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

OFFICE OF GENERAL COUNSEL

June 22, 2015

Transmitted via Messenger

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 Exceptions.

With regards,

Tresa C Rice

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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.	)	

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v.	Issue: Fair & Equitable Compliance
U.S. Department of Housing and Urban Development, Agency.	Date: June 22, 2015

AGENCY EXCEPTIONS TO ARBITRATOR AWARD

Pursuant to 5 U.S.C. § 7122(a), the Department of Housing and Urban Development (Agency or HUD) hereby files exceptions to 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's May 16, 2015, Order is deficient on the following grounds: the award is incomplete, contrary to law, modifies the original award, and is based on non-fact(s). The Agency further asserts arbitrator bias and seeks a remand to a different arbitrator. Based on the foregoing, the Agency requests that the May 16, 2015, Award be set aside, and that the processing of the Fair and Equitable case be remanded to a different arbitrator.

FACTUAL AND PROCEDURAL BACKGROUND OF THE FAIR AND EQUITABLE CASE

On November 13, 2002, AFGE Council 222 filed a grievance, alleging 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 Grievance. The grievance asserted that 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 id.

The parties participated in an arbitration hearing, and on September 29, 2009, Arbitrator McKissick issued her Merits Award, sustaining Council 222's grievance. See Merits Award. 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.

In her Merits Award, the Arbitrator ruled that an adverse inference could be made based upon the Agency's failure to preserve and produce related documents and data. See Merits Award at pg. 3. The Arbitrator specifically referenced "the Union's request for a *specific* adverse inference regarding the numbered series vacancy announcements that were not provided to the Union." See id. at pg. 10. (emphasis added)

As a remedy, Arbitrator McKissick ordered an organizational upgrade of affected positions to the GS-13 level, retroactive to 2002. See Merits Award at p. 15. Her 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 U.S. Dep't of Housing and Urban Dev., 65 FLRA 433 (2011). 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. See Remedial Award. On February 10, 2012, the Agency filed exceptions to the Opinion and Award. In its exceptions, the Agency alleged, *inter alia*, that the Opinion and Award interfered with management's rights and that implementation was not possible. See Agency Exceptions (Feb. 10, 2012). 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 U.S. Dep't of Housing and Urban Dev., 66 FLRA 867 (2012). The Opinion and Award became final and binding on August 8, 2012. See id.

IMPLEMENTATION BEFORE ARBITRATOR MCKISSICK

On December 9, 2013, Arbitrator McKissick advised the parties of her intent to convene Implementation Meetings (IM) between the parties. See McKissick IM Notice. IM participants consist of: Arbitrator McKissick and representatives from the Agency and Union. During the IMs, the Union and Agency have discussed compliance with the Opinion and Award, such as the process for identifying grievants, status of responses to requests for information and status of recalculating annuities of retired grievants.

In addition, Agency representatives, including management officials from the Office of the Deputy Secretary, Office of Chief Financial Officer, Office of Chief Human Capital Office and Office of General Counsel, provide status updates on Agency compliance with the August 10, 2012, Award.

Following each IM, the Union and Agency submit proposed summaries to Arbitrator McKissick outlining the parties' discussions during the most recent IM held. See Union Draft IM Summary Submissions 1-6 and Agency Draft IM Summary Submissions 1-6. Arbitrator McKissick reviews the proposed summaries submitted by the parties and then issues a signed IM Summary to the parties. See IM Summaries 1-6.

IMs have been held on: February 4, 2014; March 26, 2014; August 28, 2014; February 4, 2015; March 26, 2015; and June 2, 2015. Signed IM Summaries have been issued by the Arbitrator 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 May 16, 2015 (IM Summary 6).

IMPLEMENTATION MEETING SUMMARIES

On February 4, 2014, the parties participated in the first IM. See IM Summary 1 at pg. 1. In IM Summary 1, issued on March 14, 2014, the Arbitrator identified the issue of a methodology needed to identify grievants eligible for the remedy of a retroactive promotion. Of particular import, the Arbitrator acknowledged the fact that the Agency developed a methodology for identifying grievants, even though she disagreed with it. The Arbitrator states that, "... the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members ..."[1] See IM Summary 1 at pg. 2. The Arbitrator also states that she provided feedback to the Agency on its methodology, stating

[1] The Arbitrator did not define what 'minimal' constitutes.

the Agency's methodology conflicts with specific findings in her Award. See id. at pgs. 2-3. She specifically complained about the results of the Agency's methodology, which the Arbitrator indicated identified only two of the six witnesses as eligible class members. See IM Summary 1 at pg. 3. Thus, as early as February 2014, the Agency had prepared and presented a proposed list of grievants it asserted were eligible for the remedy.

The Arbitrator also stated that the *Union's* methodology identified "thousands of *potential* class members ..." See id. at pg. 2 (emphasis added). Overall, the Arbitrator advised that the "Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for back pay and promotions." See IM Summary 1 at pg. 3.

The Arbitrator further advised that "[i]mpasse in implementation is unnecessary because the Award is clear in its definition of the class." See IM Summary 1 at pg. 3. Yet she clarifies that she intended that, "the Class definition is data driven, not announcement driven" which she states was "clear from this Award and the Adverse Inference drawn due to the Agency's failure to produce data . . ." See id.

In IM Summary 1, the Arbitrator ordered the Agency to process retroactive promotions for the six witnesses who testified at the arbitration hearing within thirty days. See IM Summary at pg. 3. The Arbitrator concluded by ordering the parties to continue working to identify additional class members and to submit their respective methodologies for doing so. See id. at pg. 4.

The parties participated in the second IM on March 26, 2014. See IM Summary 2 at pg. 1. In IM Summary 2, issued on May 17, 2014, the Arbitrator recognized the Agency's methodology of identifying the class, stating it was "inadequate." See IM

Summary 2 at pg. 1. The Arbitrator also reiterated her February 2014 direction that the parties "... meet and agree on a methodology, or to present alternative methodologies ..." See id. at pg. 2.

During the March 26, 2014 Implementation Meeting (IM 2), the Agency advised the Union and Arbitrator about funding issues related to the Agency's ability to process retroactive promotions; in particular, that sufficient funding was not available in the affected program offices' prior year accounts. IM Summary 2 at pg. 2. Therefore, the Agency advised that, based upon information received from the Office of Chief Financial Officer, approval was needed from the Office of Management and Budget (OMB) prior to transferring funds to effectuate the retroactive promotions. See IM Summary 2. IM Summary 2 also indicates that the Agency informed the Arbitrator that its payroll and personnel staff had an internal review process in place, and that, consistent with established office protocols, it was necessary for the Agency's payroll and personnel staff to follow standard protocols and procedures to accurately process back pay calculations and retroactive promotion actions for the witnesses. See id. at pgs. 2-3.

The Arbitrator also recorded the Agency's stated disagreement with the Union's list of grievants. In particular, the Agency argued the scope of data used by the Union to identify grievants exceeded the claims period because it went beyond the grievance filing date of 2002. See id. at pg. 4. In the signed Summary, the Arbitrator again addressed the issue of methodology and stated that: "Coming up with a satisfactory methodology should not be difficult." See id. She directed the parties to start their review of eligible employees employed in the GS-1101 series, and to then move onto the GS-246 series to identify eligible employees. See id. at pg. 5. The Arbitrator further ordered the Agency

to produce annual bargaining unit lists to the Union, to identify an IT representative to work with the Union on a method of producing data and directed the parties to discuss the effective date for retroactive promotions. See id. at pg. 6. Finally, the Arbitrator also ordered the Agency to provide copies of OMB communications[2] that were not privileged, and related "laws, rules and regulations relied upon." See id. at pg. 3

The parties participated in the third IM on June 12, 2014. See IM Summary 3 at pg. 1. IM Summary 3, issued on August 2, 2014, reveals that the Agency's February 2014 methodology had identified eleven grievants eligible for the remedy. As of August 2, 2014, the Arbitrator extended her "Orders" to include these additional eleven employees identified by the Agency. See id. at pg. 4. Further, although the Arbitrator had not adopted a methodology at this point, she ordered the Agency to process retroactive promotions for all GS-1101 employees.[3] See id. at pg. 1.

The Arbitrator instructed the Agency that "any use of location, vacancies or any other limiting factor would not comport with the Award." See IM Summary 3 at pg. 2. In this same IM Summary, the Arbitrator states that she approved the Union's methodology, but was still providing the Agency with an opportunity to compile a list of employees in the Public Housing Revitalization Specialist (PHRS) and Contract Industrial Relations Specialist (CIRS) positions whom the Agency believed should be promoted with back pay. See id.

The parties participated in the fourth IM on August 28, 2014. See IM Summary 4 at pg. 1. In IM Summary 4, issued on January 10, 2015, the Arbitrator determined that

[2] On June 2, 2014, the Agency submitted OMB communications directly to the Arbitrator for *in camera* review.

[3] On September 4, 2014, the Agency filed exceptions over IM Summary 3. On May 22, 2015, the Authority issued an Order dismissing the Agency's exceptions. On June 8, 2015, the Agency filed a Motion for Reconsideration and Motion to Stay the Authority's May 22, 2015 Order.

the damages period for her January 10, 2012 Order and Remedy would now begin on January 18, 2002, and that bargaining unit employees would be considered class members until the "award is fully implemented." See id. at pgs. 2-3. The Arbitrator also ordered the Agency to post a notice to all bargaining unit employees in response to the Union's allegations that the Agency was "chilling" the negotiated grievance process by allegedly having employees speak with management prior to speaking with Union's counsel about the Fair and Equitable case. See id. at pgs. 1-2.

Throughout these implementation meetings, the Union also submitted requests for information. Of particular import, on July 17, 2014, and September 11, 2014, respectively, the Union submitted requests for: (1) TSP election forms; (2) TSP statements; (3) and historical TSP contribution information, including the percentage or amount contributed by the employee and fund(s) selected for investment. See TSP Information Requests. Included among the Union's requests for data was an attachment that the Union stated listed those employees it believed were entitled to the remedy of retroactive promotion. See Union grievant list. The Union's list of alleged grievants included 3,777 employee names, i.e., listing current and former GS-12 AFGE bargaining unit employees. See id.

In early December 2014, between the fourth and fifth IMs, Union and Agency leadership held a meeting regarding the Fair and Equitable case. In this meeting, the Union presented its estimated calculation of damages that it alleged were owed by HUD to potential claimants. The Union's estimation of the cost for implementation of this case, as of December 2014, totaled $720,296,230.90. See Union's December 2014 Damages Calculation.

The parties participated in the fifth IM on February 4, 2015. See IM Summary 5 at pg. 1. In IM Summary 5, issued on February 27, 2015, the Arbitrator acknowledged that the Agency, "was not waiving any rights it may have by being present at the IM." See id. IM Summary 5 included the Union's allegations of Agency non-compliance, and status of implementation with the award. See id. at pg. 2. The Union's approach was that, "... the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 jobs series at any time during the relevant damages period." See id. at 3. The Arbitrator advised that she believed the Union's interpretation comported with her previous statements on the identification of the class; namely, that the class "includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements." See id. at pg. 3.

Notwithstanding this, the Arbitrator stated in signed IM Summary 5 that she was still providing the Agency with an opportunity to "present its approach on identification of the class members." See id. at pg. 3. Therefore, even though the Arbitrator indicated that she approved of the Union's methodology, it was clear from her signed IM Summary that she had not selected a methodology for compliance for the purpose of identifying additional grievants.

IM Summary 5 described testimony from the Agency's Chief Financial Officer, Brad Huther.[4] Huther stated that, to his knowledge, no specific funding request was submitted to fund the judgment in this matter. See IM Summary 5 at pg. 4.

[4] On January 15, 2015, the Union submitted subpoenas to the Arbitrator to compel the appearance of HUD's CFO, and representatives from the Office of the Deputy Secretary. See Union subpoena request.

Even though the Agency had been faced with a proverbially moving goal post here, the Arbitrator advised in IM Summary 5 that if the Agency failed to submit its completed methodology at the following IM, she would entertain sanctions against the Agency, including but not limited to withholding the salaries of management officials. See IM Summary 5 at pg. 3. IM Summary 5 acknowledged the Agency's challenge to the Arbitrator's jurisdiction to issue sanctions against management officials by withholding their salaries. See id. To date, the Arbitrator has not taken any action regarding possible sanctions against management officials.

The parties participated in IM Summary 6 on March 26, 2015. See IM Summary 6 at pg. 1. During the IM, the Agency presented its methodology for compliance. See Agency's Draft Submission IM Summary 6.

This methodology identified all "previously classified positions" that met the definitions in the Arbitrator's issued order(s). Its methodology took into consideration the FLRA's earlier decision on this case, which stated that 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...". *See Dep't of Housing and Urban Development*, 65 FLRA 433 (2011). The methodology was data driven and used accession lists (enter on duty) information from the National Finance Center (NFC) database.

The Agency explained that in order to identify previously classified positions, it searched the (NFC) Database for all new, external hires (accessions), with AFGE

The Agency objected, and on January 21, 2015, the Arbitrator signed the Union's Order compelling the appearance of management officials, including the Agency's CFO even though the Agency argued she lacked the authority to do so. See Order Compelling Appearance of Management Officials. Nonetheless, in order to show that it was participating in the IMs in good faith, the Agency brought Mr. Huther as well as other high-ranking officials to the table.

bargaining unit (BU) status who entered the Agency at a grade lower than Grade 12, and with a full promotion level (FPL) of Grade 13. HUD's methodology did not include employees who were part of an externally regulated career ladder program (Presidential Management Fellows (PMF), Federal Career Intern (FCI) Program Participants, etc.). The Agency explained that employees hired under externally regulated career ladder programs, such the PMF and FCI, have career ladders established pursuant to these programs, and not by HUD. Because the Fair and Equitable grievance challenged HUD's selection and promotion procedures, employees hired pursuant to an externally regulated program would not be included in the subsequent award issued.

The Agency's methodology is based on the identification of all GS-12 employees with Full Performance Level to only Grade 12 and with AFGE BU status who were in similar positions to those previously classified positions identified at the time of the alleged violations (time of the external hires). The Agency's proposed methodology resulted in a total of approximately 439 claimants.

During its presentation the Agency also disputed the Union's methodology. The Agency challenged the Union's methodology with the following:

1. In response to the Union's claim that the Agency had inappropriately used "limiting factors" to "reduce" the number of awardees, from 3,777 to 439 claimants, the Agency stated that this was incorrect. The Agency noted that i used the terms and conditions promulgated by the Arbitrator in her orders to develop and define the class. Further, by making a Field and HQ distinction, and not including groups with external hiring authorities, such as PMFs, the Agency was not attempting to limit or expand the Union's list of 3,777 proposed

grievants. Rather, the Agency devised a methodology to establish the proper class based on a logical interpretation of the Authority's and Arbitrator's orders.

2. The Union's methodology did not appear to take into account whether a "newly created" and "previously classified position" existed when it identified its proposed grievants for retroactive promotion.
3. The Union's methodology did not comport with the temporal guidelines of the Award. Based on the Union's methodology, employees could receive the remedy prior to the date of any alleged or actual harm. The Union's methodology reveals that as long as a job series was listed on an exhibit list and a GS-12 employee was employed by HUD at some point during the 2002-2012 (and continuing) claims period in that job series would quality those bargaining unit employees as grievants. Therefore, the Agency argued the Union's grievant list did not accurately address remedying the harm at issue, because employees would receive the remedy prior to the date of the harm.
4. Unlike the Union, the Agency was using valid data from the National Finance Center (NFC) database to identify the accession (enter on duty) date of when a new hire became a HUD employee in one of the lower-graded positions with promotion potential to grade 13.
5. Consistent with the Arbitrator's instructions to the parties, its proposed methodology consisted of the following: it was data-driven, captured all of the witnesses and those similarly situated to the witnesses at the time of the violations, and identified the Agency's listing of Public Housing Revitalization Specialist (PHRS) and Contract Industrial Relations Specialist (CIRS) employees

as part of its proposed claimant list. See Agency's Draft IM Summary 5 Submission.

During the IM, the Union objected to the Agency's use of any HQ/Field distinction, suggesting that the HQ/Field reporting structure was actually a means of limiting the award. The Union alleged that there was no meaningful distinction between HQ and Field positions, and asserted that employees could "apply and be qualified" from HQ to the Field, and vice versa. See IM Summary 6 at pg. 13. The Agency rebutted this suggestion by noting that, according to the Factor Evaluation System defined according to OPM's Position Classification Standards, HQ and Field positions were not "similarly situated positions" because of the distinction in the reporting structure of the two categories of positions and scope and effect of the work performed by employees occupying those positions. The Agency reiterated that claimants would need to be similarly situated to the harmful hires – where a lower-graded employee with promotion potential to grade 13 was hired when a GS-12 employee already encumbered a position with a promotion potential to the grade 12. Citing directly to the findings of the FLRA, the Agency advised the Arbitrator and Union that its proposed methodology[5] incorporated FLRA's acknowledgment for this Arbitrator's identification of "previously classified positions" as newly created positions with a promotion potential to GS-13 level. The Agency further referred the Arbitrator and Union to FLRA's decision at *Dep't of Housing and Urban Development*, 65 FLRA 433, 436 (2011).

[5] Immediately following the Agency's presentation, the Arbitrator advised that she did not believe that either the Agency's or the Union's "number" was correct, but that the "number was somewhere in the middle."

Also during IM 6, the Agency advised the Union and Arbitrator that it was not able to produce responsive TSP data because the data was maintained by the Federal Retirement Thrift Investment Board (FRTIB) and the FRTIB was refusing to produce the requested information. The Arbitrator did not provide any orders or instruction to the Agency in response to its position on disclosure of TSP data.

After the sixth IM, the Union submitted its IM Summary 6 Draft Submission. The Union's IM Summary 6 Draft Submission included information, data and analysis completed by the Union after the sixth IM took place. For example, the Union included a comparative analysis identifying the Union and Agency's respective lists of eligible employees based upon categories defined in the grievance and corresponding submissions. See Union IM Summary 6 Draft Submission at pg. 10. Additionally, the Agency took issue with the Union's account of events and argued the Union's account was not factually correct. See Agency Email (Apr. 28, 2015). For example, the Agency commended that it had disputed the Union's methodology. Additionally, when the Agency forwarded its Agency IM Summary 6 Draft Submission, the Agency also raised issues about the Union's inclusion of data and conclusions that were neither presented to, or discussed before the Arbitrator during the IM, and did not accurately describe the events that transpired at the sixth IM. See id.

In signed IM Summary 6, issued on May 16, 2015, the Arbitrator adopts in their entirety the Union's comments challenging the Agency's methodology – most notably that a distinction between Headquarters and Field positions due to reporting structure was not valid, that the Agency's use of accessions lists from the National Finance Center constituted an "unknown source", and that the Agency was improperly limiting the class

through the use of data being employed from the Agency's systems of record. IM Summary 6 identified the totals from the parties' respective grievant listings. The Arbitrator noted in IM Summary 6 that the results of the Union's methodology totaled 3,777 grievants. See id. at pg. 9. The Arbitrator also indicated that the Agency's proposed grievant list, presented on March 26, 2015, totaled 439 employees. See id. at pg. 7.

The Arbitrator also ordered the Agency to "submit proof from TSP which sets forth TSP's position" regarding legal restrictions for providing the requested data. See IM Summary 6 at pg. 2. She further ordered the Agency to produce new and additional announcement listing data, dating back to 1999. See id. at pg. 3. The Arbitrator stated that the Union sought the data "to discover and present new evidence in support of showing that *violations* existed prior to 2002." See IM Summary 6 at pg. 3. (emphasis added). However, she ordered production of the data and states that, "[T]his ruling shall not yet be construed as a finding that the *damages period* extends back to July 1999." See id. (emphasis added). Similar to the order directing the Agency to produce evidence of TSP's legal analysis and positioning, the Arbitrator did not issue an order that the Agency produce announcement listing data during IM 6.

Signed IM Summary 6 also included the Union's contention that the Agency's grievant list did not comport with the Award, and the Union's position that the class definition explicitly included additional job series beyond those listed in the grievance due to the adverse inference ruling, as though she adverse inference ruling was inclusive of all issues.[6] See id. at pg. 9.

[6] This is in spite of the Union's request for a specific adverse inference regarding the numbered series vacancy announcements that were not provided to the Union. See Merits Award at pg. 10

In signed IM Summary 6, the Arbitrator found that the Agency's methodology should be more inclusive. See IM Summary 6 at pg. 9. She also remarked that the Agency had been provided with ample opportunity to create a methodology that complies with her Award and summaries, and referenced IM Summaries 1, 2 and 5. See id. at pg. 12. The Arbitrator then states that eligible class members are easily identified by the listing of employees identified in exhibits listed in the Award, "during the relevant time." See IM Summary 6 at pg. 12.

The Arbitrator also states in IM Summary 6 that the Agency's data systems may be used to extend the class of employees, but not to limit the class. See IM Summary 6 at pg. 7. The Arbitrator states that she is relying upon "the adverse inference that has been previously drawn in this case." See id.

In IM Summary 6, the Arbitrator comments that the Union's methodology identified, as a *minimum,* 3,777 grievants. See IM Summary 6 at pg. 15. (emphasis supplied) Specifically, she notes:

> This list was provided by the Union to the Agency in September 2014 and the Agency has had ample time to review and comment upon it. *The Agency has not disputed this list. Therefore,* the Agency is directed to, within forty-five (45) days, retroactively promote and make whole these three-thousand, seven-hundred, seventy-seven (3,777) employees ..." (emphasis added).

See id.

Signed IM Summary 6 also included the post-IM information and data submitted by the Union in their draft IM Summary but never discussed during the IM meeting. See Union IM 6 Draft Submission. This is in spite of the fact that the Agency challenged the Union's use of the draft submission to include information not discussed, or presented as part of the parties' IMs conducted by the Arbitrator. See Agency IM 6 Draft Submission.

The use of this practice effectively precluded the Agency from raising objections to the substance of the information and contentions raised by the Union because it incorporated additional information and argument directly to the Arbitrator after the IM. The Arbitrator responded to the Agency's complaint about the inclusion of post-IM information and data in summaries by stating that the "information is pertinent and relevant to the current controversy regarding the best methodology" and responded to the Agency's complaint that the Union's submission was not an accurate accounting of the sixth IM with a cursory statement that "... this Arbitrator disagrees." See IM Summary 6 at pg. 17.

In signed IM Summary 6, the Arbitrator also re-states her approval of the Union's methodology and, surprisingly, in finding that the Agency failed to identify an alternative methodology, proceeded to adopt the Union's methodology. See IM Summary 6 at pg. 15.

Most significantly, in IM Summary 6, the Arbitrator issued the following Orders:

(1) That the Agency retroactively promote and make whole 3,777 employees dating back to January 18, 2002, within 45 days;

(2) That the Agency work with the Union to determine a reasonable and appropriate manner for obtaining requested information seeking employee contribution and allocation data from employee Thrift Savings Plan (TSP) contributions,

(3) Interpreting adverse inferences to preclude the use of data to "limit" the class;

(4) The parties are to work together to identify additional class members (beyond the 3,777); and

(5) *Adopting* the Union's methodology for identifying grievants; (emphasis added).

See IM Summary 6.

The parties participated in IM 7[7] on June 2, 2015. During the IM, the Agency challenged the Arbitrator's Order that the Agency retroactively promote and make whole, at a minimum, 3,777 employees dating back to January 18, 2002, citing the inability to complete the Award, as written. In particular, the Agency challenged the incompleteness of the Award, and argued that the Award could not be implemented without additional information. In particular, the Agency advised that in order to effectuate promotions from the grade 12 to grade 13 levels it would be necessary to identify a classified position at the grade 13. The Agency also advised that it would also be necessary to identify the job title at the grade 13 level. For example, the 1101 job series is a general, "catch all" series that includes numerous job titles. Thus, under the GS-1101 job series it would be necessary to review the job titles listed under this job series for each of the identified grievants.[8] Therefore, the Order, as written, does not provide sufficient detail to the Agency in order to identify the corresponding job title and classified position for promotion to the grade 13. Lastly, from a position management perspective, the Agency argued that the Order would effectively contravene the Agency's position management structure and *eliminate grade 12 AFGE bargaining unit employees from the Agency.*

The Agency also challenged the Order's language that the Agency work with the Union to determine a reasonable and appropriate manner for obtaining requested employee TSP information. The Agency informed the Union and Arbitrator that TSP data was within the sole possession of a third party and an independent Federal agency,

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[7] During IM 7, the Agency arranged for a court reporter to obtain an accurate record of the meeting. However, the Arbitrator advised that she desired to have a "free flowing" discussion. Over the Agency's objection, the Arbitrator advised that discussions would be off the record and any decisions, or summaries of disputes, could be placed on the record as she saw fit.

[8] GS-1101 is the General Business and Industry job series.

the Federal Retirement Thrift Investment Board (FRTIB). The Agency also contacted the FRTIB over the Union's information request and FRTIB told the Agency it would not release employee TSP data, absent individual employee consent. Therefore, the Agency challenged that it could not be ordered to work with the Union to produce TSP data that it was not in possession of, and unable to arrange for its disclosure to the Union, absent employee consent. The Agency also offered to work with the Union to obtain employee consent from the 17 grievants identified thus far.

The Agency again reiterated its objection to the Union's methodology used to identify grievants based upon a failure to connect the date of eligibility to the alleged harm in order to qualify for the remedy. In particular, the Agency again stated that, similar to its presentation at IM 5, the Union's failure to identify a time-specific aspect (i.e., at any time) could not effectively remedy employees. Under the Union's methodology, employees would be eligible for the award at any time during the claims period, regardless of when data revealed the presence of a corresponding grade 13 announcement within this same claims period.

The Agency further challenged the Arbitrator's interpretation that adverse inferences preclude the use of data to limit the class. The Agency asserted that, in regards to identifying additional grievants, the adverse inferences were based upon the failure to produce data. However, in sharp contrast, the Arbitrator was now using the adverse inferences to preclude the use of NFC data (accession lists) which allegedly had the effect of improperly manipulating the data to support her desire to have retroactive promotions "apply to the largest class of grievants possible" as opposed to those employees deemed eligible based upon the grievance and her findings of fact, and not her

feelings. Thus, the Agency challenged the Arbitrator's use of adverse inferences in this regard.

Lastly, the Agency took the position that the Arbitrator was acting with partiality in her failure to identify factual events that transpired during the IMs. The Agency's representatives questioned whether they were actually present at the IMs because they could not confirm the description of events outlined in the IM Summaries compared to their actual recollections from the attendance of any of the more than six individuals at the IMs. The Arbitrator took issue with the Agency's challenge, citing the Agency's "audacity" to challenge her partiality, and countered that she had been "kind and patient" with the Agency.

ARGUMENT

I. Non-Fact

The Arbitrator McKissick's signed IM Summary, issued on May 26, 2015, is based on a non-fact. Specifically, the Arbitrator erroneously found that the Agency did not dispute the Union's proposed class of 3,777 grievants since September 2014 to support her Order directing the Agency to retroactively promote and make whole (at a minimum) 3,777 grievants from the Union's list of grievants. See IM Summary 6 at pg. 15. To establish that an award is based on a nonfact, the appealing party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. See U.S. Dep't of Homeland Security, 68 FLRA 253 (2015).

A review of the plain language of the Arbitrator's decision shows that the Agency's alleged failure to dispute the Union's grievant list of 3,777 was a central fact underlying this portion of the award. Indeed, immediately following the erroneous fact reached by the

Arbitrator on the Agency's alleged failure to dispute the Union's list, she stated, "*Therefore*, the Agency is directed to, within forty-five (45) days, retroactively promote and make whole these three-thousand, seven-hundred, seventy-seven (3,777) employees that have so far been identified..." See IM Summary 6 at pg. 15 (emphasis added). Thus, the Arbitrator's order that the Agency retroactively promote the 3,777 grievants is directly related to the Agency's alleged failure to dispute the Union's list of 3,777. However, the record, as evidenced from IM Summary 6, refutes this erroneous fact. IM Summary 6 demonstrates that the Agency's identification and presentation of its own grievant list, totaling 439 grievants, disputes the Union's list. This interpretation is further buttressed by the Arbitrator's acknowledgment in IM Summary 6 that when asked whether it would be able to modify its methodology, the Agency responded that it would not be able to do so. See IM Summary 6 at pg. 14. The Arbitrator's own summary contradicts the finding made on the Agency's alleged failure to dispute the Union's grievant list. Hence, the record clearly refutes the Arbitrator's erroneous fact used to support the award directing, at a minimum, 3,777 retroactive promotions. It is also clear the Arbitrator would have reached a different result had she not made the erroneous finding of fact.

As fully explained in the preceding section, the record further demonstrates the Agency contested the Union's list of 3,777 the Agency presented its own proposed grievant list during IM 5. Specifically, by presenting its own grievant list – totaling 439 and not the Union's 3,777 – the record reveals that the Agency disputed the Union's grievant list. Therefore, the Agency has, in fact, disputed the Union's proposed list since September 2014, and this fact was not a point of contention or disagreement between the parties, or before the Arbitrator. See generally NFFE 1984, 56 FLRA 38 (2000) (a factual matter

disputed before the arbitrator does not constitute a nonfact exception). Because the record shows the Arbitrator's order to retroactively promote (at a minimum) 3,777 employees was based upon a nonfact, the Order is deficient and should be set aside.

II. Incomplete Award

The Arbitrator's Order is also incomplete so as to make implementation impossible in regards to the retroactive promotions for "at a minimum 3,777" grievants in 45 days. In order for an award to be found deficient on the basis that it is incomplete, ambiguous, or contradictory so as to make implementation impossible, the appealing party must show that implementation of the award is impossible because the meaning and effect of the award is too unclear or uncertain. See AFGE, Local 1843, 51 FLRA 444 (1995). In her Order, the Arbitrator directs the Agency to take specific action – promote, at a minimum, 3,777 employees – without identifying the corresponding job title, classified position description and position information to promote the employees identified on the Union's list. Absent relevant position information, such as job title and a classified position description, for each of the employees, it is impossible for the Agency to take the specific action required in the Order. Thus, the Order is uncertain as to individual employee job title and position information in order to comply with processing at least 3,777 retroactive promotions.

The Agency recognizes that the Authority has rejected alleged ambiguities as a basis for finding an award deficient when the arbitrator has retained jurisdiction of an award. See U.S. Veterans Admin., 66 FLRA 71 (2011). So far, the Arbitrator has issued six IMs based upon her retained jurisdiction. Notwithstanding this, the record reveals that the Arbitrator's IM summaries, intended to clarify the Award, have instead created

additional ambiguity. The Arbitrator has demonstrated that she is not able to actually clarify her Award; therefore, the Agency requests that the Authority consider this ground for review.

Notwithstanding the overall inability to comply with the award, it is further impossible to implement the "at a minimum 3,777" retroactive promotions in the 45-day time period ordered by the Arbitrator due to internal personnel and payroll procedures that Agency has previously advised the Arbitrator and Union. The Agency's internal protocols and review procedures by personnel and payroll staff are needed to determine the sufficiency of funding sources. See IM Summary 2 at pg. 2. The foregoing, coupled with the need for OMB to approve the transfer of funds, if funding is available, within HUD, further render the Order incomplete. See id. Additionally, absent sufficient funding, the Agency will require time to submit a request for a supplemental appropriation. Any one of the steps described above would take more than 45-days, effectively making it impossible for the Agency to fulfill the Order, as written.

Therefore, the Arbitrator's Order is impossible to implement because it does not state with specificity salient position information - either the job title that each of grievants would qualify for under the job series they are employed under, or a classified position description at the grade 13 level for the purpose of identifying a position into which grievant should be promoted. The Order is also impossible to implement in the 45-day time frame based upon the standard internal reviews of personnel, payroll and financial staff to ensure back pay is calculated properly, and sufficient funding is available to cover the financial liabilities underlying the retroactive promotions. Among grievants identified thus far, it has taken approximately 25 days to estimate and process

calculations for former employee, and approximately 15 days to estimate and process calculations for current employees . Due to incompleteness of the Order, as written, it is deficient and should be set aside.

III. Contrary to Law

The Order is contrary to law by adopting the Union's methodology and directing the Agency to retroactively promote, at a minimum, 3,777 employees and because the Order impacts a reserved management right. The Agency also challenges the Arbitrator's order that the Agency work with the Union to produce TSP data that it is not in possession of, and cannot otherwise obtain absent employee consent. In resolving a claim that an award is contrary to law, the Authority applies the *de novo* standard of review, and assesses whether the arbitrator's legal conclusions are consistent with the applicable standard of law. See U.S. Dep't of the Army, 67 FLRA 619 (2014). In making the assessment, the Authority defers to the arbitrator's factual findings. See id.

First, the Union's methodology is contrary to law because it constitutes a classification. The Arbitrator describes the Union's methodology in IM Summary 5. In that Summary, the Union's methodology is described as requiring retroactive promotions for: at least all GS-12 employees who encumbered a position in any of those 42 job series at any time during the relevant damages period, so long as the requirements concerning performance and time in grade were met. See IM Summary 5 at pg. 3. The Arbitrator also states that the Union's methodology is consistent with her prior statements, but at no point prior to IM Summary 6 where she *adopts* the Union's methodology and rejects the Agency's methodology did the method for compliance take effect through an order issued by the Arbitrator. 5 U.S.C. §7122 (a).

Pursuant to section 7121 (c)(5) of the Federal Service Labor-Management Relations Statute, a grievance concerning the "classification of any positon which does not result in the reduction of grade or pay of an employee" is excluded from the scope of a negotiated grievance procedure and, by corollary, the jurisdiction of an arbitrator whose authority arises from the negotiated grievance procedure. See generally Social Security Admin., 55 FLRA 778 (1999). The Authority has also held that an award is contrary to law because it concerns a classification matter based upon the remedy. See U.S. Environmental Protection Agency, 59 FLRA 520 (2003).

A review of the Union's methodology reveals that it concerns solely the grade level of duties permanently assigned to grievants and, thus, deals with the classification of positions. See IM Summary 5 at pg. 3; see also 5 C.F.R. §511.701 (a) (classification action is the determination to establish or change the title, series, grade or pay system of a position). The Union's methodology effectively determines the grade of employees. Specifically, the methodology results in an Agency-wide change in grade structure by defining eligible employees based upon whether they were in a positon *in one of the job series*, and has no reasonable relation to placement into a previously classified position, as originally defined by the Arbitrator in her remedial award. See Remedial Order at pg. 2 (ordering retroactive permanent selection of all *affected* BUEs into currently existing career ladder positions). Furthermore, because the Union's methodology has no relation to the placement of employees into previously classified positions, it ultimately constitutes an organizational upgrade for the majority of the bargaining unit represented by the Union, and Agency's workforce. See U.S. Dep't of Housing and Urban Dev., 65 FLRA 433 (2011).

By the Agency's estimation, the Order to retroactively promote "at a minimum 3,777" employees from grade 12 to grade 13 impacts approximately 73% of all current grade 12 Agency employees, and 32% of all current grade 13 employees. The Arbitrator's subsequent adoption of the Union's methodology is, therefore, contrary to law because it concerns a classification under §7121 (c) of the Statute. See AFGE, Local 2142, 58 FLRA 416 (2003) (§7121 (c) exclusions are mandatory exclusions from grievance and arbitration procedures). Thus, the portions of the Order that adopt the unlawful methodology and related retroactive promotion of "at a minimum 3,777" grievants is not consistent with law.

In regards to ordering the retroactive promotion of "at a minimum 3,777" employees,[9] the Agency also contends the retroactive promotions are contrary to law because it unlawfully impacts a reserved management right; namely, the numbers, types and grades of a significant portion of its employees. Pursuant to section 7106(b)(1) of the Statute, the Agency has the right "to determine the numbers, types and grades of employees or positions." In addition, there is no contractual language that qualifies these rights in any way, and it is the duty of the Arbitrator to protect these management rights. By failing to uphold management's reserved rights under section 7106(b)(1) of the Statute, the Order is contrary to law.

The Authority has found the phrase "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty" in 7106(b)(1) relates to the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency's organization and the accomplishment of its work.

[9] The Agency is also challenging the factual finding for the order to retroactively promote "at a minimum 3,777" employees as a nonfact.

NAGE, Local R5-184, 52 FLRA 1024 (1997). The Agency has raised challenges to the Arbitrator based upon the impact of the Orders on HUD's position management and grade structure. In particular, during the seventh IM[10] recently held on June 2, 2015, the Agency argued the Arbitrator's decision to adopt the Union's methodology and order "at a minimum 3,777" retroactive promotions from grade 12 to grade 13 level effectively abolishes the grade 12 from the Agency's workforce.

The Arbitrator's Order directing the retroactive promotion of "at a minimum 3,777" employees negatively impacts the Agency's ability to determine work to be completed at the appropriate grade level, and to determine which positions should be classified at the grades 12 and 13 levels. This Order affects the Agency's exercise of a reserved management right to determine the grades of employees and positions assigned throughout the Agency. By ordering the Agency to place over three-thousand employees at the grade 13 level and on grade 13 level positions descriptions, the Order unlawfully affects management's right.

Thus, the Order directly relates to the grade levels of staff assigned within the Agency. See, e.g., NTEU, Chapter 66, 1 FLRA 927 (1979). Because the parties have not agreed on a contract provision concerning 7106(b)(1), the Arbitrator may not seek enforcement in an Order, as she has done in signed IM Summary 6. See e.g. U.S. Dep't of Transp., 62 FLRA 90 (2007). In essence, the Arbitrator seeks another organizational upgrade of the Agency. See generally U.S. Dep't of Housing and Urban Dev., 65 FLRA 433 (2011). Therefore, the Order directing the retroactive promotions for (at a minimum) 3,777 employees is not consistent with law.

[10] A signed IM has not been issued by the Arbitrator over the seventh IM.

In regards to the Order directing the parties to determine a reasonable and appropriate manner and method of obtaining TSP information, the Agency asserts this is contrary to law because it compels the Agency to determine the manner and method of obtaining information it does not maintain. 5 U.S.C. §7114(b)(4)(A). The Union previously requested data pertaining to claims and payments related to TSP. The Agency has fulfilled Statutory requirements over disclosure of this information by submitting a request to the third party that maintains the data – the FRTIB. Nevertheless, the Arbitrator directed the parties, "... to determine a reasonable and appropriate manner and method of obtaining the Union's requested information." See IM Summary 6 at pgs. 2-3.

The TSP is administered by the FRTIB. 5 U.S.C. § 8484. The Privacy Act tasks that agency with administrating the program, establishing the system of records, and maintaining the system of records. See generally 5 U.S.C § 552(a). The FRTIB has published a system of records notice (SORN) on routine uses for data collected for the TSP. See 79 FR 21246; see also 5 U.S.C. §552 (a)(b) and (e)(3). TSP requires agencies to maintain copies of records pertaining to employees enrolled in the program. See generally 5 U.S.C. §8437. However, the FRTIB's Privacy regulations define "system of records" as a "group of any records under the control of the Board." 5 C.F.R §1630.1. As the owner of TSP data, the FRTIB may not disclose records without express written consent of the individual, in accordance with the Privacy Act of 1974 and routine uses listed in the SORN. Employing agencies, such as HUD, must act in accordance with the FRTIB's Privacy regulations published at 5 C.F.R. §1630.8(b).

Based on a review of the TSP's SORN, the routine uses do not permit the FRTIB to release information, nor does it permit a secondary release by the Agency for the

purpose requested by the Union – compliance with the remedy for the Fair and Equitable implementation proceedings, nor pursuant to an arbitrator order. The Agency has further advised the Union and Arbitrator on the status of its request for TSP data; specifically, that the FRTIB will not release the requested data to HUD. See Agency IM Summary 6 Draft Submission; see generally Internal Revenue Serv., 63 FLRA 664 (2009) (information sought was not normally maintained or available to the agency). Thus, the requested TSP data is within the sole possession of the FRTIB. See generally INS and AFGE, Local 1917, 20 FLRA 391 (1985) (an arbitrator may not direct an agency to take actions within the purview of another organization). Because the Agency is not able to otherwise determine a method and manner for the release of TSP data, the Arbitrator's Order directing a manner and method for its disclosure is contrary to law.

IV. Bias

The Agency further challenges the Arbitrator's partiality and continued jurisdiction over the Fair and Equitable implementation proceedings, and requests that the Award be remanded to another arbitrator for further processing. To establish that an arbitrator is biased, the moving party must demonstrate that the award was procured by improper means, that there was partiality or corruption on the part of the arbitrator, or that the arbitrator engaged in misconduct that prejudiced the rights of the party. See U.S. Dep't of the Navy, Naval Surface Warfare Ctr., 57 FLRA 417 (2001).

The record reveals that the Arbitrator has demonstrated partiality through her continued attempts to usurp the Authority's rulings, parties' negotiated agreement and government-wide guidance that precludes classification matters, such as an organizational upgrade, from grievance procedures. Previously, on February 11, 2004,

the Authority issued its first remand in response to Arbitrator McKissick's jurisdiction for this case. See U.S. Dep't of Housing and Urban Dev., 59 FLRA 116 (2004). The Authority specifically directed the Arbitrator to clarify her reference to "reclassified positions" in her Award because she 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 id. In response to the Authority's remand, the Arbitrator ruled that the grievance concerned the right to be placed in previously classified positions, and on September 29, 2009, issued her remedial award. See Remedial Award. In her award, however, the Arbitrator again issued a decision contrary to contract and law, and attempted to secure an unlawful organizational upgrade.

In her remedial award, Arbitrator McKissick determined 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 record further demonstrates that the Authority once more remanded the Arbitrator's award. See U.S. Dep't of Housing and Urban Dev., 65 FLRA 433 (2011). In the Authority's second remand, the award was set aside for an alternate remedy. See id. On January 10, 2012, the Arbitrator issued another Order, this time finding retroactive promotions into previously classified positions an appropriate remedy, unless the Authority concluded otherwise. See Remedial Award. The Agency again appealed and argued, *inter alia*, that the remedy ordered non-competitive promotions. See Agency Exceptions (Feb. 10, 2012). 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 U.S. Dep't of Housing and Urban Dev., 66 FLRA 867 (2012).

The Arbitrator subsequently ordered the parties to participate in IMs and issued Summaries outlining additional orders. Even though the Remedial Award became final and binding in 2012, this Arbitrator has again used her authority in an attempt to secure an unlawful organizational upgrade. The record demonstrates that 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 IM Summary 3. 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 Agency's Exceptions (Sept. 4, 2014). In its exceptions, the Agency argued that the Arbitrator exceeded her authority by modifying the final and binding remedial award. See id. The record also demonstrates that the Agency has consistently maintained that the Arbitrator's remedies involve classification matters, and that her remedies result in an unlawful organizational upgrade.

Overall, the Arbitrator's IM summaries are contradictory and clearly disregard her previous conclusions in an attempt to effectuate an unlawful organizational upgrade. For instance, in IM Summary 6, the Arbitrator's Order that the Agency retroactively promote, *at a minimum*, 3,777 employees, relies upon the erroneous finding that the Agency had not disputed the Union's grievant list since September 2014. However, in this same Summary the Arbitrator acknowledges that the Agency presented not only a methodology for compliance, but a grievant list totaling 439 that was counter to the Union's list. The Agency's list was presented on March 26, 2015. Furthermore, the Arbitrator states, in

response to the Agency's methodology and grievant list, that she "inquired a number of times" whether the Agency was interested and able to "modify" its methodology to "come closer"[11] toward compliance and that the Agency was not able to do so. See IM Summary 6 at pg. 14. In actuality, the Arbitrator attempted to secure the remedy of a retroactive promotion for the 'largest class' regardless of whether the class was based upon a methodology consistent with prior orders. Thus, the record is clear that the Agency has disputed the Union's list. The Arbitrator's unsupported and contradictory finding that the Agency did not dispute Union's list is an attempt by the Arbitrator to secure Agency-wide retroactive promotions to achieve her original remedy – an organizational upgrade.

Moreover, during the entire implementation period, the Arbitrator has adopted the Union's summaries whole-cloth, disregarding inaccuracies and non-facts that the Agency has continually brought to light in its responses. Indeed, the Union has been so confident that the foregoing would take place that it has submitted its version of the IM summaries, to the Arbitrator in .pdf format (in which it would be difficult to make any edits), and has never labeled their submissions as "Proposed" or "Draft" summaries. On more than one occasion, the Arbitrator signed the Union's IM summary while the Agency's response to those summaries highlighted inaccuracies and nonfacts. See Signed IM Summaries 5 and 6.

Overall, the record reveals that the Arbitrator's continued jurisdiction and authority to issue IM summaries under the guise of "clarifications" actually constitutes unlawful attempts to change the Agency's position management and organizational

[11] During the fifth IM, the Arbitrator verbally stated to the Agency that if Agency could increase its number of 439 and add "1,000 – 2,000 additional employees" to its claimant list, that she may be satisfied.

structure. The record clearly shows that the Arbitrator willfully ignored the Authority's instruction in 65 FLRA 433. Based upon the Arbitrator's ongoing attempts to establish an unlawful organizational upgrade, this Arbitrator is no longer able to properly effectuate compliance with her award. See AFGE, Local 1757, 58 FLRA 575 (2003) (Authority remanded award to another arbitrator, citing Arbitrator's disregard of issue the arbitrator was to address on remand). Remanding the Fair and Equitable case to another arbitrator ensures that compliance will be completed in an impartial manner.

V. Modification

The Arbitrator's application of adverse inferences to limit or preclude the use of data modifies her original award. 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 AFGE, Local 2172, 57 FLRA 625 (2001).

Here, the Arbitrator has modified the adverse inference she originally reached over the Agency's failure to produce requested information. The Arbitrator originally ruled that, "an adverse inference can be made based upon the unreleased information." See Merits Award at pg. 3. In making the adverse inference ruling, the Arbitrator acknowledges in the Merits Award, "the Union's request for a *specific* adverse inference regarding the numbered series vacancy announcements that were not provided to the Union." See id. at pg. 10 (emphasis added).

Notwithstanding her ruling on the adverse inference in the Merits Award, the Arbitrator ultimately concluded in her most recent Summary, "[T]hat the adverse

inference that has been drawn and upheld precludes the use of accession lists for these purposes [to either limit class membership or reduce the damages period]." See IM Summary 6 at pg. 14. The Arbitrator's current stance on her adverse rulings has been modified and no longer relates to specific numbered vacancies; rather, the adverse ruling is being used by the Arbitrator to expand both the class of potential grievants and the timeframe for overall eligibility. 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). Neither the class determination nor damages period support the adverse inferences previously drawn by the Arbitrator.

Nevertheless, the Arbitrator attempts to expand the scope and timeframe for eligibility of her award in IM Summary 6 by placing additional conditions on the use of available data that she did not previously contemplate or address in the Merits Award. Signed IM Summary 6 twists the purpose and intent of the adverse inference reached in the Merits Award by no longer addressing the Agency's failure to preserve and provide specific information, and instead restricts the use of available and pertinent information. The Arbitrator is using this expanded adverse inference ruling to prohibit the Agency from identifying the previously classified positions into which affected employees should be promoted, because she is unwilling to let go of the unlawful organizational upgrade. Since she cannot order an organizational upgrade on the face of the IM Summaries, she simply disregards the requirement and prohibits the work and associated data that is necessary to identify those previously classified positions and lawfully implement the Award. The adverse inference are being used as a punitive measure against the Agency, restricting all information that is counter to her intent that the retroactive promotions

"apply to the largest class of grievants possible". Thus, the Arbitrator has impermissibly modified her Order.

CONCLUSION

Based on the record, signed Implementation Summary 6 is deficient on the following grounds: (1) nonfact, (2) contrary law, (3) is an impermissible modification, and (4) constitutes an incomplete award. Further, the Arbitrator has exhibited bias in the implementation proceedings and the Agency requests the Order be remanded to another arbitrator. Accordingly, the Agency requests that signed Implementation Summary 6 be set aside and further implementation proceedings be remanded to another arbitrator.

Respectfully submitted,

Tresa C. Rice

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CERTIFICATE OF SERVICE

The Agency's Exceptions have 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 2920 0001 1736 7914
Arbitrator Andree McKissick
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June 22, 2015
(Date)

Tresa O. Rice
TRESA A. RICE
Agency Representative

TABLE OF EXHIBITS

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 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

FEDERAL MEDIATION AND CONCILIATION SERVICE

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

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

APPEARANCES:

For Management:

Walter C. Vick Jr., Labor Relations Specialist
Joann T. Robinson, Esquire
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For Union:

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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**

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

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:
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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.

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

Norman Mesewicz, Deputy Director, LER
Counsel for the Agency

Carolyn Federoff, EVP
AFGW Council 222
Union Representative

Rice, Tresa A

From: mckiss3343@aol.com
Sent: Monday, December 09, 2013 1:00 PM
To: M Snider
Cc: Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; Jason Weisbrot; Federoff, Carolyn; Biggs, William L; Rice, Tresa A; Jacob Statman
Subject: Re: Fair and Equitable: Phase III Results & Documentation

Hello Counselors:
In light of the issues presented during Phrase III , it is time to schedule an Implementation Meeting. This conduit can be quite productive and helpful to the process of resolution. I have had others with DOD and NEA.

Prior to this meeting, specific issues should be delineated and Position Papers should be written setting forth the current problems of implementation.

I am available January 4, February 4 and February 25, 2014. Kindly advise me, if your schedules comport with mine.

In the interim,please have Ms. Federoff contact me. Thanks for your help to effectuate this implementation.

Dr. McKissick
Sent from my Verizon Wireless BlackBerry

From: M Snider <m@sniderlaw.com>
Date: Mon, 9 Dec 2013 17:14:23 +0000
To: Dr. Andree McKissick<McKiss3343@aol.com>
Cc: Myung, Javes<javes.myung@hud.gov>; Mercer-Hollie, Jacqueline<Jacqueline.Mercer-Hollie@hud.gov>; Fruge, James E<James.E.Fruge@hud.gov>; Jason Weisbrot<Jason@sniderlaw.com>; Federoff, Carolyn<Carolyn.Federoff@hud.gov>; Biggs, William L<William.L.Biggs@hud.gov>; Rice, Tresa A<tresa.a.rice@hud.gov>; Jacob Statman<jstatman@sniderlaw.com>
Subject: Re: Fair and Equitable: Phase III Results & Documentation

Arbitrator McKissick:

This just reinforces our point, and we repeat our request for an in-person meeting as soon as practical.

M Snider, Esq.
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From: Rice, Tresa A
Sent: Monday, December 9, 2013 11:01 AM
To: Jacob Statman

Cc: Myung, Javes; Mercer-Hollie, Jacqueline; Fruge, James E; M Snider; Jason Weisbrot; Federoff, Carolyn; Biggs, William
Subject: Fair and Equitable: Phase III Results & Documentation

Mr. Statman,

Attached for you review are the results and corresponding documentation from the Phase III review. Based upon the review, no eligible claimants have been identified for Remedy No. 1 of the Opinion and Award.

Hard copies are also being sent to the parties.

Sincerely,
Tresa Rice
Senior Attorney-Advisor
Personnel Law Division, Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street, SW, Room 3142
Washington, DC 20410
Office: (202) 402-2222
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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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

On February 4, 2014, I met with the Parties to discuss implementation of my 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, and Kathryn Brantley. 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.

After my Award was issued, the Agency filed Exceptions, which were dismissed by the FLRA on August 8, 2012. The Award became final and binding on that date.

In my Award, I ordered:

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

The Award further defined the class of Grievants subject to the Remedy as follows: All Bargaining Unit employees in a position in a career ladder (including at the journeyman level), where the 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.

The purpose of the implementation meeting was to clarify the members of the class that was defined in my January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award. Rather, the meeting and this summary were, to the extent necessary, intended to clarify with specificity which Bargaining Unit Employees are eligible class members.

The Agency has requested written clarification of my Award (including on August 7, 2013 and November 13, 2013). I indicated that no clarification was necessary as my Award was clear and unambiguous. More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. Despite the clarity of my Award, the Agency has failed to timely implement the Award as ordered.

For example, in my Award, and as clarified in phone conferences with the Parties, all six Bargaining Unit employees who testified at the hearing on behalf of the Union (also listed below) are eligible class members. The Agency was required to promote them with backpay and interest, which it failed to do. It was then ordered to promote them with backpay and interest by September 1, 2013, which it failed to do. As of today, the Agency "has reviewed the class of

Grievants defined in the Opinion and Award and have determined that two [out of the six] employee witnesses are entitled to the backpay and interest payment." (Agency letter dated 12/18/13). The Agency has failed to implement the Award as ordered. I again reiterated at the implementation meeting what was clarified last summer: that based upon my Award as written, all six Union witnesses are eligible class members. I also notified the Agency that its methodology of determining the class members conflicts with the specific findings in my Award, if the result of its own methodology revealed that only two out of six witnesses were eligible class members.

Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for backpay and promotions. Impasse in implementation is unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce data, as I told the Agency previously last spring and summer. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.

Per the Union's December 13, 2012 data request, the Agency provided data to the Union on January 18, 2013 which listed all of the Bargaining Unit Employees that encumbered, per the definition of the Class set forth in the Award, the Job Series referenced in Joint Exhibits 2, 3, 4, & 7G and Union Exhibits 1 and 9.

The six Bargaining Unit employees who testified at the hearing, specifically: (1) Lynna Schonert, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie

Lovorn, and (6) Marcia Randolph-Brown similarly fall within the class definition. As such all six are eligible Class Members. The Agency shall process retroactive promotions with backpay and interest, as previously ordered, within thirty (30) days from the date of this Summary.

The Agency shall communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), backpay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.

The Union and Agency shall continue working to identify additional class members as set forth in my Award and as stated in the meeting, and shall keep the Arbitrator informed of its progress. Another implementation meeting is scheduled to take place at the Agency on March 26, 2014, at 10:00AM. I expect the Parties to meet in person and/or by phone to work on the identification of additional class members and to submit methodologies for doing so at our March 2014 meeting.

I 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. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

I met with the Parties on March 26, 2014 to discuss the progress of the Parties with the implementation of my 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 Kathryn Brantley (by phone). Present for the Union were Michael J. Snider, Esq. from Snider & Associates, LLC, and Carolyn Federoff, EVP, from AFGE Council of Locals, 222 (by phone). Previously, on February 4, 2014, I had met with the Parties to discuss implementation and I had issued a Summary of Implementation Meeting, wherein I discussed matters covered during the first meeting and my expectations regarding implementation, progress and clarification of my Award.

As set forth in my Summary of the Implementation meeting held February 4, the Agency was to accomplish the following:

1. Process retroactive promotions with back pay and interest for all six witnesses within thirty (30) days from the date of the Summary (March 14, 2014);

2. Communicate with the Union promptly concerning implementation of back pay and interest for all six witnesses, including providing copies of all forms, back pay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc.
3. Meet with the Union to identify additional class members as set forth in the Award and to submit methodologies for doing so at the March 26, 2014 Implementation Meeting.

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

During the prior meeting and in my prior Summary, I noted that the Agency not only had failed to promote the six witnesses who testified at the hearing, with backpay and interest, but that it failed to agree that they should all be entitled to relief at all. I explained that the Agency was incorrect with its interpretation, and once that was clarified, the Agency stated that it would promote those individuals with backpay and interest. As of our meeting on March 26, 2014, the Agency had not yet completed the process of retroactively promoting four out of the six witnesses, had not paid those four any backpay and had not paid any of the witnesses their full backpay and interest. Additionally, the Agency had not provided the Union with any of the forms, calculations, or other evidence of retroactive promotion or calculation and payment of backpay for the witnesses.

The six Bargaining Unit employees who testified at the hearing, specifically: (1) Lynna Schonert, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie Lovorn, and (6) Marcia Randolph-Brown all fall within the class definition. As such all six are eligible Class Members. The Agency has not paid any of these six witnesses in full, nor has it stated that it intends to, short of OMB approval. This is not in compliance with my Award, or my Summary of the February 4, 2014, Implementation Meeting. This is a unilateral failure and is without the agreement of the Union or Arbitrator. Moreover, the Agency has not sought approval of the Arbitrator or agreement by the Union before deciding what to do or how to do it, and has failed to provide the justification for its decisions or communications showing its efforts.

The Agency has since indicated that it had begun the process of initiating payment to the four remaining witnesses, but that the process was complicated, protracted and that none of the six witnesses would be paid in full by April 14, 2014, due to alleged deficiencies in prior year funds.

The Agency is directed to provide to the Arbitrator and Union copies of all communications with OMB. If the Agency believes that any of its communications with OMB are privileged or otherwise not releasable to the Union, it shall provide them to the Arbitrator for *in camera* review, and I will decide whether they are releasable or not. In either case, the Agency shall provide the Union with a summary of the general information contained in the communications. The Agency shall provide to the Union and Arbitrator copies of all policies, laws, rules and regulations relied upon to not pay the witnesses until OMB provides approval. All of the items in this paragraph shall be accomplished within two weeks of the date of this Summary.

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

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

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

Coming up with a satisfactory methodology should not be difficult. Impasse in implementation should be unnecessary because the Award is clear in its definition of the class.

The Class definition is data driven, not vacancy announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce evidence, as I told the Agency previously last spring and summer and in my prior Summary. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.

The Parties and I discussed at the March 26, 2014, meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that the witnesses who testified at the hearing were in two job series, GS-1101 and GS-236. Employees encumbering those job series are clearly within the scope of the Award, although they comprise a small portion of the job series covered by the Award, and therefore will serve as the basis for the next round of Grievants to be promoted with backpay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others), the PHRS group is discrete and therefore the Parties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with backpay and interest, among other relief. The Parties 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.

The Union requested quarterly Bargaining Unit Lists in December 2012, to assist in implementation of the Award. The Agency represents that it cannot produce quarterly Bargaining Unit Lists but that it can and will produce annual Bargaining Unit lists on a Fiscal Year basis in electronic format. The Agency was and is directed to provide the Union with annual Bargaining Unit Lists in electronic format within two weeks of the date of this Summary, as well as a current Bargaining Unit List, and shall appoint a Point of Contact in its IT department to work with a Union appointee to work on a method of providing the Union with the data that it requested in the form of quarterly Bargaining Unit Lists, in order to identify class members and their eligibility with particularity. The POC shall be identified within two weeks of the date of this Summary.

At the March 26, 2014 meeting, the Agency, for the first time, presented a statement that it believed that the retroactive promotions and backpay should only be processed retroactively until November 2002. This was not agreed to by the Union and I did not approve of this at any time. The Union proposed either August or September 2002 as a retroactive promotion/payment date. The Parties are directed to discuss the backpay/retroactive promotion date together and to either come to an agreement or to submit the matter to me for a decision.

As previously ordered, The Agency is required to communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), backpay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.

In light of the failure to come up with any alternative methodology to that of the Union for identifying class members, despite my instructions to do so, the Agency was instructed that the Award is to be construed broadly and to implement it in that spirit. While the Award covers all GS-1101 employees who were not promoted to the GS-13 level in 2002 (among others), the PHRS group is discrete and should be easily identified. Therefore the Parties were directed to work through the GS-1101 series, beginning with the PHRS employees, to identify all employees and to work to have them retroactively promoted with backpay and interest, among other relief. The Parties were directed to then move on to the other GS-1101 employees and the CIRS (Contract Industrial Relation Specialist) employees in the GS-246 series, and then others in that series, and then others in other applicable job series, until implementation is complete.

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

The Parties are to meet in person or by phone no less than two times prior to our next meeting, which will be in June 12, 2014. The Parties are to keep me apprised of progress and any impasses. I expect the Parties to make substantial progress on their own; so that we see concrete progress by the time we meet in June 2014.

The purpose of these meetings is to monitor implementation of my January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award.

I 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. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

I met with the Parties on June 12, 2014, to discuss the progress of the Parties with the implementation of my 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 I stated in prior Summaries, I have instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon my 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 backpay and interest, as of their earliest date of eligibility. As a simple subset that should be easily identifiable, I 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 my Summary, on multiple occasions. The Agency did not and has not disagreed with the Union's PHRS class member listing, nor has it proposed an alternative methodology of identifying those class members. As I have stated previously, I expected the Parties to have worked together to compile a list of PHRS employees from the annual employee listings provided by the Agency so that concrete progress could have been achieved by the June 12, 2014 meeting. I have instructed on multiple occasions that my 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 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 I approved and discussed in my prior Summary. Initially, the basics of a new Agency proposal were discussed, mostly by Mr. Fruge (by phone). I noted that the Agency's new proposal, as described by Mr. Fruge, does not comport with my Award, my prior Summaries or with my prior instructions to the Parties. I further reminded the Agency that any use of location, vacancies or any other limiting factor would not comport with my Award. I will allow the Agency one last opportunity to compile a list of PHRS and CIRS employees who should be promoted with backpay, and I permitted that the Agency be provided thirty days from the date of the June 12, 2014 meeting to present their PHRS and CIRS lists. My Award, which is final, must be fully followed; I expect my Award to be implemented by the Agency as written, and as clarified through our meetings and my Summaries. The Parties shall discuss the Union and Agency PHRS and CIRS lists, if they differ. I expect that, after discussion of the lists, the Parties will present to me a Stipulation signed by the Parties to be submitted to me after they meet. The

Stipulation should list all eligible PHRS and CIRS employees, the amount of backpay and interest due each, and a date by which the retroactive promotions, recalculated retirement annuities (as applicable), backpay and interest will be paid to each. Any disagreement between the Parties shall be submitted to me in writing for consideration.

The Union noted during our meeting that it was not receiving advance information prior to monies being disbursed to its Bargaining Unit Members, and the problems arising therefrom. I 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.

The Union further noted during the meeting that - contrary to my prior orders - 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. I 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. I further ordered, that 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. I ordered, based upon the Agency's own timeline, that no later than the week of June 23, the Agency will inform the Arbitrator and the Union of the status of the FY-2011 payments to the already eligible class members.

Despite my prior Orders, the Agency has not responded to the Union's request to reach an agreement on a proposed earliest backpay date. As such, within two weeks from the meeting, the Union and Agency will reach an agreement on the earliest backpay 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 payments errors not being caught until after payments had already been made. I ordered the Agency to look into the possibility of running all calculations and meeting with the Union about the calculations prior to any SF-50s being processed or issued.

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. I 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 my prior Orders requiring that all six witnesses receive retroactive promotions and all backpay, interest and emoluments. The Agency also continues to be in violation of my 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 employees that the Agency previously identified as eligible class members. Those eleven employees are: (1) Crispino, Brenda (Retired); (2) Di Pietro, Steven; (3) Duca, Santo; (4) Ferguson, Leroy; (5) Galinato, Gilbert; (6) House, James; (7) Masters-High, Kaeron (Retired); (8) Simmons, Tammie; (9) Trumbla, Anne; (10) White, Gwen (Retired); (11) Williams, Jr., Edward. I expect to see

substantial, concrete progress towards promotions, backpay 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 my 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 our next meeting, which will be on August 28, 2014, beginning at 10:00AM. The Parties are to keep me apprised of progress and any impasses. I expect the Parties to make substantial progress on their own so that we see substantial, concrete progress by the time we meet in August 2014.

The purpose of these meetings is to monitor implementation of my 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.

I 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. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING ORDER

This Arbitrator met with the Parties on August 28, 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 Union were Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, Holly Salamido, Jerry Gross and Sal Viola. Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Craig T. Clemmensen, Mary Pavlik, and Towanda Brooks. This is the fourth Summary of Implementation Meeting Order ("Summary 4"), the first three having been issued on March 14, 2014 ("Summary 1"), May 17, 2014 ("Summary 2"), and August 2, 2014 ("Summary 3"), respectively. The Agency filed Exceptions before the FLRA to the August 2, 2014, Summary of Implementation Meeting Order, and those Exceptions are currently pending. This Order only relates to the Award and the first and second Summary Orders, which are final and binding. This Order does not relate to the August 2, 2014 Summary (Summary 3).

At the August 28, 2014, meeting, the Union raised concerns that the Agency is chilling the negotiated grievance process by requiring Agency employees to speak with management prior to speaking with attorneys from Snider & Associates, LLC, about this case. This Arbitrator informed the

Agency that it was to notify all Bargaining Unit Employees that they do not need to contact management prior to discussing the Fair and Equitable case with the Union's counsel. Specifically, this Arbitrator informed the Agency that the language from Union Counsel's previous email, which states in part, should be used:

1. BUEs may participate in any interview conducted by a firm employee without the need to inform management or receive permission from management.
2. It is illegal for management/supervisors to direct employees not to participate or to in any way discourage participation.

The Parties have had a disagreement concerning the earliest date for the Grievance's damages period. After giving the Parties ample opportunity to work this out between themselves, it is now ripe for me to issue a clarification on the matter. The Agency's position is that the earliest the damages period could begin would be on November 13, 2002, the date of the Grievance. The Union argues that the damages period should begin as early as possible, as this is and has been an ongoing and continuous violation. The Award states that the Agency shall process "promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002." The Parties agreed that new evidence provided by the Agency in May 2014, showing that the earliest date in 2002 that a violation was found was January 18, 2002. The Parties also agreed that the Agency, when processing the seventeen (17) retroactive promotions described in Summary 1 and Summary 2, had an effective promotion and backpay date prior to November 13, 2002.

The Award is hereby clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed[1]. This ruling is based upon data provided by the Agency to the Union and shared with me at the hearing by the Parties. If the Union or Agency presents additional new evidence or data, this ruling may be further clarified.

[1] This ruling does not yet apply to the eleven employees identified by the Agency during its initial methodology. For the time being, this Arbitrator will take those employees under advisement while the Parties work together to resolve their back-pay date.

The Parties have also disputed the end date for inclusion in the class and have sought clarification on that issue as well. The Agency's position was that no class member could be included after August 8, 2012, the date the Award became final. The Union has argued that the Award states "until the present," and that the Agency's violations have been ongoing and continuous and that the Agency has failed to implement the Award. Based upon the Agency's failure to implement the Award, Bargaining Unit Employees shall continue to be considered class members until the award is fully implemented. August 8, 2012, is an improper cut-off date.

This Arbitrator ordered the Parties to schedule a weekly conference call to discuss all outstanding issues relating to implementation in this case. The Parties are to keep this Arbitrator apprised of progress and any impasses. This Arbitrator continues to expect the Parties to make substantial progress between themselves.

The purpose of the August 28, 2014 implementation meeting was to monitor and oversee implementation of the 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.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1 and 2. The Parties are directed to provide their availability for the next implementation meeting no later than five days after receipt of this Order.

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Dr. Andree Y. McKissick, Esq. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

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

At the onset of the February 4, 2015 Implementation Meeting ("IM"), the Agency noted that it was not waiving any rights it may have by being present at the IM. The Agency further noted that it

intended to invoke its right to call its own witnesses at a future date. The Union had previously provided notice of the possibility of its intention to elicit sworn testimony, but elected not to do so at this IM.

Also at the IM, the Union requested the Agency's position as to whether the Arbitrator had continuing jurisdiction to conduct the IM. The Agency responded that it was reviewing its options in this regard but it did not raise any objection.

At the IM, the Union provided this Arbitrator and the Agency with a presentation concerning non-compliance and implementation for the remaining BUEs. Specifically, the Union noted that: (1) none of the 17 class members had received their performance bonus differential; (2) only one out of the seven employees from the 17 class members who are retired received her revised annuity; and (3) the Union had not received sufficient information as to the TSP contributions for the ten employees from the 17 class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

The Union's presentation stated that even though the Award has been final and binding since August 2012, the Agency has still failed to complete its approach as to its position on the class composition. The Agency has repeatedly failed to comply with this Arbitrator's prior Order(s) to submit its final approach. In spite of these failures, HUD stated that it was not prepared to present any list of class members at this IM. At the IM, HUD once again requested an opportunity to present its approach to identification of the class members. This Arbitrator will allow one last opportunity to the Agency, this time until March 26, 2015, for submission of its approach to identification of class members, which the Agency is warned must comply with this Arbitrator's Award and prior Summaries. This Arbitrator further warned that if the Agency fails to submit its completed approach by the next IM (now scheduled

for March 26, 2015), this Arbitrator would entertain sanctions against the Agency, including but not limited to the withholding of management officials' salaries. This Arbitrator is willing to entertain sanctions due to the Agency's failure to comply with the Award and Summaries to date.

The Union's presentation continued by restating its approach to the class composition based upon this Arbitrator's Award and subsequent Summaries. As noted by this Arbitrator in Summary 1, "[T]he eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award." The Union's presentation revealed that the Job Series identified in the Exhibits as listed in the Award include 42 applicable Job Series, and at a minimum, the Union stated that the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 Job Series at any time during the relevant damages period, so long as the requirements concerning performance and time-in-grade were met. This presentation and interpretation comports with previous statements by this Arbitrator reiterating that the class is easily identifiable and includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements.

At the conclusion of the Union's presentation, the Parties and this Arbitrator informally questioned Mr. Brad Huther, Chief Financial Officer for the Agency. Mr. Huther remarked that to date HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. He also stated that to his knowledge no specific request to fund the judgment in this matter had been made.

The purpose of the February 4, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2 and 4. The next IM will take place on March 26, 2015, beginning at 10:00am.

_____ _____

Dr. Andree Y. McKissick, Esq. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

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

I. Status of Outstanding Compliance Issues

In Summary 5, this Arbitrator noted that at the February 4, 2015 Implementation Meeting ("IM"), the Union provided a presentation concerning non-compliance and implementation for the remaining class of BUEs subject to the Award. Specifically, the Union noted that: (1) none of the 17 class members had received their performance bonus differential; (2) only one out of the seven employees from the 17 class members who are retired received her revised annuity; and (3) the Union had not received sufficient information as to the TSP contributions for the ten employees from the 17 class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

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

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

The Union has requested certain data concerning TSP contributions from class members and potential class members. The Agency has informed the Union that TSP will not provide such data to the Union due to legal restrictions in doing so. Within fourteen days of receipt of this Summary, the Agency shall provide written proof from TSP which sets forth TSP's position in this regard. The Parties are then directed to work together to determine a reasonable and appropriate manner and method of obtaining the Union's requested information. This will be further discussed at the June 2015 IM.

II. Orders on Outstanding Motions

The Union has filed a Motion to Compel the production of MSCS Announcement Listings from 1999 to 2002. The Agency has opposed the Union's Motion, and the Union has filed a Reply. The Union's Motion is granted. Moreover, as explained in Summary 4, due to new evidence being submitted, the Award was clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed. This ruling was based upon data from the MSCS system provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties. This Arbitrator stated that "if the Union or Agency presents additional new evidence or data, this ruling may be further clarified." The Union seeks the identical MSCS data relied upon in Summary 4 in an effort to discover and present new evidence in support of showing that violations existed prior to 2002; without this evidence, which is in the sole control of the Agency, the Union effort will be stymied. The Back Pay Act has a 6 year look back period, or statute of limitations. The July 1999 date proffered by the Agency as the beginning of entries to the MSCS system falls well within that 6 year period prior to the filing of the Grievance of this case, in November 2002. Despite the Agency's claim that this Arbitrator lacks jurisdiction prior to 2002, the Back Pay Act says otherwise. Since there

is jurisdiction, and the evidence is germane to this case, therefore, the Union's Motion is granted. The Agency shall produce the MSCS Announcement Listings in the same format as in its May 2014 production, for the period from the inception of the MSCS system entries (circa July 1999) until 2002, to the Union, within thirty (30) days. This ruling shall not yet be construed as a finding that the damages period extends back to July 1999, rather it is a directive that the Agency produce the requested data.

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

III. Identification of Class Members

a. Background

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

> The purpose of the implementation meeting was to clarify the members of the class that was defined in my January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award. Rather, **the meeting and this summary were, to the extent necessary, intended to clarify with specificity which Bargaining Unit Employees are eligible class members.**
>
> The Agency has requested written clarification of my Award (including on August 7, 2013 and November 13, 2013). **I indicated that no clarification was necessary as my Award was clear and unambiguous.** More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. Despite the clarity of my Award, the Agency has failed to timely implement the Award as ordered.
>
> ...

> Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for backpay and promotions. **Impasse in implementation is unnecessary because the Award is clear in its definition of the class.** The Class definition is data driven, not announcement driven, **as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce data, as I told the Agency previously last spring and summer. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.**
>
> Per the Union's December 13, 2012 data request, the Agency provided data to the Union on January 18, 2013 which listed all of the Bargaining Unit Employees that encumbered, per the definition of the Class set forth in the Award, the Job Series referenced in Joint Exhibits 2, 3, 4, & 7G and Union Exhibits 1 and 9.

Summary 1 (emphasis added).

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

> During our prior meeting, I noted that the Agency's methodology of identifying class members entitled to relief under my Award was flawed, and I directed the Parties to meet and agree on a methodology, or to present alternative methodologies at our March 26, 2014 meeting. The reason we are meeting is to ensure that implementation is moving forward and does not stretch out.
>
> In the prior meeting and Summary, I made it clear that the Agency was to meet with the Union to identify additional class members as set forth in the Award and **jointly to submit methodologies for doing so at the March 26, 2014 Implementation Meeting.** The Parties informed me that they met on March 13, 2014, and that the Union asked the Agency if it agreed with the Union's list of class members; if not, the Union asked the Agency for suggestions of alternative methodologies to identify class members.
>
> The Agency confirmed at the March 26, 2014, Implementation Meeting that it does not agree with the Union's list of class members, arguing that the scope of the data exceeds the claims period. The Agency agreed, however, that it is at fault for failing to provide the Union with data confined to the claims period. The Agency also confirmed that it has not yet developed or presented

for the Union's consideration an alternative methodology for identifying class members.

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

Coming up with a satisfactory methodology should not be difficult. Impasse in implementation should be unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not vacancy announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce evidence, as I told the Agency previously last spring and summer and in my prior Summary. **The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.**

The Parties and I discussed at the March 26, 2014, meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that **the witnesses who testified at the hearing were in two job series, GS-1101 and GS-236. Those job series are clearly within the scope of the Award, although they comprise a small portion of the job series covered by the Award**, and therefore will serve as the basis for the next round of Grievants to be promoted with backpay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. **Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others)**, the PHRS group is discrete and therefore the Parties were directed to work through the GS-1101 series to identify all eligible class

> members in the PHRS position, and to work to have them retroactively promoted with backpay and interest, among other relief. The Parties 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.

Summary 2 (Emphasis added).

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

This Arbitrator has noted on a number of occasions that due to the Agency's historical failure to produce information and data to the Union – even after being ordered to do so and being provided ample opportunity to comply - the Agency's data systems may be used to expand the Class of employees subject to the Award and Remedy, but not to limit the Class. This is the result of the adverse inference that has been drawn in this case and was noted by, and upheld by,

the FLRA. Further, this Arbitrator has stated on numerous occasions that the Award was to be interpreted broadly, so as to apply to the largest class of Grievants possible. For example, in Summary 2 this Arbitrator stated:

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

(Summary 2, emphasis added).

b. The Agency's Methodology

i. Agency Presentation

On March 26, 2015, the Agency presented its "HUD Compliance Methodology" for the first time, along with a list of "HUD's Proposed Claimant List" of approximately 439 employees. After the Agency meticulously presented and explained its methodology, the Parties and this Arbitrator discussed the matter thoroughly. The Agency methodology utilized "accession lists" along with the Agency's identification of previously classified positions (drawn from an unknown source), "affected bargaining unit employees" – at the time of new hires into positions with FPL of GS-13, and stated that those employees "are the claimants." HUD also applied filters and utilized the "HR System of Records" to find self-identified "newly created, previously classified positions" and other limitations in order to arrive at the class of 439 claimants. HUD specifically stated that it only included "GS-12 employees with FPL of only GS-12 occupying the same positions at the same time as the violations." HUD stated that headquarters and field employees are "different position[s] altogether, based on the reporting structure of the organization and the scope and effect of the work of the relevant employee." The Agency stated that its methodology complied with the Award and Summaries, because it includes all 6 witnesses, PHRS employees, and CIRS employees. The Agency further explained that its

methodology was designed to result in "practical implementation," was a "data driven exercise" and was guided by the "rate of promotions internally."

ii. Union's Comments on Agency Methodology

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

The Union noted that the Grievance included allegations of violations on behalf of:

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

The Union previously submitted a list to both the Agency and this Arbitrator identifying the class of employees entitled to relief under the Award and Summaries, using "listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing" whom the Union believes, at a minimum, are eligible class members. The Union stated that the class consists of under 1500 current employees due promotions to the GS-13 level. The Union estimates the total

class to be at least 3,777 former and current Bargaining Unit employees – many of whom are already retired, many of whom are already GS-13's and many of whom have deceased during the pendency of this matter.

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

For example, the Union pointed out, the Grievance itself listed specifically six Job Series and positions. The Union claimed that it's listings of class members in these six Job Series and positions alone would include approximately 697 eligible former and current employee class members - while the Agency's methodology only produces 289 class members for these six Job Series and positions named in the Grievance, or 41%. The Union's list contains approximately 101 GS-343 Program Analyst employees as eligible class members; only 15 of whom are Class members according to the Agency's methodology (15%). The Union's list contains approximately 33 GS-246 CIRS employees as eligible class members; only 28 of whom are Class members according to the Agency's methodology. The Union's list contains approximately 10 GS-801 Engineer employees as eligible class members; only one of whom is a Class member according to the Agency's methodology (10%). Union's list contains approximately 170 GS-1160 Financial Analyst employees as eligible class members; only 36 of whom is a Class member according to the Agency's methodology (21%). The Union's list of class members

contains approximately 147 employees in the GS-828 Construction Analyst position as eligible class members; only six of whom are Class members according to the Agency's methodology (4%). Finally, the Union's list contains approximately 236 employees in the GS-1101 PHRS position as eligible class members; only 203 of whom are Class members according to the Agency's methodology[1].

In sum, the Union argues, based upon just the six positions explicitly listed and contained in the initial Grievance, the Union's methodology utilizing listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing would include approximately 697 eligible class members while the Agency's methodology produces 289, or only 41%. The Union noted that the dichotomy is even greater when reviewing the class as a whole; the Agency's entire list of class members is comprised of 439 current and former employees while the Union claims the class numbers in excess of 3,777. The Union claims that the Agency's methodology cannot be in compliance with the Arbitrator's directive that "my Award to be interpreted broadly, so as to apply to the largest class of Grievants possible." Summary 2.

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

The Union asked the Agency questions at the March 26, 2015 IM about which Job Series were included in the Proposed Claimant List, as that information was not revealed in the Agency's exhibits. The Union also questioned the Agency's apparent integration of a portion of

[1] These calculations have been provided by the Union and were not checked by this Arbitrator.

the Remedy ("that the Agency process retroactive permanent selections of all affected BUE's into currently existing career ladder positions") into the Class Definition (BUE's in career ladder positions where that ladder lead to a lower journeyman grade than the target grade of "a career ladder of a position with the same job series").

The Union stated that the Agency limited application of the Class Definition by incorporating into it the Remedy and its description of "currently existing career ladder positions." The Union also claimed that the Agency limited the Class by utilizing an Agency systems data point called "accession lists" whose use the Union claimed was apparently designed to pare down the size, membership and damages period for Class members, in contradistinction to this Arbitrator's Award and prior Summaries. The Union pointed out that the Agency's list of 439 employees does not include all employees in, for example, the entire GS-1101 series (as were included explicitly in Summary 2 at pages 5 and 6) but rather singles out a very few individual positions within very few Job Series (i.e. the Agency methodology misinterprets the Award as reading "a career ladder **of the same position with the same job series"**) as opposed to following the actual language of the Award ("a career ladder of **a position with the same job series**"). The Union pointed out that in Summary 2, the Arbitrator has found that employees in the same job series were to be treated similarly due to the adverse inference drawn in the Awards issued by the Arbitrator. The Union pointed out that its methodology identifies the applicable class as consisting of at least all GS-12 employees who encumbered a position in any of the 42 Job Series listed in the Joint and Union Exhibits described in the Award (Award at page 4, Summary 5 at page 3) and that the Arbitrator found, in Summary 5, that:

> ...the **Union's "presentation and interpretation comports with previous statements by this Arbitrator** reiterating that the class is easily identifiable and **includes any employee who encumbered any position in any of the Job Series identified in the Exhibits** as noted in the Award and presented by the Union, at

any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements."

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

iii. Arbitrator's Analysis and Findings Regarding Agency Methodology

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

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

The Agency limited the Class by artificially distinguishing between Field and Headquarters positions, explaining that they have a different reporting structure and that even

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

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

Moreover, no explanation was provided by the Agency as to why it was using the Agency's data systems to limit, as opposed to expand, the Class of employees subject to the Remedy. As this Arbitrator has noted throughout the litigation of this matter, the Agency had ample opportunity to provide data that might support its position, yet repeatedly failed to produce that data, which resulted in the finding of an adverse inference against the Agency. The Agency is now attempting to use new data to limit the class. The adverse inference precludes the usage of data to limit the class, as explained to the Parties repeatedly. New data may be used to expand the class, but not to limit it.

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

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

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

c. Ruling on Remaining Class Members

This Arbitrator has carefully reviewed the Award, prior Summaries and both the Union's and Agency's proposed methodologies. As in Summary 2, the Agency has again failed "to come up with any [valid] alternative methodology to that of the Union for identifying class members." Therefore, as this Arbitrator cited with approval in Summary 5, the Union's methodology for identifying class members is hereby adopted. To the extent any clarification is necessary, the

Award is clarified that the class of employees eligible for the relief stated includes: any employee who encumbered any position in any of the Job Series identified in the Hearing Exhibits as noted in the Award and presented by the Union at the February 4, 2015 IM (Union Exhibit 12, "List of Series Pulled from Hearing Exhibits"), at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements. As set forth in Summary 4, the relevant damages period in this case, is from January 18, 2002 until the present[2].

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

The Agency and Union are furthermore directed to work together to continue to review the Agency's employee data to identify additional and those remaining Class members as defined above, to calculate all damages and emoluments due under the Back Pay Act, and to present the results to the Arbitrator within sixty (60) days. An extension may be granted if there

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

is a joint request for one. This Arbitrator would like regular status updates on the implementation of the Award and Summaries on a weekly basis, and a full briefing at the next IM, to be held in June 2015. The goal is to have all Class members promoted and the remedy implemented this Fiscal Year. The Parties are directed to continue their weekly discussions on information exchange and implementation status.

IV. Additional Issues and Conclusion

This Arbitrator has expressed concern about HUD's stated inability to pay for the damages pursuant to the Award and Summaries. Mr. Brad Huther, Chief Financial Officer for the Agency remarked in February 2015 that, to date, HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. As Union counsel pointed out, the HUD Inspector General's March 6, 2015 Audit of HUD's Budgets from FY 2013 and FY 2014 revealed that HUD not only has not set aside funding for satisfaction of the claims in this case, its "management and general counsel" have opined that "the ultimate resolution of pending litigation will not have a material effect on the Department's financial statements." [3] This is especially concerning because by the Agency's own admission, it does not have adequate funding to pay even the damages it believes are owed as a result of its own, improper, methodology.

The purpose of the March 26, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should

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

be construed as a new requirement or modification of the existing Award. This Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2, 4 and 5. This Arbitrator has and will continue to maintain jurisdiction over any Union request for attorney fees, costs and expenses. A final decision on attorney fees, costs and expenses does not appear to be ripe at this time since the matter is ongoing and, therefore, this Arbitrator shall continue to retain jurisdiction over any Union request for attorney fees, costs and expenses until the matter is completed.

The next IM will take place on June 2 and/or 10, 2015 (after being confirmed by the Parties) beginning at 10:00am.

_____ _____

Dr. Andree Y. McKissick, Esq. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING[1]

On February 4, 2014, I met with the Parties to discuss implementation of my 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, and Kathryn Brantley. 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.

After my Award was issued, the Agency filed Exceptions, which were dismissed by the FLRA on August 8, 2012. The Award became final and binding on that date.

In my Award, I ordered:

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

[1] Please be advised that the Agency's edits in the attached document shall not constitute a waiver of any right to relief or remedy, nor shall the Agency's edits constitute an acquiescence of the Agency's position and arguments that have been raised, or will be raised, with regard to the sufficiency, clarity and implementation of the January 10, 2012, Arbitration Award.

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promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002.

The Award further defined the class of Grievants subject to the Remedy as follows: All Bargaining Unit employees in a position in a career ladder (including at the journeyman level), where the 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.

The purpose of the implementation meeting was to clarify the members of the class that was defined in my January 10, 2012 Award. ~~Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award~~. Rather, ~~the meeting and~~ this summary ~~were, to the extent necessary, intended to clarify with specificity which Bargaining Unit Employees are eligible class members~~ is an account of what transpired during the February 4, 2014, Implementation Meeting.

The Agency has requested written clarification of my Award (including on August 7, 2013 and November 13, 2013). I indicated that no clarification was necessary as my Award was clear and unambiguous. More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are ~~a minimal number of~~approximately eleven class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. ~~Despite the clarity of my Award, the Agency has failed to timely implement the Award as ordered.~~

~~For example, i~~In my Award, and as clarified in phone conferences with the Parties, all six Bargaining Unit employees who testified at the hearing on behalf of the Union (also listed below) are eligible class members. The Agency was required to promote them with backpay and

interest, which it failed to do. It was then ordered to promote them with backpay and interest by September 1, 2013, which it failed to do. As of today, the Agency "has reviewed the class of Grievants defined in the Opinion and Award and have determined that two [out of the six] employee witnesses are entitled to the backpay and interest payment." (Agency letter dated 12/18/13). ~~The Agency has failed to implement the Award as ordered.~~ I again reiterated at the implementation meeting what was clarified last summer: that based upon my Award as written, all six Union witnesses are eligible class members. ~~I also notified the Agency that its methodology of determining the class members conflicts with the specific findings in my Award, if the result of its own methodology revealed that only two out of six witnesses were eligible class members.~~

Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for ~~backpay~~back pay and promotions. ~~Impasse in implementation is unnecessary because the Award is clear in its definition of the class~~. The Class definition is data driven, not announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce data, as I told the Agency previously last spring and summer. The potentially eligible class members are ~~easily~~ identified by listings of employees who encumbered positions ~~in Job Series~~ identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, ~~and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.~~

Per the Union's December 13, 2012 data request, the Agency provided data to the Union on January 17~~18~~, 2013 which listed all of the Bargaining Unit Employees that occupied any Series contained in the attached Exhibit A for any duration of time since 2000. ~~encumbered, per~~

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

The six Bargaining Unit employees who testified at the hearing, specifically: (1) ~~Lynna~~Lynne ~~Schonert~~Schooner, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie Lovorn, and (6) Marcia Randolph-Brown similarly fall within the class definition. As such all six are eligible Class Members. The Agency shall process retroactive promotions with ~~backpay~~back pay and interest, as previously ordered~~, within thirty (30) days from the date of this Summary~~.

The Agency shall communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, ~~as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), backpay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.~~

The Union and Agency shall continue working to identify additional class members as set forth in my Award and as stated in the meeting, and shall keep the Arbitrator informed of its progress. Another implementation meeting is scheduled to take place at the Agency on March 26, 2014, at 10:00AM. I expect the Parties to meet in person and/or by phone to work on the identification of additional class members and to submit methodologies for doing so at our March 2014 meeting.

~~I 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. Date

Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING

I met with the Parties on March 26, 2014 to discuss the progress of the Parties with the implementation of my 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 Kathryn Brantley (by phone). Present for the Union were Michael J. Snider, Esq. from Snider & Associates, LLC, and Carolyn Federoff, EVP, from AFGE Council of Locals, 222 (by phone). Previously, on February 4, 2014, I had met with the Parties to discuss implementation and I had issued a Summary of Implementation Meeting, wherein I discussed matters covered during the first meeting and my expectations regarding implementation, progress and clarification of my Award.

As set forth in my Summary of the Implementation meeting held February 4, the Agency was to accomplish the following:

1. Process retroactive promotions with back pay and interest for all six witnesses within thirty (30) days from the date of the Summary (March 14, 2014);

2. Communicate with the Union promptly concerning implementation of back pay and interest for all six witnesses, including providing copies of all forms, back pay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc.
3. Meet with the Union to identify additional class members as set forth in the Award and to submit methodologies for doing so at the March 26, 2014 Implementation Meeting.

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

During the prior meeting and in my prior Summary, I noted that the Agency not only had failed to promote the six witnesses who testified at the hearing, with backpay and interest, but that it failed to agree that they should all be entitled to relief at all. I explained that the Agency was incorrect with its interpretation, and once that was clarified, the Agency stated that it would promote those individuals with backpay and interest. As of our meeting on March 26, 2014, the Agency had not yet completed the process of retroactively promoting four out of the six witnesses, had not paid those four any backpay and had not paid any of the witnesses their full backpay and interest. However, the Agency advised that its payroll staff had initiated the process to effectuate backpay and retroactive personnel actions to the remaining witnesses. Additionally, the Agency had not provided the Union with any of the forms, calculations, or other evidence of retroactive promotion or calculation and payment of backpay for the witnesses.

However, the Agency further advised the parties it would provide payroll and personnel documents generated in the normal course of business to the Union documenting the backpay and retroactive personnel actions.

The six Bargaining Unit employees who testified at the hearing, specifically: (1) Lynna Schonert, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie Lovorn, and (6) Marcia Randolph-Brown all fall within the class definition. As such all six are eligible Class Members. The Agency has not paid any of these six witnesses in full, and has consistently advised that it has a pending request for the authorization to transfer funds that is subject to OMB approval. The Agency also advised that this position is based upon guidance received from officials in the Agency's Office of Chief Financial Officer, who are responsible for ensuring the fiscal responsibility of the Agency and its individual program offices. Specifically, the Agency's OCFO has identified deficiencies in prior year funds for the Office of Public and Indian Housing, which is the program office primarily responsible for effectuating back pay and retroactive promotion actions for the witnesses. The Agency has further advised that OCFO staff continue to engage with OMB on fulfilling HUD's request to transfer the funds necessary to fully compensate the witnesses.

The Agency has since indicated that it had begun the process of initiating payment to the four remaining witnesses. The Agency has further indicated that its payroll and personnel staff have a review process consistent with all cases in which it must implement for back pay and retroactive actions. Consistent with its established office practice, payroll and personnel staff are currently employing its standard protocols and procedures in fulfilling backpay and retroactive promotion actions for the witnesses.

In regards to communications with OMB, the Agency is directed to provide to the Arbitrator and Union copies of all communications with OMB. If the Agency believes that any of its communications with OMB are privileged or otherwise not releasable to the Union, it shall provide them to the Arbitrator for *in camera* review, and I will decide whether they are releasable or not. The Agency shall provide to the Union and Arbitrator copies of all policies, laws, rules and regulations relied upon for its position that it is not able to transfer funds to cover deficient fiscal years absent OMB approval.

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

The Agency confirmed at the March 26, 2014, Implementation Meeting that it does not agree with the Union's list of class members, arguing that the scope of the data exceeds the claims period. The Agency also confirmed that it is working on developing an alternative methodology for consideration by the Union.

In my prior Summary I noted that the Agency had unilaterally determined, based upon its own methodology, that there are a minimal number of class members which it was able to identify, including only two of the six witnesses. As set forth in my prior Summary, any methodology that failed to identify each of the six witnesses as class members is by definition flawed. The Agency again advised that it disputes my understanding of my Award. Specifically, the Agency continues to contest that my oral statements communicated on the broad

interpretation of my Award are not consistent with the written scope of my Award, as determined by the definition of the class of grievants where I reference grievants being a position for a series that was subsequently posted from 2002 to present.

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

Coming up with a satisfactory methodology should not be difficult. Impasse in implementation should be unnecessary because I believe my Award is clear in its definition of the class. It is my position that the Class definition is data driven, not vacancy announcement driven, as is clear from my Award and the Adverse Inference drawn due to the Agency's failure to produce evidence, as I told the Agency in my prior Summary. The eligible class members are based on the listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until the Award became final and binding in 2012.

The Parties and I discussed at the March 26, 2014, meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that the witnesses who testified at the hearing were in two job series, GS-1101 and GS-236. Employees encumbering those job series are clearly within the scope of the Award, although they comprise a small portion of the job series covered by the Award, and therefore will serve as the basis for the next round of Grievants to be promoted with backpay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. The PHRS group is discrete and

therefore the Parties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position who are entitled to the remedy outlined in my Award. The Parties were directed to then move on to the CIRS (Contract Industrial Relations Specialist) employees in the GS-246 series, the other GS-1101 employees, and then others in applicable job series, until implementation is complete.

The Union requested quarterly Bargaining Unit Lists in December 2012, to assist in implementation of the Award. The Agency advised that it cannot produce quarterly Bargaining Unit Lists but that it can and will produce annual Bargaining Unit lists on a Fiscal Year basis in electronic format. The Agency was and is directed to provide the Union with Fiscal year Bargaining Unit Lists in electronic format within two weeks of the date of this Summary, as well as a current Bargaining Unit List, and shall appoint a Point of Contact in its IT department to work with a Union appointee to work on a method of providing the Union with the data that it requested in the form of quarterly Bargaining Unit Lists, in order to identify class members and their eligibility with particularity. The POC shall be identified within two weeks of the date of this Summary.

At the March 26, 2014 meeting, the Agency advised the Parties that the retroactive promotions and backpay were being processed with a retroactive date of November 2002. The Agency further advised the parties that its justification was based upon the filing date of the original grievance, which was filed in November 2002. The November 2002 date was not agreed to by the Union. The Union proposed either August or September 2002 as a retroactive promotion/payment date. The Parties are directed to discuss the backpay/retroactive promotion date together and to either come to an agreement or to submit the matter to me for a decision.

As previously ordered, the Agency is required to communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), backpay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.

In light of the failure to come up with any alternative methodology to that of the Union for identifying class members, despite my instructions to do so, the Agency was instructed that the Award is to be construed broadly and to implement it in that spirit. The PHRS group is discrete and should be easily identified. Therefore the Parties were directed to work through the GS-1101 series, beginning with the PHRS employees, to identify all employees and to work to have them retroactively promoted with backpay and interest, consistent with the remedy outlined in my Award. The Parties were directed to then move on to the other GS-1101 employees and the CIRS (Contract Industrial Relation Specialist) employees in the GS-246 series, and then others in that series, and then others in other applicable job series, until implementation is complete.

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

The Parties are to meet in person or by phone no less than two times prior to our next meeting, which will be in June 12, 2014. The Parties are to keep me apprised of progress and any impasses. I expect the Parties to make substantial progress on their own; so that we see concrete progress by the time we meet in June 2014.

The purpose of these meetings is to monitor implementation of my January 10, 2012 Award.

I 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. Date
Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

I met with the Parties on June 12, 2014, to discuss the progress of the Parties with the implementation of my 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 I stated in prior Summaries, I have instructed the Parties to make substantial progress on identifying class members. The Parties were instructed that based upon my 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 backpay and interest, as of their earliest date of eligibility. As a simple subset that should be easily identifiable, I instructed the Parties to identify all PHRS employees, who would comprise the first set of class members. The Union stated that it

Comment [RTA1]: Union Counsel/Arbitrator McKissick: The Agency responds that it respectfully disputes that the highlighted statement was made during the parties' Implementation Meeting. Rather, Arbitrator McKissick advised that, as a starting point, the parties would initiate its review of eligible claimants from the 1101 series – Public Housing Revitalization Specialists and Contract Industrial Relations Specialists job series. At no time has a statement or writing been made to the effect that all GS-1101 employee were to be promoted.

Comment [RTA2]: Union Counsel/Arbitrator McKissick: The Agency can find no information to support that the highlighted statement was made during the parties' Implementation Meeting. The only reference, to date, that discusses the issue of the date of eligibility from Arbitrator McKissick is the Opinion and Award.

provided its list of PHRS class members to the Agency in early May 2014. It requested feedback from the Agency, in compliance with my Summary, on multiple occasions. The Agency did not and has not disagreed with the Union's PHRS class member listing, nor has it proposed an alternative methodology of identifying those class members. As I have stated previously, I expected the Parties to have worked together to compile a list of PHRS employees from the annual employee listings provided by the Agency so that concrete progress could have been achieved by the June 12, 2014 meeting. I have instructed on multiple occasions that my 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~~ 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 I approved~~ and discussed in my prior Summary. Initially, the basics of a new Agency proposal were discussed, mostly by Mr. Fruge (by phone). I noted that the Agency's new proposal, as described by Mr. Fruge, does not comport with my Award, my prior Summaries or with my prior instructions to the Parties. I further reminded the Agency that any use of location, vacancies or any other limiting factor would not comport with my Award. I will allow the Agency one last opportunity to compile a list of PHRS and CIRS employees who should be promoted with backpay, and I permitted that the Agency be provided thirty days from the date of the June 12, 2014 meeting to present their PHRS and CIRS lists. My Award, which is final, must be fully followed; I expect my Award to be implemented by the Agency as written, and as clarified through our meetings and my Summaries. The Parties shall discuss the Union and Agency PHRS and CIRS lists, if they differ. I expect that, after discussion of the lists, the Parties will present to me a Stipulation signed by the Parties to be submitted to me after they meet. The

Comment [H3]: Union Counsel/Arbitrator McKissick: The Agency has thoroughly reviewed its notes and respectfully disputes that the Union's methodology has been approved by Arbitrator McKissick.

Comment [RTA4]: Union Counsel/Arbitrator McKissick: The Agency has no record to support the highlighted language. Instead, during the June 2014,Implementation Meeting, upon response by Union counsel that the initial methodology provided by the Agency during its introductory remarks included location criteria, Arbitrator McKissick specifically made references and comments on the subject of location as a criteria.

Comment [RTA5]: Union Counsel/Arbitrator McKissick: The Agency respectfully objects to the highlighted language because the statement was not made; as such, the reference is not accurate. At no point during the entire June 2014 Implementation Meeting was the subject of a stipulation raised by either side, nor Arbitrator McKissick.

Stipulation should list all eligible PHRS and CIRS employees, the amount of backpay and interest due each, and a date by which the retroactive promotions, recalculated retirement annuities (as applicable), backpay and interest will be paid to each. Any disagreement between the Parties shall be submitted to me in writing for consideration.

Comment [RTA6]: Union Counsel/Arbitrator McKissick: The Agency respectfully reiterates its objection to continued reference(s) to a stipulation for the reason stated in [RTA 5].

The Union noted during our meeting that it was not receiving advance information prior to monies being disbursed to its Bargaining Unit Members, and the problems arising therefrom. I 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.

The Union further noted during the meeting that - contrary to my prior orders - 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. I 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. I further ordered, that 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. I ordered, based upon the Agency's own timeline, that no later than the week of June 23, the Agency will inform the Arbitrator and the Union of the status of the FY-2011 payments to the already eligible class members.

Despite my prior Orders, the Agency has not responded to the Union's request to reach an agreement on a proposed earliest backpay date. As such, within two weeks from the meeting, the Union and Agency will reach an agreement on the earliest backpay date, or will submit the matter to the Arbitrator for a decision.

Comment [RTA7]: Union Counsel/Arbitrator McKissick: The Agency does not has any notes which support the highlighted statement. Rather, the Agency's notes indicate that the Agency is to identify a backpay date and, absent agreement, that the parties' respective backpay dates will be submitted to the Arbitrator.

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 payments errors not being caught until after payments had already been made. I ordered the Agency to look into the possibility of running all calculations and meeting with the Union about the calculations prior to any SF-50s being processed or issued.

Comment [RTA8]: Union Counsel/Arbitrator McKissick: The Agency has again reviewed its notes and can find no information that the highlighted order was made to the Agency. Instead, the information and data ordered by Arbitrator McKissick were in two and three-week increments since the June 2014 Implementation Meeting.

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. I 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 my prior Orders requiring that all six witnesses receive retroactive promotions and all backpay, interest and emoluments. The Agency also continues to be in violation of my 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 employees that the Agency previously identified as eligible class members. Those eleven employees are: (1) Crispino, Brenda (Retired); (2) Di Pietro, Steven; (3) Duca, Santo; (4) Ferguson, Leroy; (5) Galinato, Gilbert; (6) House, James; (7) Masters-High, Kaeron (Retired); (8) Simmons, Tammie; (9) Trumbla, Anne; (10) White, Gwen (Retired); (11) Williams, Jr., Edward. I expect to see

substantial, concrete progress towards promotions, backpay 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 my 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 our next meeting, which will be on August 28, 2014, beginning at 10:00AM. The Parties are to keep me apprised of progress and any impasses. I expect the Parties to make substantial progress on their own so that we see substantial, concrete progress by the time we meet in August 2014.

The purpose of these meetings is to monitor implementation of my 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.

Comment [RTA9]: Union Counsel/Arbitrator McKissick: The Agency continues to respectfully disagree that oral statements on the Arbitrator's broad interpretation on application of the remedy comport with the stated definition of grievants outlined in the original Opinion and Award.

I 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. Date
Arbitrator

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. Andree Y. McKissick, Esq.

SUMMARY OF IMPLEMENTATION MEETING ORDER

This Arbitrator met with the Parties on August 28, 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 Union were Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, Holly Salamido, Jerry Gross and Sal Viola. Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Craig T. Clemmensen, Mary Pavlik, and Towanda Brooks. This is the fourth Summary of Implementation Meeting Order ("Summary 4"), the first three having been issued on March 14, 2014 ("Summary 1"), May 17, 2014 ("Summary 2"), and August 2, 2014 ("Summary 3"), respectively. The Agency filed Exceptions before the FLRA to the August 2, 2014, Summary of Implementation Meeting Order, and those Exceptions are currently pending. This Order only relates to the Award and the first and second Summary Orders, which are final and binding. This Order does not relate to the August 2, 2014 Summary (Summary 3).

At the August 28, 2014, meeting, the Union raised concerns that the Agency is chilling the negotiated grievance process by requiring Agency employees to speak with management prior to speaking with attorneys from Snider & Associates, LLC, about this case. This Arbitrator informed the

Agency that it was to notify all Bargaining Unit Employees that they do not need to contact management prior to discussing the Fair and Equitable case with the Union's counsel. Specifically, this Arbitrator informed the Agency that the language from Union Counsel's previous email, which states in part, should be used:

1. BUEs may participate in any interview conducted by a firm employee without the need to inform management or receive permission from management.
2. It is illegal for management/supervisors to direct employees not to participate or to in any way discourage participation.

The Parties have had a disagreement concerning the earliest date for the Grievance's damages period. After giving the Parties ample opportunity to work this out between themselves, it is now ripe for me to issue a clarification on the matter. The Agency's position is that the earliest the damages period could begin would be on November 13, 2002, the date of the Grievance. The Union argues that the damages period should begin as early as possible, as this is and has been an ongoing and continuous violation. The Award states that the Agency shall process "promotions within (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002." The Parties agreed that new evidence provided by the Agency in May 2014, showing that the earliest date in 2002 that a violation was found was January 18, 2002. The Parties also agreed that the Agency, when processing the seventeen (17) retroactive promotions described in Summary 1 and Summary 2, had an effective promotion and backpay date prior to November 13, 2002.

The Award is hereby clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed[1]. This ruling is based upon data provided by the Agency to the Union and shared with me at the hearing by the Parties. If the Union or Agency presents additional new evidence or data, this ruling may be further clarified.

[1] This ruling does not yet apply to the eleven employees identified by the Agency during its initial methodology. For the time being, this Arbitrator will take those employees under advisement while the Parties work together to resolve their back-pay date.

The Parties have also disputed the end date for inclusion in the class and have sought clarification on that issue as well. The Agency's position was that no class member could be included after August 8, 2012, the date the Award became final. The Union has argued that the Award states "until the present," and that the Agency's violations have been ongoing and continuous and that the Agency has failed to implement the Award. Based upon the Agency's failure to implement the Award, Bargaining Unit Employees shall continue to be considered class members until the award is fully implemented. August 8, 2012, is an improper cut-off date.

This Arbitrator ordered the Parties to schedule a weekly conference call to discuss all outstanding issues relating to implementation in this case. The Parties are to keep this Arbitrator apprised of progress and any impasses. This Arbitrator continues to expect the Parties to make substantial progress between themselves.

The purpose of the August 28, 2014 implementation meeting was to monitor and oversee implementation of the 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.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1 and 2. The Parties are directed to provide their availability for the next implementation meeting no later than five days after receipt of this Order.

_____ _____

Dr. Andree Y. McKissick, Esq. Date
Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

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

At the onset of the February 4, 2015 Implementation Meeting ("IM"), the Agency noted that it was not waiving any rights it may have by being present at the IM. The Agency further noted that it

intended to invoke its right to call its own witnesses at a future date. The Union had previously provided notice of the possibility of its intention to elicit sworn testimony, but elected not to do so at this IM.

Also at the IM, the Union requested the Agency's position as to whether the Arbitrator had continuing jurisdiction to conduct the IM. The Agency responded that it was reviewing its options in this regard ~~but it did not raise any objection~~.

Comment [H1]: The Agency asserts that its rights include, but are not limited to, raising objections. Further, the Agency is not conceding that employees employed as CIRS are excluded from the exceptions.

At the IM, the Union provided this Arbitrator and the Agency with a presentation concerning its allegations of non-compliance, and implementation for the remaining BUEs. Specifically, the Union noted that to its knowledge: (1) none of the 17 class members had received their performance bonus differential; (2) only one out of the seven employees from the 17 class members who are retired received her revised annuity; and (3) the Union had not received sufficient information as to the TSP contributions for the ten employees from the 17 class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

The Union's presentation stated that even though the Award has been final and binding since August 2012, the Agency has still failed to complete its approach as to its position on the class composition. ~~The Agency has repeatedly failed to comply with this Arbitrator's prior Order(s) to submit its final approach. In spite of these failures, HUD stated that it was not prepared to present any list of class members at this IM. At~~ During the IM, HUD ~~once again~~ requested ~~an~~ the opportunity to present its approach to identification of the class members at the next IM, now scheduled for March 26, 2015. This Arbitrator will allow ~~one last opportunity to~~ the Agency to present its approach on ~~, this time until~~ March 26, 2015, ~~for submission of its approach to identification of class members, which the Agency is warned must comply with this Arbitrator's Award and prior Summaries.~~ This Arbitrator further warned that if the Agency fails to submit its completed approach by the next IM ~~(now scheduled~~

~~for March 26, 2015)~~, this Arbitrator would entertain sanctions against the Agency, including but not limited to the withholding of management officials' salaries. ~~This Arbitrator is willing to entertain sanctions due to the Agency's failure to comply with the Award and Summaries to date.~~

The Union's presentation continued by restating its approach to the class composition based upon this Arbitrator's Award and subsequent Summaries. As noted by this Arbitrator in Summary 1, "[T]he eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award." The Union's presentation revealed that the Job Series identified in the Exhibits as listed in the Award include 42 applicable Job Series, and at a minimum, the Union stated that the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 Job Series at any time during the relevant damages period, so long as the requirements concerning performance and time-in-grade were met. This presentation and interpretation comports with previous statements by this Arbitrator reiterating that the class is easily identifiable and includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements.

At the conclusion of the Union's presentation, the Parties and this Arbitrator informally questioned Mr. Brad Huther, Chief Financial Officer for the Agency. ~~Mr. Huther remarked that to date HUD has not recorded this matter as either a Contingent Liability or as an Obligation.~~ Mr. Huther remarked that he was not personally aware of any recordings of this matter as a contingent liability or obligation, but that he was relatively new to the Agency. Mr. Huther did explain, however, ~~explained~~ that recording a Contingent Liability does not, in itself, guarantee funding based on the liability identified. Mr. Huther further explained that a Contingent Liability constitutes mere notice that a liability may arise in the future. He described ~~stated~~ the general expectations regarding when and how agencies record liabilities and explained that, in some cases, the certainty of the value of a liability is a determining factor. ~~that this omission was in part~~

~~due to the fact that the entire value of the case was~~

Comment [H2]: On January 30, 2015 , the Agency responded that there was nothing in the CBA that mandates identification of management officials, and that the Arbitrator did not have jurisdiction over this issue. The Agency will be filing a formal response to fully address the Arbitrator's purported jurisdiction to entertain sanctions, including the withholding of management officials' salaries.

Comment [H3]: In the Award , the Arbitrator explicitly identifies the class of grievants subject to the Remedy as: All bargaining unit employees in a position in a currently existing career ladder (including at the journeyman level).... Therefore, the requirements also include being in a position with a currently existing career ladder.

Comment [MBP4]: Mr. Huther remarked that he was not aware of any recordings of this matter as a Contingent Liability or Obligation, but that he was relatively new to the Agency.

~~not known.~~ He also stated that to his knowledge no specific request to fund the judgment in this matter had been made, reiterating again that he was relatively new to the Agency.

The purpose of the February 4, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award.

Comment [H5]: The FLRA is the only proper authority for determining whether an arbitrator's writing constitutes a modification.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2 and 4. The next IM will take place on March 26, 2015, beginning at 10:00am.

_____ _____

Dr. Andree Y. McKissick, Esq. Date
Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

This Arbitrator met with the Parties on March 26, 2015, to discuss their progress toward implementing 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., Peter Constantine, Esq., Mercedeh Momeni, Esq., Towanda Brooks, Acting Chief Human Capital Officer ("CHCO"), Michael Moran, Esq., from the Office of Chief Financial Officer ("OCFO"), and Mary Beth Pavlik, Office of the Deputy Secretary. Present for the Union were Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, and Holly Salamido, Union Council President. What follows is a summary of the March 26, 2015 proceedings before the Arbitrator.

Preliminary Matters

At the outset, the Agency reiterated its position and the Arbitrator accepted that HUD's participation in the March 26, 2015 implementation meeting ("IM") did not constitute a waiver of its rights with regard to matters pending before the FLRA and pursuant to the September 2014 exceptions, it had filed with the Authority.

I. Presentation of Agency's Methodology

Pursuant to the Arbitrator's previous instructions that each party present its proposal, including methodology and numbers of awardees, for resolution of this matter, the Agency made its presentation, during this IM, which included an explanation of its approach to the formulation of the methodology.[1] Specifically, the Agency identified all "previously classified positions" that meet the definitions in the Arbitrator's order(s). The Agency took into consideration the FLRA's earlier decision on this case, which stated that 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...". *See Dep't of Housing and Urban Development*, 65 FLRA 433 (2011). The results of this data driven exercise, as explained below, identified 439 individual claimants.

The Agency explained that in order to identify previously classified positions, it searched the National Finance Center ("NFC") Database for all new, external hires ("accessions") with AFGE bargaining unit ("BU") status who entered the Agency with a grade lower than Grade 12, and with a full promotion level ("FPL") of Grade 13. HUD's methodology did not include employees who were part of an externally regulated career ladder program (Presidential Management Fellows, Federal Career Intern Program Participants, etc.). This is based on the fact that employees hired under externally regulated career ladder programs, such the PMF and FCI programs, have career ladders that are established pursuant to these programs, and the career ladders are not established by HUD. Because the Fair and Equitable grievance challenged

[1] In a prior implementation summary issued on March 14, 2014, this Arbitrator advised the parties to submit methodologies, and in a subsequent implementation summary issued on May 17, 2014, further advised the parties that if they could not agree upon a methodology, to present alternative methodologies to her. This Arbitrator has verbally stated to the parties that, absent agreement on a methodology, she would select either the Union or the Agency's methodology after each had been presented to her.

HUD's selection and promotion procedures, employees hired pursuant to an externally regulated program would not be included in the subsequent award issued.

The Agency's proposed methodology resulted in a total of approximately 439 claimants, and was based on the Agency's identification of identified all GS-12 employees with FPL to only Grade 12 and with AFGE BU status who were in similar positions to those previously classified positions identified at the time of the violations (time of the external hires). During the presentation, the Agency explained each component of the methodology and expounded that it also wanted to "hand check" a potential 36 additional employees who may be eligible for the award. The Agency indicated its interest in performing the "hand check" because of a potential for the proposed methodology to inadvertently omit the additional 36 employees. Thus, the list of 439 maybe adjusted to include some portion of those 36 additional employees.

The Agency advised that its methodology recognized that field positions and headquarters ("HQ") positions have a different reporting structure and, thus, are not "similarly situated" as required by the Award. *See generally Dep't of Housing and Urban Dev. Merits Award*, p. 15 (Sept. 29, 2009) (McKissick, Arb.) Based upon HUD's position management and OPM classification standards, HQ jobs have a national scope and effect, while Field jobs have a regional and/or localized scope and effect.

The Agency further advised that, consistent with the Arbitrator's instructions to the parties, that its proposed methodology consisted of the following: it was data-driven, captured all of the witnesses and those similarly situated to the witnesses at the time of the violations, and identified the Agency's listing of Public Housing Revitalization Specialist (PHRS) and Contract Industrial Relations Specialist (CIRS) employees as part of its proposed claimant list.

The Union objected to the Agency's use of any HQ/Field distinction, suggesting that the HQ/Field reporting structure was actually a means of limiting the award. The Union alleged that

there was no meaningful distinction between HQ and Field positions, and asserted that employees could "apply and be qualified" from HQ to the Field, and vice versa. The Agency rebutted this suggestion by noting that, due to the reporting structure and scope and effect on the classification of positions at HUD, HQ and Field positions were not "similarly situated positions" for the HQ/Field filter being used. The Agency reiterated that claimants would need to be similarly situated to the harmful hires – where a lower-graded employee with promotion potential to grade 13 was hired when a GS-12 employee already encumbered a position with a promotion potential to the grade 12. Citing directly to the findings of the FLRA, the Agency advised this Arbitrator and the Union that its proposed methodology incorporated FLRA's acknowledgment for this Arbitrator's identification of "previously classified positions" as newly created positions with a promotion potential to GS-13 level. The Agency further referred the Arbitrator and Union to FLRA's decision at *Dep't of Housing and Urban Development*, 65 FLRA 433, 436 (2011).

The Union appeared to concur with the Agency's proposed claimant list of 439; however, it still claimed that the final list should include additional employees from its list of 3,777. During the meeting, Union counsel specifically asked if the Agency was conceding that the list of its proposed claimants was part of the class. The Agency responded that, if the Arbitrator accepted its proposed methodology, than the proposed claimant list would constitute the entire class. The Union, however, took the position that the claimant list should indeed be larger and inquired as to whether HUD could begin piecemeal compliance and start to provide the remedy to the Agency's proposed claimant list of 439. The Agency responded that its proposed methodology constituted the complete universe of what it claims constitutes the class of claimants.

The Agency also noted that the Arbitrator's previous representations to the parties that, absent agreement, she would have both sides identify and present methodologies for her consideration. The Arbitrator also represented to the parties during prior IMs that she would then

choose a methodology on how to proceed with compliance over her Award. Consistent with the Arbitrator's previous statements on this subject, the Agency requested that, in her next IM Summary, she instruct the parties which methodology should be used to implement the Award.

The Agency demonstrated that the Union's methodology was inappropriate for implementation, and provided the following specifics:

1. Preliminarily, the Union's claim that HUD had inappropriately used "limiting factors" to "reduce" the number of awardees, from 3,777 to 439 claimants was incorrect. In fact the Agency used the terms and conditions promulgated by Arbitrator in her orders and used them in context to develop and define the class. The Agency also noted that by making a Field and HQ distinction and not including PMFs in its identification process it was not attempting to limit or an expand the Union's claimant list, but simply devise a methodology based on the proper interpretation of the Arbitrator's orders.
2. The Union's methodology did not appear to take into account whether a "newly created," "previously classified position" existed in its identification of claimants.
3. The Union's methodology did not comport with the temporal guidelines of the Award, in that its list shows that as long as a violation occurred at some point during the 2002-2012 (approx.) claims period, a BUE would automatically be deemed a claimant. Therefore, the Union's list did not accurately address remedying the harm at issue, because employees would receive the remedy prior to the date of the harm, according to valid data from the NFC database that identified the accession date when a new hire became a HUD employee in one of the positions with a promotion potential to grade 13.

The Agency also stated that, based upon a review of historical data prepared in connection with the development of the methodology for this case, HUD had, in fact, maintained a good balance of internal and external hiring during the years covered by the claims period. The

Agency provided charts outlining data showing that: (1) overall as an agency, and (2) individually at the HQ and Field levels, HUD consistently had a higher number of promotions from internal employees, compared to outside hires, also called accessions..

The Arbitrator asked Michael Moran from the OCFO, about the feasibility of HUD initiating a piecemeal implementation, starting with the list of 439 employees identified by HUD. Mr. Moran responded that piecemeal implementation would not be a prudent way to proceed with compliance. Mr. Moran advised that HUD did not have the funds to initiate the remedy for the proposed claimant list of 439 employees for all of the accounts (by program office, year and individual employee), and funds from specific accounts would be necessary in order for HUD to process the retroactive promotions.

Mr. Moran further stated that if the Agency was forced to engage in immediate and piecemeal action of this nature, the likely result would be that it would have to submit an Anti-Deficiency Act report to the Congress, and a request for a deficiency appropriation. Mr. Moran further stated that, typically, when an agency submits a request for a deficiency appropriation, Congress would require the finalized number, and that the open-ended scenario proposed by the Arbitrator and Union would not be feasible.

The Arbitrator stated that she highly appreciated the Agency's methodology and approach but did not agree with the number of claimants identified by HUD, because she felt that HUD's numbers were low. The Arbitrator specifically explained that although she did not agree with the Agency's number, that she would not necessarily be inclined to accept the Union's number, either. Rather, if the Agency could increase its number of 439 and add 1,000 – 2,000 additional employees to its claimant list, that she may be satisfied. The Arbitrator also advised the parties that henceforth, she would be approaching the proceeding as a negotiation/mediation process, and asked for the parties to "come to the middle," as she felt that the Agency's failure to

previously respond to her orders to produce documents constitute adverse inferences. She noted that it was her opinion that the Award needs to be construed as broadly as possible to remedy the employees she believes were harmed in this case. She noted her preference to keep the compliance process "loose and wiggly."

The Arbitrator also requested that the Agency return to the proverbial drawing table and attempt and "tweak" its methodology to assess if more HUD employees could be included. The Agency reiterated that the proposed claimant list of 439, with the exception of some portion of an additional 36 employees, comprised the Agency's methodology. It advised the Arbitrator that based on its methodology, it did not anticipate broadening the claimant list. The Agency also restated its request that, based upon its reliance upon the Arbitrator's previous representations, that she now choose between the Union and Agency's methodologies and advise the Parties which methodology she selected to effectuate compliance with her Award.

II. Miscellaneous

Following the presentation of the Agency's proposed methodology and questions from the Union and Arbitrator, the Parties discussed additional, general matters related to compliance. The Union requested an update on the status of the Agency's response to a data request for Thrift Saving Plan ("TSP") information. The Agency responded that, based upon discussions with TSP counsel over the Union's request, that it would not be able to provide the requested TSP information because the data requested is within the sole discretion of the TSP, and cannot be disclosed by HUD, absent individual waivers.

The Arbitrator also requested copies of documents cited to by the parties in their filings to her. Regarding the request for an update on the status of recalculated annuities for retired grievants, the Arbitrator discussed having the Deputy Secretary or CHCO contact the Office of Personnel Management ("OPM") directly on the status on payments stemming from revised

annuities and to encourage OPM to expedite the processing of claimant payments. The Acting CHCO advised that she would initiate contact with OPM. The Arbitrator further requested the contact information for OPM to discuss the status of payments to claimants that have retired.

III. Next Implementation Meeting

The Arbitrator advised that she is available on June 2 or June 10, 2015, to schedule another IM between the parties, and requested to know the parties' availability. HUD stated that it would provide counsel and other relevant HUD personnels' availability, but now having presented its methodology, it would await a decision from the Arbitrator as to the preferred methodology for implementation before participating in further implementation meetings.

_____ _____

Dr. Andree Y. McKissick, Esq. Date
Arbitrator

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

On February 4, 2014, this Arbitrator met with the Parties to discuss 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, and Kathryn Brantley. 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.

After this Award was issued, the Agency filed Exceptions, which were dismissed by the FLRA on August 8, 2012. The Award became final and binding on that date.

In the Award, this Arbitrator ordered:

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

The Award further defined the class of Grievants subject to the Remedy as follows: All Bargaining Unit Employees in a position in a career ladder (including at the journeyman level), where the 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.

The purpose of the implementation meeting was to clarify the members of the class that was defined in this Arbitrator's January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award. Rather, the meeting and this summary were, to the extent necessary, intended solely to clarify with specificity which Bargaining Unit Employees are eligible class members.

The Agency has requested written clarification of this Award (including on August 7, 2013 and November 13, 2013). This Arbitrator indicated that no clarification was necessary as this Award was clear and unambiguous. More recently, however, the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members which it was able to identify. The Union's methodology has identified thousands of potential class members through data provided by the Agency. Despite the clarity of this Award, the Agency has yet to timely implement the Award as ordered.

For example, in this Award, and as clarified in phone conferences with the Parties, all six Bargaining Unit Employees who testified at the hearing on behalf of the Union (also listed below) are eligible class members. The Agency was required to promote them with back pay and interest, which it failed to do. It was then ordered to promote them with back pay and interest by September 1, 2013, which it failed to do. As of today, the Agency "has reviewed the class of Grievants defined in the Opinion and Award and have determined that two [out of the six] employee witnesses are entitled to the back pay and interest payment." (Agency letter dated 12/18/13). The Agency has yet to implement the Award as ordered. This Arbitrator again reiterated at the implementation meeting what was clarified last summer: that based upon this Award as written, all six Union witnesses are eligible class members. This Arbitrator also notified the Agency that its methodology of determining the class members conflicts with the

specific findings in this Award, if the result of its own methodology revealed that only two out of six witnesses were eligible class members.

Moreover, the Parties are at an impasse regarding the appropriate methodology for identifying the class of employees eligible for back pay and promotions. Impasse in implementation is unnecessary because the Award is clear in its definition of the class. The Class definition is data driven, not announcement driven, as is clear from this Award and the Adverse Inference drawn due to the Agency's failure to produce data, as this Arbitrator explained to the Agency previously last spring and summer. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of this Arbitrator's Award.

Pursuant to the Union's December 13, 2012 data request, the Agency provided data to the Union on January 18, 2013 which listed all of the Bargaining Unit Employees that encumbered, per the definition of the Class set forth in the Award, the Job Series referenced in Joint Exhibits 2, 3, 4, & 7G and Union Exhibits 1 and 9.

The six Bargaining Unit employees who testified at the hearing, specifically: (1) Lynna Schonert, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie Lovorn, and (6) Marcia Randolph-Brown similarly fall within the class definition. As such all six are eligible Class Members. The Agency shall process retroactive promotions with back pay and interest, as previously ordered, within thirty (30) days from the date of this Summary.

The Agency shall communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), back pay and interest calculations, payment forms, forms showing

adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.

The Union and Agency shall continue working to identify additional class members as set forth in this Arbitrator's Award and as stated in the meeting, and shall keep the Arbitrator informed of its progress. Another implementation meeting is scheduled to take place at the Agency on March 26, 2014, at 10:00 AM. This Arbitrator expects the Parties to meet in person and/or by phone to work on the identification of additional class members and to submit methodologies for doing so at our March 2014 meeting.

This Arbitrator continues to retain jurisdiction over this matter for all matters relating to implementation as well as an award of attorney fees, costs and expenses.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

3-14-2014
Date

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

This Arbitrator met with the Parties on March 26, 2014 to discuss the progress of the Parties with the implementation of the January 10, 2012, Opinion and Award (the "Award") in the above captioned matter. Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Jim E. Fruge (by phone), and Kathryn Brantley (by phone). Present for the Union were Michael J. Snider, Esq. from Snider & Associates, LLC, and Carolyn Federoff, EVP, from AFGE Council of Locals, 222 (by phone).

As set forth in this Arbitrator's Summary of the Implementation Meeting held February 4, the Agency was to accomplish the following:

1. Process retroactive promotions with back pay and interest for all six witnesses within thirty (30) days from the date of the Summary (March 14, 2014);
2. Communicate with the Union promptly concerning implementation of back pay and interest for all six witnesses, including providing copies of all forms, back pay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc.
3. Meet with the Union to identify additional class members as set forth in the Award and to submit methodologies for doing so at the March 26, 2014 Implementation Meeting.

During our prior meeting, this Arbitrator noted that the Agency's methodology of identifying class members entitled to relief under the Award was inadequate. Thus, this

Arbitrator directed the Parties to meet and agree on a methodology, or to present alternative methodologies at our March 26, 2014 meeting.

During our prior meeting, this Arbitrator noted that the Agency had omitted to promote the six witnesses who testified at the hearing, with back pay and interest. Upon explaining that the Agency was incorrect with its interpretation, and once that was clarified, the Agency replied that it would promote those individuals with back pay and interest. As of our meeting on March 26, 2014, the Agency had not yet completed the process of retroactively promoting four out of the six witnesses, had not paid those four any back pay and had not paid any of the witnesses their full back pay and interest.

Although the Agency has not paid any of these six witnesses in full, it has consistently advised that it has a pending request for the authorization to transfer funds that is subject to OMB (Office of Management and Budget) approval. The Agency also advised that this position is based upon guidance received from officials in the Agency's Office of Chief Financial Officer (OCFO), who are responsible for ensuring the fiscal responsibility of the Agency and its individual program offices.

Specifically, the Agency's OCFO has identified deficiencies in prior year funds for the Office of Public and Indian Housing, which is the program office primarily responsible for effectuating back pay and retroactive promotion actions for the witnesses. The Agency has further advised that OCFO staff continue to engage with OMB on fulfilling the Department of Housing and Urban Development's (HUD) request to transfer the funds necessary to fully compensate the witnesses.

The Agency has since indicated that it had begun the process of initiating payment to the four remaining witnesses. The Agency has further indicated that its payroll and personnel staff have a review process consistent with all cases in which it must implement for back pay and retroactive actions. Consistent with its established office practice, payroll and personnel staff are

currently employing its standard protocols and procedures in fulfilling back pay and retroactive promotion actions for the witnesses.

Additionally, the Agency has not yet provided the Union with any of the forms, calculations, or other evidence of retroactive promotion or calculation and payment of back pay for the witnesses.

The six Bargaining Unit employees who testified at the hearing, specifically: (1) Lynna Schonert, (2) Victoria Reese-Brown, (3) Melanie Hertel, (4) Julia A. McGuire, (5) Bonnie Lovorn, and (6) Marcia Randolph-Brown all fall within the class definition. As such all six are eligible Class Members. The Agency has not paid any of these six witnesses in full, nor has it stated that it intends to, short of OMB approval. This is not in compliance with this Arbitrator's Award, or the Summary of the February 4, 2014, Implementation Meeting.

The Agency has since indicated that it had begun the process of initiating payment to the four remaining witnesses, but that the process was complicated, protracted and that none of the six witnesses would be paid in full by April 14, 2014, due to alleged deficiencies in prior year funds.

The Agency is directed to provide to the Arbitrator and Union copies of all communications with OMB. If the Agency believes that any of its communications with OMB are privileged or otherwise not releasable to the Union, it shall provide them to the Arbitrator for *in camera* review, and the Arbitrator will decide whether they should be released. In either case, the Agency shall provide the Union with a summary of the general information contained in the communications. The Agency shall provide to the Union and Arbitrator copies of all policies, laws, rules and regulations relied upon to not pay the witnesses until OMB provides approval. All of the items in this paragraph shall be accomplished within two weeks of the date of this Summary.

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

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

In the prior Summary this Arbitrator noted that the Agency had unilaterally determined, based upon its own methodology, that there are a minimal number of class members which it was able to identify, including only two of the six witnesses. As set forth in the prior Summary, any methodology that failed to identify each of the six witnesses as class members is by definition flawed. The Agency insists that it is unclear of this Arbitrator's Award and thus prefers to interpret the Award narrowly. However, the Agency was informed that while it may disagree with this Award, it must nevertheless implement the Award as written – not as the Agency unilaterally interprets it. It was explained again that this Arbitrator intends for this Award to be interpreted broadly, so as to apply to the largest class of Grievants possible.

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

previously mentioned last spring and summer and in the prior Summary. The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of this Arbitrator's Award.

As discussed at the March 26, 2014, meeting, the appropriate portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that the witnesses who testified at the hearing were in two job series, GS-1101 and GS-236. Employees encumbering those job series are clearly within the scope of the Award, although they comprise a small portion of the job series covered by the Award, and therefore will serve as the basis for the next round of Grievants to be promoted with back pay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others), the PHRS group is discrete and therefore the Parties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with back pay and interest, among other relief. The Parties were directed to then move on to the CIRS (Contract Industrial 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.

The Union requested quarterly Bargaining Unit Lists in December 2012, to assist in implementation of the Award. The Agency represents that it cannot produce quarterly Bargaining Unit Lists but that it can and will produce annual Bargaining Unit lists on a Fiscal Year basis in electronic format. The Agency was and is directed to provide the Union with annual Bargaining Unit Lists in electronic format within two weeks of the date of this Summary,

as well as a current Bargaining Unit List, and shall appoint a Point of Contract in its IT department to work with a Union appointee to work on a method of providing the Union with the data that it requested in the form of quarterly Bargaining Unit Lists, in order to identify class members and their eligibility with particularity. The Point of Contact (POC) shall be identified within two weeks of the date of this Summary.

At the March 26, 2014 meeting, the Agency, for the first time, presented a statement that it believed that the retroactive promotions and back pay should only be processed retroactively from November 2002. This was not agreed to by the Union and this Arbitrator did not approve of this at any time. The Union proposed either August or September 2002 as a retroactive promotion/payment date. The Parties are directed to discuss the back pay/retroactive promotion date together and to either come to an agreement or to submit the matter to this Arbitrator for a decision.

As previously ordered, the Agency is required to communicate with the Union concerning the implementation of the previously ordered Remedy No. 1, as clarified in this Clarification. Copies of all forms (including SF-52 and SF-50), back pay and interest calculations, payment forms, forms showing adjusted retirement annuities, etc., shall be provided to the Union in a prompt and timely manner. All forms and calculations for previous payments shall be provided to the Union as well.

In light of the failure to come up with any alternative methodology to that of the Union for identifying class members, despite this Arbitrator's instructions to do so, the Agency was instructed that the Award is to be construed broadly and to implement it in that manner. While the Award covers all GS-1101 employees who were not promoted to the GS-13 level in 2002 (among others), the PHRS group is discrete and should be easily identified. Therefore the Parties were directed to work through the GS-1101 series, beginning with the PHRS employees, to identify all employees and to work to have them retroactively promoted with back pay and

interest, among other relief. The Parties were directed to then move on to the other GS-1101 employees and the CIRS (Contract Industrial Relation Specialist) employees in the GS-246 series, and then others in that series, and then others in other applicable job series, until implementation is complete.

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 is progress.

The Parties are to meet in person or by phone no less than two times prior to our next meeting, which will be on June 12, 2014. The Parties are to keep this Arbitrator apprised of progress and any impasses. This Arbitrator expects the Parties to make substantial progress on their own; so that we see concrete progress by the time we meet again in July 2014.

The purpose of these meetings is to monitor implementation of the January 10, 2012 Award. Nothing discussed or stated at the meeting should be construed as a new requirement or modification of the existing Award.

This Arbitrator continues to retain jurisdiction over this matter for all matters relating to implementation as well as an award of attorney fees, costs and expenses.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

May 17, 2014

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,

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. Andrée Y. McKissick, Esq.
Arbitrator

August 2, 2014

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IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

This Arbitrator met with the Parties on August 28, 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 Union were Michael J. Snider, Esq. and Jacob Y. Statman, Esq., from Snider & Associates, LLC, Holly Salamido, Jerry Gross and Sal Viola. Present for the Agency were: Tresa A. Rice, Esq., Javes Myung, Esq., Craig T. Clemmensen, Mary Pavlik, and Towanda Brooks.. This is the fourth Summary of Implementation Meeting Order ("Summary 4"), the first three having been issued on March 14, 2014 ("Summary 1"), May 17, 2014 ("Summary 2"), and August 2, 2014 ("Summary 3"), respectively. The Agency filed Exceptions before the FLRA to the August 2, 2014, Summary of Implementation Meeting Order, and those Exceptions are currently pending. This Order only relates to the Award and the first and second Summary Orders, which are final and binding. This Order does not relate to the August 2, 2014 Summary (Summary 3).

At the August 28, 2014 meeting, the Union raised concerns that the Agency is chilling the negotiated grievance process by requiring Agency employees to speak with management prior to speaking with attorneys from Snider & Associates, LLC, about this case. This Arbitrator informed the Agency that it was to notify all Bargaining Unit Employees that they do not need to contact management prior to discussing the Fair and Equitable case with the Union's counsel. Specifically, this Arbitrator strongly recommended that the Agency should consistently utilize the following language:

1. BUEs may participate in any interview conducted by a firm employee without the need to inform management or receive permission from management.

2. It is illegal for management/supervisors to direct employees not to participate or to in any way discourage participation.

This language was based in part on the Union's counsel's previous email. Although the Agency claims that these allegations could not be substantiated, the Arbitrator finds that the Union's version of events to be credible.

The Parties have had a disagreement concerning the earliest date for the Grievance's damages period. After giving the Parties ample opportunity to work this out between themselves, it is now ripe for this Arbitrator to issue a clarification on the matter. The Agency's position is that the earliest the damages period could begin would be on November 13, 2002, the date of the Grievance. The Union argues that the damages period should begin as early as possible, as this is and has been an ongoing and continuous violation. The Award states that the Agency shall process "promotions with (30) thirty days, and calculate and pay affected employees all back pay and interest due since 2002." The Parties agreed that new evidence provided by the Agency in May 2014, showing that the earliest date in 2002 that a violation was found was January 18, 2002. The Parties also agreed that the Agency, when processing the seventeen (17) retroactive promotions described in Summary 1 and Summary 2, had an effective promotion and back pay date prior to November 13, 2002.

The Award is hereby clarified that the damages period begins on January 18, 2002, which was the first date in 2002 that a violation was shown to have existed.[1] This ruling is based upon data provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties. If the Union or Agency presents additional new evidence or data, this ruling may be further clarified, in contradistinction to a modification as the Agency alleges.

The Parties have also disputed the end date for inclusion in the class and have sought clarification on that issue as well. The Agency's position was that no class member could be included after August 8,

[1] This ruling does not yet apply to the eleven employees identified by the Agency during its initial methodology. For the time being, this Arbitrator will take those employees under advisement while the Parties work together to resolve their back-pay date.

2012, the date the Award became final. The Union has argued that the Award states "until the present," and that the Agency's violations have been ongoing and continuous and that the Agency has failed to implement the Award. Based upon the Agency's failure to implement the Award, Bargaining Unit Employees (BUEs) shall continue to be considered class members until the award is fully implemented. In light of the foregoing analysis, August 8, 2012, is an improper cut-off date, and contradicts the Award.

This Arbitrator ordered the Parties to schedule a weekly conference call to discuss all outstanding issues relating to implementation in this case. The Parties are to keep this Arbitrator apprised of progress and any impasses. This Arbitrator continues to expect the Parties to make substantial progress between themselves.

The purpose of the August 28, 2014 implementation meeting was to monitor and oversee implementation of the 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.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1 and 2. The Parties are directed to provide their availability for the next implementation meeting no later than five (5) days after receipt of this Order. The next Implementation Meeting is now scheduled for February 4, 2015 at 10:00 AM at the Agency's address.

Dr. Andrée Y. McKissick, Esq.,
Arbitrator

January 10, 2015

IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

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

At the onset of the February 4, 2015 Implementation Meeting ("IM"), the Agency noted that it was not waiving any rights it may have by being present at the IM. The Agency further noted that it intended to invoke its right to call its own witnesses at a future date. The Union had

previously provided notice of the possibility of its intention to elicit sworn testimony, but elected not to do so at this IM.

Also at the IM, the Union requested the Agency's position as to whether the Arbitrator had continuing jurisdiction to conduct the IM. The Agency responded that it was reviewing its options in this regard but it did not raise any objection.

At the IM, the Union provided this Arbitrator and the Agency with a presentation concerning non-compliance and implementation for the remaining Bargaining Unit Employees (BUEs). Specifically, the Union noted that: (1) none of the 17 class members had received their performance bonus differential; (2) only one out of the seven employees from the 17 class members who are retired received her revised annuity; and (3) the Union had not received sufficient information as to the Thrift Savings Plan (TSP) contributions for the ten employees from the 17 class members who were or are enrolled in FERS. This Arbitrator ordered the Agency to provide a detailed update as to the status of the recalculated annuities and the TSP contributions no later than February 16, 2015.

On February 18, 2015, the Agency complied with a submission which contained contact information for HUD's touch point at the Office of Personnel Management (OPM) regarding retirement annuity calculations and an update on the TSP information requested for the seventeen (17) claimants. However, the sufficiency of this submission has yet to be examined by the Union or this Arbitrator. This Arbitrator further ordered the Agency to provide a detailed update as to the status of the performance bonus differential at the next IM.

The Union's presentation stated that even though the Award has been final and binding since August 2012, the Agency has still failed to complete its approach as to its position on the class composition. The Agency has repeatedly failed to comply with this Arbitrator's prior Order(s) to submit its final approach. In spite of these failures, HUD stated that it was not prepared to present any list of class members at this IM. At the IM, HUD once again requested an

opportunity to present its approach to identification of the class members. This Arbitrator will allow one last opportunity to the Agency, this time until March 26, 2015, for submission of its approach to identification of class members, which the Agency is warned must comply with this Arbitrator's Award and prior Summaries. This Arbitrator further warned that if the Agency fails to submit its completed approach by the next IM (now scheduled for March 26, 2015), this Arbitrator would entertain sanctions against the Agency, including but not limited to the withholding of management officials' salaries. This Arbitrator is willing to entertain sanctions due to the Agency's failure to comply with the Award and Summaries to date. However, the Agency has recently informed the Arbitrator that a formal response regarding the appropriate sanctions shall be forthcoming. Moreover, the Agency is now also challenging the Arbitrator's jurisdiction to evoke these aforementioned sanctions.

The Union's presentation continued by restating its approach to the class composition based upon this Arbitrator's Award and subsequent Summaries. As noted by this Arbitrator in Summary 1, "[T]he eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award." The Union's presentation revealed that the Job Series identified in the Exhibits as listed in the Award include 42 applicable Job Series, and at a minimum, the Union stated that the applicable class consists of at least all GS-12 employees who encumbered a position in any of those 42 Job Series at any time during the relevant damages period, so long as the requirements concerning performance and time-in-grade were met. This presentation and interpretation comports with previous statements by this Arbitrator reiterating that the class is easily identifiable and includes any employee who encumbered any position in any of the Job Series identified in the Exhibits as noted in the Award and presented by the Union, at any time during the relevant damages period so long as that employee met the required time-in-grade and performance requirements.

At the conclusion of the Union's presentation, the Parties and this Arbitrator informally questioned Mr. Brad Huther, Chief Financial Officer (CFO) for the Agency. Mr. Huther remarked that to date HUD has not recorded this matter as either a Contingent Liability or as an Obligation. He stated that this omission was in part due to the fact that the entire value of the case was not known. He also stated that to his knowledge no specific request to fund the judgment in this matter had been made. However, CFO Huther also stated that he was relatively new to the Agency at this juncture.

The purpose of the February 4, 2015, IM was to monitor and oversee implementation and compliance of the Award. Nothing discussed or stated at the meeting or in this Summary should be construed as a new requirement or modification of the existing Award.

Even with the pendency of the Agency's Exceptions, this Arbitrator continues to maintain jurisdiction over the Award and Summaries 1, 2 and 4. The next IM will take place on March 26, 2015, beginning at 10:00 AM.

Dr. Andrée Y. McKissick, Esq.,
Arbitrator

February 27, 2015

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IN THE MATTER OF ARBITRATION BETWEEN:

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

SUMMARY OF IMPLEMENTATION MEETING

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

I. Status of Outstanding Compliance Issues

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

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

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

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

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

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

II. Orders on Outstanding Motions

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

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

III. Identification of Class Members

a. Background

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

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

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

Summary 1 (emphasis added).

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

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

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

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

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

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

> failure to produce evidence, as I told the Agency previously last spring and summer and in my prior Summary. **The eligible class members are easily identified by listings of employees who encumbered positions in Job Series identified in the Exhibits as listed in the Award, during the relevant time frame of 2002 until 2012, and ongoing until the Agency ceases and desists from posting positions that are violative of my Award.**
>
> The Parties and I discussed at the March 26, 2014 meeting which portion of the eligible class of Grievants would be the easiest to identify, so as to begin implementation of the Award with undisputed class members. It became apparent through discussion that **the witnesses who testified at the hearing were in two Job Series, GS-1101 and GS-236. These Job Series are clearly within the scope of the Award, although they comprise a small portion of the Job Series covered by the Award**, and therefore will serve as the basis for the next round of Grievants to be promoted with back pay and interest. A subset of the GS-1101 series is the PHRS (Public Housing Revitalization Specialist) job title. **Although the Award covers all GS-1101 employees who were not promoted to the GS-13 level (among others)**, the PHRS group is discrete and therefore the Parties were directed to work through the GS-1101 series to identify all eligible class members in the PHRS position, and to work to have them retroactively promoted with back pay and interest, among other relief. The Parties were directed to then move on to the CIRS (Contract Industrial Relations Specialist) employees in the GS-246 series, the other GS-1101 employees, and then others in other applicable Job Series, until implementation is complete.

Summary 2 (emphasis added).

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

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

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

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

(Summary 2, emphasis added).

b. The Agency's Methodology

i. Agency Presentation

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

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

ii. Union's Comments on Agency Methodology

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

iii. Arbitrator's Analysis and Findings Regarding Agency Methodology

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

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

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

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

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

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

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

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

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

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

iv. Ruling on Remaining Class Members

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

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

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

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

v. Additional Issues and Conclusion

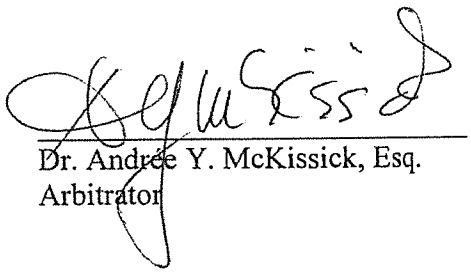
This Arbitrator has expressed concern about HUD's stated inability to pay for the damages pursuant to the Award and Summaries. Mr. Brad Huther, Chief Financial Officer for the Agency remarked in February 2015 that, to date, HUD has not recorded this matter as either a Contingent Liability or as an Obligation.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

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

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

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

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



Dr. Andrée Y. McKissick, Esq.
Arbitrator

May 16, 2015

AFGE Council 222 v. U.S. Department of Housing & Urban Development
(Fair & Equitable Grievance)
July 17, 2014
Request for Information Pursuant to 5 U.S.C. §7114(b)

AFGE Council 222 (the "Union") hereby incorporates by reference all previously filed Requests for Information. Pursuant to the background information, generalized statement of particularized need, and case law contained therein the Union now requests:

1. A copy of any and all: (a) TSP election forms; and (2) TSP statements covering the time period from 2002 until the present for each of the seventeen (17) employees that have been under FERS for any time period between 2002 until the present.

Particularized Need: The Union requires this information in order to ascertain with specificity the damages owed to BUEs as a result of the Fair and Equitable Grievance.

Please continue to note the undersigned's appearance and forward all responses to the contact information shown below.

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Respectfully Submitted,

/s/

Jacob Y. Statman, Esq.
Snider & Associates, LLC

AFGE Council 222 v. U.S. Department of Housing & Urban Development
(Fair & Equitable Grievance)
September 11, 2014
Request for Information Pursuant to 5 U.S.C. §7114(b)

AFGE Council 222 (the "Union") hereby incorporates by reference all previously filed Requests for Information. Pursuant to the background information, generalized statement of particularized need, and case law contained therein the Union now requests:

1. Attached as Exhibit A is a list of 3,777 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every individual on the List identify the date he or she joined the Agency as well as his/her grade, step, series, and position on his/her first day with the Agency.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

2. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every individual on the List identify the date the employee received each and every grade and/or step increase, and the locality, series and position that he or she encumbered on the day of said increase.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

3. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every individual on the List identify whether or not the employee is currently with the Agency. For every BUE that is no longer with the Agency, provide his/her last known address, phone number and/or email address.

Particularized Need: The Union requires this information so that it can contact affected BUEs and confirm all data and calculations provided by the Agency.

4. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every individual on the List identify whether he/she retired from the Agency, and if so, the date of retirement.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

5. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. Identify which retirement system (FERS, CSRS or Other) each individual is or was enrolled.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

6. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every FERS enrollee (as listed in your response to Request No. 5), identify his/her historical TSP contributions from 2000 until the present. Including, but not limited to: the percentage or amount contributed by the employee and the fund(s) selected for investment.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

7. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every employee no longer with the Agency (as identified in response to Request No. 3) identify the amount the employee received as an annual leave payout and the number of hours for which it was paid.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

8. Attached as Exhibit A is a list of 3,377 BUEs (the "List"). The Union believes that all of the employees included on the List are eligible for relief in this case. For every individual on the List identify the employee's annual performance rating from 2002 until the present and the accompanying cash award.

Particularized Need: The Union requires this information so that it can calculate with specificity the damages to which each BUE is entitled in this case.

Please provide the responsive data in digital form wherever possible. If the responsive data is contained in a spreadsheet or database, please provide the data in that format as well. The Union understands that the data requested will take a significant amount of time to respond to adequately. The Union requests the all responsive data is provided immediately, in piece meal, as it becomes available. The Union further requests weekly conferences to discuss the status of the responses.

Please continue to note the undersigned's appearance and forward all responses to the contact information shown below.

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Respectfully Submitted,

/s/

Michael J. Snider, Esq.
Snider & Associates, LLC

No.	Column1	MaxOfFY	CountOfFY	NAME	GR
1	2001	2009	9	AARON, AGNES	12
2	2009	2013	5	ABALOS, IRMA D.	12
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3722	2011	2013	3	WRIGHT, LESLEY N.	12
3723	2001	2011	11	WRIGHT, LISA Y.	12
3724	2001	2013	13	WRIGHT, ROBERT	12
3725	2001	2006	6	WRIGHT, SALLY N.	12
3726	2001	2006	6	WRIGHT, SANDRA J.	12
3727	2005	2006	2	WRIGHT, SHERIDA L.	12
3728	2009	2013	5	WRIGHT, SUZANNE E.	12
3729	2008	2010	3	WRIGHT, VALORIE D.	12
3730	2001	2004	4	WRZESC, JOHN M.	12
3731	2001	2013	13	WU, PAULINA	12
3732	2012	2013	2	WUEST, JAMES W.	12
3733	2012	2013	2	WYATT, DELORES J.	12
3734	2001	2005	5	WYCKOFF, JANE E.	12
3735	2011	2013	3	WYLEY, DELCENIA	12
3736	2001	2009	9	WYSOCKI, JOANNA C.	12
3737	2001	2012	12	YABLONSKIE, ROBERT B.	12
3738	2001	2013	13	YAMAMOTO, CRISTINA V.	12
3739	2004	2010	7	YANETTA, JANICE O.	12
3740	2001	2005	5	YANKEY, MARGARET G.	12
3741	2006	2010	5	YATES, GREGORY P.	12
3742	2001	2003	3	YEAROUT, DEBORAH H.	12
3743	2001	2008	8	YEATTS, MARY	12
3744	2009	2010	2	YEH, TANG C.	12
3745	2011	2013	3	YEH, TANG-CHI	12
3746	2012	2013	2	YONG, LIONG W.	12
3747	2011	2013	3	YOUMANS, JAMES L.	12
3748	2005	2013	9	YOUNG II, JOHN L.	12
3749	2001	2013	13	YOUNG, ALPRETT W.	12
3750	2001	2013	13	YOUNG, BARTON	12
3751	2006	2013	8	YOUNG, BRENDA S.	12
3752	2012	2013	2	YOUNG, JOHN P.	12
3753	2001	2013	13	YOUNG, JOYCE L.	12
3754	2001	2007	7	YOUNG, KAREN J.	12
3755	2011	2013	3	YOUNG, KIMBERLY D.	12
3756	2001	2003	3	YOUNG, KIRK A.	12
3757	2011	2013	3	YOUNG, KRISTINA A.	12
3758	2003	2004	2	YOUNG, LA WANDA J.	12
3759	2001	2006	6	YOUNG, LINDA	12

3760	2001	2013	13	YOUNG, MARK G.	12
3761	2001	2011	11	YOUNG, PATRICIA L.	12
3762	2002	2013	12	YOUNG, PHILOMENA L.	12
3763	2003	2004	2	YOUNG, THANN	12
3764	2003	2013	11	YOWTZ, JANIS M.	12
3765	2001	2005	5	YU, JOHN S.	12
3766	2010	2011	2	YUEN, JESSICA	12
3767	2012	2013	2	YUHASZ, AMY E.	12
3768	2001	2006	6	ZAFIROPOULOS, CAROL A.	12
3769	2011	2013	3	ZAIC, JEROME E.	12
3770	2009	2010	2	ZAMBRANO, TONIA M.	12
3771	2008	2013	6	ZARATE, CYNTHIA H.	12
3772	2007	2013	7	ZEGARELLI, JOHN N.	12
3773	2001	2008	8	ZEH, DAVID J.	12
3774	2005	2010	6	ZEISE, DAVID L.	12
3775	2001	2003	3	ZIGLER, PATRICIA A.	12
3776	2001	2002	2	ZUCKER, LAWRENCE	12
3777	2001	2007	7	ZUROWSKI, ROBERT G.	12

AFGE 222 v. U.S. DEPARTMENT OF HUD
FAIR EQUITABLE DAMAGES

Backpay and Interest			
Class Members		3777	
Potential Addl. Members		350 +	
Est. Class Members 2014		150	
Additional Class members to be added for period 1995-2001		950	(new evidence)
Total estimated class members		5227	
Average Claim Backpay/Interest	$	97,000.00	
Total BP&I	**$**	**507,019,000.00**	
Annual Leave Payouts			
Average Payout	$	929.00	
25% Class Retirement		1306.75	
Total Annual Leave	**$**	**1,213,970.75**	
Performance Awards			
Average Claim	$	1,015.00	
100% Class Participation		4077	
Total Class - Perf. Awards	**$**	**4,138,155.00**	
TSP Contribution			
40% FERS Participation		2090.8	
Average TSP Growth (7% @ 5% - 3% Contrib)	$	12,500.00	
Total TSP	**$**	**26,135,000.00**	
CSRS Catch-Up			
Average Payout	$	28,000.00	
25% Class Retirement		1306.75	
Total CSRS Catch-Up	**$**	**36,589,000.00**	
Implementation / Taxes (10%)	**$**	**64,211,415.09**	
Attorney Fees / Oversight	**$**	**40,000,000.00**	
Total	**$**	**679,306,540.84**	
Gross-up on BPA portion	$	40,989,690.06	
Total including Gross-up on BPA	**$**	**720,296,230.90**	

FEDERAL MEDIATION AND CONCILIATION SERVICE
IN THE MATTER OF ARBITRATION BETWEEN:

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

SUBPOENA DUCES TECUM

TO: Mary Beth Pavlik
U.S. Department of Housing & Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

GREETING:

YOU ARE HEREBY COMMANDED, that, all business and excuses being laid aside, you must appear and attend before Arbitrator Andree Y. McKissick, acting under the arbitration laws of the United States, at the Department of Housing & Urban Development in Washington, D.C., in a room to be determined on February 4, 2015, at 10:00am, to testify and give evidence in this arbitration, then and there to be held between the above captioned Parties. Said witness is to be then and there prepared to testify concerning all aspects of the above captioned matter, and shall bring all documents listed in **Attachment A,** hereto. Failure to appear and/or provide the requested documentation may result in the issuance of sanctions including adverse inference that the requested testimony and/or documentation would have been harmful to the Agency's case.

Requested by:
AFGE Council of Locals,
Council 222

Signed: _____
Arbitrator Andree Y. McKissick, Esq.

Dated: _____

ATTACHMENT A TO SUBPOENA DUCES TECUM

DEFINITIONS AND INSTRUCTIONS

The following terms shall have the meanings indicated for purposes of this subpoena:

1. "Any" means "each and every" as well as "any one."

2. "And" and "or" shall be construes conjunctively or disjunctively, as necessary to make the request inclusive rather than exclusive.

3. "Award" means the Remedial Award issued by Arbitrator McKissick on January 10, 2012, and upheld by the FLRA on August 8, 2012.

4. Any reference to a person other than a natural person includes employees, agents, officers, directors, representatives, parents, and subsidiaries of that entity.

5. The singular includes the plural and vice versa.

6. "Relating to" and "pertaining to" means and includes containing, referring to, alluding to, responding to, concerning, connected with, commenting on, in respect of, about, regarding, discussing, showing, describing, mentioning, analyzing, reflecting or constituting.

7. "Document" or "documents" means the original and copies of any existing printed, typewritten, handwritten, computer generated or otherwise recorded material of whatever character including without limitation, letters, memoranda, bulletins, emails, telegrams, notes, notebooks, transcripts, diaries, minutes and other records of meetings, photographs, computer printouts or any other data storage medium, tapes, and other recordings or other data compilations providing the requested information; any correspondence and other written communication; and books, pamphlets, manuals, brochures and guides; any contracts, reports, studies, invoices and receipts; and all other documentary material, including any nonidentical copy (whether different from the original because of alterations, notes, comments, or other material contained thereon or attached thereto, or otherwise) and including all drafts of documents as well as final versions.

8. As to any documents withheld from production on any ground, including privilege, and/or any responsive document that has been withheld or was destroyed, state or describe:
   a. The author;
   b. The recipient;
   c. The date of the original document;
   d. The subject matter of the document;
   e. If destroyed, the date the original document was withheld or destroyed and the person(s) who determined to withhold or destroy it.

REQUESTED DOCUMENTS

1. Copies of, and any and all documents pertaining to, budget submissions and supplemental budget submissions, including drafts, for FY-12, FY-13, FY-14, FY-15, and FY-16.

2. For any of the documents responsive to Request No. 1 that do not contain requests for the funding of the Award in this case, provide any documentation explaining why the funding was not requested.

3. All correspondence, including emails, faxes, and memoranda that you have sent or received to/from any other Agency pertaining to obtaining funding to pay the Award in this case.

4. All documentation pertaining to recording the Award in this matter as an Obligation, pursuant to 31 U.S.C. §1501 *et seq.* or as Contingent Liability.

5. All documents related to the efforts the Agency took to avoid a situation where the Contingent Liability status of this case became an Obligation, thus resulting in an Antideficiency Act violation.

6. All job announcement listings from the MSCS database for all Job Series in HUD from 1990 until the present.

7. A copy of the Vacancy Announcement associated with each MSCS entry.

On September 11, 2014, the Union provided the Agency with a list of 3,777 individuals that it believes are part of the list of eligible class members in this matter. The following requests pertain to those 3,777 individuals. If you require an additional copy of the list please let counsel for the Union know and one will be provided.

8. For every individual on the list, identify the date the employee received each and every grade and/or step increase, and the locality, series and position that he or she encumbered on the day of said increase.

9. For every individual on the list, identify whether or not the employee is currently with the Agency. For every BUE that is no longer with the Agency, provide his/her last known address, phone number and/or email address.

10. For every individual on the list, identify which retirement system (FERS, CSRS or Other) each individual is or was enrolled.

11. For every FERS enrollee (as listed in your response to Request No. 10), identify his/her historical TSP contributions from 2000 until the present. Including, but not limited to: the percentage or amount contributed by the employee and the fund(s) selected for investment.

12. For every employee identified in No. 9 as no longer with the Agency identify the amount the employee received as an annual leave payout and the number of hours for which it was paid.

13. For every individual on the list, identify the employee's annual performance rating from 2002 until the present and the accompanying cash award.

14. For every deceased employee that is on the list, identify any FEGLI payments made or claims paid.

FEDERAL MEDIATION AND CONCILIATION SERVICE
IN THE MATTER OF ARBITRATION BETWEEN:

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

SUBPOENA DUCES TECUM

TO: Craig T. Clemmensen
U.S. Department of Housing & Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

GREETING:

YOU ARE HEREBY COMMANDED, that, all business and excuses being laid aside, you must appear and attend before Arbitrator Andree Y. McKissick, acting under the arbitration laws of the United States, at the Department of Housing & Urban Development in Washington, D.C., in a room to be determined on February 4, 2015, at 10:00am, to testify and give evidence in this arbitration, then and there to be held between the above captioned Parties. Said witness is to be then and there prepared to testify concerning all aspects of the above captioned matter, and shall bring all documents listed in **Attachment A,** hereto. Failure to appear and/or provide the requested documentation may result in the issuance of sanctions including adverse inference that the requested testimony and/or documentation would have been harmful to the Agency's case.

Requested by:
AFGE Council of Locals,
Council 222

Signed: _____
Arbitrator Andree Y. McKissick, Esq.

Dated: _____

ATTACHMENT A TO SUBPOENA DUCES TECUM

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1. "Any" means "each and every" as well as "any one."

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8. As to any documents withheld from production on any ground, including privilege, and/or any responsive document that has been withheld or was destroyed, state or describe:
   a. The author;
   b. The recipient;
   c. The date of the original document;
   d. The subject matter of the document;
   e. If destroyed, the date the original document was withheld or destroyed and the person(s) who determined to withhold or destroy it.

REQUESTED DOCUMENTS

1. Copies of, and any and all documents pertaining to, budget submissions and supplemental budget submissions, including drafts, for FY-12, FY-13, FY-14, FY-15, and FY-16.

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FEDERAL MEDIATION AND CONCILIATION SERVICE
IN THE MATTER OF ARBITRATION BETWEEN:

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

SUBPOENA DUCES TECUM

TO: Brad Huther
Chief Financial Officer
U.S. Department of Housing & Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

GREETING:

YOU ARE HEREBY COMMANDED, that, all business and excuses being laid aside, you must appear and attend before Arbitrator Andree Y. McKissick, acting under the arbitration laws of the United States, at the Department of Housing & Urban Development in Washington, D.C., in a room to be determined on February 4, 2015, at 10:00am, to testify and give evidence in this arbitration, then and there to be held between the above captioned Parties. Said witness is to be then and there prepared to testify concerning all aspects of the above captioned matter, and shall bring all documents listed in **Attachment A,** hereto. Failure to appear and/or provide the requested documentation may result in the issuance of sanctions including adverse inference that the requested testimony and/or documentation would have been harmful to the Agency's case.

Requested by:
AFGE Council of Locals,
Council 222

Signed: _____
Arbitrator Andree Y. McKissick, Esq.

Dated: _____

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IN THE MATTER OF ARBITRATION BETWEEN:

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

* * * * * * * * * * *

ORDER

Having scheduled a hearing for Februaty 4, 2015 on the issue of Noncompliance with this Arbitrator's Award and subsequent clarifications, and having determined that the presence of certain witnesses will be helpful to furthering the matter, it is this 21st day of January, 2015, **ORDERED**:

The Agency is hereby **ORDERED** to provide for the attendance of the following Agency Management Officials for testimony at the hearing scheduled for February 4, 2015, at 10:00 a.m.:

1. Craig Clemmensen
2. Brad Huther, CFO
3. Mary Beth Pavlik

Failure to properly and fully comply with this **ORDER** may result in a sanction against the Agency, including an adverse inference.

Dr. Andrée Y. McKissick, Esq.
Arbitrator

Rice, Tresa A

Subject: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

From: Myung, Javes
Sent: Tuesday, May 05, 2015 5:56 PM
To: 'M Snider'; 'mckiss3343@aol.com'
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Clemmensen, Craig T; Pavlik, Mary E; Salamido, Holly; 'Jacob Statman'; Rice, Tresa A
Subject: RE: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Dr. McKissick,

Based upon the email communications, it is readily apparent that the parties require a signed IM Summary from you, advising of the methodology you have selected for compliance with your award. You have indicated that, absent agreement, you would select a methodology. The record is clear that parties are not able to agree on a methodology; therefore, the time is ripe for you to select a methodology.

Regarding the Union's arguments below, the Agency did not edit those arguments made by the Union during the March 26, 2015, IM. As indicated in its preliminary statement to you on April 28, 2015, the Agency disputes the Union's submission because it does not constitute an accurate description of the March 26, 2015, IM conducted by you. For instance, a review of the Union's IM Summary reveals that pp 4 – to the top of pp 7 restates prior Summaries. The language highlighted from the prior Summaries was not discussed during the March 26, 2015, IM. In addition, the parties have copies of the prior Summaries, so there is no need for the Union's re-statement. Instead, it is the Union who has exaggerated not only the events that transpired at the March 26, 2015, IM, but also the instructions you provided to the parties during the March 26, 2015, IM. For example, the Agency does not dispute your instruction that HUD contact OPM on the status of recalculated annuities. However, we do dispute the Union's "account;" you did not order HUD's Deputy Secretary to initiate contact with OPM. Rather, as accurately identified in its IM Summary submission, HUD's Acting CHCO volunteered during the March 26, 2015, IM to initiate contact with OPM on behalf of the Agency.

Further, as demonstrated by the IM submission provided by HUD, what is undisputed is that the Agency has, in fact, objected to the Union's analysis. The Agency can further attest that its position was noted during the IM as part of the Agency's presentation of its proposed methodology, and is accurately identified in the Agency's IM Summary submission. Instead, the Union has used its submission, and emails such as the one below, in an attempt to raise additional arguments for your consideration, but that were not raised by the Union during the March 26, 2015, IM.

The Agency reiterates, as stated during the IM, that its proposed methodology is based upon a logical and accurate reading of your Award and subsequent instructions to the parties. Further, ***the Agency's IM Summary submission correctly describes what transpired during the parties'*** March 26, 2015 IM. That being said, the Agency looks forward to receiving the signed IM Summary, and identification of your methodology for compliance.

Thank you for your consideration.

Javes Myung
Deputy Assistant General Counsel, Personnel Law Division
U.S. Department of Housing and Urban Development
451 7th St., SW, Rm. 2124
Washington, DC 20410
phone (202) 402-5364
fax (202) 401-7400

From: M Snider [mailto:m@sniderlaw.com]
Sent: Monday, May 04, 2015 6:55 PM
To: mckiss3343@aol.com
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; Clemmensen, Craig T; Pavlik, Mary E; Salamido, Holly; Jacob Statman; Rice, Tresa A
Subject: RE: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Dr. McKissick:

I apologize for this follow up email on this issue, but as I just returned back from a week in Israel today, it struck me upon reading the "Agency Edits" document that HUD has not only deleted the vast majority of the Union's comments and notes – erroneously claiming that they were not mentioned at the IM – but has also edited the Union's arguments! The Agency this time, as on prior occasions, has a differing memory of what was stated at the IM and what was not. The Arbitrator knows what was discussed and the Union included that information, including the Arbitrator's directives to contact OPM (not HUD's "volunteering to do so") etc.

The Agency also urges the Arbitrator to not include excerpts of prior IM Summaries, even though this is a clear practice that has occurred in the prior IM Summaries themselves.

Finally, the Agency appears to claim that its list of 439 class members is in compliance with the Award and prior Summaries. We have shown conclusively that it is not true, and cannot be true. The Arbitrator needs to look at the list provided by HUD after the IM, and the Union's analysis thereof (which is undisputed by HUD) in order to see through HUD's claims. HUD is proposing to ***promote only 41% of the class members in the Job Series listed in the Grievance itself*** – not to mention the vast majority of additional class members in additional Job Series. There is nothing wrong including this analysis in the IM, since the data that was used for the analysis was discussed and HUD committed itself to provide it during the IM, within a short time thereafter.

Thank you for your indulgence.

M Snider, Esq.
Law Offices of Snider and Associates, LLC
The Pikesville Plaza Building
600 Reisterstown Road, 7th Floor
Baltimore, MD 21208

410-653-9060 phone
410-653-9061 fax

m@sniderlaw.com email
www.sniderlaw.com website

From: Rice, Tresa A [mailto:Tresa.A.Rice@hud.gov]
Sent: Tuesday, April 28, 2015 4:32 PM
To: mckiss3343@aol.com
Cc: Constantine, Peter J; MOMENI, MERCEDEH; Myung, Javes; Clemmensen, Craig T; Pavlik, Mary E; Salamido, Holly;

Jacob Statman; M Snider
Subject: Fair and Equitable: March 26, 2015, Implementation Meeting Summary

Dear Arbitrator McKissick,

The Agency disputes that the Union's submission, dated April 14, 2015, constitutes a "Summary" of the March 26, 2015, Implementation Meeting (IM). Based upon a thorough review and evaluation by management's team, it is our position that the Union's April 14, 2015, submission incorporates many statements and/or opinions that were neither discussed between the parties, nor raised for your consideration during the March 26, 2015, IM. The Agency believes the Union's submission is inappropriate, and does not provide an accurate accounting of the March 26, 2015, IM. The Agency respectfully requests that you disregard the Union's submission in its entirety, and instruct the Union against submitting wholly inaccurate submissions which they purport by the heading 'Summary of IM' to reflect the parties' IM convened by you.

The Agency has converted the Union's submission from pdf to word version, and is additionally submitting the following to you: (1) a copy of the Agency's summary of IM, (2) copy of Union's submission, with Agency edits, and (3) proposed Order adopting the Agency's proposed methodology.

The Agency is also looking at whether any TSP information maintained by HUD may be released.

Sincerely,
Tresa A. Rice
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Department of Housing and Urban Development
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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

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

AGENCY EXECPTIONS TO ARBITRATION DECISION
FMCS CASE NO: 03-07743

CERTIFICATE OF SERVICE

I hereby certify that copies of the Agency Exceptions to the above-captioned arbitration decision were served on this 10th day of February 2012, upon the following in the manner indicated:

By Us Mail:

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Norman Mesewicz

Norman Mesewicz,
Agency Representative

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:

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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.

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

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 "reclassifying the grievants' permanent positions" or "reassigning 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]

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 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).

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 reclassify 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.

[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.

[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)).

[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)).

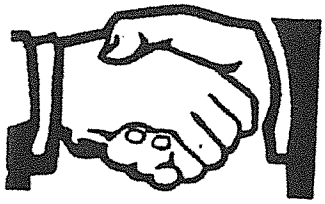
[6]. According to the Union, "[t]his exact same remedy was addressed in the [parties' m]emorandum of [u]nderstanding, where the Agency agreed to the reassignment of employees to reclassified positions." Opp'n at 8.

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

Agreement

between
U.S. Department of Housing
and Urban Development

and
American Federation of
Government Employees
AFL-CIO



A-3

ARTICLE 3
RIGHTS AND OBLIGATIONS OF THE PARTIES

Section 3.01 - Governing Authorities. In the administration of all matters covered by this Agreement, the parties are governed by existing and future laws, existing Governmentwide regulations, and existing and future decisions of outside authorities binding on the Department.

Section 3.02 - Rights of Union Recognition. The Union is the exclusive representative of the employees in the unit and is entitled to act and contract for all employees in the unit. The Union is responsible for representing the interests of all employees in the bargaining unit without discrimination and without regard to labor organization membership. Management shall fulfill any bargaining obligations imposed by law. Soliciting of membership in the Union is internal Union business and is prohibited on official time.

Section 3.03 - Union Presence at Formal Discussions.

(1) The Civil Service Reform Act of 1978 provides that the Union shall be informed of and be entitled to be present at "all formal discussions"[1] between one (1) or more representatives of Management and one (1) or more unit employees, or their representatives, concerning any grievance, personnel policies and practices, and other general conditions of employment. Consistent with the Act, Management will not communicate directly with employees regarding conditions of employment in a manner which under the law will improperly bypass the Union. The Union representative may participate and ask questions, as appropriate.

(2) Meetings held for the purpose of making a statement or announcement and not to engender a dialogue, if they meet the Federal Labor Relations Authority (FLRA) criteria, are formal discussions. It is not necessary that a meeting propose or result in a change in working conditions or personnel policies or practices to be considered a formal meeting. In a number of case decisions, the FLRA has noted several factors relevant to a determination of whether discussions are formal. These factors are:

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[1] In formal discussions, the Union representative may participate and ask questions, as appropriate. In this instance "participate" means the right to comment, speak and make statements.

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.

Section 13.02 - Equal Employment Opportunity. The parties agree that the staffing of all positions within the bargaining unit shall be accomplished without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying disability or age.

Section 13.03 - Definitions. The following words and phrases shall have the meanings indicated for the purposes of the application of this Article:

(1) **Position Change.** A promotion, demotion, or reassignment made during an employee's continuous service within the Department.

(2) **Promotion.** The change of an employee, while serving continuously within the Department:

(a) To a higher grade when both the old and new positions are under the General Schedule or under the same type graded wage schedule; or

(b) To a position with a higher rate of pay when both the old and the new positions are under the same type ungraded wage schedule, or in different pay method categories.

(3) **Demotion.** The change of an employee, while serving continuously within the Department:

(a) To a lower grade when both the old and the new positions are under the General Schedule or under the same type graded wage schedules; or

and per diem shall be paid for one (1) witness if the incident giving rise to the grievance occurs at a location other than the location of the hearing.

(4) Either party may request the sequestration of any witness or witnesses during the testimony of other witnesses.

(5) Either party may purchase a stenographic record. If such transcript is agreed by the parties to be, or in appropriate cases determined by the arbitrator to be, the official record of the proceeding, it must be made available to the arbitrator. The total cost of such a record shall be shared equally by those parties that order copies. If only one (1) party orders and purchases a copy of the transcript, it shall be provided to the arbitrator. However, the transcript shall be made available to the other party for inspection for accuracy following the submission of post-hearing briefs.

Section 23.10 - Authority of the Arbitrator.

(1) The parties agree that the jurisdiction and authority of the arbitrator shall be confined to the issue(s) presented in the grievance.

(2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto. In the case of a back-pay award based on an employee having been affected by an unjustified or unwarranted personnel action, the arbitrator may authorize reasonable attorney's fees in accordance with standards contained in the Back-Pay Act, as amended by the Civil Service Reform Act of 1978, and as interpreted by the Merit Systems Protection Board (MSPB).

(3) Except for decisions to discipline, an arbitrator shall lack authority to determine the appropriateness of a Management decision to exercise any of the rights set forth in Article 3, Section 3.07, which do not amount to a violation of applicable law, regulation, or this Agreement.

(4) An arbitrator shall lack authority to determine the legality or regulatory correctness of any Management decision not impacting personnel policies, practices or matters affecting general conditions of employment.

(5) The arbitrator shall resolve any arbitrability disputes consistent with this Agreement.

5 CFR 335.103 - Agency promotion programs.

Code of Federal Regulations - Title 5: Administrative Personnel

Updated to: January 01, 2011

Linked as: http://cfr.vlex.com/vid/335-103-agency-promotion-programs-19601556

Text

Title 5: Administrative Personnel

CHAPTER I: OFFICE OF PERSONNEL MANAGEMENT

SUBCHAPTER B: CIVIL SERVICE REGULATIONS

PART 335: PROMOTION AND INTERNAL PLACEMENT

Subpart A: General Provisions

335.103 - Agency promotion programs.

(a) Merit promotion plans. Except as otherwise specifically authorized by OPM, an agency may make promotions under ? 335.102 of this part only to positions for which the agency has adopted and is administering a program designed to insure a systematic means of selection for promotion according to merit. These programs shall conform to the requirements of this section.

(b) Merit promotion requirements?(1) Requirement 1. Each agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this section. Actions under a promotion plan?whether identification, qualification, evaluation, or selection of candidates?shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical handicap, or age, and shall be based solely on job-related criteria.

(2) Requirement 2. Areas of consideration must be sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Agencies must also

ensure that employees within the area of consideration who are absent for legitimate reason, e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments, receive appropriate consideration for promotion.

(3) Requirement 3. To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by the Office of Personnel Management (OPM). Methods of evaluation for promotion and placement, and selection for training which leads to promotion, must be consistent with instructions in part 300, subpart A, of this chapter. Due weight shall be given to performance appraisals and incentive awards.

(4) Requirement 4. Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates. They will also provide for management's right to select from other appropriate sources, such as reemployment priority lists, reinstatement, transfer, handicapped, or Veteran Recruitment Act eligibles or those within reach on an appropriate OPM certificate. In deciding which source or sources to use, agencies have an obligation to determine which is most likely to best meet the agency mission objectives, contribute fresh ideas and new viewpoints, and meet the agency's affirmative action goals.

(5) Requirement 5. Administration of the promotion system will include recordkeeping and the provision of necessary information to employees and the public, ensuring that individuals' rights to privacy are protected. Each agency must maintain a temporary record of each promotion sufficient to allow reconstruction of the promotion action, including documentation on how candidates were rated and ranked. These records may be destroyed after 2 years or after the program has been formally evaluated by OPM (whichever comes first) if the time limit for grievance has lapsed before the anniversary date.

(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 all promotions under ? 335.102 of this part and to the following actions:

(i) Time-limited promotions under ? 335.102(f) of this part for more than 120 days to higher graded positions (prior service during the preceding 12 months under noncompetitive time-limited promotions and noncompetitive details to higher graded positions counts toward the 120-day total). A temporary promotion may be made permanent without further competition provided the temporary promotion was originally made under competitive procedures and the fact that might lead to a permanent promotion was made known to all potential candidates;

(ii) Details for more than 120 days to a higher grade position or to a position with higher promotion potential (prior service during the preceding 12 months under noncompetitive details to higher graded positions and noncompetitive time-limited promotions counts toward the 120-day total);

(iii) Selection for training which is part of an authorized training agreement, part of a promotion program, or required before an employee may be considered for a promotion as specified in ? 410.302 of this chapter;

(iv) Reassignment or demotion to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction-in-force regulations);

(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; and

(vi) Reinstatement to a permanent or temporary position at a higher grade or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(2) Noncompetitive actions. Competitive procedures do not apply to:

(i) A promotion resulting from the upgrading of a position without significant change in the duties and responsibilities due to issuance of a new classification standard or the correction of an initial classification error; and

(ii) A position change permitted by reduction-in-force procedures in part 351 of this chapter.

(3) Discretionary actions. Agencies may at their discretion except the following actions from competitive procedures of this section:

(i) A promotion without current competition of an employee who was appointed in the competitive from a civil service register, by direct hire, by noncompetitive appointment or noncompetitive conversion, or under competitive promotion procedures for an assignment intended to prepare the employee for the position being filled (the intent must be made a matter of record and career ladders must be documented in the promotion plan);

(ii) A promotion resulting from an employee's position being classified at a higher grade because of additional duties and responsibilies;

(iii) A temporary promotion, or detail to a higher grade position or a position with known promotion potential, of 120 days or less;

(iv) Promotion to a grade previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under ? 6.7 of this chapter) from which an employee was separated or demoted for other than performance or conduct reasons;

(v) Promotion, reassignment, demotion, transfer, reinstatement, or detail to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an interchange agreement approved under ? 6.7 of this chapter) and did not lose because of performance or conduct reasons; and

(vi) Consideration of a candidate not given proper consideration in a competitive promotion action.

(vii) Appointments of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any grade or salary level, including Senior-Level positions established under 5 CFR Part 319?Employment in Senior-Level and Scientific and Professional positions.

(d) Grievances. Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in part 300, subpart A, of this chapter. While the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal of OPM, but OPM may conduct

investigations of substantial violations of OPM requirements.

[59 FR 67121, Dec. 29, 1994, as amended at 63 FR 34258, June 24, 1998; 70 FR 72067, Dec. 1, 2005]

FEDERAL MEDIATION AND CONCILIATION SERVICE

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

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

APPEARANCES:

For Management:
Walter C. Vick Jr., Labor Relations Specialist
Joann T. Robinson, Esquire
U.S. Dept. of Housing & Urban Development
451 7th Street, SW, Room 2150
Washington, D.C. 20410

For Union:
Michael Snider, Esquire
Ari Taragin, Esquire
Snider & Associates
104 Church Lane, Suite 100
Baltimore, MD 21208

Carolyn Federoff, Esquire, Former President
AFGE Council 222
108 Ashlaud Street
Melrose, MA 02176

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**

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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

FLRA.GOV
Federal Labor Relations Authority

43:0147(14)AR - - Defense Mapping Agency, Aerospace Center, St. Louis, MO and NAGE Local 1827 - - 1991 FLRAdec AR - - v43 p147

[v43 p147]
43:0147(14)AR
The decision of the Authority follows:

43 FLRA No. 14

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF DEFENSE

DEFENSE MAPPING AGENCY

AEROSPACE CENTER

ST. LOUIS, MISSOURI

(Agency)

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

LOCAL 1827

(Union)

0-AR-1880

DECISION

November 20, 1991

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This case is before the Authority on an exception to an award of Arbitrator Mark W. Suardi filed by the Union under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Agency filed an opposition to the Union's exception.

The Arbitrator denied the Union's grievance, which claimed that the Agency violated the parties' collective bargaining agreement by unilaterally changing a past practice involving the computation and payment of overtime under the Fair Labor Standards Act, 29 U.S.C § 207 (FLSA). For the reasons explained below, we will remand the case to the parties for further processing consistent with our decision.

II. Background and Arbitrator's Award

The Defense Mapping Agency acts as paymaster for the 3600 employees located at the Aerospace Center in CCO Louis. The Agency uses the U.S. Air Force automated pay system for processing its payroll. The pay system is a computerized system under which pay data for each employee is entered into the system and paychecks are printed by computer. The record indicates that although all bargaining unit employees are covered by the overtime provisions of 5 U.S.C. § 5542, some employees are also covered by the overtime provisions of the FLSA.(1)

For ten or more years before November 1988, the Agency utilized a key punch system to process the employees' time and attendance cards. The Agency also performed manual FLSA overtime computations which allowed the Agency to include the full amount of any overtime compensation due an employee in the first paycheck issued after the close of the pay period in which the overtime was worked. In November 1988, the Agency replaced the key punch

system with an optical mark reader (OMR) system, which electronically scans the time and attendance forms and automatically calculates both the base pay and the Title 5 overtime from these readings. However, with this new system, the payroll office was no longer able to perform the manual FLSA overtime computations in time to include the full amount of the FLSA overtime in an employee's next check. Consequently, employees only received their Title 5 overtime in their first check after the close of the relevant pay period. Employees who earned overtime at a greater rate under the FLSA than under Title 5 were paid the "overage" or additional amount in a future check. The grievance arose from this delay in the payment of the FLSA overtime.

Before the Arbitrator, the Union argued that: (1) the Agency could have bargained over the impact and implementation of the OMR system and there was no evidence that modification of the system was beyond the Agency's control; (2) the grievance was timely filed, as the change affecting the payment of FLSA overtime was continuing in nature; and (3) the Agency's previous method of paying FLSA overtime became a condition of employment and ripened into a binding past practice.

The Agency contended that the grievance was neither grievable nor arbitrable because it had no discretion to deviate from the Air Force's OMR system. The Agency argued that it had not intended to change the manner of FLSA overtime payment and only discovered that there was a problem when the Agency's payroll office tried to prepare the payroll using the OMR system. The Agency argued, further, that the grievance was untimely filed because the Union learned of the FLSA overtime payment change in late March or early April but did not file the grievance until after the 21-day filing period provided for in the parties' agreement.

The Agency asserted to the Arbitrator that the Union's reliance on the overtime provision of the parties' agreement was inapposite because FLSA overtime was being calculated and paid in accordance with applicable laws and regulations. The Agency also argued that it had the reserved right, under the management rights provisions of the agreement and section 7106(a) of the Statute, to delay the payment of FLSA overtime. In this connection, the Agency urged that it had the right to change past practices where, as here, such practices conflict with the Agency's reserved rights under the agreement. Finally, the Agency contended that the change in paying FLSA overtime had not had any real effects on employees and the Union's requested remedy was not possible with the current technology.

The Arbitrator stated that the issues in the case were: (1) whether the grievance was arbitrable; (2) if the grievance was arbitrable, whether the Agency violated the past practice provision and overtime provisions of the parties' collective bargaining agreement; and (3) if these contract sections were violated, what was the appropriate remedy.[2]

In addressing the grievance, the Arbitrator first responded to the Agency's contentions that the grievance was not timely filed and that it concerned a matter beyond the control of the Agency. The Arbitrator rejected these arguments finding, first, that the grievance was timely filed because it concerned a matter which was continuing in nature. Second, the Arbitrator found that the facts and exhibits presented did not establish that the grievance concerned a matter beyond the Agency's control.

The Arbitrator then addressed the merits of the grievance. The Arbitrator found that "both the Agency and the Union seem to agree that a binding past practice existed on the subject prior to November, 1988." Award at 18. The Arbitrator then determined that the question was whether the Agency could legitimately change the practice by its unilateral action. The Arbitrator concluded that the Agency did not violate the agreement and denied the grievance.

In reaching this conclusion, the Arbitrator found that the existence of a past practice under section 7-2 of the parties' agreement was "conditioned on there being no conflict with this agreement." Id. The Arbitrator then examined the management rights provisions of the agreement, which are contained in sections 5-1 and 5-2 of the parties' agreement.[3] The Arbitrator found that "the Agency's rights under Section 5.1 and 5.2 are inconsistent with the Union's claim for relief." Id. at 19 (emphasis in original). The Arbitrator concluded, therefore, that the past practice provision did not limit the Agency's right to unilaterally change the manner in which FLSA overtime previously had been paid. In making his findings as to the management rights provisions of the agreement, the Arbitrator stated that, in his opinion, the case before him was analogous to National Association of Government Employees, Local R14-89 and Headquarters, U.S. Army Air Defense Artillery Center and Fort Bliss, Fort Bliss, Texas, 32 FLRA 392 (1988) (Fort Bliss), which the Agency had cited in support of its position. In Fort Bliss, the Authority found that a proposal to maintain a pay lag at 6 days, rather than the agency's proposed 12 days, was nonnegotiable on the basis that the proposal interfered with the exercise of various management rights. The Arbitrator found that Fort Bliss did much "to resolve the question of the Agency's right to introduce the delay in payments here challenged." Award at 19.

The Arbitrator further held that, at that time, there would be no workable way for the Agency to grant the Union's requested relief without expending added time and manpower in the Agency's payroll office. The Arbitrator found that the requested relief would infringe on the Agency's rights under Article 5 of the agreement.

Finally, the Arbitrator found that the Agency's decision to delay the payment of FLSA overtime did not violate any law or regulation such as would give rise to a violation of the overtime provision of the parties' agreement and, further, that the processing of overtime did not violate 5 U.S.C. § 5542. . Accordingly, the Arbitrator denied the grievance.

III. Positions of the Parties

A. The Union's Exception

The Union contends that the award is deficient because the Arbitrator used the wrong standard in reaching his decision. The Union states that if the resolution of a dispute involves a negotiability determination, as it does here, an arbitrator is required to apply the standards in National Association of Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24 (1986) (Kansas Army National Guard). The Union states that the

Arbitrator failed to consider and apply Kansas Army National Guard. The Union also asserts that in deciding that Fort Bliss was analogous to the instant case, the Arbitrator did not consider the significant differences in the circumstances between the instant case and those in Fort Bliss. Finally, the Union states that the Arbitrator's finding, that there was no way to accommodate the Union's requested relief without an additional expenditure of time and resources, is based on facts that were not in evidence.

B. The Agency's Opposition

The Agency contends that the Union's exception constitutes mere disagreement with the Arbitrator's award and fails to establish a ground for review under section 2425.3 of the Authority's Rules and Regulations. The Agency maintains, contrary to the Union, that the Arbitrator did not make a negotiability determination but reasoned that if management in Fort Bliss had a reserved management right under the Statute to increase its pay lag from six to twelve days, then the Agency had a reserved management right under sections 5-1 and 5-2 of the parties' agreement to increase the delay in the payment of FLSA overtime. In this regard, the Agency refers to its closing argument before the Arbitrator, in which it stated that

> [a] comparison of Sections 5-1 and 5-2 of the [agreement] with Section 7106(a) makes it clear that the Agency's reserved rights under the [agreement] are coextensive with its reserved rights under the Statute. In fact, the reference to Title VII, Public Law 95-454 is the public law citation to the Statute.

Enclosure 3 to Union's Exception at 15.

The Agency also maintains that the test for determining whether a proposal constitutes an appropriate arrangement set forth in Kansas Army National Guard is not applicable to the arbitration of the instant grievance because the grievance does not involve a bargaining proposal. In this connection, the Agency states that the Union's right to bargain over the impact and implementation of the change in FLSA overtime payment procedures was not an issue submitted to the Arbitrator. Finally, the Agency contends that the Arbitrator's findings of fact were based on the evidence presented and that the Union's disagreement with such findings does not constitute a basis for review.

IV. Analysis and Conclusions

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. In this case, we are unable to determine whether the Arbitrator's award is deficient. Consequently, we will remand the case to the parties for further processing, as explained below.

As a general proposition, we will not disturb an award that is based solely on a contract interpretation. However, where, as here, that contract provision is a reiteration of the management rights provision of the Statute, we must exercise care to ensure that the interpretation is consistent with the Statute, as well as the parties' agreement. If parties intend that a contractual management rights provision which is identical to the language set forth in section 7106 of the Statute be interpreted in a manner that differs from, but is not inconsistent with, the Statute, that should be made known to the arbitrator, who can then clearly specify the basis for an award. The Authority would uphold the award insofar as it is not otherwise inconsistent with law, rule or regulation. In this case, we find that the Arbitrator did not interpret the parties' agreement so as to restrict the exercise of management's rights in a manner that is inconsistent with the Statute. Consequently, the Arbitrator's award, to this extent, is not inconsistent with the Statute. However, such a finding does not end our inquiry.

As noted, the Arbitrator found that the Agency did not violate the parties' agreement concerning the change in the timing of FLSA overtime payments. He reached that result based on an examination of the management rights provisions of the agreement, among others, and an application of the Authority's decision in Fort Bliss. The Union excepts to the award on the basis that the Arbitrator incorrectly applied Authority case precedent. After reviewing the award, and the basis for the Arbitrator's decision, it is not clear to us whether the Arbitrator was resolving the dispute based solely on an interpretation of the agreement or whether his award was based on an interpretation of the Statute and Authority case law defining an agency's rights under section 7106 of the Statute.

In this connection, we note that the management rights provision of the parties' agreement is a restatement of sections 7106(a) and 7106(b)(1) of the Statute. Significantly, the prefatory language of section 5-1 of the agreement states that the management rights clause is to be exercised in accordance with the Statute. Further, in explaining the application of the management rights provision of the agreement, the Agency specifically stated its view that management's reserved rights under sections 5-1 and 5-2 of the agreement are coextensive with the management rights contained in the Statute. Although the Arbitrator stated that he was "bound to apply the entire agreement of the parties[,]" the Arbitrator looked to the decision in Fort Bliss, which he found presented an analogous situation. Award at 18. Consequently, we are unable to ascertain from the award whether the Arbitrator applied only the provisions of the agreement, or the provisions of the Statute, as well.

If, in interpreting the parties' agreement, the Arbitrator had issued an award finding that the Agency had a statutory right to alter the method of paying FLSA overtime when Authority case law held otherwise, such an award would have been inconsistent with the Statute and, therefore, deficient as contrary to law. Similarly, if the Arbitrator had concluded that the Agency could not alter the method of paying FLSA overtime, when, in fact, the Agency had acted consistent with the exercise of a statutory management right, the Arbitrator's award would have been deficient as contrary to law. See for example, U.S. Department of Veterans Affairs Medical Center, Providence, Rhode Island and Laborers' International Union of North America, Local 1056, 37 FLRA 566 (1990) (arbitrator's award finding violation of parties' agreement and ordering negotiations over changes in position description and assignment of duties found inconsistent with management's right to assign work under the Statute and modified to reflect statutory bargaining obligations). In the absence of a

clear understanding as to the basis of the Arbitrator's award, we are unable to assess whether the award is contrary to law, rule and regulation.

Therefore, we will remand this case to the parties for resubmission to the Arbitrator to clarify the basis of his award. The parties should also be advised that the Authority no longer adheres to Fort Bliss. See American Federation of Government Employees, Local 1698 and U.S. Department of the Navy, Naval Aviation Supply Office, Philadelphia, Pennsylvania, 38 FLRA 1016 (1990). See also National Federation of Federal Employees, Local 2099 and U.S. Department of the Navy, Naval Air Systems Command, Naval Plant Representative Office, St. Louis, Missouri, 38 FLRA 1191 (1990); Department of the Army, U.S. Army Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana and Finance and Accounting Office for the Secretary of the Army, St. Louis, Missouri, 41 FLRA 885, 896 (1991), petition for review filed sub nom. U.S. Department of the Army, U.S. Army Enlisted Records and Evaluation Center, Fort Benjamin Harrison, Indiana v. FLRA, No. 91-1473 (D.C. Cir. Sept. 26, 1991).

V. Decision

The case is remanded to the parties for resubmission to the Arbitrator in accordance with this decision.

APPENDIX

Article 5 (Rights of the Employer), Section 5-1 states in pertinent part that

> [I]n accordance with Title VII [Federal Service Labor-Management Relations], Public Law 95-454, nothing in this Agreement shall affect the authority of any management official of the Employer:
>
> a. To determine the mission, budget, organization, number of employees and internal security practices of the Employer.
>
> b. In accordance with applicable laws:
>
> (1) To hire, assign, direct, layoff and retain employees, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees.
>
> (2) To assign work, to make determinations with respect to contracting out, and to determine the personnel by which the Employer's operations shall be conducted.
>
> (3) With respect to filling positions, to make selections for appointments from:
>
> (a) Among properly ranked and certified candidates for promotion.
>
> (b) Any other appropriate source.
>
> (4) To take whatever actions may be necessary to carry out the Employer's mission during emergencies.

Section 5-2 states that

> [t]he obligation of the Employer to negotiate with the Union does not include the numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods and means of performing work.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. At the time of the processing of the grievance in this case, General Schedule employees who were entitled to overtime compensation under 5 U.S.C. § 5542 and who were also covered by the FLSA, were entitled to overtime compensation under the FLSA if that entitlement was greater than under 5 U.S.C. § 5542. 5 C.F.R. § 551.513. The Federal Employees Pay Comparability Act of 1990, Pub. L. No. 101-509, § 210, 104 Stat. 1427, eliminated the requirement to perform overtime computations under both title 5 and the FLSA for covered employees. Instead, overtime pay for employees covered by the FLSA are to be computed and paid only under the FLSA. See 56 Fed. Reg. 20339-20343 (1991).

2. Article 7 (Employee Rights), Section 7-2 (Past Practice), provides:

> Those privileges which by custom, tradition, or known past practice have become an integral part of working conditions, which are not in conflict

with this Agreement, shall not be abridged as a result of not being enumerated in this Agreement.

Article 32 (Overtime), Section 32-5 provides in pertinent part:

Premium pay for overtime work will be computed and paid in accordance with applicable laws and regulations. . . . Actual hours worked will be paid at the applicable overtime rate, when worked in conjunction with the normal tour of duty.

3. Sections 5-1 and 5-2 are set forth in the Appendix to this decision.

05:0050(9)AR - Delaware NG, Wilmington, DE and ACT, Delaware Chapter -- 1981 FLRAdec AR

[v05 p50]
05:0050(9)AR
The decision of the Authority follows:

5 FLRA No. 9

DELAWARE NATIONAL GUARD
WILMINGTON, DELAWARE
Activity

and

ASSOCIATION OF CIVILIAN
TECHNICIANS, DELAWARE
CHAPTER
Union

Case No. 0-AR-86

DECISION

THIS MATTER IS BEFORE THE AUTHORITY ON EXCEPTIONS TO THE AWARD OF ARBITRATOR ALEXANDER M. FREUND FILED BY THE UNION UNDER SECTION 7122(A) OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE (5 U.S.C. 7122(A)).

ACCORDING TO THE ARBITRATOR, THE PARTIES SUBMITTED A GRIEVANCE TO ARBITRATION "INVOLV(ING) A DISPUTE AS TO THE INTERPRETATION OF THE CONTRACT LANGUAGE 'STANDARD CIVILIAN ATTIRE.'" SPECIFICALLY, IN THEIR SUBMISSION AGREEMENT THE PARTIES STIPULATED THE UNRESOLVED ISSUES TO BE PRESENTED TO THE ARBITRATOR AS FOLLOWS:

IS (THE ACTIVITY) CORRECT IN (ITS) INTERPRETATION OF THE CONTRACT WHEREBY BARGAINING UNIT

EMPLOYEES MAY ONLY WEAR STANDARD CIVILIAN ATTIRE OF COMMON DESIGN AND STYLE . . . ?

IS (THE UNION) CORRECT IN (ITS) INTERPRETATION OF THE CONTRACT WHEREBY BARGAINING UNIT

EMPLOYEES MAY WEAR CIVILIAN ATTIRE AS LONG AS IT IS CONSISTENT WITH SECTION 7 OF ARTICLE XXV

(RELATING TO ATTIRE AND GROOMING) . . . ?

AT ARBITRATION THE UNION ARGUED THAT THE MEANING OF THE TERM "STANDARD CIVILIAN ATTIRE," AS USED IN ARTICLE XXV OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, WAS THAT CIVILIAN ATTIRE WAS STANDARDIZED ONLY WITH RESPECT TO COLOR. THE ACTIVITY ARGUED THAT THIS TERM MEANT THAT "AN UNDIVERSIFIED AND STANDARDIZED CIVILIAN UNIFORM (WAS) TO BE WORN BY ALL."

IN RESOLVING THIS DISPUTE, THE ARBITRATOR FIRST REVIEWED THE SUBSECTIONS OF SECTION 7 OF ARTICLE XXV OF THE AGREEMENT. HE FOUND THE UNION'S ARGUMENT "UNPERSUASIVE BECAUSE SUBSECTION 7-A SIMPLY DOES NOT SAY THAT CIVILIAN ATTIRE SHALL BE STANDARD IN RESPECT TO COLOR ONLY." HE FURTHER EMPHASIZED THAT "IF THE LANGUAGE 'STANDARD CIVILIAN ATTIRE' WAS INTENDED TO REFER TO STANDARDIZATION OF COLOR ONLY, THERE WOULD HAVE BEEN NO NEED FOR THAT LANGUAGE, SINCE SUBSECTIONS 7-C THROUGH 7-J SPECIFY THE COLOR COMBINATIONS EMPLOYEES ARE REQUIRED TO WEAR." MOREOVER, THE ARBITRATOR RECOGNIZED THAT WHEN THE PARTIES BEGAN THEIR NEGOTIATIONS, THE TERM "STANDARD CIVILIAN ATTIRE" HAD BEEN REFERRED TO IN A NUMBER OF DECISIONS OF THE FEDERAL SERVICE IMPASSES PANEL INVOLVING

OTHER NATIONAL GUARD ACTIVITIES. THE PANEL HAD REFERRED TO "STANDARD CIVILIAN ATTIRE" AS A "CIVILIAN UNIFORM," AND AS ATTIRE, "STANDARD IN DESIGN AND COLOR." THE ARBITRATOR ALSO FOUND, BASED ON TESTIMONY BEFORE HIM, THAT THESE DECISIONS WERE KNOWN TO THE PARTIES AT THE TIME THEY WERE NEGOTIATING THEIR AGREEMENT. THUS, THE ARBITRATOR OBSERVED THAT THE LANGUAGE IN QUESTION HAD A SPECIFIC MEANING THAT WAS KNOWN TO MANAGEMENT AND THE UNION. ACCORDINGLY, THE ARBITRATOR "UPHELD" THE ACTIVITY'S INTERPRETATION AND RULED THAT WHEN THE PARTIES AGREED TO THE CONTRACT LANGUAGE "STANDARD CIVILIAN ATTIRE," IT WAS UNDERSTOOD THAT BARGAINING UNIT EMPLOYEES WOULD BE REQUIRED TO WEAR A CIVILIAN UNIFORM.

WITH RESPECT TO A REMEDY, THE ARBITRATOR NOTED THAT "THE PROBLEM WHICH GAVE RISE TO THE GRIEVANCE APPEARS TO INVOLVE COMFORT ITEMS" (IDENTIFIED IN THE AGREEMENT AS ITEMS SUCH AS SWEATERS AND JACKETS). THE ARBITRATOR NOTED THAT THE ACTIVITY HAD REQUESTED AS A REMEDY THAT THE EMPLOYEES BE DIRECTED TO OBTAIN SUCH ITEMS FROM ONE SOURCE IN ORDER TO ASSURE UNIFORMITY OF DRESS. IN REFUSING SUCH A REMEDY, THE ARBITRATOR RULED THAT IT WAS SUFFICIENT THAT THE ACTIVITY'S INTERPRETATION OF THE AGREEMENT WAS BEING UPHELD BECAUSE EMPLOYEES WOULD
BE OBLIGATED TO COMPLY WITH THAT INTERPRETATION. THEREFORE, THE ARBITRATOR'S AWARD WAS AS FOLLOWS:

THE GRIEVANCE IS DENIED. THE EMPLOYER'S INTERPRETATION OF SECTION 7 IS UPHELD: THE INTENT

OF THE LANGUAGE "STANDARD CIVILIAN ATTIRE" IS A CIVILIAN UNIFORM.

THE UNION FILED EXCEPTIONS TO THE ARBITRATOR'S AWARD UNDER SECTION 7122(A) OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE /1/ AND PART 2425 OF THE AUTHORITY'S RULES AND REGULATIONS, 5 CFR PART 2425. THE AGENCY DID NOT FILE AN OPPOSITION.

THE QUESTION BEFORE THE AUTHORITY IS WHETHER, ON THE BASIS OF THE UNION'S EXCEPTIONS, THE ARBITRATOR'S AWARD IS DEFICIENT BECAUSE IT IS CONTRARY TO ANY LAW, RULE, OR REGULATION, OR IS DEFICIENT ON OTHER GROUNDS SIMILAR TO THOSE APPLIED BY FEDERAL COURTS IN PRIVATE SECTOR LABOR-MANAGEMENT RELATIONS CASES.

IN ITS FIRST EXCEPTION THE UNION CONTENDS THAT THE AWARD IS CONTRARY TO EXISTING LAW. IN SUPPORT OF THIS EXCEPTION, THE UNION ASSERTS THAT THE ARBITRATOR "ABRIDGED THE RIGHTS OF THE (UNION) FOUND IN 5 U.S.C. 7119(A), (B) AND (C)" /2/ BY APPLYING THE FEDERAL SERVICE IMPASSES PANEL'S DEFINITION OF "STANDARD CIVILIAN ATTIRE" TO THE CONTRACT DISPUTE IN THIS CASE. THE UNION ARGUES THAT IT WAS IMPROPER FOR THE ARBITRATOR TO IMPOSE THE PANEL'S DEFINITION ON THE PARTIES WHEN THEY HAD AGREED TO THEIR OWN DEFINITION. THE UNION FURTHER MAINTAINS THAT PANEL DETERMINATIONS ONLY HAVE "PRECEDENTIAL APPLICATION" TO THE ISSUES AND PARTIES DIRECTLY BEFORE THE PANEL.

THE UNION'S EXCEPTION THAT THE AWARD IS CONTRARY TO LAW STATES A GROUND ON WHICH THE AUTHORITY WILL FIND AN AWARD DEFICIENT UNDER SECTION 7122(A)(1) OF THE STATUTE. HOWEVER, IN THIS CASE THE UNION DOES NOT DEMONSTRATE IN WHAT MANNER THE AWARD IS CONTRARY TO LAW. IN PARTICULAR, THE UNION HAS FAILED TO SHOW THAT THE ARBITRATOR'S AWARD IS CONTRARY TO SECTION 7119 OF THE STATUTE. THE UNION HAS PRINCIPALLY ASSERTED THAT THE ARBITRATOR VIOLATED SECTION 7119 BY "IMPOSI(NG) . . . THE PANEL'S CONSTRUCTION OF DEFINITIONS . . . WHEN IN FACT, THE PARTIES HAD AGREED TO THEIR OWN DEFINITION DURING NEGOTIATIONS." HOWEVER, AS WAS NOTED, THE ARBITRATOR, RATHER THAN "IMPOSI(NG)" THE PANEL'S DEFINITION, RESOLVED THE PARTIES' DISPUTE BY DETERMINING PRECISELY THE MEANING OF THE CONTRACT LANGUAGE THEY "HAD AGREED TO . . . DURING NEGOTIATIONS." THUS, THE ARBITRATOR IN HIS AWARD SPECIFICALLY UPHELD THE ACTIVITY'S INTERPRETATION OF THE LANGUAGE IN DISPUTE. FURTHERMORE, THE ARBITRATOR SPECIFICALLY RULED THAT, WHEN THE PARTIES AGREED TO THE LANGUAGE "STANDARD CIVILIAN ATTIRE," BOTH MANAGEMENT AND THE UNION UNDERSTOOD AS THEIR AGREEMENT THAT EMPLOYEES WOULD BE REQUIRED TO WEAR A CIVILIAN UNIFORM. THE ARBITRATOR, AS AN AID IN DETERMINING WHAT THE PARTIES "HAD AGREED TO . . . DURING NEGOTIATIONS," DID OBSERVE THAT THE CONTRACT LANGUAGE AGREED TO HAD A SPECIFIC MEANING FROM THE PANEL DECISIONS THAT WAS WELL KNOWN TO BOTH MANAGEMENT AND THE UNION AT THE TIME OF THEIR NEGOTIATIONS. HOWEVER, THIS PROVIDES NO BASIS FOR FINDING THE AWARD CONTRARY TO SECTION 7119. IT IS WELL ESTABLISHED THAT AN ARBITRATOR MAY PROPERLY DRAW FROM ANY RELEVANT SOURCE AS AN AID IN INTERPRETING A COLLECTIVE BARGAINING AGREEMENT. UNITED STEELWORKERS OF AMERICA V. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 578-82(1960); UNITED STEELWORKERS OF AMERICA V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 597(1960); HUMBLE OIL & REFINING CO. V. LOCAL 886, INTERNATIONAL

BROTHERHOOD OF TEAMSTERS, 447 F.2D 229, 232-33 (2D CIR. 1971); UAW V. WHITE MOTOR CORP., 505 F.2D 1193, 1197-98 (8TH CIR. 1974). THIS IS PRECISELY WHAT THE ARBITRATOR DID IN THIS CASE, LOOKING TO DECISIONS OF THE PANEL KNOWN TO THE PARTIES DURING NEGOTIATIONS, AS WELL AS TO THE CONTRACT LANGUAGE UPON WHICH THEY ULTIMATELY AGREED. CONSEQUENTLY, THE UNION IN ITS EXCEPTION AND SUPPORTING ASSERTIONS IS DISAGREEING WITH THE ARBITRATOR'S INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT, WHICH DOES NOT CONSTITUTE A BASIS FOR FINDING THE AWARD DEFICIENT. UNITED STATES ARMY MISSILE MATERIEL READINESS COMMAND (USAMIRCOM) AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1858, AFL-CIO, 2 FLRA NO. 60(1980). THEREFORE, THE UNION'S FIRST EXCEPTION PROVIDES NO BASIS FOR FINDING THE AWARD DEFICIENT UNDER 5 U.S.C. 7122(A) AND SECTION 2425.3 OF THE AUTHORITY'S RULES AND REGULATIONS.

IN ITS SECOND EXCEPTION THE UNION CONTENDS THAT THE ARBITRATOR'S AWARD IS INCOMPLETE AND AMBIGUOUS. IN SUPPORT OF THIS EXCEPTION THE UNION ASSERTS THAT THE AWARD IS AMBIGUOUS BECAUSE A QUESTION REMAINS AS TO WHICH PARTY THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE. IN THIS RESPECT, THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE. IN THIS RESPECT, THE UNION MAINTAINS THAT THE PARTIES AGREED THE ACTIVITY WOULD BE THE GRIEVANT IN THE DISPUTE. THE UNION FURTHER ARGUES THAT THE AWARD IS INCOMPLETE AND AMBIGUOUS BECAUSE THE ARBITRATOR HAS LEFT THE PARTIES WITH "UNACCEPTABLE TERMS WHICH WILL NOT SETTLE THE INITIAL DISPUTE." THE UNION THEN SPECULATES THAT AS A RESULT IT "APPEARS THAT THE PARTIES ARE COMPELLED TO RETURN TO THE BARGAINING TABLE" WHICH IT ASSERTS WOULD BE CONTRARY TO SECTION 7114(B)(5) AND SECTION 7117 OF THE STATUTE CONCERNING THE DUTY TO BARGAIN IN GOOD FAITH. THE UNION ALTERNATIVELY SPECULATES THAT "THE AWARD WOULD LEND ITSELF TO VIOLATIONS" OF SECTION 7116(A) OF THE STATUTE CONCERNING AGENCY UNFAIR LABOR PRACTICES.

THE AUTHORITY WILL FIND AN ARBITRATION AWARD DEFICIENT UNDER SECTION 7122(A)(2) OF THE STATUTE WHEN IT IS INCOMPLETE, AMBIGUOUS, OR CONTRADICTORY SO AS TO MAKE IMPLEMENTATION OF THE AWARD IMPOSSIBLE. VETERANS ADMINISTRATION HOSPITAL, NEWINGTON, CONNECTICUT AND NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R1-109, 5 FLRA NO. 12(1981). HOWEVER, THE UNION HAS PROVIDED NO BASIS FOR FINDING THE AWARD DEFICIENT. THE UNION HAS ONLY ASSERTED THAT A QUESTION REMAINS AS TO WHICH PARTY THE ARBITRATOR WAS REFERRING TO WHEN HE DENIED THE GRIEVANCE AND HAS SURMISED THAT THE AWARD "LEND(S) ITSELF" TO VARIOUS VIOLATIONS OF THE STATUTE AS A RESULT OF ITS ASSERTED INCOMPLETENESS AND AMBIGUITY. HOWEVER, AS HAS BEEN NOTED, THE PARTIES STIPULATED THE ISSUE TO BE RESOLVED BY THE ARBITRATOR AS WHICH PARTY WAS CORRECT IN ITS INTERPRETATION OF THE CONTRACT LANGUAGE IN DISPUTE. THE ARBITRATOR COMPLETELY AND UNAMBIGUOUSLY RESOLVED PRECISELY THAT ISSUE WHEN AS HIS AWARD THE ARBITRATOR "UPHELD" THE ACTIVITY'S INTERPRETATION OF THE DISPUTED LANGUAGE. MOREOVER, IN RECOGNITION THAT "THE PROBLEM WHICH GAVE RISE TO THE GRIEVANCE APPEARS TO INVOLVE COMFORT ITEMS," THE ARBITRATOR SPECIFICALLY REJECTED THE REQUESTED REMEDY OF THE ACTIVITY THAT HE DIRECT EMPLOYEES TO OBTAIN SUCH ITEMS FROM ONE SOURCE IN ORDER TO ASSURE UNIFORMITY OF DRESS. INSTEAD, THE ARBITRATOR ADVISED THAT IT WAS SUFFICIENT THAT THE ACTIVITY'S INTERPRETATION OF THE AGREEMENT WAS BEING UPHELD BECAUSE EMPLOYEES WOULD BE OBLIGATED TO COMPLY WITH THAT INTERPRETATION. IN THESE CIRCUMSTANCES, THE UNION HAS FAILED TO DEMONSTRATE THAT THE AWARD IS INCOMPLETE OR THAT THE AWARD IS AMBIGUOUS OR THAT IMPLEMENTATION OF THE AWARD IS IMPOSSIBLE AS A RESULT OF THE AWARD BEING "UNCLEAR IN ITS MEANING AND EFFECT" OR BEING "TOO UNCERTAIN IN (ITS) EFFECT TO BE (SUSTAINED)." VETERANS ADMINISTRATION HOSPITAL, SUPRA AND THE PRIVATE SECTOR CASES CITED THEREIN. THEREFORE, THIS EXCEPTION CONTENDING THAT THE AWARD IS INCOMPLETE AND AMBIGUOUS PRESENTS NO BASIS FOR FINDING THE AWARD DEFICIENT. CONSEQUENTLY, THE UNION'S ASSERTIONS SPECULATING VARIOUS POTENTIAL VIOLATIONS OF THE STATUTE PREMISED SOLELY ON THE AWARD BEING INCOMPLETE AND AMBIGUOUS LIKEWISE PRESENT NO BASIS FOR FINDING THE AWARD DEFICIENT. THUS, THE UNION'S SECOND EXCEPTION FAILS TO PROVIDE A BASIS FOR FINDING THE AWARD DEFICIENT UNDER 5 U.S.C. 7122(A) AND SECTION 2425.3 OF THE AUTHORITY'S RULES AND REGULATIONS.

FOR THE FOREGOING REASONS AND PURSUANT TO SECTION 2425.4 OF THE AUTHORITY'S RULES AND REGULATIONS, WE HEREBY SUSTAIN THE ARBITRATOR'S AWARD.

ISSUED, WASHINGTON, D.C., FEBRUARY 4, 1981

RONALD W. HAUGHTON, CHAIRMAN

HENRY B. FRAZIER III, MEMBER

LEON B. APPLEWHAITE, MEMBER

FEDERAL LABOR RELATIONS AUTHORITY

---------- FOOTNOTES$ ----------

/1/ 5 U.S.C. 7122(A) PROVIDES:

(A) EITHER PARTY TO ARBITRATION UNDER THIS CHAPTER MAY FILE WITH THE AUTHORITY AN EXCEPTION

TO ANY ARBITRATOR'S AWARD PURSUANT TO THE ARBITRATION (OTHER THAN AN AWARD RELATING TO A

MATTER DESCRIBED IN SECTION 7121(F) OF THIS TITLE). IF UPON REVIEW THE AUTHORITY FINDS THAT

THE AWARD IS DEFICIENT--

(1) BECAUSE IT IS CONTRARY TO ANY LAW, RULE, OR REGULATION; OR

(2) ON OTHER GROUNDS SIMILAR TO THOSE APPLIED BY FEDERAL COURTS IN PRIVATE SECTOR

LABOR-MANAGEMENT RELATIONS;

THE AUTHORITY MAY TAKE SUCH ACTION AND MAKE SUCH RECOMMENDATIONS CONCERNING THE AWARD AS IT

CONSIDERS NECESSARY, CONSISTENT WITH APPLICABLE LAWS, RULES, OR REGULATIONS.

/2/ 5 U.S.C. 7119 CONCERNS THE AVAILABILITY AND APPLICATION OF THE IMPASSE RESOLUTION SERVICES OF THE FEDERAL MEDIATION AND CONCILIATION SERVICE AND THE FEDERAL SERVICE IMPASSES PANEL.

FLRA.GOV
Federal Labor Relations Authority

40:0937(76)AR - - DOL, Mine Safety and Health Administration, Southeastern District and AFGE Local 2519 - - 1991 FLRAdec AR - - v40 p937

[v40 p937]
40:0937(76)AR
The decision of the Authority follows:

40 FLRA No. 76

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR

MINE SAFETY AND HEALTH ADMINISTRATION

SOUTHEASTERN DISTRICT

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

LOCAL 2519

(Union)

0-AR-2023

DECISION

May 24, 1991

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

This matter is before the Authority on exceptions to the award of Arbitrator George V. Eyraud, Jr. filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator sustained a grievance alleging that the Agency violated the collective bargaining agreement in filling a vacancy. The Arbitrator ordered the Agency to remove the selectee from the position and rerun the selection action.

For the following reasons, we conclude that the portion of the award requiring the Agency to remove the selectee from the position is deficient. We will, however, deny the remainder of the Agency's exceptions.

II. Background and Arbitrator's Award

The Agency posted a vacancy announcement for the position of Mine Safety and Health Specialist, GS-13. The announcement stated that the position was not in the bargaining unit. The announcement also stated:

> Legal Requirements: The Federal Mine Safety and Health Amendments Act of 1977 states: "That, to the maximum extent feasible, in the selection of persons for appointment as mine inspectors, no person shall be selected unless he has the basic qualification of at least five years practical mining experience . . . ."

Award at 9 (emphasis in original).

A Certificate of Eligibles for the position was issued containing the names of six applicants, including the grievant. The certificate did not contain the name of the employee who ultimately was selected (the selectee) for the position. On the date the certificate was issued, the selectee "filed a request for re-evaluation and her immediate supervisor . . . filed a request for review of classification strongly protesting the selection process." Id. The selectee's immediate supervisor was the selecting official for the vacancy.

Subsequently, the requirement for 5 years' practical mining experience was deleted as a qualification requirement for the position. A new vacancy announcement was not posted, however. An amended certificate was prepared containing the names of eleven applicants, including the selectee. The selecting official selected his assistant, the selectee, for the position.

The grievant filed a grievance alleging that the Agency's actions in filling the position violated various provisions in the parties' collective bargaining agreement. When the grievance was not resolved, it was submitted to arbitration.

Before the Arbitrator, the Agency conceded that "procedural errors were made in the selection process." Id. at 11. Among other things, the Agency conceded that applicants for the position should have been ranked by a qualified rating examiner and that the vacancy announcement erroneously stated that the position was outside the bargaining unit.(1) The Agency asserted, however, that its errors were "harmless." Id. at 12.

The Arbitrator concluded that the Agency violated two sections of Article 20 of the parties' collective bargaining agreement. First, the Arbitrator found that the Agency violated section 10(A)(1) by failing to submit the candidates' applications to a qualification rating examiner or a merit staffing evaluation panel.(2) Second, the Arbitrator found that the Agency violated section 11(B)(1) by failing to conduct interviews of the candidates.(3) The Arbitrator also concluded that although the Agency's failure to reannounce the vacancy after the requirement for 5 years' mining experience was deleted "may not be a direct violation" of the agreement, "it certainly leaves a great deal to be desired." Id. at 14. The Arbitrator stated that if other employees had "known of the lesser requirements for the position, most assuredly there would have been additional applicants for the job." Id.

Finally, the Arbitrator rejected the Agency's argument that "it has a right to determine qualifications . . . and that such matters are not arbitrable." Id. at 15. The Arbitrator stated that the matter before him did not "turn on management rights to set qualifications or determine qualifications of employees." Id. Instead, according to the Arbitrator, the matter involved the requirements of Article 20.

To remedy the violations of the parties' agreement, the Arbitrator directed the Agency to remove the selectee from the position "with a re-announcement of the position based on applicants at the time of the award." Id. at 16.

III. Agency's Exceptions

The Agency excepts to the award on four grounds.

First, the Agency asserts that the Arbitrator's award violates the Agency's rights to assign employees and assign work under section 7106(a)(2)(A) and (B) of the Statute. The Agency claims that the Arbitrator improperly substituted his judgment for management's in determining that the selectee was not qualified for the disputed position.

Second, the Agency contends that the Arbitrator violated section 7105(a)(2)(A) of the Statute by determining that the disputed position is in the bargaining unit. The Agency asserts that only the Authority is authorized to make such determinations.

Third, the Agency contends that the Arbitrator's remedy is contrary to Federal Personnel Manual (FPM) Chapter 335, Appendix A, section A-4b and violates its right to make selections for appointments under section 7106(a)(2)(C) of the Statute. The Agency asserts that a selectee is entitled to be retained in a position pending corrective action unless it is specifically determined that he or she could not have been properly selected.

Finally, the Agency argues that the award is unclear and "does not give the [A]gency adequate direction as to what relief has been granted." Exceptions at 10.

IV. Union's Opposition

The Union claims that the Arbitrator did not determine the qualifications necessary to perform the work of the disputed position. The Union also contends that the Arbitrator did not resolve an issue concerning the bargaining unit status of the disputed position. The Union notes that after its CU petition was filed, the parties agreed that the position was in the unit.

Finally, the Union argues that the Arbitrator's remedy is not deficient. The Union contends that the Arbitrator properly ordered that the selectee be removed from the position because he found that she could not have been selected under the original vacancy announcement.

V. Analysis and Conclusions

A. Management's Rights to Assign Employees and Work

The Agency's argument that the award is deficient because it violates its rights to assign employees and assign work is misplaced. The Arbitrator did not

determine that the selectee was not qualified for the disputed position and the award does not, in any way, restrict the Agency's rights to establish qualifications or determine whether employees possess required qualifications. In fact, the Arbitrator specifically stated that the dispute before him did not "turn on management's rights to set qualifications or determine qualifications of employees" but rather, "turns on Article 20 . . . which requires that the content of vacancy announcements set forth knowledge, skills, and abilities required and their relative importance." Award at 15. Accordingly, the Agency's exception provides no basis for finding the award deficient.

B. Bargaining Unit Status

Section 7105(a)(2)(A) of the Statute provides that the Authority shall "determine the appropriateness of units for labor organization representation under section 7112 . . . ." The Authority's jurisdiction under this provision is exclusive. As such, "factual disputes concerning the bargaining unit status of employees must be resolved by filing a clarification-of-unit petition with the Authority under section 2422.2(c) of our Rules and Regulations." U.S. Department of Defense, Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, 37 FLRA 71, 75 (1990). See also U.S. Small Business Administration and American Federation of Government Employees, Local 2532, AFL-CIO, 32 FLRA 847 (1988) (SBA), motion for reconsideration granted sub nom. U.S. Small Business Administration and American Federation of Government Employees, Local 2532 and Council 228, 36 FLRA 155 (1990).

In this case, the Arbitrator did not resolve a dispute over the unit status of the disputed position. Prior to the arbitration hearing, the parties agreed that the disputed position was in the bargaining unit represented by the Union and, as a result of that agreement, the Union withdrew a CU petition it had filed with the Authority regarding the issue. We note, in this regard, that the Agency does not now assert that the disputed position is outside the unit. Accordingly, there was no issue regarding the unit status of the position to be resolved by the Arbitrator and the Agency's exception does not demonstrate that the award is deficient. Compare SBA, 32 FLRA at 854 ("There is no unit status question when the Authority has already determined that the grievant or the grievant's position is in the unit . . . .").

C. The Arbitrator's Remedy

Except with respect to its assertion that the award is ambiguous, the Agency does not except to the portion of the award requiring it to rerun the selection action. Moreover, it is well established that where an arbitrator finds that a selection action did not conform to applicable requirements of law or a collective bargaining agreement, the arbitrator may order that the action be rerun. For example, U.S. Small Business Administration, Atlanta, Georgia and American Federation of Government Employees, Local 3906, 37 FLRA 137, 143 (1990).

We agree with the Agency's argument that the portion of the award requiring the Agency to remove the selectee from the position is deficient, however. Where an arbitrator determines that an agency violated proper procedures in filling a vacant position, including procedures contained in a collective bargaining agreement, "the incumbent employee is entitled under [FPM] Chapter 335, Appendix A, section A-4b to be retained in the position pending corrective action unless it is specifically determined that the incumbent originally could not have been properly selected." U.S. Department of Defense, Delaware National Guard, Wilmington, Delaware and Association of Civilian Technicians, 39 FLRA 1225, 1236 (1991) (Delaware National Guard).

In this case, the Arbitrator made no finding that the selectee could not have been selected if the Agency had followed proper procedures. The Arbitrator found only that the Agency violated the parties' collective bargaining agreement by its actions in filling the vacancy. In the absence of the required finding that the selectee could not originally have been properly selected for the position, the award is deficient as contrary to FPM Chapter 335, Appendix A, section A-4b.[4] See Delaware National Guard, 39 FLRA at 1236. We will, therefore, modify the award to delete the requirement that the selectee be removed from the position.

D. The Arbitrator's Award Is Not Ambiguous

The Agency objects to the portion of the award requiring the Agency to "reannounce[] . . . the position based on applicants at the time of the award." Award at 16. The Agency claims that this portion of the award "is ambiguous and does not give the [A]gency adequate direction as to what relief has been granted." Exceptions at 10.

The Authority will find an award deficient when it is incomplete, ambiguous, or contradictory so as to make implementation of the award impossible. Delaware National Guard, Wilmington, Delaware and Association of Civilian Technicians, Delaware Chapter, 5 FLRA 50, 53 (1981). The Agency has not established that the award is deficient under this standard.

The award requires the Agency to rerun the disputed selection action. As no contrary indication appears in the award or the record, the Agency is required to reannounce the position and fill it in accordance with applicable procedures. There is no basis on which to conclude that the award is impossible of implementation. As such, the Agency's exception provides no basis for finding the award deficient.[5] See, for example, Social Security Administration and American Federation of Government Employees, SSA General Committee, 30 FLRA 381 (1987).

VI. Decision

The Arbitrator's award is modified to delete the portion requiring the selectee to be removed from the position.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. After the grievance was filed, the Union filed a clarification of unit (CU) petition with the Authority seeking to include the disputed position in the bargaining unit. Before the arbitration hearing was conducted, the parties agreed that the position was in the unit and the Union withdrew the CU petition. Joint Exhibit 11.

2. Article 20, Section 10(A)(1) provides, in pertinent part:

> If 10 or fewer eligible candidates apply, all may be certified to the selecting official without evaluation. . . . Otherwise, the [qualification review examiner] or panel is responsible for identifying a reasonable number of best qualified candidates to certify to the selecting official.

Joint Exhibit 1 at 63.

3. Article 20, Section 11(b)(1) provides, in pertinent part:

> The selecting official or his/her designee must interview each DOL bargaining unit candidate on the certificate. The interview . . . must be done face-to-face if the candidates are in the same region.

Joint Exhibit 1 at 65.

4. As that part of the remedy requiring the Agency to remove the selectee from the position is contrary to the FPM, we do not address whether it also violates the Agency's right to select.

5. We express no view on the Union's contention that if the selectee applies for the position after it is reannounced, the selectee may not claim any experience gained during her tenure in the position.

FLRA.GOV
Federal Labor Relations Authority

43:0927(73)AR - - Justice, INS, Honolulu District Office, Honolulu, HI and AFGE, National INS Council - - 1992 FLRAdec AR - - v43 p927

[v43 p927]
43:0927(73)AR
The decision of the Authority follows:

43 FLRA No. 73

FEDERAL LABOR RELATIONS AUTHORITY

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

HONOLULU DISTRICT OFFICE

HONOLULU, HAWAII

(Agency)

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

NATIONAL IMMIGRATION AND NATURALIZATION

SERVICE COUNCIL

(Union)

0-AR-2118

DECISION

January 7, 1992

Before Chairman McKee and Members Talkin and Armendariz.

I. Statement of the Case

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

The Union filed a grievance disputing the Agency's 7-day suspension of an employee for "neglect of duty and . . . failure or delay in carrying out the orders, work assignments, or instructions of superiors." Exceptions, Exhibit 2. The Arbitrator determined that the Agency did not violate any existing laws, rules, regulations or the parties' negotiated agreement by disciplining the employee and, therefore, denied the grievance. After denying the grievance, the Arbitrator then determined that the 7-day suspension was excessive and directed the Agency to: (1) rescind the suspension and, instead, issue an official reprimand for the misconduct found; and (2) reimburse the employee for any pay or benefits lost as a result of the suspension.

For the reasons discussed below, we conclude that the award is ambiguous and must be remanded to the parties for resubmission to the Arbitrator.

II. Background

The grievant has been employed by the Agency for over 16 years as a criminal investigator and special agent. Currently, he works as a special agent in the Agency's Honolulu District Office (HDO). The grievant also serves as chief steward for the Union.

The HDO is responsible for all law enforcement in that jurisdiction that is within the Agency's authority. On April 11, 1990, the assistant district director for investigations of the HDO directed the grievant to "initiate a seizure case against" a fishing vessel called the Magic Dragon. Award at 7.[1] To initiate such proceeding, the grievant had to prepare an affidavit, "which is a requisite in seizure proceedings[.]" Id. at 10.

On May 11, the assistant district director advised the grievant that he wanted to see the affidavit on May 14. On May 14, he met with the grievant and the grievant's supervisor to review the affidavit and during this meeting advised the grievant that the affidavit was insufficient and that it must be completed for presentation on May 30. Later, the assistant district director was told by the acting district director that the affidavit must be completed no later than May 25. On May 25, the grievant's supervisor informed the assistant district director that the grievant was not ready to present the case for seizure. Later, the grievant's supervisor advised the assistant district director that on May 29, the grievant informed him that he was scheduled for training for Union officers and that he had not completed the affidavit. Subsequently, the assistant district director advised the grievant of his failure to complete the seizure assignment. On June 4, the assistant district director advised the district director that he was initiating disciplinary action against the grievant for "'failure to carry out orders and dereliction of duty.'" Id. at 14.

By letter dated July 16, the deputy district director, the proposing official in disciplinary matters, informed the grievant that, based upon the record submitted to him, he proposed that the grievant be suspended without pay for 7 days for "'[n]eglect of duty and failure/delay in carrying out orders, work assignments, or instructions of superiors.'" Id. at 17. The deputy district director asserted that the discipline was based on the Agency's schedule of disciplinary offenses and penalties.

Subsequently, the grievant's Union representative responded to the deputy district director's letter and informed the district director that several of the allegations against the grievant were untrue. By memorandum of August 29, the district director rejected the Union representative's contentions and, on August 30, suspended the grievant, without pay, effective September 16 through September 22. A grievance disputing the suspension was filed and submitted to arbitration. The stipulated issue presented before the Arbitrator was:

> Did the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . . from duty? And, if so, what is the remedy?

Id. at 3 (footnote omitted).

III. Arbitrator's Award

The Arbitrator found that the record showed that no special agent in the Western Region, except the grievant, had been disciplined for failing to meet a work deadline. According to the Arbitrator, this evidence suggested that work performance deficiency problems are addressed through means other than disciplinary measures, such as performance improvement plans (PIP). In the Arbitrator's view, a PIP, rather than the suspension, would have been the appropriate forum in which to correct the grievant's alleged deficiencies. The Arbitrator noted that the Agency did place the grievant on a PIP in late October to correct the "same work performance deficiencies for which he initially received a seven-day disciplinary suspension" in September. Id. at 32-33. The Arbitrator, noting that discipline is generally viewed as corrective rather than punitive in nature and noting the Agency's reliance on the schedule of disciplinary offenses and penalties, stated that, in this case, if discipline is viewed as corrective, an "'official reprimand,' rather than a punitive seven-day suspension, would clearly have been within the discretion of [the] Agency . . . ." Id. at 34. The Arbitrator rejected the Agency's claim that the Magic Dragon seizure was a high profile case because there was "no evidence" to support this claim. Id.

The Arbitrator stated that the "weight of [the] record evidence . . . strongly suggests that the subject disciplinary action was taken largely, if not entirely, because of an alleged attitudinal problem on the part of the grievant rather than substantive deficiencies" in the affidavit. Id. at 35. The Arbitrator found that the assistant district director's instructions and guidance to the grievant in preparing the affidavit, including the two, not three, deadlines that he set for completion of the work, "were not unreasonable in terms of time." Id. at 39. In this regard, the Arbitrator found that although the Agency claimed that the grievant failed to meet three deadlines for completion of the affidavit, the evidence revealed that the grievant was not informed of the May 25 deadline. The Arbitrator further stated that the assistant district director's instructions and guidance to the grievant "lend themselves to scrutiny in view of the information conveyed to" the grievant and his supervisor as to what was needed in the affidavit, coupled with doubt raised in the matter as a result of the deputy district director's remark to the assistant district director that he was "'out to get'" the grievant for his alleged involvement in a matter causing an internal investigation of a trip made by the deputy district director. Id. at 38 and 39.

Nevertheless, the Arbitrator further found that the grievant was "dilatory in completing the assignment as requested." Id. at 39. The Arbitrator noted that this was "especially" true in light of the grievant's statement that, in his view, the assistant district director was "'running the case'" and his claim that other Agency employees were the ones that would determine what needed to be done. Id. Therefore, the Arbitrator stated that he was "compelled to conclude that the Agency did not violate any existing laws, rules, regulations or the negotiated agreement by taking the subject disciplinary action against the grievant." Id. at 40. The Arbitrator also stated that, "in light of the overall findings and reasons" in his decision, the 7-day suspension was excessive for the misconduct found. Id. As his award, the Arbitrator concluded that the "issue presented for determination must be answered in the NEGATIVE, that is the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action against the grievant." Id. at 41 (emphasis in original). Accordingly, he denied the grievance.

After denying the grievance, the Arbitrator repeated his conclusion that the 7-day suspension, "in light of the overall findings and reasons," was "excessive for the grievant's dilatory conduct found." Id. The Arbitrator directed the Agency to: (1) rescind the suspension in its entirety; (2) issue an official

reprimand to the grievant for the dilatory conduct; and (3) reimburse the grievant for any pay or benefits lost as a result of the suspension.

IV. Agency's Exceptions

The Agency contends that the award is deficient because the Arbitrator exceeded his authority under the parties' agreement. The Agency states that the parties stipulated that the issue for determination was "'did the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . .,'" and that "only" if the Arbitrator found that the Agency committed such violation was he then authorized to remedy that violation. Exceptions at 8. The Agency asserts that notwithstanding the Arbitrator's determination that the Agency did "'not violate[] any existing laws, rules, regulations, or the negotiated agreement,'" by suspending the grievant, he, nonetheless, fashioned a remedy rescinding the suspension. Id. Relying on the Authority's decision in Veterans Administration and American Federation of Government Employees, Local 2798, 24 FLRA 447 (1986) (Veterans Administration), the Agency contends that the Arbitrator's award constitutes a clear case of the Arbitrator "exceeding the authority granted to him by the parties' submission." Id. Therefore, the Agency contends that the award, to the extent that it requires the Agency to rescind the suspension and instead issue a reprimand and to provide the grievant with backpay, "must be set aside as in excess of the Arbitrator's authority." Id. at 9.

The Agency next argues that, even assuming that the Arbitrator did not exceed his authority, the remedy "is predicated on a non-fact." Id. The Agency states that the Arbitrator "was concerned that the suspension action was 'punitive' rather than 'corrective' in nature because of the fact that management subsequently placed the grievant on a PIP on October 30, 1990." Id. at 10. According to the Agency, the Arbitrator was concerned that management "was not privileged to take what he incorrectly viewed as two separate personnel actions against the grievant" based on the same incident involving the seizure affidavit. Id. The Agency contends that the Arbitrator was "laboring under the unwarranted misapprehension that the grievant had been placed in some form of double jeopardy, and that it was this misapprehension" that motivated the Arbitrator to order that the suspension be rescinded notwithstanding his finding that the suspension did not violate any law, rule, regulation, or the parties' agreement. Id. The Agency asserts that the Arbitrator's "error of fact in this regard was compounded by his initial error in considering the October 30, 1990 action . . . to be a central fact" which was relevant to the appropriateness of the suspension and his "assumption that a PIP was a separate personnel action." Id. at 11 and 12. In conclusion, the Agency asserts that the Arbitrator's "finding" that the suspension was "'punitive'" was based on the "non-fact that management was precluded by law from putting the grievant on a PIP." Id. at 13.

The Agency further contends that the award directly interferes with management's right to discipline employees under section 7106(a)(2)(A) of the Statute. Citing the Supreme Court's decision in Department of the Treasury, Internal Revenue Service v. FLRA, 110 S. Ct. 1623 (1990), the Agency asserts that the Court made it clear that arbitrators may not reverse an agency's decision under section 7106(a)(2) of the Statute, such as the right to "'suspend,'" unless they find that the decision was not "in accordance with applicable laws." Exceptions at 13. The Agency argues that as the Arbitrator found that management did not violate any applicable laws or any rules, regulations, or the negotiated agreement, the Arbitrator "had no legal basis" for directing the Agency to rescind the suspension. Id. at 14.

Finally, the Agency asserts that the award of backpay is deficient under the Back Pay Act, 5 U.S.C. § 5596. The Agency states that, as a prerequisite for an award of backpay, a grievant must demonstrate that the challenged personnel action violated applicable law, rule, regulation or the parties' collective bargaining agreement. The Agency asserts that in this case, the Arbitrator "affirmatively found[]" to the contrary. Id. at 15. The Agency argues, therefore, that the award of backpay is deficient.

V. Union's Opposition

The Union asserts that the Agency "seeks to overturn the [Arbitrator's] decision on the grounds of a minor error in the crafting" of his award. Opposition at 2. The Union states that while the Union might have written the award differently, "the [a]ward is well thought out . . . and should be allowed to stand." Id. The Union asserts that if there is a question as to the Arbitrator's meaning or a need for clarification, the award should be remanded to the Arbitrator for clarification. However, the Union also states that, in its view, "such action is not necessary as the . . . [a]ward [is] clear and unambiguous despite the seeming contradiction." Id. at 4.

The Union acknowledges that the Arbitrator "plainly found there was no contract violation in the Agency's decision to discipline [the] grievant." Id. at 3. However, the Union also contends that the Arbitrator found, "on the separate but included issue, that the discipline imposed was excessive." Id. (emphasis in original). The Union asserts that what the Arbitrator failed to do was include in his award a statement to the effect that "although discipline was appropriate, and did not violate the contract, law or regulation, the discipline imposed was excessive to such a degree that it did not comport with the contract." Id. (emphasis in original). According to the Union, it is only in this respect that the award may be lacking. In this regard, the Union contends that it believes that the purposes of the agreement, the grievance procedure and its just cause provisions, and the Statute, are to promote good labor relations and substantial justice in the relationship between the Agency and the employees. According to the Union, "[s]uch provisions demand more than a mere dot your i and cross your t approach to personnel matters." Id. at 4.

As to the Agency's specific contentions, the Union asserts that the Arbitrator did not exceed his authority. The Union asserts that although the Arbitrator found that management's decision to discipline the grievant did not violate any authorities, he had "implicit jurisdiction to find the penalty excessive." Id. at 6. According to the Union, this jurisdiction is contained "within the language of [Article 31, Section H(1) of] the contract which states that discipline must be taken only for reasons that are 'just and sufficient,'" and will promote the efficiency of the Agency. Id. (emphasis in original).[2] The Union contends that the issue before the Arbitrator "incorporated the questions of sufficiency of cause within it by reference to the agreement." Id.

The Union states that it is not inappropriate for an arbitrator to find that just cause exists for discipline while also finding sufficient cause lacking to sustain discipline in the degree imposed. In the Union's view, the Arbitrator found that the discipline imposed was affected "by unacceptable considerations,

among them a desire for vengeance and the punitive rather than corrective nature of the action." Id. at 7. According to the Union, the Arbitrator found that these considerations "merited mitigation of the penalty." Id. In the Union's view, nothing in the issue presented to the Arbitrator "limited his authority to mitigate the discipline imposed if he first found discipline per se justified." Id. Therefore, the Union asserts that the Arbitrator did not exceed his authority by requiring the Agency to mitigate the penalty.

The Union further contends that there is no basis for the Agency's contention that the award is based on a nonfact because the Arbitrator did not find that the suspension and the imposition of a PIP on the grievant were both improper. The Union also asserts that the award does not interfere with management's right to discipline employees because the award "clearly draws its essence from the language of the agreement." Id. at 9. Finally, the Union contends that the award does not violate the Back Pay Act. According to the Union, the Arbitrator's finding that the discipline imposed was excessive "makes it (the discipline) a wrongful personnel action." Id. at 10.

VI. Analysis and Conclusions

For the reasons discussed below, we conclude that the award is ambiguous and, therefore, we cannot determine whether the award is deficient under section 7122(a) of the Statute. Thus, the award must be remanded to the parties for resubmission to the Arbitrator for clarification.

In its exceptions, the Agency contends, among other things, that the Arbitrator failed to confine his award to the stipulated issue and that he exceeded his authority by directing the Agency to rescind the suspension, issue a reprimand, and to pay backpay. It is well established that an arbitrator exceeds his or her authority by, among other things, resolving an issue not submitted to arbitration. See, for example, U.S. Department of Veterans Affairs Medical Center, Asheville, North Carolina and American Federation of Government Employees, Local 446, 37 FLRA 1054 (1990) (arbitrator exceeded his authority by directing an agency to reassign a grievant to his former position); Veterans Administration Medical Center, Houston, Texas and American Federation of Government Employees, Local 1633, 36 FLRA 122, 127-28 (1990) (arbitrator's award resolving an issue not properly before him found deficient as in excess of his authority); Veterans Administration, 24 FLRA at 450-51 (arbitrator exceeded his authority when he failed to confine his decision and remedy to the issues as he framed them).

On the other hand, an arbitrator does not exceed his or her authority when the arbitrator resolves an issue or issues an affirmative order that is within the scope of the matter submitted to arbitration. See U.S. Department of Health and Human Services, Austin, Texas and National Treasury Employees Union, Chapter 219, 40 FLRA 1035, 1041 (1991) (HHS) (arbitrator acted within his authority when he determined that a part of the disciplinary action was not based on just caused and reduced a 3-day suspension to a written reprimand). In HHS, we noted that it is well established that an arbitrator may determine whether or not all or part of a disciplinary action is for just and sufficient cause and may accordingly set aside or reduce the penalty. Id.

In this case, the parties stipulated the issue as: "[d]id the Agency violate any existing laws, rules, regulations, or the negotiated agreement when it suspended the grievant . . . from duty? And, if so, what is the remedy?" Award at 3 (footnote omitted). Thus, the issue before the Arbitrator, as agreed to by the parties, encompassed determinations as to the appropriate remedy for any violation of laws, rules, regulations or the parties' negotiated agreement. In other words, if the Arbitrator answered the issues presented to him by concluding that the Agency's decision to discipline the grievant, including the disciplinary penalty, did not violate any laws, rules, regulations, or the parties' negotiated agreement, then the Arbitrator would have decided the issues presented to him. If the Arbitrator answered the issues presented to him by concluding that the Agency's decision to discipline the grievant did not violate any of the applicable authorities, but that the disciplinary penalty did violate applicable authorities, then it would be within the scope of the Arbitrator's authority to mitigate the penalty.

Having reviewed the record, we are not certain of the Arbitrator's determinations. That is, the award is ambiguous as to: (1) whether the Arbitrator determined that the Agency's decision to discipline the grievant, including the disciplinary penalty, did not violate any laws, rules, regulations, or the parties' negotiated agreement; or (2) whether he determined that the Agency's decision to discipline the grievant did not violate any of the applicable authorities, but that the severity of the disciplinary penalty did violate applicable authorities. In this regard, the Arbitrator stated:

> Based upon the record of this case in its entirety and for the reasons and specific findings contained herein, the Arbitrator concludes that the issue presented for determination must be answered in the NEGATIVE, that is, the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action against the grievant.
>
> Accordingly, the subject grievance is hereby denied.

Id. at 41 (emphasis in original).

Having denied the grievance, the Arbitrator then stated:

> The Arbitrator, however, finds and concludes that the seven-day disciplinary suspension, in light of the overall findings and reasons contained herein, is excessive for the grievant's dilatory conduct found herein. Accordingly, the Arbitrator directs the Agency to rescind the subject disciplinary suspension in its entirety while, at the same time, further directs the Agency to issue the grievant an official reprimand for the grievant's dilatory conduct found herein. The Arbitrator further directs the Agency to reimburse the grievant for any pay or benefits lost as a result of the subject disciplinary suspension.

Id. at 41-42.

We note, as conceded by the Union, that the Arbitrator did not cite specific violations of the parties' agreement or law, rule, or regulation with respect to this determination. However, we note that in his decision, the Arbitrator discussed the Agency's schedule of disciplinary offenses and penalties, the Agency's reliance on this schedule in determining the grievant's penalty, and the range of penalties applicable to the offense for which the grievant was charged. In considering the schedule of disciplinary offenses and penalties, the Arbitrator rejected the Agency's official reason for imposing a suspension rather than a reprimand. The Arbitrator's mitigation of the penalty, therefore, can be viewed as a determination that the Agency, under its schedule of penalties, did not have just cause to suspend the grievant for seven days and, therefore, the penalty violated applicable authority.

On the other hand, the Arbitrator determined, "based upon the record of the case in its entirety[,]" that the issue presented for determination must be answered in the "NEGATIVE, that is, the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by taking the subject disciplinary action." Id. at 41. That language makes the award unclear as to whether the Arbitrator's mitigation of the penalty is based on a finding of a specific violation of applicable authority. Therefore, we are unable to determine whether the Arbitrator's award exceeds the authority granted to him by the parties.

As the Arbitrator's award is unclear, we find it necessary to remand the award to the parties for the purpose of obtaining a clarification of the award from the Arbitrator. The remand is for the limited purpose of having the Arbitrator clarify and interpret his award by stating the basis for his affirmative order directing the Agency to rescind the suspension, issue a reprimand, and to pay backpay in light of his conclusion that the Agency did not violate any existing laws, rules, regulations, or the negotiated agreement by "taking the subject disciplinary action against the grievant." Id. On receipt of the award, as clarified, either party may file timely exceptions to that award.[3]

VII. Decision

The award is remanded to the parties in accordance with this decision.

FOOTNOTES:

(If blank, the decision does not have footnotes.)

1. Unless otherwise noted, all dates refer to 1990.

2. Article 31, Section H(1) provides:

> The parties agree that letters [of] reprimand, suspensions of less than fifteen (15) days, and other adverse actions will be taken only for appropriate cause as provided in applicable law. Such cause, in the case of actions which are not based on unacceptable performance, shall be just and sufficient and only for reasons as will promote the efficiency of the service.

Award at 5.

3. In view of this decision, it is unnecessary to address the Agency's exceptions that the award is based on a nonfact and violates the Back Pay Act. For the reasons stated in U.S. Department of Justice, Immigration and Naturalization Service, New York District Office and American Federation of Government Employees, Immigration and Naturalization Service Council, Local 1917, 42 FLRA 650, 658 (1991), we reject the Agency's exception that the award conflicts with management's right to discipline employees under section 7106(a)(2)(A) of the Statute.

U.S. OFFICE OF PERSONNEL MANAGEMENT

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MAXIMUM PAYABLE RATE RULE

Description

The maximum payable rate rule is a special rule that allows an agency to set pay for a General Schedule (GS) employee at a rate above the rate that would be established using normal rules, based on a higher rate of pay the employee previously received in another Federal job. The pay set under the maximum payable rate rule may not exceed the rate for step 10 of the GS grade or be less than the rate to which the employee would be entitled under normal pay-setting rules. The maximum payable rate rule may be used in various pay actions, including reemployment, transfer, reassignment, promotion, demotion, change in type of appointment, termination of a critical position pay authority under 5 CFR part 535, movement from a non-GS pay system, or termination of grade or pay retention under 5 CFR part 536.

Rates of pay that may be used as the highest previous rate (HPR)

The highest previous rate is--

- The highest rate of basic pay previously received by an individual while employed in a civilian position in any part of the Federal Government (including service with the government of the District of Columbia for employees first employed by that government before October 1, 1987), without regard to whether that position was under the GS pay system; or
- The highest rate of basic pay in effect when a GS employee held his or her highest GS grade and highest step within that grade.

The highest previous rate must be a rate of basic pay received by an employee while serving-

- On a regular tour of duty under an appointment not limited to 90 days or less; or
- For a continuous period of not less than 90 days under one or more appointments without a break in service.

If the highest previous rate is a GS locality rate, the underlying GS rate or an LEO special base rate associated with that locality rate must be used as the highest previous rate in applying the maximum payable rate rule.

An agency may use a GS employee's special rate established under 5 U.S.C. 5305 and 5 CFR part 530, subpart C, or 38 U.S.C. 7455 as the highest previous rate when all of the following conditions apply:

- The employee is reassigned to another position in the same agency at the same grade level;
- The special rate is the employee's rate of basic pay immediately before the reassignment; and
- An authorized agency official finds that the need for the services of the employee, and the employee's contribution to the program of the agency, will be greater in the position to which

reassigned. An agency must make such determinations on a case-by-case basis. In each case, the agency must document the determination to use the special rate as an employee's highest previous rate in writing.

Any rate that does not meet the definition of General Schedule or GS in 5 CFR 531.203 is a rate from a non-GS pay system. If an employee's highest previous rate is a non-GS hourly rate of pay, the agency must convert the hourly rate of pay to an annual rate of pay by multiplying the hourly rate of pay by 2,087.

Pay rates that must be treated as if they were rates under a non-GS pay system:

- A critical position pay rate under 5 CFR part 535, and
- An adjusted GS rate that includes market pay under 38 U.S.C. 7431(c).

Rates of basic pay that may not be used as the HPR

The highest previous rate may not be based on certain types of rates, including the following:

- Erroneous rates;
- A rate received during a temporary promotion lasting less than 1 year, except (1) upon permanent placement at the same or higher grade or (2) when a temporary promotion is extended so that the total time equals or exceeds 1 year;
- A special rate established under 5 U.S.C. 5305, except in a reassignment within the same agency when the special rate is the employee's current rate and the agency has a need for the employee's services. (See 5 CFR 531.222(c) for use of a special rate as the HPR.) When a special rate is not used, the employee's underlying GS rate is the HPR.;
- A rate received as a member of the uniformed services; or
- A retained rate under 5 U.S.C. 5363 or a similar rate under another legal authority.

If a temporary promotion of less than 1 year is extended so that the total time of the temporary promotion equals or exceeds 1 year, the HPR may be based on the rate received during the temporary promotion once the total time of the temporary promotion equals or exceeds 1 year.

Determining the maximum payable rate (MPR)

When HPR is based on a GS rate:

When an employee's HPR is based on a GS rate, determine the MPR as follows:

Step A: Compare the employee's highest previous rate with the GS rates for the grade in which pay is currently being set using the schedule of GS rates (excluding any locality payment or additional pay of any kind) in effect at the time the highest previous rate was earned.

Step B: Identify the lowest step in the grade at which the GS rate was equal to or greater than the employee's highest previous rate. If the employee's highest previous rate was greater than the maximum GS rate for the grade, identify the step 10 rate.

Step C: Identify the rate on the currently applicable GS rate range for the employee's current position of record and grade that corresponds to the step identified in step B. This rate is the maximum payable GS rate the agency may pay the employee.

Step D: After setting the employee's GS rate within the rate range for the grade (not to exceed the MPR identified in step C), determine the employee's payable rate of basic pay (i.e., locality rate or special rate).

When HPR is based on an LEO special base rate, see 5 CFR 531.221(b) for special MPR rules.

When HPR is based on the special rate of an employee who is reassigned to a position in the same agency as provided by 5 CFR 531.222(c), see 5 CFR 531.221(c) for special MPR rules.

When HPR is based on a rate under a non-GS pay system:

When a GS employee's HPR is based on a non-GS rate, determine the MPR as follows:

Step A: Compare the highest previous rate to the highest applicable rate range (including a locality rate or special rate range) in effect at the time and place where the highest previous rate was earned. The highest applicable rate range is determined as if the employee held the current GS position of record (including the grade in which pay is being set) at that time and place.

Step B: Identify the lowest step rate in that range that was equal to or higher than the highest previous rate (or the step 10 rate if the highest previous rate exceeded the range maximum).

Step C: Convert the step rate identified in step B to a corresponding rate (same step) on the current highest applicable rate range for the employee's current GS position of record and official worksite. That step rate is the employee's maximum payable rate of basic pay.

Step D: After setting the employee's rate of basic pay in the current highest applicable rate range (not to exceed the MPR identified in step C), determine any underlying rate of basic pay to which the employee is entitled at the determined step rate.

See examples 6-8 and 10 on Pay Action Examples Other than Promotions and Grade and Pay Retention.

Key Terms

Highest applicable rate range means the rate range applicable to a GS employee, based on a given position of record and official worksite that provides the highest rates of basic pay, excluding any retained rates. For example, a rate range of special rates may exceed an applicable locality rate range. In certain circumstances, the highest applicable rate range may consist of two types of pay rates from different pay schedules-e.g., a range where special rates (based on a fixed dollar supplement) are higher in the lower portion of the range and locality rates are higher in the higher portion of the range.

General Schedule or GS means the classification and pay system established under 5 U.S.C. chapter 51 and subchapter III of chapter 53. It also refers to the pay schedule of GS rates established under 5

U.S.C. 5332, as adjusted under 5 U.S.C. 5303 or other law (including GS rates payable to GM employees). Law enforcement officers (LEOs) receiving LEO special base rates are covered by the GS classification and pay system, but receive higher base rates of pay in lieu of GS rates at grades GS-3 through GS-10.

Locality rate means a GS rate or an LEO special base rate, if applicable, plus any applicable locality payment.

Position of record means an employee's official position (defined by grade, occupational series, employing agency, LEO status, and any other condition that determines coverage under a pay schedule (other than official worksite)), as documented on the employee's most recent Notification of Personnel Action (Standard Form 50 or equivalent) and current position description. A position to which an employee is temporarily detailed is not documented as a position of record.

References

- 5 CFR 531.221-223
- 5 CFR 531.247 for GM employees
- 5 CFR 531.216 for an employee moving to a GS position from a Department of Defense and Coast Guard nonappropriated fund instrumentality (NAFI) position

This page can be found on the web at the following url: *http://www.opm.gov/oca/pay/html/MPRRule.asp*

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

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.	)	

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1400 K Street, NW, Suite 200
Washington, DC 2042-0001

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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
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Washington, DC 20424-0001
Phone: (202) 218-7740
Fax: (202) 482-6657

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September 4, 2014
(Date)

Tresa A. Rice
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