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 to Stay.

With regards,

Tresa A. Rice
Senior Attorney-Advisor
Department of Housing and Urban Development
Personnel Law Division, Office of General Counsel
451 7th Street, SW, Room 2124
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Email: tresa.a.rice@hud.gov

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. U.S. Department of Housing and Urban Development, Agency.	Case No: O-AR-4586 Date: June 8, 2015

MOTION TO STAY AUTHORITY ORDER

The U.S. Department of Housing and Urban Development (Agency or HUD) files a Motion to Stay the Federal Labor Relations Authority's (FLRA) May 22, 2015, Order Dismissing Exceptions (Order). 5 U.S.C. §705 provides the FLRA with the flexibility to postpone an order to prevent irreparable injury. In addition, 5 U.S.C. §7105(a) empowers the FLRA to take necessary and appropriate actions to effectively administer the statute.

Taken together, the Agency argues that the Authority should exercise its flexibility to postpone the Order that will result in irreparable injury to the Agency's position management structure. Specifically, the impact of the FLRA's Order will result in an unlawful organizational upgrade of virtually all GS-12 AFGE bargaining unit employees employed in positions in the 1101 series and, therefore, constitutes an extraordinary circumstance. 5 U.S.C. §7112 (c)(5) of the Statute excludes matters involving the classification of any position which does not result in the reduction in grade

or pay. Because the FLRA'S Order will result in an unlawful organizational upgrade, it is an extraordinary circumstance, and the Agency requests a stay of the Order. *See generally Int'l Assoc. of Machinists and Aerospace Workers, Franklin Lodge No. 2135*, 44 FLRA 761 (1992) (the FLRA considers whether extraordinary circumstances "or another basis" warrants stay of an order)

The requested stay will provide an opportunity for the Authority to reopen and reconsider the decision issued in *U.S. Department of Housing and Urban Development*, 68 FLRA 631 (2015). Additional review is necessary in order for the Authority to fully examine the Agency's argument that errors in the Authority's factual findings resulted in dismissal of the Agency's exceptions alleging that the Arbitrator modified her remedial award. Left undisturbed, the Authority's Order will result in an unlawful organizational upgrade. Therefore, a stay of the Authority's Order is warranted during the pendency of the Agency's Motion for Reconsideration.

ARGUMENT

I. History of Arbitrator Remedies of Unlawful Organizational Upgrades

The Parties have been engaged in ongoing litigation over the subject matter underlying the Order. The National Council of HUD Locals 222, AFGE filed a grievance on November 13, 2002, alleging that the manner in which the Agency posted and filled certain positions violated the parties' collective bargaining agreement. *See* Attachment 1. The remedy sought was an increase in the full promotion potential for all similarly situated employees at the grade 13 level. *See id.* In response, the Agency determined that the grievance involved a classification matter, and denied the grievance finding the matter not arbitrable. *See* Attachment 2. The Arbitrator disagreed, and concluded that

the substance and nature of the grievance involved the fairness of advertisements and vacancy announcements, and was arbitrable. *See* Attachment 3.

The Agency appealed, and on February 11, 2004, the Authority issued its first remand, directing the Arbitrator to clarify her reference to "reclassified positions" because the Arbitrator was not clear whether the Union's grievance concerned the promotion potential of permanent positions, or the right for employees to be placed in previously classified positions. *See* Attachment 4. The Arbitrator concluded that the grievance concerned the right to be placed in previously classified positions, and on September 29, 2009, issued her remedial award. *See* Attachment 5. In her award, however, the Arbitrator found that, "the appropriate remedy is an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively from 2002." *See id.* The Agency again appealed, and the Authority again remanded the Arbitrator's award. *See* Attachment 6. In the Authority's second remand, the award was set aside and remanded for an alternate remedy. *See id.* On January 10, 2012, the Arbitrator issued another order, finding retroactive promotions into previously classified positions an appropriate remedy, unless the Authority concluded otherwise. *See* Attachment 7. The Agency again appealed and argued, among other things, that the remedy ordered non-competitive promotions. *See* Attachment 8. On August 8, 2012, the Authority dismissed the Agency's exceptions, concluding that the Agency raised arguments to the FLRA that could have been, but were not, raised before the Arbitrator first. *See* Attachment 9.

The Arbitrator subsequently ordered the parties to participate in Implementation Meetings (IM). Following each Implementation Meeting, the Arbitrator issued

Implementation Meeting Summaries (IM Summaries), where she provided additional orders and instructions to the parties. To date, IMs have been held on: March 14, 2014, May 17, 2014, August 2, 2014, January 10, 2015, February 27, 2015, and June 2, 2015. IM Summaries were issued for each of these meetings on: March 14, 2014 (IM Summary 1), May 17, 2014 (IM Summary 2), August 2, 2014 (IM Summary 3), January 10, 2015 (IM Summary 4), February 27, 2015 (IM Summary 5), and June 2, 2015 (IM Summary 6). Additionally, the Agency has previously argued that the Arbitrator's "clarifications" actually constituted an impressible modification. *See e.g.* Attachment 10.

II. Impact of May 22, 2015, Order constitutes an unlawful organizational upgrade to which a stay is warranted, pending reconsideration request

On August 2, 2014, the Arbitrator issued an IM Summary, in which she ordered that, "... all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted..." *See* Attachment 11. The Agency excepted to the Arbitrator's August 2, 2014, IM Summary that the Agency promote all employees employed in the 1101 job series. *See* Attachment 12. In its exceptions, the Agency argued that the Arbitrator exceeded her authority by modifying the final and binding remedial award. *See id.* On May 22, 2015, the Authority issued an Order dismissing the Agency's exceptions. *See* Attachment 13. In its Order, the Authority concluded that the Arbitrator's May 17, 2014, IM Summary, in addition to the August 2, 2015, IM Summary, directed the Agency to implement the challenged remedy of retroactive promotions for all GS-1101 employees. *See id.*

On June 8, 2015, the Agency filed a Motion for Reconsideration, alleging the Authority erred in the following factual findings: (1) finding that nothing in Summary 3

eliminated the requirement that parties "work through" the GS-1101 series to identify eligible class members; and (2) finding language that the 1101 job series was "covered" by the Award in IM Summary 2 is similar to language to "promote" all 1101s in IM Summary 3. *See* Attachment 14. The Agency further alleged that the erroneous factual findings resulted in dismissal of the Agency's exceptions. *See id.*

The record demonstrates that, at all times relevant, the Agency has maintained that the Arbitrator's remedies involve classification matters, and that her remedies result in an unlawful organizational upgrade of certain positions within the Agency's workforce. Similarly, language in IM Summary 3 requires that the Agency promote virtually all grade 12 employees in the 1101 job series and once again results in an unlawful upgrade to the grade 13 level for all GS-1101s, without competition. *See generally* Attachment 6. (FLRA found the Arbitrator's previous remedy of an organizational upgrade of affected positions by upgrading the journeyman level involves classification). Therefore, absent a stay, the Authority's Order has the practical effect of ordering the Agency to implement mass, non-competitive retroactive promotions.

III. Granting the Stay Request is Appropriate and Within the Authority's Jurisdiction.

In deciding whether to grant a request to stay, the FLRA is guided by the principle that tribunals may properly order stays "... when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *See Nat'l Treasury Employees Union*, 32 FLRA 1131 (1988) (Authority granted agency motion to stay).

Additionally, 5 U.S.C. 705[1] provides the FLRA with the flexibility to postpone an order to prevent irreparable injury. The history of this case clearly demonstrates that the underlying question of whether the Arbitrator issuance of an order under the guise of placement into previously classified positions has, in fact, resulted in remedies that seek to impermissibly change the organizational structure of the Agency. Namely, by explicitly referencing "organizational upgrades" in her original award, and continuing in IM Summaries[2] that seek the promotion of all 1101s, without consideration of the full range of criteria via a methodology that the Arbitrator previously ordered the parties to develop. *See* Attachment 11. The record further reveals that the Arbitrator has consistently attempted to circumvent section 7112 (c)(5) of the Statute by issuing instructions and orders that have the practical effect of changing the Agency's organizational structure to the point where practically no employee will be employed at the grade 12 level within the Union's bargaining unit. Based upon a cursory review of Agency records, absent a stay of the Authority's Order, the Agency will have to consider whether approximately 2,500 current and former GS-12 employees are entitled to a retroactive promotion without due consideration of the Agency's argument that additional eligibility criteria were contemplated by the Arbitrator at the time of IM Summary 2 and 3, that the Arbitrator directed the parties to develop these criteria, which the Arbitrator subsequently disregarded in IM Summary 3.

As such, granting the Motion to Stay will prevent irreparable injury to the Agency's position management structure in that the immediate impact of retroactive

[1] When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. Conditions include the extent necessary to prevent irreparable injury.
[2] On May 16, 2015, the Arbitrator issued IM 6, and the Agency is currently preparing Exceptions to challenge additional organizational upgrades.

promotions for an approximate 2,500 current and former employees will be on hold during the review and consideration of the Agency's Motion for Reconsideration. In the event the Motion for Stay is not granted, Agency staff and resources would have to be unnecessarily expended on the determinations for potentially 2,500 individuals. Additionally, in the absence of a stay, the Authority's Order will also result in the still unknown expenditure of financial resources to effectuate approximately 2,500 retroactive promotions for the GS-1101 job series *alone*. For example, Agency records reveal that the financial impact resulting from processing retroactive promotions for 17 current and former employees employed in certain job series is currently over 1.6 million dollars. Therefore, very significant personnel management and financial implications are directly tied to IM Summary 3 that the Agency has filed a Motion for Reconsideration over. Status quo will prevent the immediate irreparable injury; therefore, a stay pending resolution of the Motion for Reconsideration is warranted and promotes the interests of equity.

CONCLUSION

For the foregoing reasons, the Agency requests that the Authority grant its Motion to Stay the Order issued in *U.S. Department of Housing and Urban Development*, 68 FLRA 631 (2015).

Respectfully submitted,

Agency Representative
Department of Housing and Urban Development
451 Seventh Street, SW, Room 2124
Washington, DC 20410
Telephone (202) 402-2222
Fax: (202) 708-1999
Email: tresa.a.rice@hud.gov

CERTIFICATE OF SERVICE

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

Overnight Mail
Federal Labor Relations Authority
Office of Case Intake and Publication
Docket Room, Suite 200
1400 K Street, NW
Washington, DC 20424-0001
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Email: jstatman@sniderlaw.com

June 8, 2015
(Date)

TRESA A. RICE
Agency Representative

November 13, 2002

MEMORANDUM FOR: Norman Mesewicz, Deputy Director, Labor and Employee Relations Division, ARHRL

FROM: Carolyn Federoff, President, Council of HUD Locals 222

SUBJECT: Grievance of the Parties and Request for Information
Failure to Employees Fair and Equitably

Please accept this Grievance of the Parties and Request for Information. We believe the HUD/AFGE Agreement has been violated, employees harmed, and that a remedy is necessary.

Facts

On or about August 5, 2002, the agency advertised a Program Analyst, GS-0343-09 (vacancy number GS-MSH-2002-0101z and GR-DEU-2002-0043z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We believe that there are similarly situated persons (GS-0343 Program Analysts) working for HUD whose grade potential is limited to GS-12. We are unsure if the agency hired anyone under this announcement, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

On or about August 7, 2002, the agency advertised 22 Contract Industrial Relations Specialists, GS-0246-09/11/12 (vacancy number PO-MSH-2002-0153z and PO-DEU-2002-0098z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We know that there are similarly situated persons (GS-0246 Contract Industrial Relations Specialists) working for HUD whose grade potential is limited to GS-12. We know the agency has hired at least some of the positions, but are unsure of the total number and location, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

On or about August 6, 8 and 12, 2002, the agency advertised Engineers, GS-0801-09/13 (vacancy numbers 06-MSR-2002-0106Z, 06-MSR-2002-0107, 06-MSR-2002-0112Z, 06-MSR-2002-0113Z, 06-DEU-2002-0083Z, 06-DEU-2002-0084, 06-DEU-2002-0089Z, and 06-DEU-2002-0090Z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We believe that there are similarly situated persons (GS-0801 Engineers) working for HUD whose grade potential is limited to GS-12. We are unsure if

attachment 1

the agency hired anyone under this announcement, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

On or about August 8, 2002, the agency advertised Financial Analysts, GS-1160-09/13 (vacancy number 04-MSA-2002-0048Z and 04-DEU-2002-0036Z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We believe that there are similarly situated persons (GS-1160 Financial Analysts) working for HUD whose grade potential is limited to GS-12. We are unsure if the agency hired anyone under this announcement, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

On or about August 9, 2002, the agency advertised Construction Analysts, GS-0828-11/13 (vacancy number RE-MSH-2002-0247Z and RE-DEU-2002-0124Z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We believe that there are similarly situated persons (GS-0828 Construction Analysts) working for HUD whose grade potential is limited to GS-12. We are unsure if the agency hired anyone under this announcement, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

On or about August 16, 2002, the agency advertised Public Housing Revitalization Specialists, GS-1101-09/13 (vacancy number 04-MSA-2002-0051Z and 04-DEU-2002-0039z) with maximum grade potential to GS-13. These advertisements were open to current federal employees and the general public, respectively. We believe that there are similarly situated persons (GS-1101 Public Housing Revitalization Specialists) working for HUD whose grade potential is limited to GS-12. We are unsure if the agency hired anyone under this announcement, as Management has not yet provided this information in response to our request for information dated October 9, 2002.

Harm

In each of these instances, the potential is to hire a person at an entry level (GS-9/11) to work side by side with and to be mentored and/or trained by another employee in the same position whose career ladder potential is limited to GS-12. In at least one of these instances, persons were hired at a GS-9 only, thus requiring any current GS-12 employee in the same position who is seeking promotion potential to take a downgrade to the GS-9. Additionally, employees in some offices, but not others, have career ladder potential to GS-13, though they occupy the same positions. Employees are harmed by this practice, in that they do not have an opportunity to be promoted to the GS-13 without competition.

Agreement and Violation

This is a violation of the HUD/AFGE Agreement as follows:

Section 4.01 (". . .employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment . . .")

Section 4.06 (". . . managers, supervisors, and employees shall endeavor to treat one another with the utmost respect . . .")

Section 9.01 ("Classification standards shall be applied fairly and equitably to all positions.")

Section 13.01 ("Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department . . ., where feasible, to help promote the internal advancement of employees.")

Additionally, the practice violates the Federal Service Labor-Management Relations Statute, and other law, rule and regulation.

Remedy

-

We are seeking as a remedy that the full promotion potential for all similarly situated employees be GS-13, and such other relief as may be just.

Request for Information

-

There may be additional instances, and we are requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to:

02-MSD-2002-0066Z and 02-DEU-2002-0013Z
152700
152698
152696
PHJT-2-152800S0
PHJT-2-152806S0
152702
03-MSA-2002-0032Z

Additionally, to fully assess the matter, we are requesting a list of employees as follows:

For all Program Analysts GS-0343
name duty station maximum promotion potential

For all Contract Industrial Relations Specialists GS-0246
name duty station maximum promotion potential

For all Engineers GS-0801
name duty station maximum promotion potential

For all Financial Analysts GS-1160
name duty station maximum promotion potential

For all Construction Analysts GS-0828
name duty station maximum promotion potential

For all Public Housing Revitalization Specialists GS-1101
name duty station maximum promotion potential

Finally, we need to know if persons were hired under each of vacancy announcements listed in the fact section above. For each person hired, please advise of his/her name, duty station, grade at which s/he was hired, and the vacancy announcement under which s/he was hired.

Thank you for your consideration in this matter. Please advise us as soon as possible when we can anticipate receiving the remainder of the information to complete our investigation. I may be reached at 617/994-8264.

cc: Council 222 Executive Board and
Local Presidents

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-3000

JAN 17, 2003

OFFICE OF THE ASSISTANT SECRETARY
FOR ADMINISTRATION

Memorandum For: Carolyn Federoff, President, American Federation of Government Employees, National Council of HUD Locals 222

FROM: Norman Mesewicz, Deputy Director, Labor and Employee Relations Division, ARHL

SUBJECT: Decision - Grievance of the Parties

This is in response to the Grievance of the Parties (grievance) dated November 13, 2002 (attached). For the reasons specified below, I must deny the grievance and the remedies it seeks.

The grievance alleges violations of the following provisions of the HUD/AFGE Agreement (Agreement): Article 4, Sections 4.01 and 4.06, Article 9, Section 9.01 and Article 13, Section 13.01. Also alleged are unspecified provisions of the Federal Service Labor-Management Relations Statute (Statute) and other law rule and regulation. The grievance asserts that management advertised/filled certain positions with greater promotion potential (GS-13) than those encumbered by similarly situated HUD employees (GS-12). The remedy sought is that the full promotion potential for all similarly situated employees be GS-13, and any such other relief as may be just. The grievance concludes with a data request.

Section 7121(c)(5) of the Statute excludes from negotiated grievance procedures the classification of any position which does not result in the reduction in grade or pay of an employee. Moreover, Article 22, Section 22.05(5) of the Agreement tracks the language of the Statute. Your grievance asserts that certain positions are classified at grades that are too low. It presents no evidence that the advertising/filling of the above-noted positions resulted in the reduction in grade or pay of any employee. The requested remedy requires the reclassification of certain positions. Accordingly, the grievance falls within the scope of a statutory exclusion to the grievance procedure, and must be denied on that basis.

The statutory exclusion also relieves management of any obligation to respond to the data request. In this regard, please see IRS National Office, 21 FLRA 646 (1986) at footnote 3 (attached). If the union desires to submit further justification for the request management will reconsider its position.

In light of the foregoing facts, the grievance and the remedies it seeks are denied.

Attachments

Attachment 2

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration

Between **Class Action**
Grievance

U.S. Department of HUD

And **FMCS No: 03-**
07743

Council of HUD, Local 222

OPINION AND AWARD: Dr. Andree Y. McKissick, ARBITRATOR

APPEARANCES:

For Management: Norman Mesewiez, Deputy Director
Labor and Employee Relations Division
U.S. Department of HUD
451 Seventh Street, S.W., Room 2150
Washington, D.C. 20410

For Union: Carolyn Federoff, President
Council of HUD Local 222
P.O. Box 5961
Boston, Massachusetts 02114

DATES OF CONFERENCE CALLS: April 7 and May 25, 2003

AWARD: **This Arbitrator finds that the subject matter of this grievance is arbitrable. The Agency is ordered to provide the data requested to allow the complete identification of all potential grievants. A hearing on the merits is scheduled for July 24, 2003.**

DATE OF AWARD: **June 23, 2003**

(arbitrator's signature is here on original document)

Attachment 3

BACKGROUND

This is an arbitration determination pursuant to the arbitrability provision of Article 22, Section 22.14 of the Collective Bargaining Agreement (CBA) between the American Federation of Government Employees, AFL-CIO, (hereinafter "Union") and the U.S. Department of Housing and Urban Development (HUD) (hereinafter "Agency"). Conference calls were held on April 7 and May 25, 2003. The hearing on the merits of this grievance is scheduled for July 24, 2003.

PERTINENT PROVISIONS

The central controversy of this class action grievance lies within the applicability of the contractual provisions of the aforementioned Agreement between Agency and Union, effective 1998.

COLLECTIVE BARGAINING AGREEMENT (CBA)

ARTICLE 22 - GRIEVANCE PROCEDURES

Section 22.14 - Questions of Arbitrability. An unresolved question shall be considered as a threshold issue should the grievance go to arbitration. Questions of arbitrability shall be submitted to the arbitrator in writing and be decided prior to any hearing unless mutually agreed otherwise. The moving party shall have the affirmative in going forward with the demonstration that the matter is not grievable.

Section 22.05 - Exclusions. Excepted from these negotiated procedures coverage are on the following:

5. **The classification of any position which does not result in the reduction in grade or pay of any employee...**

ARTICLE 13 - MERIT PROMOTION AND INTERNAL PLACEMENT

Section 13.01 - General. This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are evaluated and selected solely on the basis of merit in accordance with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/or upward mobility positions, where feasible, to help promote the internal advancement of employees.

ARTICLE 9 - POSITION CLASSIFICATION

Section 9.01 – General. Classification standards shall be applied fairly and equitably to all positions. Each position covered by this Agreement that is established or changed must be accurately described, in writing, and classified as to the proper title, series, and grade and so certified by an appropriate Management official. A position description does not list every duty an employee may be assigned but reflects those duties which are series and grade controlling. The phrase "other duties as assigned" shall not be used as the basis for the assignment to employees of duties unrelated to the principal duties of their position, except on an infrequent basis and only under circumstances in which such assignments can be justified as reasonable.

ARTICLE 4 - EMPLOYEE RIGHTS/STANDARDS OF CONDUCT

Section 4.01 – General. Employees have the right to direct or to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in the policies and practices concerning conditions of employment, and may grieve and matter relating to employment.

Section 4.06 - Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.

STATEMENT OF FACTS

Pursuant to Article 22, Section 22.14 of the Agreement, the sole question of substantive arbitrability was submitted to the Arbitrator, as required. This provision also requires that this determination be made prior to a hearing on the merits of this controversy.

Since an agreement on the selection of an Arbitrator was not determined by the parties; a direct designation was made by the Federal Mediation and Conciliation Service (FMCS) on March 13, 2003.

The grievance, dated November 13, 2002, alleges that the Agency advertised or filled certain positions with promotion potential to the GS-13 level around Fall, 2002. It further alleges that those particular positions were open to current federal employees and the general public while similarly situated HUD staff have promotion potential only to the GS-12 level. Thus, the effect of such alleged harm is that employees do not have the opportunity to be noncompetitively promoted to the GS-13 level. Based on these allegations, the remedy sought is full promotion potential for all similarly situated employees to the GS-13 level and other just relief.

STIPULATED ISSUE:

Whether or not this grievance is arbitrable?

POSITIONS OF THE PARTIES

It is the Agency's position that this dispute is not arbitrable because the subject matter of the grievance deals with a classification issue. The Agency points out that Section 5 USC §7121(C)(5) of the Federal Service Labor-Management Statute precludes arbitrability on its face

from the grievance procedures. Moreover, the Agency notes that the remedy sought by the grievance would require the reclassification of certain positions from GS-12 to GS-13. In addition, the Agency asserts that there was no loss of grade or pay by anyone in this grievance. Based on all the above, the Agency requests that this Arbitrator find this grievance not to be arbitrable.

On the other hand, the Union rebuts that the subject matter of the grievance is not a classification issue. Moreover, the Union asserts that the remedy does not involve reclassification. Instead, the Union points out that issues of this grievance involve the lack of: fairness, equity and consistency based upon advertisements of positions with career ladders to GS-13. Presently, the Union points out that individuals who have reached the journey level of GS-12 for their career ladders, are now mentoring, training and working side by side with entry level GS-9 staff who have career ladder potential to GS-13. Specifically, the Union asserts that the remedy requires reassignment of employees to reclassified positions. Based on all the above, the Union requests that the Arbitrator find this grievance to be arbitrable. In addition, it also requests that the Arbitrator issue an order to require the Agency to supply the needed data requested to identify all the potential grievants.

FINDINGS AND DISCUSSION

After a careful review of the record, Statute, and Agreement on the issue of substantive arbitrability, this Arbitrator finds this grievance to be arbitrable for following reasons.

First, the subject matter of this grievance does not involve a classification issue, prohibited by Section 5 USC §7121(C)(5) of the Federal Service Labor-Management Relations

Statute and Article 22 Section 22.05 of the Agreement. The substance and nature of this grievance involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties.

Second, the remedy requested, reassignment is consistent with the Memorandum of Understanding (MOU), dated February 27, 1995, which "allows an employee who is reassigned to a reclassified position with greater promotion potential to attain the new career ladder potential without competition."

Third, the subject matter of this remedy is also congruent with Article 4, Section 4.01, General, which states that "Employees shall be treated fairly and equitably."

Fourth, the allegations of the grievance should be allowed to develop and be proven by evidence adduced via hearing on the merits of the controversy. Moreover, this analysis squares with the strong presumption toward arbitrability, espoused by Ernest C. Hadley's "A Guide to Federal Sector Labor Arbitration", Dewey Publications, Inc. (2d Ed. 1999) as well as, other arbitrators. (See Mass. Army Nat'l Guard. and NAGE, Local R1-154, LAIRS 14178 (Arbitrator Grossman, 1982)

Fifth, pursuant to Article 22, Section 22:14, this Arbitrator finds that the Agency has not met its burden in showing that this grievance is not arbitrable.

AWARD

This Arbitrator finds that the subject matter of this grievance is arbitrable. The Agency is ordered to provide the data requested to allow the complete identification of all potential grievants. A hearing on the merits is scheduled for July 24, 2003.

_____

ARBITRATOR

(signature above on original document)

United States, Department of Housing and Urban Development, Washington, D.C. (Agency) and American Federation of Government Employees National Council of HUD, Locals 222, AFL-CIO (Union)

[v59 p630]

59 FLRA No. 116

UNITED STATES
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
WASHINGTON, D.C.
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF HUD
LOCALS 222, AFL-CIO
(Union)

0-AR-3718

DECISION

February 11, 2004

Before the Authority: Dale Cabaniss, Chairman, and
Carol Waller Pope and Tony Armendariz, Members

This matter is before the Authority on exceptions to an award of Arbitrator Andree Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator determined that a grievance challenging the Agency's advertising and filling of certain positions with promotion potential to GS-13 was arbitrable and directed the parties to proceed to a hearing on the merits of the grievance.

For the reasons that follow, we remand the award to the parties.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's advertising and filling certain positions with promotion potential to GS-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be non-competitively promoted to GS-13. The grievance sought as a remedy "full promotion potential for all similarly situated employees to the GS-13 level and other just relief." Award at 4. The Agency denied the grievance on the ground that it was not arbitrable under § 7121(c)(5) of the Statute and Article 22 § 22.05 of the parties' agreement because it concerned the classification of positions. **[n1]** The grievance was unresolved and was submitted to arbitration on the following stipulated issue: "Whether or not this grievance is arbitrable?" **[n2]** *Id.*

The Arbitrator concluded that the grievance was arbitrable because, as relevant here, it did not involve a classification matter. In this regard, the Arbitrator stated that the grievance involves "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." *Id.* at 6. The Arbitrator also determined that the remedy requested by the Union -- "reassignment of employees to reclassified positions" -- was consistent with a memorandum of understanding (MOU). **[n3]** *Id.* at 5, 6. As her award, the Arbitrator found the grievance arbitrable and directed the parties to proceed to a hearing on the merits of the grievance. **[n4]** *See id.* at 7.

Attachment 4

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the exceptions are not interlocutory because the issue before, and decided by, the Arbitrator was limited to arbitrability. The Agency also contends that if the exceptions are interlocutory, then there are extraordinary circumstances warranting review because the exceptions present a plausible jurisdictional defect. In particular, the Agency claims that the award is contrary to § 7121(c)(5) because the grievance involves a classification matter. The Agency claims, in this regard, that the grievance sought reclassification of the grievants' positions.

The Agency also claims that the Arbitrator's finding that the Union's requested remedy was reassignment constitutes a nonfact because the remedy requested in the grievance was full promotion potential for all similarly situated employees to the GS-13 level. In addition, the Agency asserts that a remedy requiring reassignments **[v59 p631]** would interfere with management's right to assign employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

B. Union's Opposition

The Union contends that the exceptions are interlocutory because the Arbitrator provided only an interim ruling on the jurisdictional issue. In this regard, the Union points out that the Arbitrator ordered a hearing on the merits of the grievance. The Union also claims that the exceptions do not present any extraordinary circumstances warranting review.

The Union also contends that the award is not contrary to § 7121(c)(5) of the Statute. According to the Union, the Agency's classification exception "merely repeats the argument it unsuccessfully made before the [A]rbitrator." Opposition at 5. Also according to the Union, the award is not based on a nonfact. In this regard, the Union claims that the requested remedy sought not only "full promotion potential for all similarly situated employees," but also "such other relief as may be just" and the Agency has not demonstrated why reassignment may not be considered to be part of the "other relief." *Id.*

IV. Analysis and Conclusions

Section 2429.11 of the Authority's Regulations provides: "[T]he Authority . . . ordinarily will not consider interlocutory appeals." In arbitration cases, the Authority will not resolve exceptions filed to an arbitration award unless the award constitutes a complete resolution of all of the issues submitted to arbitration. *See, e.g., United States Dep't of Health and Human Servs., Ctrs. for Medicare and Medicaid Servs.*, 57 FLRA 924, 926 (2002) (*HHS*). The parties' agreement to conduct a separate hearing on a threshold issue does not convert the threshold ruling into a final award subject to exceptions under § 7122(a) of the Statute. *See HHS*, 57 FLRA at 926; *United States Dep't of the Treasury, Internal Revenue Serv., L. A. Dist.*, 34 FLRA 1161, 1163 (1990).

The Agency contends that the exceptions are not interlocutory because the Arbitrator resolved the only issue -- arbitrability -- stipulated by the parties. However, as the Union argues, the award ordered the parties to proceed to a hearing on the merits issues raised in the grievance and submitted to arbitration. *See* Award at 7. Further, although the stipulated issue before the Arbitrator involved only arbitrability, the Arbitrator found, and there is no dispute, that the parties' agreement requires arbitrability determinations to be made prior to a hearing on the merits of a grievance. *See* Award at 4. In these circumstances, we conclude that the exceptions are interlocutory. *See United States Dep't of Defense, Nat'l Imagery and Mapping Agency, St. Louis, Mo.*, 57 FLRA 837, 837 n.2 (2002).

The Authority has held that review of interlocutory exceptions is warranted where the exceptions present a plausible jurisdictional defect, the resolution of which would advance the ultimate disposition of the case. See *United States Dep't of the Interior, Bureau of Indian Affairs, Wapato Irrigation Project, Wapato, Wash.*, 55 FLRA 1230, 1232 (2000). Here, the Agency contends that, if the exceptions are interlocutory, then its exceptions raise a plausible jurisdictional defect because the Arbitrator's finding of arbitrability is contrary to § 7121(c)(5) of the Statute.

A grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute where the substance of the grievance concerns the grade level to which the grievant could receive a noncompetitive career promotion. *See United States Dep't of Agric., Agric. Research Serv., Eastern Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985). In contrast, where an arbitrator determines a grievant's entitlement to a temporary, career-ladder, or other noncompetitive promotion based on performance of previously-classified duties, the award does not concern classification matters. *See United States Dep't of Health and Human Servs. Region X, Seattle, Wash.*, 52 FLRA 710, 715 (1996). Although the Authority defers to an arbitrator's factual findings, it reviews questions of law, such as the classification issue asserted in this case, *de novo. See United States Dep't of the Army, United States Army Corps of Eng'rs, Northwestern Div., Portland, Or.*, 59 FLRA 443, 445 (2003).

The Agency contends that the grievants are seeking reclassification of their permanent positions. As set forth below, there is support in the record for this contention and, if it is correct, then the grievance involves a classification matter within the meaning of § 7121(c)(5). Thus, the Agency's exceptions present a plausible jurisdictional defect.

Recently, the Authority granted review of -- and denied on the merits -- an interlocutory exception, holding that the exception raised a plausible jurisdictional defect and that, whether or not the exception was meritorious, review would advance the ultimate disposition of the case. *Library of Congress*, 58 FLRA 486, 487 (2003) (Member Pope dissenting). As the exceptions present a plausible jurisdictional defect, we conclude that, applying *Library of Congress*, the jurisdictional issue should be resolved on the merits. **[v59 p632]** Nevertheless, for the reasons that follow, the record in this case does not permit us to resolve the jurisdictional issue at this time. **[n5]**

The Arbitrator expressly found that the grievance "involves the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." Award at 6. The Arbitrator also expressly found that the requested remedy was the "reassignment of employees

to reclassified positions." Award at 5, 6. In connection with the latter point, the Arbitrator's reference to "reclassified positions" is unclear: although it may reasonably be read to refer to reclassifying the grievants' permanent positions to have noncompetitive promotion potential to GS-13, it may also be reasonably read to refer to reassigning the grievants to the newly-established, already-classified positions with promotion potential to GS-13. The distinction between the two is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions.

For the foregoing reasons, we remand the award to the parties. Absent settlement, the award must be resubmitted to the Arbitrator for clarification of the jurisdictional issue.

The Authority remands the award to the parties for action consistent with this decision.

Footnote # 1 for 59 FLRA No. 116 - Authority's Decision

Article 22 § 22.05(5) excludes from the scope of the negotiated grievance procedure "[t]he classification of any position which does not result in the reduction in grade or pay of an employee . . . ." Exceptions, Exhibit 2.

Footnote # 2 for 59 FLRA No. 116 - Authority's Decision

The Arbitrator noted that pursuant to Article 22 § 22.14, an arbitrability determination must be made prior to a hearing on the merits of this grievance.

Footnote # 3 for 59 FLRA No. 116 - Authority's Decision

According to the Arbitrator, the MOU "allows an employee who is reassigned to a reclassified position with greater promotion potential to attain the new career ladder potential without competition." Award at 6.

Footnote # 4 for 59 FLRA No. 116 - Authority's Decision

The Arbitrator also ordered the Agency to provide the Union certain information. As no exceptions were filed to this aspect of the award, we do not address it further.

Footnote # 5 for 59 FLRA No. 116 - Authority's Decision

Member Pope dissented in *Library of Congress* on the ground, among others, that granting interlocutory review should be restricted primarily to cases where the excepting party demonstrates that the arbitrator lacks jurisdiction. 58 FLRA at 489. Here, as the record does not permit resolution of the jurisdictional issue at this time, Member Pope agrees that the award must be remanded.

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration:	
U.S. DEPARTMENT of HOUSING and URBAN DEVELOPMENT	
	FMCS No: 03-07743
and	
AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, AFL-CIO	

OPINION AND AWARD: Dr. Andrée Y. McKissick, **ARBITRATOR**

APPEARANCES:

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DATES AND PLACE OF HEARING:
July 15, 2008 and August 28, 2008
U.S. Dept. of Housing and Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

POST-HEARING BRIEFS: **December 1, 2008**

Attachment 5

PROCEDURAL POSTURE

The Union filed this grievance on November 13, 2002. The Agency denied this grievance based upon its position that it was not arbitrable pursuant to § 7121 (c) (5) of the Federal Service Labor Management Statute. Subsequently, this grievance was submitted to arbitration on the sole issue of arbitrability. At that juncture, this Arbitrator found that the subject matter of this grievance, based upon the failure to treat employees fairly and equitably, to be arbitrable on June 23, 2003.

The Agency filed exceptions to this Award the same day. The Federal Labor Relations Authority (FLRA) remanded the Award to the parties and ordered that it be resubmitted to this Arbitrator for clarification of the jurisdictional issue on February 11, 2004. The Union's request for a hearing was granted. It was held on June 23, 2006, where additional evidence and arguments were made. On June 24, 2007, this Arbitrator clarified the Award on remand. This Arbitrator found that this grievance was arbitrable, as the grievance was based upon the right to be placed in previously classified positions. In addition, this Arbitrator ruled that there were several possible remedies pursuant to Section 22.11 of the Agreement, consistent with the FLRA's decision.

The record further reflects that on March 1, 2007, the Agency filed exception to the January 24, 2007 Award. On March 22, 2007, the Union filed an Opposition to the Agency's Exceptions. Subsequently, the FLRA issued a Show Cause Order as to why the Agency's Exceptions should not be dismissed as untimely. Thereupon, the FLRA ruled that the Exceptions were untimely and dismissed them on August 3, 2007.

The Union then filed a Motion to Compel the Production of Documents on March 14, 2007, explaining the history of its request for documents commencing from October 2002. This

information request was based on 5 USC 7114, drafted by Carolyn Federoff, Esquire and then President of Council 222. The record reflects that the documents requested for the purpose of amending the grievance were not forthcoming. Instead, the Agency denied the grievance, as stated earlier, based on its position that this grievance was not arbitrable. Based upon the Motion to Compel, this Arbitrator ruled that the Agency must comply with the request for information immediately, but no later than "June 30, 2008". Since the information requested was still not forthcoming, this Arbitrator ruled that an adverse inference can be made based upon the unreleased information. The record further reflects that some documents were later released, but the information was largely insufficient. Based upon the foregoing, this current arbitration hearing was held on July 15, 2008 and continued on August 28, 2008.

STIPULATED ISSUES:

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

2. **If so, what are the appropriate remedies?**

RELEVANT PROVISIONS

The central controversy of this grievance lies within the applicability of the contractual provisions of the Agreement between the U.S. Department of Housing and Urban Development and the American Federation of Government Employees (AFL-CIO) (CBA - Joint Exhibit I), effective 1998 thru present.

COLLECTIVE BARGAINING AGREEMENT
(CBA - Joint Exhibit I)

ARTICLE 4-EMPLOYEE RIGHTS/STANDARDS OF CONDUCT

Section 4.01- General. Employees have the right to direct and to pursue their private lives consistent with the standards of conduct, as clarified by this Article, without interference, coercion or discrimination by Management. Employees shall be treated fairly and equitably in the administration of this Agreement and in policies and practices concerning conditions of employment, and may grieve any matter relating to employment.

Section 4.06- Morale. Recognizing that productivity is enhanced when their morale is high, managers, supervisors, and employees shall endeavor to treat one another with the utmost respect and dignity, notwithstanding the type of work or grade of jobs held.

ARTICLE 9-POSITION CLASSIFICATION

Section 9.01- General. Classification standards shall be applied fairly and equitably to all positions. Each position covered by this Agreement that is established or changed must be accurately described, in writing, and classified as to the proper title, series, and grade and so certified by an appropriate Management official. A positions description does not list every duty an employee may be assigned but reflects those duties which are series and grade controlling. The phrase "other duties as assigned" shall not be used as the basis for the assignment to employees of duties unrelated to the principal duties of their position, except on an infrequent basis and only under circumstances in which such assignments can be justified as reasonable.

Section 9.05- Resolution of Discrepancies. Employees shall be encouraged to discuss any position description change or inaccuracy with the supervisor, who shall also maintain a continuing view of duties. Disputes involving the qualitative or quantitative value of tasks performed by the employees which affect the grading of a job may be appealed to the Department and /or other appropriate authorities. This does not preclude the filing of a grievance where the loss of a grade is involved. The following issues may be appealed through the Grievance Procedure, Article 22:

1. **Accuracy of the Official Position Description including the inclusion or exclusion of a major duty.**

2. **An assignment or detail out of the scope of normally performed duties outlined in the Official Position Description.**

3. **The accuracy, consistency, or use of agency supplemental classification guides.**

4. **The title of the position unless a specific title is authorized in a published Office or Personnel Management classification standard or guide, or title reflects a qualification requirement or authorized area of specialization.**

ARTICLE 13- MERIT PROMOTION AND INTERNAL PLACEMENT

Section 13.01- General. This Article sets forth the merit promotion and internal placement policy and procedures to be followed in staffing positions within the bargaining unit. The parties agree that the provisions of this Article shall be administered by the parties to ensure that employees are with valid job-related criteria. Management agrees that it is desirable to develop or utilize programs that facilitate the career development of the Department's employees. To that end, Management shall consider filling positions from within the Department and developing bridge and/ or upward mobility positions, where feasible, to help promote the internal advancement of employees.

ARTICLE 22- GRIEVANCE PROCEDURES

Section 22.01- Definition and Scope. This Article constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining unit and between the parties. This grievance procedure replaces Management's administrative procedure for employees in the bargaining unit only to the extent of those matters which are grievable and arbitrable under this negotiated Agreement. A grievance means any complaint by:

1. **Any employee concerning any matter relation to his/her employment; or**
2. **The Union concerning any matter relating to the employment of any employee; or**
3. **Any employee, the Union, or Management concerning:**
    a. **The effects or interpretation, or claim of breach, of this collective bargaining agreement; or**
    b. **Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.**

Section 22.02- Statutory Appeals. Adverse actions consist of:

1. **Reduction in grade or removal for unacceptable performance;**
2. **Removals for misconduct;**
3. **Suspensions for more than fourteen (14) days; and**
4. **Furloughs for thirty (30) days or less.**

Adverse actions may, in the discretion of the aggrieved employee, be raised under either:

1. **The appropriate statutory procedures; or**

2. **Under the negotiated grievance procedure, but not both.**

ARTICLE 3- RIGHTS AND OBLIGATIONS OF THE PARTIES

Section 3.06- Managements Rights. Nothing in this Agreement shall affect the authority of Management:

1. **To determine the mission, budget, organization, number of employees, and internal security practices of the agency; and**

2. **In accordance with applicable laws and its duty to bargain on such matters, to the extent provided by law:**

    a. **To hire, assign, direct, lay off, and retain employees in the agency; or to suspend, remove, reduce, in grade or pay; or take other disciplinary action against such employees;**

    b. **To assign work, to make determinations with respect to contracting out and to determine the personnel by which agency operations shall be conducted;**

    c. **With respect to the filling of positions, to make selections for appointments from:**

        i. **Among properly ranked and certified candidates for promotion; or**

        ii. **Any other appropriate source.**

    d. **To take whatever actions may be necessary to carry out the agency mission during emergencies.**

POSITIONS OF THE PARTIES

It is the position of the Agency that the grievance is in contravention of federal regulations as well as the collective bargaining agreement because it pertains to classification issues which did not result in the reduction in grade or pay of any employees.

Specifically, the Agency maintains that only the Office of Personnel Management (OPM) has the authority to classify or reclassify positions, after consultation with the Agency. The

Agency asserts that Article 13.03 (9) sets forth three modes for non-competitive promotions. Although the Union would argue that (b) of Article 13.03 (9) is applicable, the Agency retorts that the Union did not show that the Grievants performed work at a higher grade or that such higher graded work even existed at that time.

The Agency asserts that the grievance, dated November 13, 2002, lists six (6) job series and eighteen (18) vacancy announcements. However since that time, the Agency asserts that the grievance has exponentially expanded to include many more Grievants. The Agency also contends that the grievance was never amended to include these alleged additional violations, as it promised to do. Most importantly, the Agency points out that the Union never requested the sixteen (16) announcements. Thus, the Agency argues these announcements are not subject to negative inferences, as the Union urges. The Agency admits that four (4) of the announcements requested by the Union, that had a series of six (6) sequential even numbers, were among the documents that the Agency could not locate. However, the Agency notes that these announcements were for intern positions only, based on the numerical sequence.

The Agency stringently argues that the positions of the grieving parties were not the same as those positions listed in the 2002 vacancy announcements on the date of the grievance. That is, the Agency argues that the Union failed to show that the positions were identical in every way to the current duties, responsibilities, job descriptions, experience requirements, general qualifications, education, and level of responsibilities. Thus, the Agency reasons that the Union failed to establish its prima facie case. In addition, the Agency further asserts no substantive evidence was presented such as: classification studies, desk audits, or copies of the job announcement listed in the grievance.

Moreover , the Agency further points out that there are but four (4) areas, outlined in Article 9.05, which are classification-related issues that are grievable. However, the Agency notes that the grievance does not fall within the ambit of these delineated categories of Article 9.05 of the Agreement.

The Agency contends that promoting Grievants or increasing their non-competitive promotion potential would constitute a violation of 5 USC § 7106 (c) (5) as well as Article 3.06 of the Agreement, as both interfere with Management's right to determine the numbers, types, and grades of employees or positions within its organizational subdivisions.

In response to the remedy of retroactive promotion with back pay and interest suggested by the Union, the Agency counters that if the Arbitrator decides to sustain this grievance that a desk audit is the appropriate remedy. That is, the Agency argues that any more relief would be windfall for the Union, and would be punitive. The Agency further argues that no unwarranted personnel action has occurred here, a prerequisite for both back pay as well as attorney's fees, as the Union urges.

Lastly, the Agency points out that the Union's proposed remedy would award Grade 13 promotions without a showing that (1) the individual performed, or would perform, Grade 13 work; (2) the individual could perform Grade 13 work; or (3) there was any Grade 13 work at the individuals location. Based on all of the above, the Agency requests that the Arbitrator deny this grievance in its entirety, as the Union failed to meet its burden of proof.

On the other hand, it is the Union's position that the Agency had advertised a number of positions with a maximum grade potential of GS-13. However, in contrast, current employees who occupied these exact same positions had, and have, only a maximum potential to the GS-12 level. Specifically, the Union asserts that the Agency would hire someone at the entry level (GS-

7, 9, or 11). Subsequently, these new employees were trained and mentored by other existing employees in the same position. Nonetheless, the Union maintains that these employees who trained and mentored only had career ladder potential to the GS-12 level. However, the Union asserts that the new trainees would eventually become GS-13 employees.

In addition, the Union contends that although there were postings both internally and externally for vacancies, the internal announcements were subsequently cancelled. Thus, the Union argues that the current employees were discouraged from applying. The Union also alleges that current employees were told that their applications would be thrown out. Other current employees, the Union alleges, were told they were ineligible to apply for vacancies, but were told to train and mentor new trainees who "leapfrogged" them to become GS-13 journeyman level employees.

Another example the Union points out as being exemplary of inequitable and unfair treatment was when a vacancy announcement required that a current employee take a constructive demotion to GS-7 level with maximum career ladder potential to GS-13 level.

Still another example, the Union contends was demonstrative of unfair treatment was when a current employee was told that she was not selected for a position because she was retirement-eligible, yet she trained the actual selectees. Based upon the foregoing, the Union asserts that Articles 4.01, 4.06, 9.01, and 13.01 of the Agreement were violated.

In response to the Agency's argument regarding the Union's omission to amend this grievance, the Union counters that the Agency never presented the necessary documents that it needed to amend the grievance.

In response to the Agency's argument that the missing announcements dealt exclusively with the intern positions, the Union rebuts that is an untruthful assessment of the situation.

In addition, the Union reminds the Arbitrator of her prior adverse inference regarding the missing documents as it relates to the Union's Motion to Compel the Production of Documents on March 14, 2007. Based on the foregoing, the Union requests that this Arbitrator sustain this grievance.

In regards to the appropriate remedy, the Union offers the Arbitrator multiple creative options. However, the Union strongly asserts its right to be compensated by retroactive promotions with back pay and interest. The Union also concurrently requests that the Arbitrator retains jurisdiction in this matter.

FINDINGS AND DISCUSSION

After careful review of the record in its entirety and having had the opportunity to weigh and evaluate the testimony of witnesses, this Arbitrator finds that this grievance should be sustained for the following reasons.

First, in response to the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union, case law is replete with poignant instances of spoliation. That is, the failure to preserve property for the other party's use "as evidence in pending or reasonable foreseeable litigation." (See Zubulake ag. UBS Warburg, LLC, 229 FRD 422, July 20, 2004) Clearly, there is a right to an adverse inference because there is duty to preserve and protect pertinent and relevant documents, as here. It is important to note that there does not have to be a showing of willful or intentional conduct for this inference to be made. That is, mere ordinary negligence is sufficient for this doctrine to be viable, as here. (See "Adverse Inference Spreadsheet", U-1)

In response to the Agency's argument that the missing announcements were for intern positions only, this apparently means that such positions were temporary as opposed to being career conditional. Thus, intern positions simply do not have promotion potential to the GS-13 level, even if converted such positions are prohibited from going higher than GS-12. However, evidence presented by the Union was incongruent with the Agency's assessment. (See U-7(G) and U-3) Such evidence was exemplary of a marked-up numbered vacancy announcement and a full-time permanent position, only open at GS-7 level with promotion potential to the GS-13 level. Again, this Arbitrator has right to an adverse inference that the missing documents would have been unfavorable to the possessor of these germane documents, the Agency.

Second, in response to the Agency's argument that the Union failed to amend this grievance, it is well established that the exclusive representative is entitled to necessary information to enable one to effectively carry out one's representational duties. These duties include the acquisition of information which will assist in the "investigation, evaluation, and processing of a grievance." (See U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990); also see National Park Service, National Capital Region, U.S. Park Service and Police Association of the District of Columbia, 38 FLRA 1037, December 18, 1990).

Applying this case law to this grievance, the requested documents were necessary for the Union to amend the grievance. However, such necessary and pertinent materials were not forthcoming. Thus, the Union was unable to amend this grievance due to the Agency's omission to furnish such needed materials.

Third, in response to the request for an adverse inference regarding the absence of Agency's witnesses, it is well recognized that the failure of one party to call sufficient witnesses

to rebut the other party's case allows this Arbitrator to make an adverse ruling. (See Internal Revenue Service, Philadelphia Center and National Treasury Employees Union, 54 FLRA 674, July 31, 1998; Bureau of Engraving and Printing and Lodge 2135, International Association of Machinists and Aerospace, Workers, 28 FLRA 796, August 31, 1987).

Applying this case law to this grievance, the Agency only presented one witness. That is, the Agency did not present the persons who posted the vacancy announcements nor any supervisor in the various divisions to rebut the plethora of Union witnesses' testimony. Thus, the record reflects that evidence presented by the Union was largely unrebutted. Specifically, the Agency failed to present evidence via witnesses to rebut the Union's GS-12 witnesses' testimony that they performed the same work as the GS-13 employees and they trained employees who subsequently leapfrogged them to the GS-13 level. Still further, the Agency failed to present witnesses to rebut that they were told by their supervisors that their applications to various positions would be destroyed, or not considered, and they should not apply.

Fourth, this Arbitrator was persuaded by the testimonies of the following witnesses: Bonnie Lovorn, Public Housing Revitalization Specialist, GS-12, Lynn Schonert, Public Housing Revitalization Specialist, GS-12, Monica Randolph-Brown, Public Housing Revitalization Specialist in the Public and Indian Housing Office, Victoria Reese Brown, Public Housing Revitalization Specialist, and Melanie Hertel, Contractor Industrial Relations Specialist in the Office of Labor Relations.

Specialist Lovorn, GS-12, testified that she applied for both the internal and external announcement for a GS-13 but was not selected. Nonetheless, she testified that she performed the same identical work as the GS-13, selectee, Gloria Smith. [TR-72-74]

Specialist Schonert, GS-12, testified that she applied for two internal vacancy positions in 2002, as a Facilities Management Specialist as well as a Financial Analyst. Although these vacancy announcements were posted internally and externally, she was not selected for either position. Specialist Schonert was told by her supervisor that it was in the best interest of the Agency to make external selections to promote growth in the Agency. [TR-177-181]

Specialist Randolph-Brown, GS-12, now retired, testified that she applied for a GS-13 level position in 2002, but was not selected because she was retirement-eligible. However, she trained the actual selectees. Interestingly, Randolph-Brown testified that at the time of her retirement there were other employees who were GS-13 except for her. However, she also added that she was fully qualified for the positions and had already performed the higher graded work as well as received fully successful performance appraisals. [TR-199-204]

Specialist Reese Brown, GS-12, also President of Local 3980, testified that the Agency posted a vacancy announcement for a GS-7 Financial Analyst position, yet the same announcement had a promotion to GS-13 level for three (3) or four (4) other offices, but with identical duties. (See U-7(G) and TR-213-14) Specifically, on the handwritten notation on the vacancy announcement indicated that a constructive demotion was necessary, from a GS-7 level with the maximum career ladder potential to GS-13 level. This assessment was confirmed by Administrative Officer Whitehouse.

Specialist Hertel, GS-13, testified that the Agency posted her same position with a promotion potential to GS-13 level, but she was maxed out at GS-12 at that juncture. However, she further testified that she was discouraged from applying, as her Supervisor Herald stated that new external recruits were needed. Thus, Specialist Hertel did not apply because she believed

that her application would not be considered. [TR-227-232] This Arbitrator credits this testimony of the above witnesses on these issues.

Fifth, the Agency's sole witness, Specialist Lyman, a Supervisor in Human Resources, but who was a Position Classification Specialist for approximately thirty (30) years, made several admissions of irregularities by the Agency.

Specifically , when asked on cross-examination about dual postings of internal and external vacancy announcements and an internal cancellation, he responded as follows:

> "It would seem to go against [this] simultaneous consideration clause."
>
> [TR-99]

Still further, he explains what he means regarding the "simultaneous consideration" in direct examination as follows:

> "If you're advertising externally to HUD, you also do an ad internal to HUD to permit you know, HUD staff...to apply."
>
> [TR-19]

Moreover, he testified that such contravention, the cancellation of an internal advertisement, was "bizarre". [TR-99]

Another example of Specialist Lyman's admission is when posed with still another hypothetical question regarding a vacancy with two different growth potentials. He responded on cross-examination that he would not do such a thing. [TR-104-105]

When questioned about the process of constructive demotion, where a position which is only available at GS-7 level but later expands to a GS-13 level, Specialist Lyman responded that this arrangement was "odd". [TR-109] He further added the following:

> "Because many HUD employees who are
> GS-12's would obviously not be interested
> in applying even though the job...grew to 13."
>
> [TR-109] also see [TR-115]

Based on the foregoing, Specialist Lyman admitted that such irregularities would be violative of the Agreement.

Accordingly, this Arbitrator finds that the Agency violated Article 4, Sections 4.01and 4.06 as these Grievants were unfairly treated and were unjustly discriminated against, as delineated above. In addition, this Arbitrator finds that the Agency violated Article 9, Section 9.01, as classification standards were not fairly and equitably applied. Lastly, this Arbitrator finds that the Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees.

Sixth, in response to the Agency's argument that this grievance is precluded from coverage because there is no reduction in the grade or pay of any employee, this Arbitrator disagrees. The evidence supports the Union's case that the Grievants were: (1) not considered for selections; (2) dissuaded from applying; (3) external applicants were given priority over internal employees; (4) GS-12 journeyman employees must train, tutor, and perform the same work as GS-13 journeyman employees in the same position. Thus, but for these inequitable and unfair situations delineated above, these affected positions should have been promoted to the journeyman level to GS-13 retroactively to 2002. The basis for this organizational upgrade is because the Agency failed to follow the procedures set forth the Agreement which

correspondingly resulted in the loss of pay, had these Grievants been promoted to the GS-13 level at the time of this occurrence.

Seventh, in response to what is an appropriate remedy, it would seem to this Arbitrator that an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively to 2002 is the fair and equitable solution. Pursuant to the Agreement, an Agency supervisor would have the final determination as to whether the affected employee has performed the duties of one's position satisfactorily.

AWARD

Accordingly, this Arbitrator finds that the Agency violated Article 4, Section 4.01 and 4.06, Article 9, Section 9.01, and Article 13, Section 13.01 for the aforementioned reasons. The appropriate remedy is an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to GS-13 level retroactively from 2002. Pursuant to the Agreement, a supervisor would have the final determination as to whether the affected employees have performed the duties of one's position satisfactorily. In addition, this Arbitrator shall maintain jurisdiction of this matter for implementation of this Award

_____

ARBITRATOR

DATE OF AWARD: September 29, 2009

65 FLRA No. 90

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

DECISION

January 26, 2011

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

The Union filed a grievance alleging that the Agency violated the parties' agreement by failing to promote the grievants. *See U.S. Dep't of Hous. & Urban Dev.*, 59 FLRA 630, 630 (2004) (*HUD*). In her merits award (the MA), the Arbitrator sustained the grievance and awarded an "organizational upgrade" to the grievants. MA at 16. For the reasons that follow, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

II. Background and Arbitrator's Award

The Union filed a grievance alleging that the Agency's advertising and filling of certain positions with promotion potential to General Schedule (GS)-13 deprived employees occupying similar positions with promotion potential to GS-12 of the opportunity to be promoted to GS-13. *HUD*, 59 FLRA at 630. In response, the Agency asserted, as relevant here, that the grievance was not arbitrable under § 7121(c)(5) of the Statute because it concerned the classification of positions.[1] *Id.* The parties proceeded to arbitration on the stipulated issue of arbitrability, and the Arbitrator issued an award (First Arbitrability Award, or First AA) finding that the grievance involved "the fairness of advertisements and vacancy announcements, not the proper classification of a position and one's concurrent duties." *Id.* (citing First AA at 6) (internal quotation marks omitted). Therefore, the Arbitrator found that the grievance was arbitrable.

The Agency filed exceptions to the First AA, and, in *HUD*, the Authority found that the Agency presented a plausible jurisdictional defect that warranted interlocutory consideration of the exceptions – namely, whether the grievance concerned classification, under § 7121(c)(5) of the Statute. 59 FLRA at 631. However, the Authority could not determine whether the Arbitrator had found that the grievance concerned "re*classifying* the grievants' permanent positions" or "re*assigning* the grievants to . . . newly-established, already-classified positions[.]" *Id.* at 632 (emphases added). The Authority stated that the "distinction between the two [findings] is critical because the Arbitrator: (1) would not have jurisdiction over a grievance concerning the promotion potential of employees' permanent positions; but (2) would have jurisdiction over a grievance alleging a right to be placed in previously-classified positions." *Id.* Accordingly, the Authority remanded the First AA for resubmission to the Arbitrator for clarification of the arbitrability issue. *Id.* On resubmission, the Arbitrator clarified that she found the "grievance [to be] alleging a right to be placed in previously-classified positions [with promotional potential to GS-13] and . . . thus arbitrable." Second Arbitrability Award (Second AA) (Opp'n, Attach., Ex. 2) at 1; *see also id.* at 6, 8.[2]

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1. Under § 7121(c)(5) of the Statute, a grievance concerning "the classification of any position which does not result in the reduction in grade or pay of an employee" is excluded from the scope of the negotiated grievance procedure. 5 U.S.C. § 7121(c)(5).

2. The Agency filed exceptions to the Second AA, but the Authority's Office of Case Intake and Publication dismissed them as untimely filed. *See* MA at 2.

Attachment 6

Thereafter, the Arbitrator issued the MA, which resolved the grievance's merits. In that award, the Arbitrator first recounted her earlier finding that the "grievance was arbitrable, as [it] was based upon the right to be placed in previously classified positions." MA at 2. She then stated that the issues for resolution in the MA were: "Whether the Agency violated the [c]ollective [b]argaining [a]greement [(CBA)], [l]aw[, r]ule, or other regulation [by] fail[ing] to treat bargaining unit employees fairly and equitably [at the time it] post[ed] vacancy announcement[s for newly-created positions] . . . until the present? If so, what are the appropriate remedies?" *Id.* at 3.

Because the Agency did not disclose information, including vacancy announcements, that the Arbitrator had previously directed it to provide to the Union, the Arbitrator drew an adverse inference against the Agency regarding the advertising and selection for newly-created positions with promotion potential to GS-13. *Id.* at 10-11. The Arbitrator also found that the Agency failed to rebut Union witnesses' testimony that "they were told by their supervisors that their applications to various [advertised, newly-created] positions would be destroyed, or not considered, and they should not apply." *Id.* at 12. Therefore, the Arbitrator concluded that the "evidence supports the Union's case that the [g]rievants were . . . not considered for selections [and were] dissuaded from applying" for positions with promotion potential to GS-13. *Id.* at 15.

The Arbitrator concluded that "but for these inequitable and unfair situations . . . , these affected positions [sic] should have been promoted to the journeyman level to GS-13 retroactively . . . ." *Id.* at 15. The Arbitrator found that the Agency's actions violated the following provisions of the CBA: (1) Article 4, Sections 4.01 and 4.06, "as these [g]rievants were unfairly treated and were unjustly discriminated against[;]" (2) Article 9, Section 9.01, "as classification standards were not fairly and equitably applied[;]" and (3) Article 13, Section 13.01, as the Agency "sought to hire external applicants, instead of promoting and facilitating the career development of internal employees." MA at 15. As for the appropriate remedy, the Arbitrator directed "an organizational upgrade of affected positions by upgrading the journeyman level for all the subject positions to [the] GS-13 level retroactively[.]" *Id.* at 16.

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that, by requiring an "organizational upgrade" of the grievants' positions, the award improperly: (1) classifies positions, in violation of law; (2) awards promotions, in violation of applicable regulations; (3) interferes with management's rights under the Statute; (4) exceeds the authority of the Arbitrator; and (5) violates the CBA. Exceptions at 2. According to the Agency, because the award directs "[t]he elevation of the grade of a position[,]" it "by definition[] requires [the position's] reclassification[,]" contrary to law. *Id.* at 2, 3 n.1. In addition, the Agency argues that the award provides the grievants with noncompetitive promotions, contrary to 5 C.F.R. § 335.103(c)(1)(v).[3] *Id.* at 3. Further, the Agency contends that the award "prohibits the Agency from removing duties from the positions encumbered by the grievants" and, consequently, violates its statutory rights to "determine its organization, assign work, and determine the grades of employees assigned to its organization." *Id.* at 4 (citing 5 U.S.C. § 7106(a), (b)(1)).[4] Moreover, the Agency contends that the award is deficient because the Arbitrator assumed classification authority that she did not possess under

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3. 5 C.F.R. § 335.103 provides, in pertinent part:

> (c) Covered personnel actions--
>
> (1) Competitive actions. Except as provided in paragraphs (c)(2) and (3) of this section, competitive procedures in agency promotion plans apply . . . to the following actions:
>
> . . . .
>
> (v) Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service . . . .

5 C.F.R. § 335.103(c)(1)(v).

4. The Agency notes that management's rights are incorporated into the CBA, and, therefore, the Agency argues that the award's alleged violations of management's rights contravene both the Statute and the CBA. *See* Exceptions at 4 (citing CBA Art. 3, § 3.06 (Exceptions, Attach. 3 at 7) (CBA provisions restating 5 U.S.C. § 7106(a)-(b)).

law or the CBA. *See id.* at 2-3 (citing CBA Art. 23, § 23.10(2) (Exceptions, Attach. 3 at 121)).[5] Finally, the Agency asserts that the award grants noncompetitive promotions in violation of the CBA. *Id.* at 3-4 (citing CBA Art. 13, § 13.09 (Exceptions, Attach. 3 at 58-59) (describing the application process "[t]o be considered for a vacancy")).

B. Union's Opposition

The Union asserts that the exceptions ignore the Arbitrator's clear statement that the MA determined "whether the bargaining unit employees were treated unfairly and inequitably with regard to *already* classified vacant positions[.]" Opp'n at 7 (citing MA). In this regard, the Union contends that the "remedy does not require [the] reclassification of employees presently at the GS-12 level, but rather [requires] that the Agency promote or reassign bargaining unit employees to the already classified positions."[6] *Id.* at 8. The Union argues that the remedy can be viewed as "direct[ing] the Agency to permanently[,] retroactively promote all affected [employees] into currently existing career ladder positions[.]" *Id.* at 16. In addition, the Union argues that an "organizational upgrade" will "remedy the Agency's failure to give the bargaining unit employees . . . proper consideration at the time of the competitive hiring/promotion actions." *Id.* at 11; *see also id.* at 9. In the alternative, the Union argues that the awarded "organizational upgrade can also be viewed as an accretion of duties, a valid and lawful remedy." *Id.* at 11. Finally, the Union contends that the award "is silent as to the prospective treatment of bargaining unit employees[,]" and, thus, does not violate management's rights by prohibiting the Agency from "removing duties from positions encumbered by bargaining unit employees[.]" *Id.* at 15.

IV. Analysis and Conclusions

The Agency argues that the award is contrary to law because it requires the reclassification of positions. When an exception involves an award's consistency with law, the Authority reviews any question of law raised by the exception and the award de novo. *See NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of de novo review, the Authority assesses whether an arbitrator's legal conclusions are consistent with the applicable standard of law. *See U.S. Dep't of Def., Dep'ts of the Army & the Air Force, Ala. Nat'l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.*

The Authority has repeatedly held that where the essential nature of a grievance concerns the grade level of the duties assigned to and performed by the grievant in his or her permanent position, the grievance concerns the classification of a position within the meaning of § 7121(c)(5) of the Statute. *E.g., U.S. Dep't of Labor, Wash., D.C.*, 64 FLRA 829, 830 (2010) (citing *U.S. EPA, Region 2*, 61 FLRA 671, 675 (2006) (*EPA*)); *SSA, Balt., Md.*, 20 FLRA 694, 694-95 (1985). In addition, a grievance concerns classification within the meaning of § 7121(c)(5) if it contends that the grievant's permanent position warrants a change in its journeyman level or promotion potential. *U.S. Dep't of Labor*, 63 FLRA 216, 218 (2009) (*DOL*) (citing *HUD*, 59 FLRA at 632). In contrast, "a disputed failure to promote a grievant under a competitive procedure . . . does not concern classification matters." *U.S. Dep't of the Air Force, Air Educ. & Training Command, Randolph Air Force Base, San Antonio, Tex.*, 49 FLRA 1387, 1389 (1994); *see also U.S. Dep't of the Army, Fort Campbell, Ky.*, 37 FLRA 1102, 1107, 1109 (1990).

Where an exception alleges that a grievance or award concerns classification in violation of § 7121(c)(5), the Authority may analyze *both* the nature of the grievance *and* the nature of the award – including the awarded remedy – in order to determine whether the award is contrary to law. *E.g., U.S. Dep't of Veterans Affairs, Med. Ctr., Muskogee, Okla.*, 47 FLRA 1112, 1117 (1993); *U.S. Dep't of Agric., Agric. Research Serv., E. Reg'l Research Ctr.*, 20 FLRA 508, 509 (1985). In this regard, an award may be contrary to law because it concerns classification within the meaning of § 7121(c)(5) based on the remedy. *See U.S. Envtl. Prot. Agency, Region 2*, 59 FLRA 520, 524-25 (2003) (*EPA, Region 2*).

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5. Article 23, Section 23.10(2) of the CBA provides, in relevant part, "The Arbitrator shall not have authority to add to, subtract from, or modify any of the terms of th[e CBA], or any supplement thereto." Exceptions, Attach. 3 at 121 (CBA Art. 23, § 23.10(2)).

6. According to the Union, "[t]his exact same remedy was addressed in the [parties' m]emorandum of [u]nderstanding, where the Agency agreed to the reassignment of employees to reclassified positions." Opp'n at 8.

In response to the Authority's decision in *HUD*, the Arbitrator found that the grievants "alleg[ed] a right to be placed in previously-classified positions[.]" Second AA at 1. The Arbitrator identified the previously-classified positions at issue as those newly-created positions – similar to the grievants' positions – with promotion potential to GS-13, and the Arbitrator credited the grievants' unrebutted testimony that they were "told by their supervisors that their applications to [these] various positions would be destroyed, or not considered, and they should not apply." MA at 12. The Arbitrator concluded that, "but for these inequitable and unfair situations[,]" the grievants would have been promoted to positions with GS-13 potential. *Id.* at 15. These findings support the Arbitrator's determination that the grievance was arbitrable because it did not concern classification within the meaning of § 7121(c)(5).

However, the remedy chosen by the Arbitrator – directing the Agency to perform an organizational *upgrade* of affected *positions* by *upgrading the journeyman level* for all the subject positions to GS-13 retroactively – involves classification. MA at 16 (emphases added); *see DOL*, 63 FLRA at 218; *cf. EPA, Region 2*, 59 FLRA at 525 (finding "substance of the grievance . . . [was not] barred by § 7121(c)(5)[,]" but setting aside award, in part, because remedial directions concerned classification, in part). In this regard, although the Arbitrator found that the grievance involved "previously-classified positions[,]" Second AA at 1, her remedy directs the Agency to *re*classify the grievants' *existing positions* by raising their journeyman level. As the Authority stated in *HUD*, the Statute does not authorize the Arbitrator to change the "promotion potential of employees' permanent positions[.]" *HUD*, 59 FLRA at 632. Moreover, although the Union asserts that a permanent-promotion remedy based on an accretion of duties to the grievants' positions would not involve classification within the meaning of § 7121(c)(5), the Authority has held to the contrary. *See, e.g., EPA*, 61 FLRA at 675 (citing *AFGE, Local 2142*, 61 FLRA 194, 196 (2005)). For these reasons, the Arbitrator's remedy is contrary to law because it concerns classification matters, and we set it aside.

In cases where the Authority sets aside an entire remedy, but an arbitrator's finding of an underlying violation is left undisturbed, the Authority remands the award for determination of an alternative remedy. *See, e.g., U.S. Dep't of Transp., FAA, Salt Lake City, Utah*, 63 FLRA 673, 676 (2009). As we have set aside the MA's entire remedy, we remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.[7]

V. Decision

For the foregoing reasons, we set aside the remedy and remand the MA to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy.

7. Because the Agency's remaining exceptions challenge the remedy that we set aside, they are moot, and we do not address them.

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of Arbitration:	
U.S. DEPARTMENT of HOUSING and URBAN DEVELOPMENT	**Re: Fair and Equitable Remedy**
and	**FMCS No: 03-07743**
AMERICAN FEDERATION of GOVERNMENT EMPLOYEES, AFL-CIO	**Remanded from: 59 FLRA 630 65 FLRA 90**

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

APPEARANCES:

For Management:
Norman Mesewicz, Deputy Director, LER
James Reynolds, Deputy Director
U.S. Dept. of Housing & Urban Development
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For Union:
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Carolyn Federoff, Esquire, Former President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

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

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

Attachment 7

PREFACE

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

ORDER

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

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

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

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

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

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

4. In the alternative, and only in the event the FLRA vacates ORDER No. 1, 2 and 3 above, that the Agency retroactively place all affected BUE's into an unclassified position description identical to those of the newly hired current GS-13 employees, which accurately reflects their duties from 2002 to present, and then this Arbitrator ORDERS the Agency to classify and grade those PD's, retroactively placing the Grievants in them effective 2002, with back pay and interest.

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

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

of the Agreement, this Arbitrator hereby retains jurisdiction to provide alternative relief, in the event that any relief provided is found to be inconsistent with law or otherwise not available, and if this decision is set aside or in whole or in part on that basis.

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

IT IS SO ORDERED

Date: January 10, 2012

ARBITRATOR

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

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January 10, 2012

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In the Matter of the Arbitration between:
U.S. Department of Housing and Urban Development
and
American Federation of Government Employees, AFL-CIO

Remanded from: 65 FLRA, No. 90

FMCS No: 03-07743

SERVICES RENDERED: Analysis of applicable case law: Panama Canal Commission and Marine Engineers Beneficial NO.1, 56 FLRA 67, dated June 22, 2000; Social Security Administration Chicago North District Office and American Federation of Government Employees, Local 1346, 56 FLRA No. 37. Remanded for alternative remedy and Order

PROFESSIONAL FEES:

Per Diem Charge: $ 1,500.00

2 ½ Study Days $3,750.00

TOTAL..... $3,750.00

Payable by Management* $3,750.00

Payable by Union ..... $ 0.00

This bill is due in thirty (30) days. If this invoice is unpaid by sixty (60) days from the initial bill date, a ten percent (10%) charge on the remaining balance will ensue. If this invoice is unpaid by ninety (90) days from the initial bill date, a twenty percent (20%) charge on the remaining balance will then be assessed.

***Pursuant to Section 23.04 of the Agreement, the Agency is fully liable based on the loser pays all provision.**

ARBITRATOR

C:\Bill for HUD –Remedy 01-2012
January 10, 2012

FEB 10 2012

BEFORE THE FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AGENCY EXCEPTIONS TO ARBITRATION DECISION
FMCS CASE No: 03-07743

U.S. Department of Housing and

Urban Development (Agency)

And

American Federation of Government Employees

National Council of HUD Locals 222 (Union)

Arbitrator Dr. Andree McKissick

2808 Navarre Drive

Chevy Chase, MD 20815-3802

Background

The arbitrator dated the award in question (Attachment 1) January 10, 2012 and served the Parties by regular mail. There is no legible postmark. Accordingly, pursuant to Section 2425.2 of the Authority's regulations, exceptions to the award are to be served on the Authority by February 14, 2012.

ANALYSIS OF DEFICIENCIES

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

Attachment 8

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

At the outset, it is important to note that Article 3, Section 3.01 of the Parties Agreement (Agreement) (A-3) states "In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Government-wide regulations, and existing and future decisions of outside authorities binding on the Department." This is instructive, initially, with respect to the first paragraph of the arbitrator's Order in this matter. Therein, the arbitrator states that "The Agency also violated Article 13, Section 13.01, as it sought to hire external applicants, instead of promoting and facilitating the career development of internal employees...." The language of Article 13, Section 13.10 does not contain the term "promoting" which the arbitrator quotes in her order (A-1 p 2). Here, then, the arbitrator exceeded her authority as defined by the Agreement in Article 23, Section 23.10 (A-3) which states in pertinent part "The arbitrator shall not have the authority to add to, subtract from or modify any of the terms of this Agreement or any supplement thereto." The arbitrator, exceeding her authority, clearly added to the Agreement giving the reader the impression that

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

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

Non-competitive Promotions: The award directs non-competitive promotions to the grievants retroactive to 2002. Each of the four alternative remedies, as demonstrated below, produces that same result (A-1 pp. 2-4). Thus it violates the Code of Federal Regulations. Transfer to a position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service can only be done via competitive procedures pursuant to 5 C.F.R. Section 335.103(c)(v) (A-4). The record demonstrates, as admitted by the arbitrator, that the grievants in this case never held a position higher than the GS-12 level (A-5 pp. 8-9, 12-13, 15-16). Thus, the award conflicts with applicable Federal regulations. The Authority will find an award deficient if it is contrary to law, rule or regulation or on other grounds similar to those applied by Federal courts in private sector labor relations cases. *Defense Mapping Agency and NFFE Local 1827, 43 FLRA No. 14 (1991).* (A-6) In light of the foregoing, the award cannot be allowed to stand.

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

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

that it makes implementation of the award impossible. *Delaware National Guard supra.* (A-7) Accordingly, this alternative remedy is deficient.

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

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

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

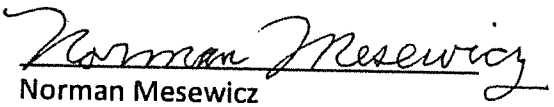
Lastly, the arbitrator exceeded her authority by resolving an issue not before her. The issue in question was an alternative remedy to her initial remedy in this matter which the Authority found to be contrary to law. (A-2) The arbitrator went well beyond that scope, and ordered the Agency to stop advertising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

CONCLUSION

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

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

Respectfully Submitted,



Norman Mesewicz
Agency Representative

http://www.flra.gov/decisions/v66/66-160.html

United States Department of Housing and Urban Development (Agency) and American Federation of Government Employees, National Council of HUD Locals 222 (Union)

66 FLRA No. 160
66 FLRA 867

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))

ORDER DISMISSING EXCEPTIONS

August 8, 2012

Before the Authority: Carol Waller Pope, Chairman, and

Ernest DuBester, Member

Attachment 9

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Andrée Y. McKissick filed by the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Union filed an opposition to the Agency's exceptions.

In a prior decision, the Authority reviewed exceptions to a merits award by the Arbitrator. *See U.S. Dep't of Hous. & Urban Dev.*, 65 FLRA 433 (2011) (*HUD*). In *HUD*, the Authority set aside the Arbitrator's chosen remedy and remanded the merits award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. *See id.* at 436. In the remedial award on remand – the award at issue here – the Arbitrator provided four alternative remedies, and she directed the Agency to stop advertising positions in a manner that violates the parties' collective-bargaining agreement (CBA).

For the following reasons, we dismiss the Agency's exceptions.

II. Background and Arbitrator's Awards

A. Merits Award and *HUD*

In the merits award, the Arbitrator found that the manner in which the Agency advertised and filled certain positions violated the CBA. *HUD*, 65 FLRA at 434 (citations omitted). The Arbitrator found, for example, that the Agency structured external and internal vacancy announcements differently so that the internal announcements – i.e., those advertising vacancies to existing agency employees – required a "constructive demotion" to a lower General Schedule (GS) grade level in order to obtain greater promotion potential. *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. B (Merits Award), at 14-15. As a remedy, the Arbitrator directed "'an organizational upgrade of affected

positions by upgrading the journeyman level for all the subject positions to [the] [GS, Grade 13 (GS-13)] level retroactively[.]'" *HUD*, 65 FLRA at 434 (first and third alterations in original) (quoting Merits Award at 16). The Agency filed exceptions to the merits award and argued that the Arbitrator's chosen remedy was deficient. *See id.* at 434-35.

In its opposition to the exceptions to the merits award, the Union argued that if the Authority set aside the Arbitrator's chosen remedy, then the Authority should remand the merits award because valid, alternative remedies existed. *See* Opp'n to Exceptions to Merits Award, at 17. According to the Union, valid remedies included: (1) retroactively promoting all affected bargaining-unit employees into currently existing career-ladder positions with GS-13 promotion potential, *id.* at 16; (2) retroactively selecting affected bargaining-unit employees for one of the vacant career-ladder positions advertised with GS-13 promotion potential, *see id.* at 11; (3) providing each grievant with one priority consideration and re-running selections for all vacancies with GS-13 promotion potential that the Agency filled in violation of the CBA, *id.* at 17; and (4) "retroactively plac[ing] all affected [bargaining-unit employees] into an unclassified position description identical to those of the externally hired . . . employees" and "order[ing] the Agency to classify and . . . grade those" position descriptions, *id.*

As mentioned earlier, the Authority in *HUD* set aside the Arbitrator's chosen remedy and remanded the merits award to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy. *See HUD*, 65 FLRA at 436.

B. Remedial Award

On remand from *HUD*, when the parties could not reach a settlement on an appropriate remedy, *see* Remedial Award at 2, the Union requested that the Arbitrator exercise her authority to award alternative relief, *see* Opp'n to Exceptions to Remedial Award, at 3-4. In its request, the Union asserted, among other things, that the Agency continued to advertise positions in a manner that violated the CBA.[1] Thereafter, the Arbitrator

directed both parties to submit proposed alternative remedies.[2] The Union submitted its remedial proposals.[3] However, the Agency neither submitted any remedial proposals to the Arbitrator, nor responded to the Union's proposals.[4]

After "read[ing] and review[ing] all prior submissions of the parties," Remedial Award at 2, the Arbitrator found four alternative remedies appropriate, *see id.* at 2-4. Specifically, as relevant here, she found that appropriate remedies included: (1) retroactively, permanently promoting all affected bargaining-unit employees into currently existing career-ladder positions with GS-13 promotion potential, *id.* at 2-3; (2) retroactively selecting affected employees to fill vacant career-ladder positions for which they applied, *id.* at 3; (3) affording one priority consideration to each grievant and re-running selections for all vacancies that the Agency filled in violation of the CBA, *id.* at 3-4; and (4) "placing all affected [bargaining-unit employees] into an unclassified position description identical to those of the newly-hired . . . GS-13 employees" and ordering "the Agency to classify and grade those" position descriptions, *id.* at 4. The Arbitrator numbered those remedies from one to four in order of priority, *see id.* at 2-4, and she directed the Agency to implement the highest-priority remedy that was not "found to be inconsistent with law or otherwise [un]available," *id.* at 5. In addition, the Arbitrator directed the Agency to "stop advertising positions in a way that requires current employees" to accept a "constructive demotion" in order to "secure greater promotion potential." *Id.* at 4 (citing Merits Award at 13-14).

III. Positions of the Parties

A. Agency's Exceptions

The Agency contends that the Arbitrator exceeded her authority by awarding multiple, alternative remedies rather than a single remedy. *See* Exceptions to Remedial Award at 1-2, 6. The Agency further asserts that the alternative remedies must be set aside because they are, in various respects: (1) contrary to regulation, *id.* at 3-4; (2) incomplete

so as to make implementation impossible, *id.* at 4-5; (3) contrary to management's rights, *id.* at 5-6; and (4) based on a nonfact, *id.* at 6.

B. Union's Opposition

The Union asserts that, after the parties' settlement discussions ended "unsuccessful[ly]," the Agency "ceased its involvement in this case." Opp'n to Exceptions to Remedial Award, at 3. In that regard, the Union states that because the Agency "failed to provide any type of response to the Arbitrator or Union concerning the Arbitrator's deadline for submission[s] . . . [and did not] reply to the Union's" remedial proposals, all of the arguments in the exceptions are being raised for the "first time." *Id.* In addition, the Union asserts that the exceptions do not establish that the remedial award is deficient. *See id.* at 3-14.

IV. Analysis and Conclusions

Under §§ 2425.4(c) and 2429.5 of the Authority's Regulations, the Authority does not consider issues or arguments in exceptions that could have been, but were not, presented to the arbitrator.[5] *See, e.g., U.S. Dep't of Transp., FAA*, 64 FLRA 387, 389 (2010) (*FAA*). Where a party makes an argument for the first time on exceptions that it could have, and should have, made before the arbitrator, the Authority applies §§ 2425.4(c) and 2429.5 to bar the argument. *See, e.g., U.S. Dep't of Homeland Sec., U.S. Customs & Border Prot.*, 66 FLRA 335, 337-38 (2011) (*Homeland*), *mot. for recons. denied*, 66 FLRA 634 (2012); *see also USDA, Animal & Plant Health Inspection Serv., Plant Prot. & Quarantine*, 57 FLRA 4, 5 (2001) (Chairman Cabaniss concurring).

On remand from *HUD*, the Union submitted to the Arbitrator proposed alternative remedies. *See* Opp'n to Exceptions to Remedial Award, at 3; *see generally id.*, Attach., Ex. A. It also asserted that the Agency was continuing to advertise positions in a manner that violated the CBA.[6] The Agency made no submission. Upon consideration of "all prior submissions of the parties," Remedial Award at 2, the Arbitrator awarded four alternative remedies,

see id. at 2-4, and also directed the Agency to "stop advertising positions" in a way that requires employees to accept a "constructive demotion" to obtain higher promotion potential, *id.* at 4. The Agency does not claim – and nothing in the record indicates – that any of the remedies that the Arbitrator awarded on remand differ from those that the Union proposed. In these circumstances, the Agency could have, and should have, presented to the Arbitrator the challenges to the remedies that it now presents in its exceptions. *See* 5 C.F.R. §§ 2425.4(c), 2429.5; *Homeland*, 66 FLRA at 337-38. As the Agency did not do so, §§ 2425.4(c) and 2429.5 bar consideration of the exceptions. *See FAA*, 64 FLRA at 389. Therefore, we dismiss the Agency's exceptions.

V. Order

The Agency's exceptions are dismissed.

[1] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, Letter from Union Rep. to Arbitrator, with Carbon Copy to Agency (July 28, 2011) (proposing timeline for parties' submissions to Arbitrator on "recommendations for alternative remedies"; asserting that Agency continued advertising and filling positions "in the exact" manner that the Arbitrator previously "found to be a violation" of the CBA).

[2] *See* Opp'n to Exceptions to Remedial Award, at 3; *id.*, Attach., Ex. A, E-mail from Arbitrator to Union and Agency Reps. (Sept. 8, 2011, 4:36 PM) (indicating Arbitrator's acceptance of Union's proposed timeline for submissions).

[3] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Arbitrator to Union Counsel, with Carbon Copy to Agency Rep. (Sept. 21, 2011, 1:58 PM) (Arbitrator's acknowledgement of Union's submission of proposed remedies).

[4] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Union Counsel to Arbitrator, with Carbon Copy to Agency Rep. (Sept. 25, 2011, 3:22 AM) (indicating that Agency declined to submit remedial proposals of its own and requesting that Arbitrator adopt Union's proposals); Opp'n to Exceptions to Remedial Award, Attach., Ex. A, E-mail from Union Counsel to Arbitrator, with Carbon Copy to Agency Rep. (Dec. 5, 2011, 3:50 PM) (setting forth post-remand

timeline of actions involving – and correspondence among – Arbitrator, Union, and Agency; and indicating that Agency declined to file "any [r]esponse or [o]pposition to the Union's [s]ubmission on [r]emedy").

[5] Section 2425.4(c) provides that exceptions may not rely on any "evidence [or] arguments . . . that could have been, but were not, presented to the arbitrator." Section 2429.5 provides that the "Authority will not consider any evidence [or] . . . arguments . . . that could have been, but were not, presented in the proceedings before the . . . arbitrator."

[6] *See* Opp'n to Exceptions to Remedial Award, Attach., Ex. A, Letter from Union Rep. to Arbitrator, with Carbon Copy to Agency (July 28, 2011), at 1.

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

OFFICE OF GENERAL COUNSEL

August 7, 2013

Transmitted via E-Mail

Dr. Andree McKissick
2808 Navarre Drive
Chevy Chase, MD 20815-3802
Email: mckiss3343@aol.com

Re: Agency Position on Arbitration Award Clarification during the July 8, 2013, Teleconference

Dear Dr. McKissick,

On June 19, 2013, a dispute arose between the parties on the scope of employees eligible for Remedy No. 1 of your January 10, 2012, Opinion and Award. The Union and Agency agreed to request clarification from you on employees eligible for Remedy No. 1. That same day, the parties submitted a joint request to you for clarification on the class of grievants. On July 8, 2013, a teleconference was held between the parties for clarification on the class of grievants entitled to Remedy No. 1 from the January 10, 2012, Opinion and Award.

During the teleconference, you provided a verbal clarification to the parties on the scope of employees eligible for Remedy No. 1. Also during the call, the Agency responded with a request that you provide your clarification in writing to the parties. The Agency's request was declined, and instead, you requested a joint statement signed by the parties on the scope of eligible employees for your records. The Union concurred with your position, and subsequently drafted a Memorandum for the Record.

This letter is being sent by Agency Counsel to reiterate the Agency's position that a clarification from you, as opposed to a joint acknowledgment from the parties, based upon your statements on the scope of eligible employees, is both necessary and warranted. Pursuant to Article 23 of the parties' collective bargaining agreement, you were empowered with jurisdiction and the authority to resolve issues related to the Fair and Equitable Arbitration. Consistent with this authority, you have previously issued written rulings on the arbitrability, merits and remedy for this case, dated June 23, 2003, September 29, 2009, and January 10, 2012, respectively. Therefore, a written statement from you in your capacity as the arbitrator on this case clarifying the scope of employees entitled to the remedy in your January 10, 2012, Opinion and Award is reasonable, and consistent with the authority you have exercised thus far in the proceedings on the Fair and Equitable Arbitration.

In addition, based upon our review of the Memorandum for the Record drafted by Union counsel, and statements made by you during the July 8, 2013, teleconference indicating your reference to the posting of announcements in the definition section of the class of grievants was "inadvertent;" the Agency further responds by raising the issue that your most recent verbal statements on the definition of the class of greivants may constitute a modification, as opposed to

Attachment D

a clarification, of your award. *See Dep't of Defense Dependents Schools, Mediterranean Region*, 32 FLRA 410 (1988) (An arbitrator may clarify or correct an award to correct clerical mistakes or obvious errors in arithmetical computation.) We, therefore, are also submitting this letter to request a written clarification from you to confirm that your clarification does, in fact, conform to your original award. *See e.g., United States Dep't of the Army Corps of Engineers Northwester Div. and Portland Dist.*, 60 FLRA 595 (2005); *see also Social Security Administration Lawrenceburg*, 60 FLRA 336 (2004) (A material factual error in an award could not be clarified without a violation of the doctrine of *functus officio*).

The Agency submits this letter to re-state its request for a written clarification from you on the scope of employees eligible for Remedy No.1 from the January 10, 2012, Opinion and Award.

Sincerely,

Tresa A. Rice, Senior Attorney-Advisor
Department of Housing and Urban Development
Personnel Law Division
Office of General Counsel
451 7th Street, SW, Room 3170
Telephone: (202) 402-2222
Fax: (202) 401-9712

cc: Union Counsel

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 June 12, 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: Tresa A. Rice, Esq., Javes Myung, Esq., Jim E. Fruge by phone, and Mike Anderson. Present for the Union were Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, and Carolyn Federoff, EVP, from AFGE Council of Locals, 222. This is the third Summary of Implementation Meeting, the first two having been issued on March 14, 2014, and May 17, 2014, respectively. Both prior Summaries are hereby incorporated by reference and remain in full force and effect.

As stated in prior Summaries, this Arbitrator has instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon this Arbitrator's Award, as an example, all GS-1101 employees at the GS-12 level from 2002 to present were to be promoted, per the Back Pay Act and CBA, with back pay and interest, as of their earliest date of eligibility. As a simple subset that should be easily identifiable, this Arbitrator instructed the Parties to identify all PHRS employees, who would comprise the first set of class members. The Union stated that it provided its list of PHRS class members to the Agency in early May 2014. It requested feedback from the Agency, in compliance with this Arbitrator's Summary, on multiple occasions. The Agency did not and has not disagreed with the Union's PHRS class member listing,

Attachment 11

nor has it proposed an alternative methodology of identifying those class members. Consistent with the Award, this Arbitrator expects the Parties to work together to compile a list of PHRS employees from the annual employee listings provided by the Agency so that concrete progress could be achieved by the next implementation meeting. As noted on prior occasions, this Award is to be interpreted broadly so as to include the maximum amount of class members as possible.

Despite these factors, and the untimeliness of the Agency's request, the Agency has requested yet another thirty (30) days to provide a response to the Union's lists of eligible employees that encumbered PHRS and CIRS positions, including explanation as to how it constructed the list(s) and if applicable, why it disagrees with the Union's list(s) and the Union's methodology, which this Arbitrator approved and discussed in the prior Summary. Initially, the basics of a new Agency proposal were discussed, mostly by Mr. Fruge by phone. This Arbitrator noted that the Agency's new proposal, as described by Mr. Fruge, does not comport with the Award, prior Summaries or with this Arbitrator's prior instructions to the Parties.

This Arbitrator further reminded the Agency that any use of location, vacancies or any other limiting factor would not comport with the Award. This Arbitrator did allow the Agency one last opportunity to compile a list of PHRS and CIRS employees who should be promoted with back pay, and permitted that the Agency be provided thirty (30) days from the date of the June 12, 2014 meeting to present their PHRS and CIRS lists. This Arbitrator's Award, which is final, must be fully followed. It is expected that the Award is to be implemented by the Agency as written, and as clarified through the meetings and subsequent Summaries. The Parties shall discuss the Union and Agency PHRS and CIRS lists, if they differ. After discussion of the lists, the Parties will present to this Arbitrator a Stipulation signed by the Parties to be submitted to the Arbitrator after they meet. The Stipulation should list all eligible PHRS and CIRS employees, the amount of back pay and interest due each, and a date by which the retroactive promotions, recalculated

retirement annuities (as applicable), back pay and interest will be paid to each. Any disagreement between the Parties shall be submitted to this Arbitrator in writing for consideration.

The Union noted during the meeting that it was not receiving advance information prior to monies being disbursed to its Bargaining Unit Members, and the problems arising therefrom. This Arbitrator ordered the Agency that at least one week prior to the issuance of any monies to affected class members that the Agency shall provide the Union with the details of who is being paid, for what time period, the gross payment, and all applicable deductions and withholdings.

Contrary to this Arbitrator's prior orders, the Union further noted during the meeting that the Agency was not providing the Union with SF-50s, worksheets, or a list of the deductions or withholdings that were being taken out of payments to class members. Thus, this Arbitrator ordered that within two weeks from the meeting, the Agency is to inform the Arbitrator and Union as to the internal controls that have been put into place to ensure that the Union receives timely notifications of all payments made including all applicable and necessary withholding details. Moreover, within two weeks from the meeting, the Agency will inform the Arbitrator and Union about: (1) whether income tax has been taken out of retirees' payments; (2) whether retirement and/or TSP contributions have been deducted from the payments to current employees; (3) whether the Agency has paid its portion of any retirement and/or TSP payments to current employees; and (4) how interest is being calculated.

At the meeting the Union inquired about the status of the FY-2011 payments that, to date, have not been paid. This Arbitrator ordered, based upon the Agency's own timeline, that no later than the week of June 23, 2014, the Agency will inform the Arbitrator and the Union of the Status of the FY-2011 payments to the already eligible class members.

Despite this Arbitrator's prior Orders, the Agency has not responded to the Union's request to reach an agreement on a proposed earliest back pay date. As such, within two weeks from the

meeting, the Union and Agency will reach an agreement on the earliest back pay date, or will submit the matter to the Arbitrator for a decision.

At the meeting, the Union raised the concern that back pay calculations were not being conducted prior to the issuance of the SF-50, which could lead to math and payment errors not being caught until after payments had already been made. This Arbitrator ordered the Agency to remedy this problem by running all calculations and then meeting with the Union.

In May 2014, the Union filed a Request for Information pursuant to 5 U.S.C. § 7114(b). The Union noted that it had not yet received a satisfactory response to Request No. 1, which requested the contact information for all potential class members. This Arbitrator ordered that within three weeks from the meeting, the Agency was required to provide the Union with an acceptable database or list of the contact information for all possible class members.

The Agency is reminded that it continues to be in violation of the prior Orders requiring that all six witnesses receive retroactive promotions and all back pay, interest and emoluments. The Agency also continues to be in violation of the Orders to submit all documentation pertaining to the retroactive promotions and payments, including but not limited to: copies of all forms, back pay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc. These Orders are hereby extended to the additional eleven (11) employees that the Agency previously identified as eligible class members. Those eleven (11) employees are: (1) Brenda Crispino (Retired), (2) Steven Di Pietro, (3) Santo Duca, (4) Leroy Ferguson, (5) Gilbert Galinato, (6) James House, (7) Kaeron Masters-High (Retired), (8) Tammie Simmons, (9) Anne Trumbla, (10) Gwen White (Retired), and (11) Edward Williams, Jr. This Arbitrator expects to see substantial, concrete progress towards promotions, back pay and interest payments and recalculation of annuities for these employees in an expeditious matter, and full communication between the Parties during the calculations period and prior to communications with and payment to the employees.

The Union and Agency shall continue working to identify additional class members as set forth in the Award and as stated in the meeting, and shall keep the Arbitrator informed of their progress.

The Parties are to meet in person or by phone no less than two times prior to the next meeting, which will be on August 28, 2014, beginning at 10:00 AM. The Parties are to keep the Arbitrator apprised of progress and any impasses. It is expected that the Parties make substantial progress on their own so that concrete progress can be achieved by the time of the August 28, 2014 meeting.

The purpose of these meetings is to monitor implementation of this Arbitrator's January 10, 2012 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 shall continue to retain jurisdiction over this matter for all matters relating to implementation as well as an award of attorney fees, costs and expenses.

Dr. Andree Y. McKissick, Esq.
Arbitrator

August 2, 2014

FMCS - Implementation Meeting(HUD) August 2014.docx

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

OFFICE OF GENERAL COUNSEL

September 4, 2014

Transmitted via Messenger Service

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 Exceptions to Modification, dated September 4, 2014.

With regards,

Tresa A. Rice
Senior Attorney-Advisor
Department of Housing and Urban Development
Personnel Law Division, Office of General Counsel
451 7th Street, SW, Room 3170
Telephone: (202) 402-2222
Fax: (202) 708-1999
Email: tresa.a.rice@hud.gov

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

Attachment 18

FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 2042-0001

National Council of HUD Locals 222, AFGE, AFL-CIO, Union	)	
v.	)	Issue: Fair & Equitable Compliance
U.S. Department of Housing and Urban Development, Agency.	)	

TABLE OF CONTENTS

Page Nos.	Description
1	Introduction
2-4	Procedural History
4-6	Implementation Efforts Before Arbitrator McKissick
7	Argument
7	Exceptions to a Modification Are Appropriate
7-10	The Arbitrator Exceeded Her Authority by Issuing a Modification to the Opinion and Award
11	Conclusion
12	Certificate of Service

FEDERAL LABOR RELATIONS AUTHORITY
1400 K Street, NW, Suite 200
Washington, DC 2042-0001

National Council of HUD Locals 222, AFGE, AFL-CIO, Union	
v.	Issue: Fair & Equitable Compliance
U.S. Department of Housing and Urban Development, Agency.	

AGENCY EXCEPTIONS TO ARBITRATOR MODIFICATION

Pursuant to 5 U.S.C. §7122(a), the Department of Housing and Urban Development (Agency or HUD) hereby files exceptions to the Modification of the January 10, 2012, Award on Remand of Arbitrator Andree McKissick. Pursuant to 5 C.F.R. Section 2425.7 of the Authority's Regulations, the Agency is not requesting an expedited, abbreviated decision.

As set forth fully below, the Agency contends that Arbitrator McKissick exceeded her authority by issuing a Modification, dated August 2, 2014, to a final and binding Opinion and Award, dated August 8, 2012. Specifically, that Arbitrator McKissick's Modification constitutes *functus officio*, and is deficient. The August 2, 2014, Modification should, therefore, be set aside.

PROCEDURAL HISTORY

The Department of Housing and Urban Development and the American Federation of Government Employees, Council 222, (Council 222) are parties to a collective bargaining agreement (CBA). See Exhibit (Exh.) 1. Pursuant to Article 22 of the parties' CBA, Council 222 filed a grievance on November 13, 2002. See Exh. 2. The grievance alleged that the Agency posted new positions to the grade 13 with identical job responsibilities of current bargaining unit employees who encumbered similar positions with a career ladder of grade 12. See id. The grievance asserted that the new positions created by the Agency offered applicants a higher grade promotion potential to grade 13, compared to the positions encumbered by bargaining unit employees at the grade 12 at the time of the job postings. See Exh. 2.

The parties participated in an arbitration hearing, and on September 29, 2009, Arbitrator McKissick issued her Initial Decision on the merits, sustaining Council 222's grievance. See Exh. 3. The Arbitrator found that the Agency violated Articles 4.01 and 4.06 [grievants were unfairly treated and unjustly discriminated against]; Article 9.01 [classification standards were not fairly and equitably applied]; and Article 13.01 [Agency sought to hire external applicants, instead of promoting and facilitating the career development of internal employees]. See id. at p. 15.

As a remedy, Arbitrator McKissick ordered an organizational upgrade of affected positions to the GS-13 level, retroactive to 2002. See Exh. 3 at p. 15. Arbitrator McKissick's Award also advised the parties that she would maintain jurisdiction for the purpose of implementation of the award. See id. On October 30, 2009, the Agency filed exceptions to the award before the FLRA.

On January 26, 2011, the FLRA issued a decision, finding the grievance was arbitrable because it dealt with issues of fairness and equity. See Exh. 4. Notwithstanding this determination, the FLRA remanded the Arbitrator's award for action consistent with its decision that the Arbitrator's reference to "reclassified positions" was unclear, and required clarification to determine whether Arbitrator McKissick had jurisdiction over the grievance. See id.

On January 10, 2012, Arbitrator McKissick issued a follow up Opinion and Award (Opinion and Award). See Exh. 5. In the Award, the Arbitrator concluded that the following remedy was appropriate:

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

See id. at pp. 2-3.

The Arbitrator identified the class of grievants subject to the Remedy as:

> All bargaining unit employees in a position 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 at p. 4.

The Arbitrator ordered that the Agency stop advertising positions in a way that requires current employees to take downgrades in order to secure greater promotion potential. See id. The Arbitrator advised the parties that she would retain jurisdiction to

provide alternative relief, in the event relief provided was found to be inconsistent with law or otherwise not available, or set aside. See Exh. 5 at p. 5.

On February 10, 2012, the Agency filed exceptions to the Opinion and Award. On August 8, 2012, the FLRA issued an Order dismissing the Agency's exceptions, citing the Agency's failure to challenge the proposed remedy prior to filing its exceptions. See Exh. 6. The Opinion and Award became final and binding on August 8, 2012. See id.

On October 24, 2012, Council 222 filed an unfair labor practice ("ULP") charge, alleging that the Agency failed to comply with the Opinion and Award. See Exh. 7. On March 21, 2013, the FLRA advised the Agency that Council 222 withdrew the ULP charge. See Exh. 8. On April 23, 2013, Council 222 advised the Agency that if the parties were not able to reach agreement on implementation, that it would contact Arbitrator McKissick. See Exh. 9.

IMPLEMENTATION EFFORTS BEFORE ARBITRATOR MCKISSICK

On May 30, 2013, the parties participated in a teleconference with Arbitrator McKissick to discuss implementation with the Opinion and Award. See Exh. 10. During the teleconference, the Agency outlined its implementation efforts toward compliance with the Opinion and Award, identified as an Implementation Plan developed during the processing of the ULP charge. See id. During a follow-up teleconference, held on July 8, 2013, Arbitrator McKissick verbally advised the parties that any reference to vacancy announcements in her Opinion and Award was "inadvertent," and that bargaining unit members deemed eligible should receive the remedy outlined in the Opinion and Award.

On August 7, 2013, the Agency responded via letter, and raised the issue of a modification with the Opinion and Award directly before the Arbitrator. See Exh. 11.

The Agency's response outlined its position that the Arbitrator's statements that the posting of announcements was "inadvertent" may constitute a modification of her Award, and requested a written clarification. See id. On August 13, 2013, the Union submitted a response to the parties, via email. See Exh. 12. A copy of a Memorandum For The Record memorializing the July 8, 2013, teleconference, was included as an attachment to the email. See id. The Memorandum For The Record prepared by Union counsel reiterates the Arbitrator's statements to the parties that the remedy was not vacancy announcement driven. See id. On August 29, 2013, Arbitrator McKissick denied the Agency's request, responding that because the Opinion and Award was final and binding, no written clarification was needed. See Exh. 13. On November 13, 2013, the Agency requested that the Arbitrator reconsider the Agency's request for written clarification. See Exh. 14.

On December 9, 2013, Arbitrator McKissick advised the parties of her intent to convene Implementation Meetings between the parties. See Exh. 15. Following the Implementation Meetings, Arbitrator McKissick issued a Summary of Implementation Meeting to the parties. See Exh. 16. The stated purpose of the Summary of Implementation Meeting is to "discuss implementation of the January 10, 2012, Opinion and Award." See id. To date, Implementation Meetings have been held on: February 4, 2014; March 26, 2014; and June 12, 2014. See Exh. 16-17. On August 2, 2014, Arbitrator McKissick forwarded a Summary of Implementation Meeting (Implementation Summary) of the parties' June 12, 2014, Implementation Meeting. See Exh. 17.

The Implementation Summary memorializes the Arbitrator's instructions to the parties. Namely, that: "The Parties were instructed that based upon this Arbitrator's

Award, as an example, all GS-1101 employees at the GS-12 level from 2002 were to be promoted, per the Back Pay Act and CBA, with back pay and interest, as of their earliest date of eligibility." See id. at p. 1. The Implementation Summary states: "This Arbitrator further reminded the Agency that any use of location, vacancies or any other limiting factors would not comport with the Award." See Exh. 17 at p. 2.

On August 28, 2014, representatives from the Agency, Council 222 and Arbitrator McKissick participated in another Implementation Meeting. Towanda Brooks was in attendance at the August 28, 2014, meeting. See Exh 18. Ms. Brooks serves as the Deputy Chief Human Capital Officer for the Agency. See id. During the Implementation Meeting, Ms. Brooks advised Council 222 representatives and Arbitrator McKissick that, based upon a career ladder analysis conducted by her staff, at least one position within the GS-1101 series, Project Manager, did not have a career ladder to the grade 13, and could not receive the remedy outlined in the Opinion and Award and Implementation Summary. See Exh. 18. Ms. Brooks advised that, based on data reviewed by the Agency, those employees encumbering positions at the GS-1101 series that did not have a career ladder to the GS-13 could not receive the remedy outlined in the Opinion and Award, even though the Implementation Summary states otherwise. See id. The Agency also advised the Arbitrator that placement into a previously classified position was, in fact, a limiting factor to identify grievants consistent with the Opinion and Award, even though the Implementation Summary also states otherwise. See Exh. 18.

ARGUMENT

I. Exceptions to a Modification are Appropriate

Exceptions filed in response to a modification of an arbitration award which gives rise to the deficiencies alleged in the exceptions filed, are deemed timely, and subject to review before the Authority. See generally U.S. Dep't of Health and Human Serv., Social Security Admin., 23 FLRA 157 (1986) (filing period for exceptions begins with arbitrator's modification of award). Where, as in this case, an arbitrator modifies a final and binding award, a party in the matter where the award was modified may file exceptions. See 5 C.F.R. §2421.11. As such, the Agency's exceptions to the modification issued by Arbitrator McKissick, dated August 2, 2014, are timely and appropriate for consideration.

II. The Arbitrator Exceeded Her Authority by Issuing a Modification to the Opinion and Award

Pursuant to 5 C.F.R. §2425.6, the Agency contends that Arbitrator McKissick exceeded her authority by modifying the Opinion and Award. An arbitrator exceeds their authority when they fail to resolve an issue submitted to arbitration, resolve an issue not submitted to arbitration, disregards specific limitation to their authority, or award relief to those not subject to the grievance. See American Fed'n of Gov't Employees, Local 1617, 51 FLRA 1645 (1996). Specifically, under the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. See U.S. Dep't of Transp., FAA, NW, Mountain Region, Renton, Wash., 64 FLRA 823 (2010). The doctrine effectively precludes an arbitrator from

reconsidering a final and binding award. See American Fed'n of Gov't Employees, Local 2172, 57 FLRA 625 (2001).

The Opinion and Award found that "grievants would have been selected for currently existing career ladder positions with promotion potential to the GS-13 level." See Exh. 5 at p. 2. The Opinion and Award defines the class of grievants as: "All Bargaining Unit employees in a position in a career ladder (including at the journeyman level), where that career ladder lead to a lower journeyman grade than the journey (target) grade of a career ladder of a position with the same job series, which was posted between 2002 and present." See id. at p. 4.

A dispute arose between the parties over the scope of employees eligible for the remedy. See Exh. 6. The parties jointly requested clarification on the scope of employees eligible for the remedy. See Exh. 11. In response, Arbitrator McKissick provided verbal clarification that her reference to the posting of announcements was "inadvertent." See id. The Agency requested written clarification based upon on its assertion that verbal statements made by the Arbitrator appeared to modify the Opinion and Award on the class of grievants. See Exh. 11. Requests for written clarification were denied by the Arbitrator. See Exh. 12.

Arbitrator McKissick maintained that because the Opinion and Award was final and binding, no written clarification was needed. See Exh. 13. Instead, the Arbitrator decided to hold Implementation Meetings with the parties. See Exh. 15. Arbitrator McKissick subsequently issued Implementation Meeting Summaries, providing an overview of the meetings, along with instructions and orders to the parties. See Exhs. 16-17.

Notwithstanding this, Arbitrator McKissick's August 2, 2014, Implementation Summary exceeds her authority because she re-examined and modified the Opinion and Award's determination on the class of grievants. Specifically, by directing the Agency to promote all employees in the GS-1101 series from the grade 12 to the grade 13, the Arbitrator modified the class of grievants to include all employees at the grade 12 in the GS-1101 series, regardless of whether a higher target grade exists. See Exh. 17.

In contrast, the Opinion and Award states that grievants be placed in a position with 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. See Exh. 5. The Opinion and Award defines the class of grievants as those employees in lower career ladder positions than the career ladders of positions subsequently posted by the Agency. The Implementation Summary modifies the Opinion and Award by:

1. Redefining 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. Redefining the application of factors used to identify grievants eligible for the remedy of a retroactive promotion to the GS-13 level.

Based on above, the Implementation Summary exceeds the Arbitrator's retained authority in effectuating implementation with the Opinion and Award. See Overseas Fed'n of Teachers, AFT, AFL-CIO, 32 FLRA 410 (1988) (after resolving an award on the merits, an arbitrator's authority is limited to the scope of their retained jurisdiction).

The Agency's exceptions, which are based on the issues stemming from the August 2, 2014, Implementation Summary, have been raised before the Arbitrator. See 5 C.F.R § 2429.5. During the parties' August 28, 2014, Implementation Meeting, the Agency raised the issue identified in the Implementation Summary restricting the use of any limiting factor for determining eligible grievants. See Exh. 18.

The Agency also raised the issue that the Implementation Summary directs the Agency to promote all employees in the GS-1101 series from the grade 12 to grade 13, before Arbitrator McKissick. See Exh. 18. At least one position in the GS-1101 series, Project Manager, did not have a career ladder to the grade 13 for the remedy of a retroactive promotion from grade 12 to grade 13. See Exh. 18. Further, those employees encumbering positions at the GS-1101 series that did not have a career ladder to the GS-13, such as the position of Project Manager, could not meet the criteria outlined in the Opinion and Award to qualify as a grievant, even though the Implementation Summary states otherwise. See id.

The Arbitrator sustained the grievance, which alleged the Agency posted new positions to grade 13 compared to positions encumbered by employees at the grade 12 with identical job responsibilities. See Exh. 2. The Opinion and Award determined that eligible employees be placed into existing career ladder positions with promotion to grade 13. See Exh. 5. Because the GS-1101 Project Manager position does not have a career ladder to the grade 13, the Implementation Summary instruction that the Agency promote all GS-1101 employees exceeds the Arbitrator's authority because she has awarded relief to persons whom the union did not file a grievance over. See U.S. Dep't of the Air Force, Air Logistics Ctr., Tinker Air Force Base, Oklahoma, 41 FLRA 303

(1991) (arbitrator exceeds authority by issuing order that awards relief to persons who did not file a grievance on own behalf, or did not have the union file a grievance for them).

CONCLUSION

Based on the record, the Arbitrator exceeded her authority in issuing the August 2, 2014, Implementation Summary. The Implementation Summary constitutes *functus officio* by instructing the Agency to: (1) promote all employees in GS-1101 series at the grade 12 to the grade 13, (2) that any use of location, vacancies or any other limiting factors to identify grievants would not comport with the Award, and (3) granting relief to individuals not covered by the grievance, are not consistent with the Opinion and Award. Accordingly, the Implementation Summary constitutes a modification, and must be set aside.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 5 C.F.R. §2429.27, the Agency's Exceptions to Modification has been served on all parties on the date below, and via the method indicated:

Commercial Delivery Service:
Federal Labor Relations Authority
Office of Case Intake and Publication
Docket Room, Suite 200
1400 K Street, NW
Washington, DC 20424-0001
Phone: (202) 218-7740
Fax: (202) 482-6657

Certified Mail No. 7012 3460 0000 4463 6794
Arbitrator Andree McKissick
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September 4, 2014
(Date)

Tresa A. Rice
TRESA A. RICE
Agency Representative

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]

[1] Exceptions at 1.

Attachment 13

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

[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:

CERTIFIED MAIL – RETURN RECEIPT REQUIRED

Tresa A. Rice
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Dated: May 22, 2015
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for Belinda Stevenson
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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.

Attachment 14

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)

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