfact exceptions were filed.

In addition, the dissent disagrees with the Authority's dismissal – in 2012 – of the Agency's exceptions to the remedial award.[63] As discussed above, in that decision, the Authority held that the Agency could not challenge the awarded remedy in exceptions to the remedial award because the Agency had failed to do so before the Arbitrator.[64] The dissent asserts that the Agency had sufficiently "raised its . . . arguments" opposing the Union's proposed remedies merely by making various arguments in the "numerous" prior "proceedings."[65] The dissent fails to explain, however, why the Authority should have rewarded the Agency's refusal to participate in arbitration proceedings on remand by considering arguments that the Agency declined to make to the Arbitrator in those proceedings. In this regard, the Agency neither complied with the Arbitrator's directive to propose alternative remedies nor responded to the Union's proposed alternative remedies. And the Authority has stated that "a party's refusal to participate in the arbitration process results in the hindrance or obstruction of grievance resolution through binding arbitration, which is contrary to the mandate and intent of Congress in enacting § 7121" of the Statute.[66] So it is not clear how rewarding the Agency's conduct in these circumstances – or, for that matter, otherwise reaching back to challenge the prior, final awards to which no party now objects – would promote "efficient [g]overnment"[67] or "the prompt 'settlement[] of disputes.'"[68]

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[57] Exceptions at 1.
[58] *Cf. Northport*, 67 FLRA at 326 (dismissing exceptions to fee award that challenged merits of underlying "final and binding" backpay award).
[59] Dissent at 11.
[60] *See HUD II*, 65 FLRA at 436.
[61] *Id.* (emphasis added) (quoting merits award).
[62] Dissent at 11.
[63] *See id.* at 14-15.
[64] *HUD III*, 66 FLRA at 869.
[65] Dissent at 14.
[66] *U.S. Dep't of Transp., FAA, Wash., D.C.*, 65 FLRA 208, 211 (2010).
[67] Dissent at 13 (quoting 5 U.S.C. § 7101(b)) (internal quotation marks omitted).
[68] *Id.* (quoting 5 U.S.C. § 7101(a)(1)(C)).

IV. Order

We dismiss the Agency's exceptions.

Member Pizzella, dissenting:

A 2014 poll conducted by the Associated Press-National Opinion Research Center for Public Affairs Research at the University of Chicago revealed that only one in twenty Americans believes that the federal government works well and does not need to be substantially changed.[1] If you ever wondered why Americans have such low confidence in their government, you might want to consider this:

The parties in this case have been arguing over the same grievance since 2002.[2] During the same timeframe, the Mars Rover launched from earth, arrived at its target planet, and completed its eleven-year mission without a hitch.[3]

But AFGE, National Council of HUD Locals 222 (Council 222) and the U. S. Department of Housing and Urban Development (HUD) have not been so successful. For thirteen years, these parties have been unable to resolve a grievance that began in 2002. HUD created several new positions that carried a potential for promotion to General Schedule (GS) -13.[4] But Council 222 was not happy when HUD decided that current employees, as well as outside candidates, should be required to compete for these positions[5] – just what is typically expected throughout the rest of the federal government and the private sector. Council 222 had other ideas as to how HUD should fill the new positions – only *its* bargaining-unit members should be promoted and they should be promoted without having to apply or compete.[6]

When HUD rejected that idea and opened the positions for competition, Council 222 filed its grievance.[7] According to Council 222, some employees were treated "unfair[ly]" when they were discouraged from applying.[8] (While Council 222 argues that requiring an employee to compete for a promotion is "unfair," it is even more likely that anyone else, including any taxpayer, reading this record just might consider that filling promotions through open competition is a *good idea* and conclude that any employee, who could be so easily dissuaded from applying for a promotion, might not be the best candidate for promotion. But, the Federal Service Labor-Management Relations Statute (the Statute)[9] does not afford taxpayers, unlike Council 222, standing to file a complaint.)

It took the parties two years to get their dispute before an arbitrator. HUD argued that because the grievance involved "classification," the matter was not arbitrable (and

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[1] http://www.military.com/daily-news2014/01/02poll, "Americans Have Little Faith in Government" (Jan. 2, 2014).
[2] Exceptions at 2.
[3] http://cpf.cleanprint.net/cpf/cpf?action=print&type=filePrint&key=San-Bariel-Valley-Tribune, "NASA's Opportunity Mars Rover Finishes World's first off-Earth marathon."
[4] Exceptions at 2.
[5] *U.S. Dep't of HUD*, 65 FLRA 433, 433 (2011) (*HUD II*).
[6] *Id.*
[7] *Id.* at 436.
[8] *Id.*
[9] 5 U.S.C. §§ 7101-7135.

the Arbitrator did not have jurisdiction) because classification matters are excluded from the grievance procedure.[10] Council 222, nonetheless, pressed ahead and asked Arbitrator Andrée McKissick to award a "full" and "permanent" promotion to all GS-12 employees. In her initial decision, Arbitrator McKissick decided that the grievance did not concern "classification" and that she had jurisdiction.[11]

When HUD appealed that decision, the Authority found that Council 222 seemed to be asking the Arbitrator to "reclassify[] the grievants' permanent positions," a remedy that involved classification.[12] But rather than addressing that question directly (a simple decision that would have resolved the question for everyone involved), the Authority remanded the matter *back to the Arbitrator* to explain how the grievance *did not* concern "classification."[13]

Five more years passed before the parties got an answer to that question from the Arbitrator. After that long lapse, Arbitrator McKissick determined for a second time that she had jurisdiction. But, apparently Arbitrator McKissick forgot what the Authority had said about classification and directed the HUD to *retroactively promote all of the grievants* whether or not the grievants had ever applied for promotion and whether or not there was a reclassified position to which the grievant could be promoted.[14] According to the Arbitrator, only "an *organizational upgrade* of [all] affected positions" would remedy the "inequitable and unfair situation[]."[15]

HUD again filed exceptions with the Authority and argued what it had all along – that the remedies sought by Council 222 were contrary to regulations and contrary to management's rights – and asked the Authority to remind Arbitrator McKissick that such a remedy was not lawful.[16] Even though the majority in *U.S. Department of HUD* (*HUD II*) specifically cautioned Arbitrator McKissick that she *could not* "direct the Agency to perform an *organizational upgrade* . . . for *all* the subject positions" because such a remedy "involves *classification*,"[17] today my colleagues assert differently that in *HUD II* the important point was that "the Arbitrator's findings 'support[ed] [her] determination that the grievance . . . *did not concern classification.*'"[18]

If I had been a Member of the Authority at the time of *HUD II*, I would have agreed with my colleagues that *the Arbitrator's remedy involved classification* but I would have gone one step further and found *that the remedies* requested by Council 222 *were so inextricably intertwined with classification* that the entire grievance was not

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[10] *HUD II* at 436.
[11] *Id.*
[12] *U.S. Dep't of HUD, Wash., D.C.*, 59 FLRA 630, 632 (2004) (*HUD I*).
[13] *Id.*
[14] *HUD II*, 65 FLRA at 434.
[15] *Id.* (emphasis added).
[16] *Id.*
[17] *Id.* at 436 (first three emphases in original; last two emphases added).
[18] Majority at 3 (emphasis added).

arbitrable.[19] Authority precedent clearly establishes that grievances which concern *the grade level of established positions* and requests *for noncompetitive promotion*[20] involve classification.[21] But, even if a remand was arguably necessary (a conclusion with which I do not agree), I do not believe that remanding this case back *to the same Arbitrator*, who had already rendered two awards that were contrary-to-law, "facilitate[d] . . . the settlement[] of [this] dispute[]"[22] or "contributed to the effective conduct of [the government's] business."[23]

Having now served as a Member of the Authority for eighteen months, I am concerned with the tendency to remand cases to the same arbitrator who has issued a deficient, confusing, or incomprehensible award. And, even though remands are technically sent back "*to the parties for resubmission to the Arbitrator*,"[24] I am unaware of any remanded case that has not been returned to the same arbitrator who in turn rebills the same parties for a second or third opinion on the same question that he or she got wrong in the first place. (In this case, the remands resulted in seven different awards – two concerning arbitrability, one concerning merits, one concerning remedy, and three concerning modifications to the remedy.)

In some respects, this scenario sounds a lot like the "strategically applied incompetence" theory discussed by William Swislow, President of William Swislow & Associates and former Chief Information Officer and Senior Vice President of Product for Cars.com from 1997 to 2014.[25] According to Swislow, decision-makers who ignore the substantial cost of "unresolved mistakes" are also likely to "give up on *points that are hopelessly misunderstood* and just plain *miss the strategic issues* that really matter."[26] In similar fashion, remanding a case to the same arbitrator, who "misunderstood and . . . miss[ed] the strategic issues that really matter,"[27] not only lends "uncertainty and confusion"[28] to the grievance process, it also fails to promote "efficient [g]overnment"[29] or the prompt "settlement[] of disputes."[30]

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[19] *HUD I*, 59 FLRA at 631 ("A grievance concerns the classification of a position within the meaning of § 7121(c)(5) . . . where the substance of the grievance *concerns the grade level* to which the grievant could receive a *noncompetitive career promotion*.") (citing *USDA, Agric. Research Serv., E. Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985) (*USDA*) (emphases added)).
[20] *Id.* at 630.
[21] *USDA*, 20 FLRA at 509.
[22] *U.S. DHS CBP*, 67 FLRA 107, 113 (2013) (*CBP*) (Concurring Opinion of Member Pizzella) (citing 5 U.S.C. § 7101(a)(1)(B) & (C)).
[23] 5 U.S.C. § 7101(a)(1).
[24] *HUD II*, 65 FLRA at 436 (emphasis added).
[25] William Swislow, "Compound Ineptitude: A Theory of Corporate Incompetence," http://www.interestingideas.com/ii/incomp.htm.
[26] *Id.* (internal quotation marks omitted) (emphases added).
[27] *Id.*
[28] *Id.*
[29] 5 U.S.C. § 7101(b); *see also CBP*, 67 FLRA at 112 (Concurring Opinion of Member Pizzella).
[30] 5 U.S.C. § 7101(a)(1)(C); *see also CBP*, 67 FLRA at 113 (Concurring Opinion of Member Pizzella).

Nonetheless, in January 2011 (*HUD II*), the Authority returned this case to Arbitrator McKissick. (If you are counting, this was the third time[31] and the Authority had already determined that her crafted remedy was deficient because "an organizational upgrade . . . involve[d] classification".[32]). But, the Authority ignored the other arguments that HUD had made to the Arbitrator and in its exceptions – the award "violat[es] . . . applicable regulations," "interferes with management's rights under the Statute," "exceeds the authority of the Arbitrator," and "violates the [parties' agreement]."[33] By not addressing these questions, the Authority missed another opportunity to put this matter to rest.

One year later, Arbitrator McKissick (in her fourth award) ignored the same arguments HUD had made since 2002 and again directed HUD "to process *retroactive permanent selections* [to] all affected [grievants]."[34] But, this time around, the Arbitrator hedged her bets in order to avoid another rejection from the Authority. She directed not just one remedy but outlined three "alternative[s]" (cut directly from Council 222's submissions)[35] just in case the Authority invalidated one, or all, of them as contrary to law.[36]

HUD filed new exceptions to the Arbitrator's shotgun approach and argued once again that the remedy was contrary to regulations and management's rights[37] but, also, as relevant here, that the new remedy was "incomplete so as to make implementation impossible."[38] The Authority (now with only two members) incorrectly found that HUD had never made these arguments to the Arbitrator and dismissed the exceptions.[39]

Contrary to the majority's conclusion in *U.S. Department of HUD* (*HUD III*), HUD specifically raised its contrary-to-regulations and contrary-to-management's rights arguments to the Arbitrator throughout the numerous proceedings.[40] Even Arbitrator McKissick acknowledged that she had considered "all prior submissions of the parties" which included all of the arguments that HUD had raised in *HUD I*, *HUD II*, and *HUD III*. Prior to *HUD III*, the Authority had not required parties to repeatedly raise *the same arguments* that were *raised in earlier stages* of an ongoing arbitral process, so long as "the record indicates that [a party] did raise [those specific issues]."[41] As a result, the majority passed up another opportunity to address and resolve whether the underlying grievance concerned classification.

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[31] *HUD II*, 65 FLRA at 433-4.
[32] *Id.* at 436.
[33] *Id.* at 434.
[34] Exceptions, Ex. 5, Remand Award (Remand Award) at 2 (emphasis added).
[35] *See U.S. Dep't of HUD*, 66 FLRA 867, 868, 868 n.3 (2012) (*HUD III*).
[36] Remand Award at 3-4.
[37] *HUD II*, 65 FLRA at 434.
[38] *HUD III*, 66 FLRA at 868.
[39] *Id.* at 869.
[40] *See HUD III*, 66 FLRA at 868; *HUD II*, 65 FLRA at 434; *HUD I*, 59 FLRA at 630; Exceptions, Ex. 3, Merits Award at 6-9.
[41] *AFGE, Local 3937*, 64 FLRA 1113, 1114 (2010).

HUD also raised a new argument. It argued that the Arbitrator's remedy was "incomplete so as to make implementation impossible."[42] The majority concluded, however, that HUD should have presented that argument earlier.[43] Earlier? How so? In effect, the majority expected HUD to make an argument that the award was impossible to implement, even though the Arbitrator had not yet formulated a remedy that was considered to be lawful.[44] HUD could not make an impossible-to-implement argument until *after* the Aribtrator issued her just-in-case-"the[-][Authority][-]vacate[d]"-any-one, or all,-of-them[45]-"alternative[-]remedies" award.[46]

Whether or not this grievance concerns classification, the parties have been unable to agree, and Arbitrator McKissick has been unable to explain, what a lawful remedy would look like. As a consequence, the parties have been going back and forth with the Arbitrator because of her obtuse remedy award.[47] The Arbitrator has consistently obliged the parties by issuing fifth, sixth, and seventh awards (which she now calls "summar[ies] of implementation meeting[s]"(summary)). With each new summary, however, the remedy continued to morph in scope and detail, further adding to the confusion and requiring even more clarification. Finally, in her third summary, Arbitrator McKissick (apparently exhausted by the lengthy ordeal) declared that her award was, at last, "final" and "must be fully followed."[48]

With the fourth set of exceptions now before us, the parties seem to have set out to challenge Vin Diesel and the Fast and the Furious franchise[49] to see who can generate the most sequels to a theme that just seems to repeat itself over and over. There is, however, one key difference. The franchise movies have *generated taxable profits* exceeding $505 million,[50] whereas, the fees generated by the Arbitrator's seven awards, the official time used by Council 222's representatives, and the non-mission-related time used by HUD's representatives are *being paid out of revenue collected from taxpayers.*

Specifically, HUD argues that Arbitrator McKissick's third summary "disregards specific limitation[s] to [her] authority."[51] But, the majority dismisses HUD's arguments as procedurally deficient because HUD made these arguments *too late*.[52] According to the majority, the first and second summaries were "modification[s]" of the Arbitrator's award and HUD could have filed exceptions, but the third summary is only a "clarification" and thus may not be appealed.[53]

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[42] *HUD III*, 66 FLRA at 868.
[43] *Id.* at 868-69.
[44] *HUD II*, 65 FLRA at 436.
[45] Remedy Award at 2-4.
[46] *HUD III*, 66 FLRA at 869.
[47] *See* Opp'n, Ex. B-D.
[48] Opp'n, Ex. D, Third Summary of Implementation Meeting at 2.
[49] http://en.wikipedia.org/wiki/The_Fast_and_the_Furious.
[50] http://www.the-numbers.com/movies/franchise/Fast-and-the-Furious.
[51] Exceptions at 7.
[52] Majority at 7.
[53] *Id.*

Confused? If there is a distinction there, I do not see it. [54]

It is clear to me that Arbitrator McKissick significantly modified her award in the third summary. Specifically, she "extended" the remedy to cover an "additional eleven [] employees"[55] but also attempted to anticipatorily preclude HUD from challenging the limitations that the Authority had already placed on her remedial authority in *HUD II.*[56] In *HUD II*, the Authority instructed that any remedy *could not require* HUD to *reclassify* existing positions to a higher grade, *could not change* the promotion potential of a *permanent position,* and *could only* direct promotion to a *vacant, previously-classified* position.[57] But in the third summary, Arbitrator McKissick directs HUD to "*promote*" within "thirty [] days" *all affected employees*, including eleven *additional* employees,[58] regardless of whether there are "vacancies" or other "factors" that would "limit" the remedy.[59] Without a doubt, these changes not only "modify" the remedy,[60] they directly counter the limitations that the Authority placed on the Arbitrator in *HUD II.*

In this respect, it is apparent to me that Arbitrator McKissick exceeded her authority.

I believe the majority was wrong when they decided in *HUD II* that the Arbitrator's statement that "'but for these inequitable and unfair situations[,]' the grievants would have been promoted to positions with GS-13 potential"[61] is sufficient to conclude that this matter does not concern classification. My colleagues would rather that I turn a blind eye to those wrong decisions,[62] but, as I have noted before, I am not willing to dismiss otherwise valid arguments because of a mere technicality,[63] and especially where, as here, the Authority made a wrong decision on this important point.

As for the merits of HUD's exceptions, I would conclude that Arbitrator McKissick exceeded her authority in her third summary by making significant changes and awarding a remedy that ignores the limitations that were imposed on her authority in *HUD II* and *HUD III.* Furthermore, I would conclude that this grievance concerns classification and should have been dismissed in *HUD I.*

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[54] *See U.S. DOJ, Fed BOP, U.S. Penitentiary, Atwater, Cal..*, 66 FLRA 737, 739 (2012) (citing *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 596 (2005)) (an arbitrator's clarification modifies [an] award when it gives rise to the deficiencies alleged in the exceptions).
[55] Opp'n, Ex., D at 4.
[56] *Id.* at 2.
[57] *HUD II,* 65 FLRA at 436.
[58] Opp'n, Ex., D at 4.
[59] *Id.* at 2
[60] *See* Majority at 7.
[61] *HUD II,* 65 FLRA at 436 (citing Award at 15).
[62] *See* Majority at 9.
[63] *U.S. Dep't of the Air Force, Space and Missile Sys. Ctr., L.A. Air Force Base, El Segundo, Cal.,* 67 FLRA 566, 573 (2014) (Dissenting Opinion of Member Pizzella) (citing *AFGE, Local 2198*, 67 FLRA 498, 500 (2014) (Concurring Opinion of Member Pizzella)).

The Arbitrator was without authority and the remedies are contrary to law.

Thank you.

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))

STATEMENT OF SERVICE

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

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WASHINGTON, D.C.

for Belinda Stevenson
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