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

OFFICE OF GENERAL COUNSEL

June 8, 2015

Transmitted via Overnight Mail

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 Motion for Reconsideration.

With regards,

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cc: Arbitrator McKissick, via Overnight Mail
Snider & Associates (Union Counsel), via Overnight Mail

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.	)	Date: June 8, 2015

MOTION FOR RECONSIDERATION

Pursuant to §2429.17 of the Authority's Regulations, the U.S. Department of Housing and Urban Development ("Agency or HUD") files its Motion for Reconsideration of the Federal Labor Relations Authority's (FLRA) May 22, 2015, Order Dismissing Exceptions (Order). The Agency further requests that the Authority stay the May 22, 2015, Order during the pendency of the Agency's Motion[1]. For the reasons set forth below, the Agency respectfully argues that extraordinary circumstances exists because the Authority erred in factual finding(s) which resulted in dismissal of the Agency's Exceptions in *U.S. Department of Housing and Urban Development*, 68 FLRA 631 (2015).

STANDARD OF REVIEW

The Authority has held that a party seeking reconsideration of an Authority decision must establish that extraordinary circumstances exist to warrant a party's

[1] On June 8, 2015, the Agency also filed a Motion to Stay Authority's May 16, 2015, Order.

reconsideration request. *See U.S. Dep't of Health and Human Serv.*, 60 FLRA 789 (2005). Instances where extraordinary circumstances have been identified include: (1) where an intervening court decision or change in the law affected dispositive issues; (2) evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) the Authority erred in its remedial order process, conclusion of law, or factual finding; and (4) the moving party has not been given an opportunity to address an issued raised sua sponte by the Authority in the decision. *See U.S. Dep't of the Air Force, 375th Combat Support Grp., Scott AFB, Ill.*, 50 FLRA 84 (1995).

In the instant matter, the Agency contends extraordinary circumstances exists that warrant reconsideration of the Authority's May 22, 2015, Order. Namely, the Authority erred in the following factual findings : (1) the Authority erred in finding that nothing in Summary 3 eliminated the requirement that parties "work through" the GS-1101 series to identify eligible class members; and (2) the Authority erred in finding the Arbitrator's prior statement that the 1101 job series was "covered" by the Award translates into a subsequent statement of all 1101s being promoted are equivalent. *See generally U.S. Dep't of Labor*, 60 FLRA 737 (2005) (Authority granted agency motion for reconsideration based on agency claim that Authority erroneously based its decision "on the assumption that Article 16 was at issue throughout the arbitration").

ARGUMENT

I. Authority erred in making the finding that nothing in Summary 3 eliminated the requirement that the parties "work through" the GS-1101 series in order to identify eligible class members.

The record reveals that the Agency's September 4, 2014, exceptions challenged the August 2, 2015, Order of Arbitrator McKissick, alleging the award redefined the

"application of factors used to identify grievants eligible for the remedy." *See* Exceptions at Pg. 9. The Agency also requested permission to file a Reply to the Union's untimely Opposition[2] to Agency's Exceptions. In its Reply, the Agency stated that the, "August 2, 2014, Order expands the definition for the class of eligible employees, along with the *method* for determining eligibility for the remedy." (emphasis added) *See* Reply at Pg. 3. In its filings, the Agency argued before the Authority that the Arbitrator's order to promote all 1101s constitutes *functus officio*. *See* Exceptions at Pg. 1.

The Authority erred in the factual finding in Implementation Meeting Summary 2 (IM Summary 2) that the parties "work through" employees in the 1101 job series was limited to the eligibility requirements defined in the remedial award. The eligibility requirements considered potential class members who meet "time in grade requirements" and have "satisfactory performance." *See* Order at Pg. 8. To the contrary, the Arbitrator's instruction to "work through" potential claimants encompassed more than the eligibility requirements identified by the Authority. Specifically, eligibility requirements consisted of a methodology, along with time in grade and satisfactory performance, as demonstrated by the record before the Authority.

The Authority correctly noted in its Order that the parties reached an impasse over an appropriate methodology for identifying eligible class members. *See* Order at Pg. 4. The Authority also highlights the Arbitrator's rejection of a methodology proposed by the Agency. *See id.* The Authority further notes that the Arbitrator attempted to resolve the

[2] On November 10, 2014, the Union filed an Opposition to the Agency's September 4, 2014, Exceptions, well beyond the 30-day regulatory time frame outlined in section 2425.3 of the Authority's Regulations. In spite of the Agency's request that the Authority strike the untimely Opposition, a review of the Authority's May 22, 2015, Order reveals that the Authority did not address the issue of the untimely filed Opposition. Therefore, to the extent considered, the Agency requests that the Union's untimely submission be stricken from the record.

dispute over an appropriate methodology by advising the parties that "the class definition is data driven, not announcement driven." *See* Order at Pg. 4.

However, the Arbitrator also states in IM Summary 2 that the Agency was to "... meet with the Union to identify additional class members as set forth in the Award and to submit methodologies for doing so ..." *See* Exh. 16[3]. The Arbitrator continues by directing the parties to meet and agree on a methodology, or present alternative methodologies[4]. ..." *See id.* at pg. 2. The plain language of the implementation summaries identifies the instruction to develop a methodology, or separate methodologies for identifying claimants and went beyond the eligibility determinations of time in grade and satisfactory performance that were highlighted in the Authority's Order. The record before the Authority demonstrates that a methodology was never identified in the remedial award and, thus, was to be developed by the parties *in addition* to the eligibility determinations of time in grade requirement and satisfactory performance.

Taken as a whole, the record reveals that after issuance of the remedial award, the Arbitrator instructed the parties to develop a methodology for the purpose of identifying claimants. *See* Exh. 16. The requirement to develop a methodology would, therefore, create additional eligibility considerations beyond time in grade and satisfactory performance. As such, the instruction in IM Summary 3 to promote all 1101s modifies the Arbitrator's previous order by no longer requiring that the parties "work through" or otherwise agree upon a methodology for the identification of eligible claimants, an exercise clearly requiring consideration of additional factors other than time in grade and satisfactory performance. The factual finding that "nothing in the third summary

[3] References to exhibits are already part of record before the Authority.
[4] On May 16, 2015, the Arbitrator issued IM Summary 6, in which she advised the parties that she was adopting the Union's methodology for determining eligible claimants. *See* Attachment 1.

eliminates the requirement" to identify additional class members is erroneous. *See* Order at Pgs. 7-8. Further, the factual finding that nothing in IM Summary 3 eliminated the requirement to "work through" the GS-1101 series to identify eligible class members is also erroneous, and served as the basis for dismissal of the Agency's Exceptions. *See Nat'l Assoc. of Gov't Employees, Local R14-52*, 46 FLRA 435 (1992) (motion for reconsideration granted where Authority error was basis on which it denied exceptions). Because these factual finding are erroneous, the Agency contends extraordinary circumstances exist that warrant reconsideration of the Order.

II. The Authority erred in finding that a statement that employees in the 1101 job series are within the scope of the award because they are "covered by" the award is equivalent to a statement that all 1101s were to be promoted.

The Authority further erred in finding equivalent the IM Summary 2 statement that the 1101 job series are covered by the Award and the IM Summary 3 statement that all 1101s were to be promoted (from IM Summary 3). In her remedial award, the Arbitrator defined the class of grievants 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* Exh. 5.

The Arbitrator issued Implementation Summaries to the parties. IM Summary 2 states, in relevant part, that, "*the Award covers all GS-1101 employees who were not promoted to the GS-13 level .... and therefore the Parties were directed to work through the GS-1101 series to identify all eligible class members ...*" *See* Exh. 16 at pg. 5. In IM Summary 2, the Arbitrator directed the parties to "meet and agree on a methodology, or to present alternative methodologies.." *See id.* at pg. 2. Based upon the plain language,

IM Summary 2, at the very least, directs the parties to determine which employees in the GS-1101 series qualify for the remedy.

In sharp contrast, IM Summary 3 orders the Agency to promote "all GS-1101 employees at the GS-12 level from 2002 to present" without regard to whether or not the employees met any methodology for ensuring eligibility. *See* Exh. 17 at pg. 1. The plain language in IM Summary 3 directs retroactive promotions for all employees in the 1101 job series, as opposed to IM Summary 2's requirement that the parties work through employees in the 1101 job series to determine which employees qualify for the remedy. The record before the Authority reveals that the Arbitrator instructed the parties to develop a methodology for identifying eligible claimants that included, but was not limited to, time in grade requirements and satisfactory performance. Thus, it is reasonable to conclude that IM Summary 2's instruction that the parties *work through* the 1101 job series because the award covers all GS-1101s would require the parties to consider employee eligibility based on time in grade, satisfactory performance, and a methodology for determining eligibility that the Arbitrator directed the parties to develop after she issued her remedial award. *See* Exhs. 16-17. It is also worth noting that the Arbitrator failed to consider or select a methodology from either party when she ordered the promotion of all 1101s. *See id.*

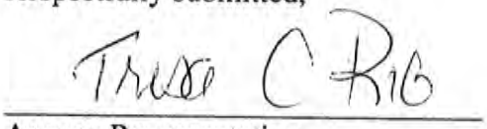
In spite of the Arbitrator's assertion in each of her implementation summaries that "nothing should be construed as a new requirement or modification of the existing award," IM Summary 3 goes beyond the requirement that the parties "work through" the 1101 job series to determine eligibility. Specifically, IM Summary 3 directs the Agency to provide the remedy of retroactive promotions to all GS-12 employees in the GS-1101

series, while IM Summary 2 advises that GS-1101 employees are merely covered by the award and, contingent upon meeting eligibility criteria, *may* be entitled to the remedy. Therefore, the Agency respectfully argues that the Authority erred in the factual finding that 1101s being covered by the award translates to the statement that all 1101s were to be promoted. *See generally U.S. Dep't of Labor*, 60 FLRA 737 (2005).

CONCLUSION

For the foregoing reasons, the Agency requests that the Authority grant its Motion for Reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The Agency's Motion for Reconsideration has been served on all parties on the date below, and via the method indicated:

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June 8, 2015
(Date)

Tresa Rice
TRESA A. RICE
Agency Representative

IN THE MATTER OF ARBITRATION BETWEEN:

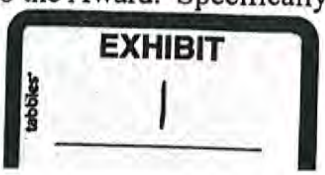
American Federation of Government, Employees (AFGE), Council of HUD Locals 222, **UNION,** **v.** **U.S. Department of Housing & Urban Development,** **AGENCY.**	**Issue: Fair and Equitable Grievance** **Case No. 03-07743** **Arbitrator:** **Dr. Andrée Y. McKissick, Esq.**

SUMMARY OF IMPLEMENTATION MEETING

This Arbitrator met with the Parties on March 26, 2014 to discuss the progress of the Parties with the implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Agency were: Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, and Holly Salamido, Union Council President Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Peter Constantine, Esq., Mercedeh Momeni, Esq., Michael Moran and Mary Beth Pavlik. This is the sixth Summary of Implementation Meeting ("Summary 6"), the first five having been issued on March 14, 2014 ("Summary 1"), May 17, 2014 ("Summary 2"), August 2, 2014 ("Summary 3"), January 10, 2015 ("Summary 4") and February 27, 2015 ("Summary 5"), respectively. The Agency filed Exceptions before the FLRA to the August 2, 2014, Summary of Implementation Meeting, and those Exceptions are currently pending. This Summary only relates to the Award and Summaries 1, 2, 4 and 5. This Summary does not relate to the August 2, 2014 Summary (Summary 3).

I. Status of Outstanding Compliance Issues

In Summary 5, this Arbitrator noted that at the February 4, 2015 Implementation Meeting ("IM"), the Union provided a presentation concerning non-compliance and implementation for the remaining class of BUEs subject to the Award. Specifically, the Union noted that: (1) none of the



seventeen (17) class members had received their performance bonus differential; **(2)** only one out of the seven (7) employees from the seventeen (17) class members who are retired received her revised annuity; and **(3)** the Union had not received sufficient information as to the TSP contributions for the ten (10) employees from the seventeen (17) class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

At the March 26, 2015 IM, the Agency provided the Union with the proposed payments for the performance bonus differential for the seventeen (17) class members. The Union is ordered to provide its response to the Agency concerning the sufficiency of those payments within two (2) weeks of the date of receipt of this Summary.

The Agency's response as to the status of the recalculated annuities is insufficient. Many of the retired class members have still not received their revised annuity payments from OPM. The Agency is ordered to schedule a call with this Arbitrator, the Union and the Agency with the Agency's OPM contact no later than one week from the date of receipt of this IM Summary. The Agency is further ordered to have the Deputy Secretary and/or CHCO contact OPM directly to ascertain a more detailed status on the payment of the revised annuities and to urge OPM to expedite the processing thereof.

The Union has requested certain data concerning TSP contributions from class members and potential class members. The Agency has informed the Union that TSP will not provide such data to the Union due to legal restrictions in doing so. Within fourteen (14) days of receipt of this Summary, the Agency shall provide written proof from TSP which sets forth TSP's position in this regard. The Parties are then directed to work together to determine a reasonable and

appropriate manner and method of obtaining the Union's requested information. This will be further discussed at the June 2, 2015 IM.

II. Orders on Outstanding Motions

The Union has filed a Motion to Compel the production of MSCS Announcement Listings from 1999 to 2002. The Agency has opposed the Union's Motion, and the Union has filed a Reply. The Union's Motion is granted. Moreover, as explained in Summary 4, due to new evidence being submitted, the Award was clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed. This ruling was based upon data from the MSCS system provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties. This Arbitrator stated that "if the Union or Agency presents additional new evidence or data, this ruling may be further clarified." The Union seeks the identical MSCS data relied upon in Summary 4 in an effort to discover and present new evidence in support of showing that violations existed prior to 2002; without this evidence, which is in the sole control of the Agency, the Union effort will be stymied. The Back Pay Act has a six (6) year look back period, or statute of limitations. The July 1999 date proffered by the Agency as the beginning of entries to the MSCS system falls well within that six (6) year period prior to the filing of the Grievance of this case, in November 2002. Despite the Agency's claim that this Arbitrator lacks jurisdiction prior to 2002, the Back Pay Act says otherwise. Since there is jurisdiction, and the evidence is germane to this case, therefore, the Union's Motion is granted. The Agency shall produce the MSCS Announcement Listings in the same format as in its May 2014 production, for the period from the inception of the MSCS system entries (circa July 1999) until 2002, to the Union, within thirty (30) days. This ruling shall not yet be construed as a finding that the damages period extends back to July 1999, rather it is a directive that the Agency produce the requested data.

A ruling on all other outstanding Motions, including the Union's Motion to order the Agency to produce the names of Responsible Management Officials, are held in abeyance until the next IM and presentation of the materials this Arbitrator requested at the IM.

III. Identification of Class Members

a. Background

As noted above, this Arbitrator has previously provided the Parties with five (5) Summaries of Implementation Meetings. In **Summary 1**, this Arbitrator stated in relevant part:

> The purpose of the implementation meeting was to clarify the members of the class that was defined in my January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award. Rather, **the meeting and this summary were, to the extent necessary, intended to clarify with specificity which Bargaining Unit Employees are eligible class members.**
>
> The Agency has requested written clarification of my Award (including on August 7, 2013 and November 13, 2013). **I indicated that no clarification was necessary as my Award was clear and unambiguous.** More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. Despite the clarity of my Award, the Agency has failed to timely implement the Award as ordered.
>
> ...
>
> Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for back pay and promotion. **Impasse in implementation is unnecessary because the Award is clear in its definition of the class.** The Class definition is data driven, not announcement driven, **as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce data, as I told the Agency previously last spring and summer. <u>The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing</u> until the Agency ceases and desists from posting positions that are violative of my Award.**
>
> Per the Union's December 13, 2012 data request, the Agency provided data to the Union on January 18, 2013 which listed all of the Bargaining Unit Employees that

encumbered, per the definition of the Class set forth in the Award, the Job Series referenced in Joint Exhibits 2, 3, 4, & 7G and Union Exhibits 1 and 9.

Summary 1 (emphasis added).

In **Summary 2**, this Arbitrator stated in relevant part:

During our prior meeting, I noted that the Agency's methodology of identifying class members entitled to relief under my Award was flawed, and I directed the Parties to meet and agree on a methodology, or to present alternative methodologies at our March 26, 2014 meeting. The reason we are meeting is to ensure that implementation is moving forward and does not stretch out.

In the prior meeting and Summary, I made it clear that the Agency was to meet with the Union to identify additional class members as set forth in the Award and **jointly to submit methodologies for doing so as the March 26, 2014 Implementation Meeting.** The Parties informed me that they met on March 13, 2014, and that the Union asked the Agency if it agreed with the Union's list of class members; if not, the Union asked the Agency for suggestions of alternative methodologies to identify class members.

The Agency confirmed at the March 26, 2014, Implementation Meeting that it does not agree with the Union's list of class members, arguing that the scope of the data exceeds the claims period. The Agency agreed, however, that it is at fault for failing to provide the Union with data confined to the claims period. The Agency also confirmed that it has not yet developed or presented for the Union's consideration an alternative methodology for identifying class members.

In my prior Summary I noted that the Agency had unilaterally determined, based upon its own methodology, that there are a minimal number of class members which it was able to identify, including only two (2) of the six (6) witnesses. As set forth in my prior Summary, any methodology that failed to identify each of the six (6) witnesses as class members is by definition flawed. **The Agency insists that it disputes my understanding of my Award and that it prefers to interpret my Award narrowly. I informed the Agency that, while it may dispute my understanding of my Award, it must nevertheless implement the Award as I interpret it – not as the Agency unilaterally interprets it. I explained again as well to the Parties that I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible.**

Coming up with a satisfactory methodology should not be difficult. Impasse in implementation should be unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not vacancy announcement drive, as is clear from my Award and the Adverse Inference drawn due to the Agency's

> failure to produce evidence, as I told the Agency previously last spring and summer and in my prior Summary. **The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.**
>
> The Parties and I discussed at the March 26, 2014 meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that **the witnesses who testified at the hearing were in two Job Series, GS-1101 and GS-236. These Job Series are clearly within the scope of the Award, although they comprise a small portion of the Job Series covered by 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 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 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-246 series, the other GS-1101 employees, and then others in other applicable Job Series, until implementation is complete.

Summary 2 (emphasis added).

In Summary 5, this Arbitrator noted that the Union's presentation restated its methodology to the class composition based upon this Arbitrator's Award and subsequent Summaries. As noted by this Arbitrator in Summary 1, "[T]he eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award." The Union's presentation revealed that the Job Series identified in the Exhibits as listed in the Award include forty-two (42) applicable Job Series, and at a minimum, the Union stated that the applicable class consists of at least all GS-12 employees who encumbered a position in any of those forty-two (42) Job Series at any time during the relevant damages period, so long as the requirements concerning performance and time-in-grade were met. This Arbitrator found, in Summary 5, that the Union's "presentation and

interpretation comports with previous statements by this Arbitrator reiterating that the class is easily identifiable and includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements."

This Arbitrator has noted on a number of occasions that due to the Agency's historical failure to produce information and data to the Union – even after being ordered to do so and being provided ample opportunity to comply – the Agency's data systems may be used to expand the Class of employees subject to the Award and Remedy, but not to limit the Class. This is the result of the adverse inference that has been drawn in this case and was noted by, and upheld by, the FLRA. Further, this Arbitrator has stated on numerous occasions that the Award was to be interpreted broadly, so as to apply to the largest class of Grievants possible. For example, in Summary 2 this Arbitrator stated:

> I informed the Agency that, while it may dispute its understanding of my Award, it must nevertheless implement the Award as I interpret it – not as the Agency unilaterally interprets it. I explained again as well to the Parties that **I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible.**

(Summary 2, emphasis added).

b. The Agency's Methodology

i. Agency Presentation

On March 26, 2015, the Agency presented its "HUD Compliance Methodology" for the first time, along with a list of "HUD's Proposed Claimant List" of approximately four hundred, thirty-nine (439) employees. After the Agency meticulously presented and explained its methodology, the Parties and this Arbitrator discussed the matter thoroughly. The Agency methodology utilized "accession lists" along with the Agency's identification of previously

classified positions (drawn from an unknown source), "affected bargaining unit employees" – at the time of new hires into positions with FPL of GS-13, and stated that those employees "are the claimants." HUD also applied filters and utilized the "HR System of Records" to find self-identified "newly created, previously classified positions" and other limitations in order to arrive at the class of four hundred, thirty-nine (439) claimants. HUD specifically stated that it only included "GS-12 employees with FPL of only GS-12 occupying the same positions at the same time as the violations." HUD stated that headquarters and field employees are "different position[s] altogether, based on the reporting structure of the organization and the scope and effect of the work of the relevant employee." The Agency stated that its methodology complied with the Award and Summaries, because it includes all six (6) witnesses, PHRS employees, and CIRS employees. The Agency further explained that its methodology was designed to result in "practical implementation," was a "data driven exercise" and was guided by the "rate of promotions internally."

ii. Union's Comments on Agency Methodology

The Union took issue with many aspects of the Agency's methodology, and pointed out many ways in which it did not comport with the Award and prior Summaries of this Arbitrator. The Union argued that the Headquarters / Field distinction created by the Agency had no valid basis – that it was essentially the same distinction as the Agency drew previously, but this time with a new alleged, and flawed, justification. The Union alleged that the Agency methodology did not construe the Award and Summaries "broadly" (as required by the Award and Summaries) but rather created an approach that did not even include all PHRS and CIRS employees. The Union claimed that, beyond the PHRS and CIRS groupings, the Agency methodology included few additional class members – essentially customizing an approach that created the smallest class possible while presenting the false image of compliance with the Award and Summaries.

The Union noted that the Grievance included allegations of violations on behalf of these six (6) categories:

1. GS-343 Program Analysts,
2. GS-246 Contractor Industrial Relations Specialists,
3. GS-801 Engineers,
4. GS-1160 Financial Analysts,
5. GS-828 Construction Analysts, and
6. GS-1101 Public Housing Revitalization Specialists.

The Union previously submitted a list to both the Agency and this Arbitrator identifying the class of employees entitled to relief under the Award and Summaries, using "listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing" whom the Union believes, at a minimum, are eligible class members. The Union stated that the class consists of under one thousand, five hundred (1,500) current employees due promotions to the GS-13 level. The Union estimates the total class to be at least three thousand, seven hundred, seventy-seven (3,777) former and current Bargaining Unit employees – many of whom are already retired, many of whom are already GS-13s and many of whom have deceased during the pendency of this matter.

The Union's review of that list, compared to the Agency's eligible class member list for these six (6) positions, further demonstrates that the Agency's methodology does not comport with this Arbitrator's Award. The Union stated that the class definition in the Award explicitly included additional Job Series beyond those listed in the Grievance, due to the adverse inference ruling. The Union stated that a simple review of these positions alone, identified in the Award itself (**Award** at page 4) demonstrates that the Agency's methodology does not comport with the Award and Summaries.

The Arbitrator now finds that the Agency's methodology should be far more inclusive as explained at the last Implementation Meeting. Specifically, the grievance itself and supporting exhibits clearly identified six (6) Job Series and positions which amounts to six hundred, ninety-

seven (697) eligible and current employees. This is in contradistinction to two hundred, eighty-nine (289) class members identified by the Agency. That is, there seems to be one hundred and one (101) GS-343 Program Analysts, based upon categories defined in the grievance and corresponding submissions. However, the Agency's methodology in contrast identifies only fifteen (15) Analysts. Moreover, it would further seem that there are thirty-three (33) GS-246 CIRS employees who are eligible class members. Nonetheless, the Agency's methodology only identifies twenty-eight (28). Still further, there seems to be ten (10) GS-801 Engineers who are eligible class members. However, only one (1) Engineer was identified by the Agency's methodology. Moreover, another category comprises one hundred, seventy (170) GS-1160 Financial Analysts who are eligible class members. This is in contrast with thirty-six (36) identified Financial Analysts based on the Agency's methodology. Still another category of eligible employees include one hundred, forty seven (147) GS-828 Construction Analysts, but only six (6) were identified by the Agency's methodology. Lastly, the final category of eligible employees seem to be two hundred, thirty-six (236) GS-1101 PHRS eligible employees, yet only two-hundred, three (203) were identified by the Agency's methodology. As noted in the Award, these six (6) categories of eligible members should be computed from 2002 to present in coverage. Based on all of the foregoing, these categories should be reviewed and expanded to include more eligible members.

The Union further argues, based upon <u>just</u> the six (6) positions explicitly listed and contained in the initial Grievance, the Union's methodology utilizing listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing would include approximately six-hundred, ninety-seven (697) eligible class members while the Agency's methodology produces two-hundred, eighty-nine (289), or only forty-one percent (41%). The Union noted that the dichotomy is even greater when reviewing the class as a whole; the Agency's entire list of class members is

comprised of four-hundred, thirty-nine (439) current and former employees while the Union claims the class numbers in excess of three-thousand, seven-hundred, seventy-seven (3,777). The Union claims that the Agency's methodology cannot be in compliance with the Arbitrator's directive that "my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible." Summary 2.

Furthermore, the Union stated that the Agency utilized information – not previously provided by the Agency – to limit the class, as opposed to expanding it, contrary to the clear and explicit directions of the Arbitrator. The Union claims that the effect of the utilization of the new information was to limit the class is clear, and therefore the Agency's integration of that information is contrary to the Award and prior Summaries.

The Union asked the Agency questions at the March 26, 2015 IM about which Job Series were included in the Proposed Claimant List, as that information was not revealed in the Agency's exhibits. The Union also questioned the Agency's apparent integration of a portion of the Remedy ("that the Agency process retroactive permanent selections of all affected BUEs into currently existing career ladder positions") into the Class Definition (BUEs in career ladder positions where that ladder lead to a lower journeyman grade than the target grade of "a career ladder of a position with the same job series").

The Union stated that the Agency limited application of the Class Definition by incorporating into it the Remedy and its description of "currently existing career ladder positions." The Union also claimed that the Agency limited the Class by utilizing an Agency systems data point called "accession lists" whose use the Union claimed was apparently designed to pare down the size, membership and damages period for Class members, in contradistinction to this Arbitrator's Award and prior Summaries. The Union pointed out that the Agency's list of four-hundred, thirty-nine (439) employees does <u>not</u> include all employees in, for example, the entire GS1101 series (as were included explicitly in Summary 2 at pages 5 and 6) but rather singles out

a very few individual positions within very few Job Series (i.e. the Agency methodology misinterprets the Award as reading "a career ladder **of the same position with the same Job Series**") as opposed to following the actual language of the Award ("a career ladder of **a position with the same Job Series**"). The Union pointed out that in Summary 2, the Arbitrator has found that employees in the same Job Series were to be treated similarly due to the adverse inference drawn in the Awards issued by the Arbitrator. The Union pointed out that its methodology identifies the applicable class as consisting of at least all GS-12 employees who encumbered a position in any of the forty-two (42) Job Series listed in the Joint and Union Exhibits described in the Award (Award at page 4, Summary 5 at page 3) and that the Arbitrator found, in Summary 5, that:

> ...the **Union's "presentation and interpretation comports with previous statements by this Arbitrator** reiterating that the class is easily identifiable and **includes any employee who encumbered any position in any of the Job Series identified in the Exhibits** as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements."

Summary 5, page 3. The Union urged this Arbitrator to reject the Agency's approach and to adopt the Union's approach as being in compliance with her Award and prior Summaries.

iii. Arbitrator's Analysis and Findings Regarding Agency Methodology

This Arbitrator finds that the Agency has been provided ample opportunity to create a methodology which complies with the Award and Summaries. See, e.g., Summary Nos. 1, 2 and 5. The Parties were given clear guidance as to who should belong in the Class, by way of the Class Definition and repeated statements in Summaries that "The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time..." *Id.* This Arbitrator also repeatedly "explained again as well to the Parties that I intend for my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible." Summary 2. Despite being given multiple

opportunities to come up with a methodology that complies with the Award and Summaries, the Agency has failed to do so.

This Arbitrator finds that the Agency's methodology is not in compliance with the Award, prior Summaries, and this Arbitrator's instructions for a number of reasons including: its deliberately limited scope, use of invalid distinctions, utilization of information that contradicts the adverse inference previously found, and upheld by the FLRA and demonstrated non-compliance with the Award and Summaries based upon the end result of application of the Agency's methodology in practice.

The Agency limited the Class by artificially distinguishing between Field and Headquarters positions, explaining that they have a different reporting structure and that even positions within the same Job Series and Job Title "are classified differently" and, in the Agency's view, were not "similar" as that term was used in the Award and FLRA Decisions upholding the Award. The Agency's use of alleged reporting or classification differences to distinguish between positions does not comport with the Award and prior Summaries. The Headquarters / Field distinction is not in compliance with this Arbitrator's Award and Summaries. This Arbitrator noted that the Headquarters / Field distinction appeared very troubling as it was made clear during the IM that Field employees could apply and qualify for Headquarters positions, and vice versa. No credible evidence was presented by the Agency in support of its Headquarters / Field distinction.

Just like employees in the same Job Series are fungible – i.e. they may be qualified for, may apply for and be selected for positions in the same Job Series regardless of reporting structure or location – employees in many Job Series are qualified for, may apply for and be selected for positions in other Job Series. This possibility was ignored by the Agency in its methodology as well.

Moreover, no explanation was provided by the Agency as to why it was using the Agency's data systems to limit, as opposed to expand, the Class of employees subject to the Remedy. As

this Arbitrator has noted throughout the litigation of this matter, the Agency had ample opportunity to provide data that might support its position, yet repeatedly failed to produce that data, which resulted in the finding of an adverse inference against the Agency. The Agency is now attempting to use new data to limit the class. The adverse inference precludes the usage of data to limit the class, as explained to the Parties repeatedly. New data may be used to expand the class, but not to limit it.

The Agency's methodology is similarly flawed in that it relies heavily on its identification of "previously classified positions with FPL [Full Performance Level] of GS-13." As noted on many prior occasions, the Agency was previously ordered to provide data on this and many other areas of information, but failed to do so and, therefore, an adverse inference was drawn. The Agency cannot now use information it failed to provide, in order to limit the Class. These new distinctions and limitations show that the Agency's methodology is not in compliance with the Award and prior summaries.

The Agency's use of accession lists, as noted above, is not in compliance with the Award and prior summaries and may not be used to either limit the class membership or to reduce the damages period for class members. The Adverse Inference that has been drawn and upheld precludes the use of the accession lists for these purposes. The eligibility for a class member is driven by their being at the GS-12 grade for 12 months in any position in an eligible Job Series, so long as their performance was fully satisfactory.

Finally, this Arbitrator inquired a number of times with the Agency during the March 26, 2015 IM as to whether it was interested and able to modify its Methodology to come closer towards compliance with the Award and summaries, since it clearly is not in compliance. The Agency stated it was not able or willing to do so.

iv. Ruling on Remaining Class Members

This Arbitrator has carefully reviewed the Award, prior Summaries and both the Union's and Agency's proposed methodologies. As in Summary 2, the Agency has again failed "to come up with any [valid] alternative methodology to that of the Union for identifying class members." Therefore, as this Arbitrator cited with approval in Summary 5, the Union's methodology for identifying class members is hereby adopted. To the extent any clarification is necessary, the Award is clarified that the class of employees eligible for the relief stated include: any employee who encumbered any position in any of the Job Series identified in the Hearing Exhibits as noted in the Award and presented by the Union at the February 4, 2015 IM (Union Exhibit 12, "List of Series Pulled from Hearing Exhibits"), at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements. As set forth in Summary 4, the relevant damages period in this case, is from January 18, 2002 until the present.[1]

Applying the Union's methodology to the "listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing" the Union has identified a class of, at a minimum, three-thousand, seven-hundred, seventy-seven (3,777) Bargaining Unit Employees. This list was provided by the Union to the Agency in September 2014 and the Agency has had ample time to review and comment upon it. The Agency has not disputed this list. Therefore, the Agency is directed to, within forty-five (45) days, retroactively promote and make whole these three-thousand, seven-hundred, seventy-seven (3,777) employees that have so far been identified, back to January 18, 2002 or the earliest date of eligibility, in accordance with the findings and Analysis set forth above (i.e. after meeting minimum time in grade and fully satisfactory performance).

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[1] As stated in Summary 4, the start date for the relevant damages period may be revisited in the event new evidence is presented by either the Union or Agency. Such a revision to the award would constitute a permissible modification under Authority precedent. **U.S. Department of the Navy, Naval Surface Warfare Center, Indian Head Division, Indian Head, Maryland and AFGE, Local 1923**. 56 FLRA 848 (September 29, 2000).

The Agency and Union are furthermore directed to work together to continue to review the Agency's employee data to identify additional and those remaining Class members as defined above, to calculate all damages and emoluments due under the Back Pay Act, and to present the results to the Arbitrator within sixty (60) days. An extension may be granted if there is a joint request for one. This Arbitrator would like regular status updates on the implementation of the Award and Summaries on a monthly basis, and a full briefing at the next IM. The goal is to have all Class members promoted and the remedy implemented this Fiscal Year. The Parties are directed to continue their weekly discussions on information exchange and implementation status.

v. Additional Issues and Conclusion

This Arbitrator has expressed concern about HUD's stated inability to pay for the damages pursuant to the Award and Summaries. Mr. Brad Huther, Chief Financial Officer for the Agency remarked in February 2015 that, to date, HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. As Union counsel pointed out, the HUD Inspector General's March 6, 2015 Audit of HUD's Budgets from FY 2013 and FY 2014 revealed that HUD not only has not set aside funding for satisfaction of the claims in this case, its "management and general counsel" have opined that "the ultimate resolution of pending litigation will not have a material effect on the Department's financial statements."[2] This is especially concerning because by the Agency's own admission, it does not have adequate funding to pay even the damages it believes are owed as a result of its own, improper, methodology.

[2] The entire statement is as follows: "HUD is party to a number of claims and tort actions related to lawsuits brought against it concerning the implementation or operation of its various programs. The potential loss related to an ongoing case related to HUD"s assisted housing programs is probable at this time and as a result, the Department has recorded a contingent liability of $117 thousand in its financial statements. Other ongoing suits cannot be reasonably determined at this time and in the opinion of management and general counsel, the ultimate resolution of pending litigation will not have a material effect on the Department's financial statements." Fiscal Years 2014 and 2013 Consolidated Financial Statements. https://www.hudoig.gov/reports-publications/audit-reports/independent-auditor%E2%80%99s-report-hud%E2%80%99s-consolidated-financial

The purpose of the March 26, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award. This Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2, 4 and 5. This Arbitrator has and will continue to maintain jurisdiction over any Union request for attorney fees, costs and expenses. A final decision on attorney fees, costs and expenses does not appear to be ripe at this time since the matter is ongoing and, therefore, this Arbitrator shall continue to retain jurisdiction over any Union request for attorney fees, costs and expenses until the matter is completed.

In response to the Agency's assessment of these composite summaries, this Arbitrator finds that some repetition is helpful for clarification and continuity of our continuing issues. In response to the Agency's conclusion that the Union's description of events and statements are inaccurate, this Arbitrator disagrees. All the categories of eligible members were specified in the grievance and corresponding exhibits submitted. Thus, such information is pertinent and relevant to current controversy regarding the best methodology to achieve the outstanding remedies awarded and validated by FLRA.

The next IM will take place on June 2, 2015 at 10:00 am at HUD's headquarters.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

May 16, 2015

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