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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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	Case No.: O-AR-4586
v.	Issue: Fair & Equitable Compliance
U.S. Department of Housing and Urban Development, Agency.	Date: July 17, 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 June 17, 2015[1], Signed Order 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 June 17, 2015 Order is deficient on the following grounds: the award is incomplete, contrary to law, and based on non-fact(s). The Agency also seeks a remand to a different arbitrator. Based on the foregoing, the Agency requests that the June 17, 2015, Order be set aside, and that the processing of the Fair and Equitable case be remanded to a different arbitrator.

[1] Order faxed on June 17, with Arbitrator's signature of June 19, 2015.

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 two arbitration hearings, 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 the parties' Collective Bargaining Agreement, specifically 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. This Award also advised the parties that she would maintain jurisdiction for the purpose of

implementation of the award. See Merits Award at p. 16. 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. The FLRA reiterated its prior statements that "the Statute does not authorize the Arbitrator to change the 'promotion potential of employees' permanent positions[.] HUD, 59 FLRA at 632," and further stated that "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. For these reasons, the Arbitrator's remedy is contrary to law because it concerns classification matters, and we set it aside." HUD, 65 FLRA at 436 (internal citations omitted).

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 the Union. During the IMs, the parties 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 Officer and Office of General Counsel, provided status updates on Agency compliance with the January 10, 2012, Award.

Following each IM, the Union and the Agency submitted proposed summaries to Arbitrator McKissick outlining the parties' discussions during the most recent IM held. See Union Draft IM Summary Submissions 1-7 and Agency Draft IM Summary Submissions 1-7. Arbitrator McKissick reviews the proposed summaries submitted by the parties and then issues a signed IM Summary to the parties. See IM Summaries 1-7.

IMs have been held on: February 4, 2014; March 26, 2014; June 12, 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); May 16, 2015 (IM Summary 6); and June 2, 2015 (IM Summary 7).

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 stated that, "... the Agency has unilaterally determined, based on its own methodology, that there are a minimal number of class members."[2] See IM Summary 1 at pg. 2. The Arbitrator also stated that she provided feedback to the Agency on its methodology, stating that she believed 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 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 "[p]arties 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 she intended that "the Class definition is data driven, not announcement

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

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 were to "... 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 these retroactive promotions; in particular, that sufficient funding was unavailable 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 stating "[c]oming 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[3], and to then move onto the GS-246 series[4] 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[5] 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

[3] Public Housing Revitalization Specialist (PHRS) employees are employed in the 1101 series.
[4] Contract Industrial Relations Specialist (CIRS) employees are employed in the 246 series.
[5] On June 2, 2014, the Agency submitted OMB communications directly to the Arbitrator for *in camera* review.

retroactive promotions for all Public Housing Revitalization Specialist (PHRS) and Contract Industrial Relations Specialist (CIRS) employees identified on the Union's list.[6] See PHRS and CIRS Order at pg. 2.

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 stated 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 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 September 11, 2014, the Union included as an

[6] 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.

attachment a list of 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 listing current and former GS-12 AFGE bargaining unit employees.[7] 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

[7] Note that the Union's September 2014 list of 3,777 proposed claimants did not include contextual information identifying the job title, occupational series, or HUD organizational unit in which each listed employee worked.

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 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.[8] 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.

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 action regarding possible sanctions against management officials.

[8] 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. 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.

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 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 noted 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. The Agency's claimants included employees employed in the GS 1101 series, PHRS and CIRS positions. The Union and Arbitrator were in attendance for the duration of the Agency's presentation on its methodology and discussion of Agency claimant list, most notably the inclusion of the PHRS and CIRS employees per the Arbitrator's orders and instructions to the parties.

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 noted that it had used the terms and conditions promulgated by the Arbitrator in her orders to develop and define the class, while the Union had not. 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 took the position 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 qualify 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 used valid data from the 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, the Agency's 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 alleged 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 at the lower grade 12.

Citing the FLRA findings, the Agency advised the Arbitrator and Union that its proposed methodology[9] 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).

Also during IM 6, the Agency advised the Union and the 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 that Agency had refused 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.

[9] 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."

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 parties 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). 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 adopted in its 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 NFC 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 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 the adverse inference ruling was inclusive of all issues.[10] See id. at pg. 9.

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 further stated 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.

[10] This is in spite of the Union's request for a *specific* adverse inference regarding the numbered series vacancy announcements, not any and all issues related to this matter. See Merits Award at pg. 10

The Arbitrator also stated 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 remarks that she was relying upon "the adverse inference that has been previously drawn in this case." See id.

In IM Summary 6, the Arbitrator commented that the Union's methodology identified, at a *minimum,* 3,777 grievants. See IM Summary 6 at pg. 15. Specifically, she noted:

> 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."

See id. (emphasis added).

Signed IM Summary 6 also included the post-IM information and data submitted by the Union in its draft IM Summary but never discussed during the 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-stated her approval of the Union's methodology and surprisingly, 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.

See IM Summary 6 (emphasis added).

IM 7, THE JUNE 17, 2015, ORDER, AND SUBSEQUENT EVENTS

The parties participated in IM 7[11] on June 2, 2015. During the IM, the Agency challenged the Arbitrator's signed Order that the Agency retroactively promote and make whole, at a minimum, 3,777 employees dating back to January 18, 2002, citing the

[11] 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.

inability to complete the Award, as written, because 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.

Furthermore, the signed Order, as written, did 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 signed Order would effectively contravene the Agency's position management structure and virtually eliminate grade 12 AFGE bargaining unit employees from the Agency.

The Agency also challenged the signed 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, the Federal Retirement Thrift Investment Board (FRTIB). The Agency also advised that it had contacted the FRTIB regarding 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 that it was 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 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 once more 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 Agency's past failure to produce data, such as job announcement information. 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 grievant 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.

The Agency also advised the parties that its payroll personnel maintained contact with the Office of Personnel Management (OPM) on the status of annuity recalculations. In particular, Acting CHCO Towanda Brooks advised the parties that as recently as the morning of the June 2, 2015, IM the Agency had once again contacted OPM to inquire about the status of annuity recalculations. Ms. Brooks further advised that HUD's

payroll personnel had been reaching out to OPM on a weekly basis for status updates on this issue.

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. The Agency also provided courtesy notice to the parties of its intent to file a Motion for Reconsideration over the Authority's May 22, 2015, Order Dismissing Agency's September 4, 2014 Exceptions.

On June 4, 2015, the Union sent via email proposed orders to the Arbitrator. See Union Email. And on June 8, 2015, the Arbitrator requested that any Agency response be provided "promptly." See Arbitrator Email. The Arbitrator subsequently clarified with a deadline of June 15, 2015. See Arbitrator Email. On June 15, 2015, at 2:31p.m., the Agency provided additional comments[12] stressing the Agency's internal payroll and processing procedures to the parties and highlighted issues[13] based on a review of the employee list. See Agency Email.

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[12] Because the plain language of PHRS and CIRS Order reveals the PHRS and CIRS class members are included in the larger class list of 3,777 class members, the Agency previously raised its arguments and factual assertions before the Arbitrator during IM 6, and are fully argued in the Agency's June 22, 2015, Exceptions pending before the Authority.

[13] Some of the issues highlighted by the Agency included the need to adhere to regulatory defined processes for effectuating retroactive promotions and identifying the effective date(s) for the retroactive promotions.

The Agency also advised that the proposed order was untenable. See id. That same day, the Union emailed a reply. See Union Email. In its reply, the Union challenged the timing of the Agency's grievant list, and attempted to challenge whether the Agency's grievant list was provided to the Arbitrator. See id. Notwithstanding this, the Union's email reply did not dispute that the Agency's presentation of its methodology to both the Union and Arbitrator identified the Agency's list of potential grievants, and that among the Agency's list included the Agency's own listing of GS 1101, PHRS and CIRS employees. See Union email.

On June 17, 2015, at 7:17[14], the Arbitrator faxed the signed PHRS and CIRS Order to the parties. In the PHRS and CIRS Order, Arbitrator McKissick stated that signed IM Summary 3 (previously issued on August 2, 2014), covered all PHRS and CIRS bargaining unit employees employed during the relevant damages period. See PHRS and CIRS Order at pg. 1. The Arbitrator also stated that she had permitted the Agency an additional opportunity to compile its list within thirty days from the June 2, 2014 meeting, and that the parties were then to discuss their respective PHRS and CIRS lists if they differed. See id. at pgs. 1-2. The Arbitrator then stated that the Agency did not present a list within thirty days, so there was no discussion. See PHRS and CIRS Order at pg. 2. Of particular importance, the PHRS and CIRS Order stated: "In light of these rulings, the Agency, despite being provided the opportunity to do so, has not contested the eligibility ... ". See id. The Arbitrator continued in a footnote, and stated that, "the Agency has not contested that any of the named employees in the attached

[14] The fax does not indicate whether the document was transmitted at 7:17 a.m. or p.m.

exhibits should be eligible class members, based on the methodology adopted by the Arbitrator therein." See PHRS and CIRS Order at pg. 2.

The Arbitrator then proceeded to order the Agency to retroactively promote all of the employees listed on the attached Exhibits, and specifically ordered the Agency to take the following steps:

1. Promote all current GS-12 employees contained in the attached Exhibits to the GS-13 level within 30 days, and
2. Provide the Union with a list of retroactive promotion dates and estimate back pay, interest, and revised annuity calculations within 45 days,

See id.

The Arbitrator further ordered the Agency to engage with OPM on the processing of revised annuity calculations. See PHRS and CIRS Order at pg. 3. Specifically, the Arbitrator instructed the Agency to request that OPM expedite the processing of retirement annuity recalculations. See id. The Arbitrator also ordered that if there was a delay in processing annuity recalculations, "the Agency shall work with OPM in order to expedite the processing." See PHRS and CIRS Order at pg. 3. The Arbitrator also ordered the parties to continue to work together to identify *additional* PHRS and CIRS employees that may be eligible class members. See id. at pg. 3 (emphasis added).

On June 22, 2015, the Agency filed exceptions to signed IM Summary 6, dated May 16, 2015. The Agency challenged signed IM Summary 6 on the following grounds: the award is incomplete, contrary to law, modifies the original award, and based on non-fact(s). See Agency's June 22, 2015, Exceptions. The Agency further asserted arbitrator

bias and requested that the Authority remand the Fair and Equitable case to a different arbitrator. See id.

In IM Summary 7, issued on June 27, 2015[15], the Arbitrator again erroneously stated that the Agency has not contested the eligibility of employees listed by the Union. See IM Summary 7 at pg. 3. The Arbitrator also states, erroneously, that she adopted the Union's methodology in Summary 3[16]. See id. Recognizing the filing of Agency exceptions, she ultimately conceded that [Summary 6] "is stayed until Summary 6 is final and binding." See IM Summary 7 at pg. 3.

ARGUMENT

I. Non-Fact

Arbitrator McKissick's signed PHRS and CIRS Order is based on a non-fact. Specifically, the Arbitrator erroneously found that the Agency did not contest any of the employees claimed by the Union should be eligible class members, based upon the methodology adopted by the Arbitrator. See PHRS and CIRS Order at pg. 2. 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 PHRS and CIRS Order shows the Agency's alleged failure to contest the Union's PHRS and CIRS class list was a central fact. This central fact resulted in the Order directing the Agency to promote the Union's list of PHRS and CIRS employees. See PHRS and CIRS Order at pg. 2. The Order to promote the

[15] Even though IM Summary 7 was issued after the PHRS and CIRS Order, the Arbitrator nonetheless states that the proposed Order remains "under consideration". See IM Summary 7 at pg. 3.
[16] The Arbitrator adopted the Union's methodology in IM Summary 6, at pg. 15.

PHRS and CIRS grievants is directly related to the Agency's alleged failure to contest the Union's list of PHRS and CIRS employees. 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 entire list, which includes PHRS and CIRS employees. The record further reveals that the Agency's own grievant list contains employees in the PHRS and CIRS series – a list clearly exclusive of a number of employees from the much longer list the Union provided. Therefore, the Arbitrator's own summary contradicts her erroneous finding.

As fully explained in the preceding section, the record demonstrates the Agency contested the Union's list of PHRS and CIRS employees when it presented its own proposed grievant list during IM 5. On a related note, the record contradicts the Arbitrator's statement that, "despite being provided the opportunity to do so, [the Agency] has not contested eligibility." See PHRS and CIRS Order at pg. 2. By presenting its own grievant list – that included PHRS and CIRS employees – the Agency disputed the Union's grievant list of PHRS and CIRS employees. Further, this fact was not a point of contention or disagreement between the parties, or before the Arbitrator prior to issuance of the Order. 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 all of the employees listed on the Union's list of PHRS and CIRS 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: current PHRS and CIRS grievants in 30 days, and the Union's overall class list of PHRS and CIRS employees. In order for an award to be found deficient on the basis that it is incomplete, ambiguous, or contradictory 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 all current PHRS and CIRS employees to a GS 13 position – without competition or identifying the corresponding job title, classified position description and position information to promote the employees identified on the Union's list, regardless of the (non)existence of a position, the employees' qualifications or the Agency's operational needs. 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 retroactive promotions for all PHRS and CIRS employees in general, and all grade 12 PHRS and CIRS employees within thirty (30) days.

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). Thus far, the Arbitrator has issued seven IMs based upon her retained jurisdiction. In summary, 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 simply 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 order to promote all current PHRS and CIRS employees in the 30-day time period designated by the Arbitrator, due to internal personnel and payroll procedures about which the Agency has previously advised the Arbitrator and Union. The Agency's internal protocols and review procedures by personnel and payroll staff must be set into motion and completed in order to determine the sufficiency of funding sources. See IM Summary 2 at pg. 2. It is also important to note that the Arbitrator has previously acknowledged the Agency's personnel and processing procedures. See id.

The foregoing, coupled with the time and resources to secure funds within HUD, if available, further renders the Order incomplete. See id. Additionally, absent sufficient funding, the Agency faces a potential Anti-Deficiency Act violation and will require time to submit a request for a supplemental appropriation. Any one of the steps described above would take more than 30-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, *inter alia*. It is also impossible to implement the ordered retroactive promotions in the 30-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. It should be noted that, among grievants identified thus far, it has taken approximately 25 days to estimate and process calculations for each former employee, and approximately 15 days to estimate and process calculations for each current employee. 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 in adopting the Union's methodology and directing the Agency to retroactively promote all PHRS and CIRS employees because it impacts a reserved management right. The Agency also challenges the Arbitrator's order that the Agency work with OPM to expedite the processing of annuity recalculations, because this Agency has no control over the acts of OPM, a separate federal agency. HUD also objects to the Arbitrator's Order because the PHRS and CIRS employees at issue are part of the larger class of 3,777 grievants currently on appeal before the Authority, along with the Arbitrator's adoption of the Union's methodology.

In essence, the Agency's June 22, 2015 Exceptions effectively hold in abeyance the Arbitrator's adoption of the Union's methodology, and the related processing of all PHRS and CIRS employees identified using the Union's methodology, because the identified PHRS and CIRS grievants are contained within the larger 3,777 grievant list currently on appeal. Because the grievants encumbering PHRS and CIRS positions and the Arbitrator's adoption of the Union's methodology are on appeal before the Authority, the Order instructing that the Agency process the PHRS and CIRS employees based upon the methodology she has adopted is contrary to law.

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.

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, is outside 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).

The Arbitrator's order to promote all PHRS and CIRS employees 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). In particular, the PHRS and CIRS Order determines the grade of employees employed in the PHRS and CIRS job series. Specifically, the Order results in an Agency-wide change in grade structure[17] 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

[17] Because the Order impacts the Agency's organizational structure, there may well be a need to consult with OPM to ensure compliance is consistent with Title 5.

her remedial award. See Remedial Order at pg. 2 (ordering retroactive permanent selection of all *affected* BUEs into currently existing career ladder positions).

The retroactive promotions of the listed PHRS and CIRS employees is contrary to law because they unlawfully impact a reserved management right; namely, the numbers, types and grades of a significant portion of the Agency's 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. NAGE, Local R5-184, 52 FLRA 1024 (1997). The Agency has previously raised challenges to the Arbitrator's Orders based on the impact of the Orders on HUD's position management and grade structure. In particular, during the seventh IM held on June 2, 2015, the Agency argued that the Arbitrator's decision to adopt the Union's larger class of 3,777 grievants and order retroactive promotions for each of those employees from grade 12 to grade 13 levels would effectively abolish the grade 12 from the Agency's workforce.[18]

[18] The Agency additionally argued that the adoption of the Union's methodology had similar impacts on HUD's position management and grade structure.

The Arbitrator's Order directing the retroactive promotion of PHRS and CIRS employees also 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 grade levels 12 and 13. Therefore, the PHRS and CIRS Order affects the Agency's exercise of a reserved management right to determine the grades of employees and positions assigned throughout the Agency.

The Order unlawfully affects a reserved management right because it 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 attempted to do in the PHRS and CIRS Order. 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 all PHRS and CIRS employees is not consistent with law.

It is contrary to law to order the Agency to work with OPM to expedite any delayed annuity recalculations, the Agency asserts this is contrary to law because it cannot take actions within the purview of a third party. See 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). The record demonstrates that the Agency has submitted repeated requests on the status of annuity recalculations to the responsible third party– OPM. Nevertheless, the Arbitrator determined that if there is a delay in annuity recalculations that she was directing the Agency to, "work with OPM in order to expedite

the processing." See PHRS and CIRS Order at pg. 3. Because the Agency does not have the authority to expedite annuity recalculations, which is within the purview of a separate federal agency, the Arbitrator's Order directing that the Agency work with OPM in this regard is contrary to law.

The Agency further challenges the Arbitrator's Order because the PHRS and CIRS Order is effectively incorporated within the larger class of 3,777 grievants currently on appeal before the Authority. In signed IM Summary 6, Arbitrator McKissick ordered the retroactive promotions of "at a minimum" 3,777 employees. See IM Summary 6. On June 22, 2015, the Agency appealed the Arbitrator's order directing the "at a minimum" 3,777 retroactive promotions. See Agency's June 22, 2015, Exceptions. The subsequently issued IM Summary 7 recognizes the effect of Agency exceptions, as she acknowledges that "this matter is stayed until Summary 6 is final and binding." See IM Summary 7 at pg. 3.

Notwithstanding this, the PHRS and CIRS Order attempts to circumvent Authority precedent and regulation by ordering promotions based upon a methodology where both 1) the promotions and 2) the methodology are currently on appeal. Based on above, the Agency's June 22, 2015, Exceptions effectively hold in abeyance the Arbitrator's adoption of the Union's methodology, and the related processing of the PHRS and CIRS employees based upon the Union's methodology because the PHRS and CIRS positions are contained within the entire 3,777 grievant list and Union methodology – both of which are on appeal before the Authority. See U.S. Dep't of the Treasury, 48 FLRA 938 (1993) (an award becomes final when the appeals period lapses, a decision is issued resolving the exceptions, or the exceptions are withdrawn).

IV. Bias

The Arbitrator's partiality calls for a discontinuation of her jurisdiction over the Fair and Equitable implementation proceedings. Accordingly, the Agency reiterates its request 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 Arbitrator has demonstrated partiality through the exercise of her retained jurisdiction 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 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. In her award, however, the Arbitrator again issued a decision contrary to contract and law, and attempted to secure an unlawful organizational upgrade.

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 misused her authority in an attempt to secure an unlawful organizational upgrade. 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.

Furthermore, even though the record clearly demonstrates that the PHRS and CIRS employees are subsumed within the larger class of 3,777, the Arbitrator additionally attempted to secure an organizational upgrade on a piecemeal basis through her Order of June 17, 2015, affecting the underlying PHRS and CIRS employees.

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 acknowledged 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 presented its list on March 26, 2015. The Arbitrator then stated, 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"[19] 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, it is clear that the

[19] During the fifth IM, the Arbitrator verbally told the Agency that if it could increase its number of 439 by adding "1,000 – 2,000 additional employees" to its claimant list, that she may be satisfied.

Agency has disputed the Union's list in every regard – (a) the overall 3,777 list, (b) the list of GS 1101 employees and (c) the CIRS and PHRS lists, with the presentation of its own grievant lists that counter the Union's lists. 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.

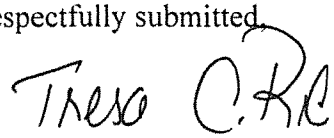
Overall, the record reveals that the Arbitrator's continued jurisdiction and authority to issue IM summaries under the guise of "clarifications" actually constitutes unlawful attempts to change the Agency's position management and organizational structure within the PHRS and CIRS job titles. The record clearly shows that the Arbitrator willfully ignored the Authority's instruction in 65 FLRA 433. In sum, during these entire proceedings, the Arbitrator has continued to expand the class of awardees and has done so despite the Authority's orders as well as the data-driven analysis the Agency presented to her. Because of her 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.

CONCLUSION

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

Respectfully submitted,



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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:

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July 17, 2015
(Date)

TRESA A. RICE
Agency Representative

TABLE OF EXHIBITS

17	PHRS & CIRS Order
18	Agency's Exceptions (June 22, 2015)
19	IM Summary 7