FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

American Federation of Government, Employees (AFGE), Council of HUD Locals 222, UNION, v. US Department of Housing & Urban Development, AGENCY.	Issue: Fair and Equitable FLRA Docket No. 0-AR-4586-003 Arbitrator: Dr. Andree Y. McKissick, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Union's Response in Opposition to the Agency's Exceptions to Arbitrator's Award, with exhibits were served on this 3rd day of August, 2015.

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UNION'S RESPONSE IN OPPOSITION TO AGENCY'S EXCEPTIONS TO ARBITRATOR AWARD

AFGE Council of Locals 222 (the "Union"), by and through its undersigned counsel, hereby responds in opposition to the Agency's Exceptions to Arbitrator Award. The Exceptions do not contain any legal reason to disturb Summary 6, the Arbitrator's Award, and must be dismissed or denied. In support, thereof, the Union states as follows:

Background

The Authority is no stranger to this matter as this case has an extensive procedural history dating back to the filing of the Grievance on November 13, 2002. Most relevant to the instant filing, however, are: the Order on the Union's Motion to Compel dated May 29, 2008, (**Exhibit A**); the Merits Award dated September 29, 2009 (**Exceptions, Agency Exhibit 2**[1]); the Remedial Award issued on January 10, 2012, (**Exceptions, Agency Exhibit 3)**; and the Arbitrator's Summary of Implementation Orders dated March 14, 2014, ("Summary 1"); May 17, 2014,

[1] All references to "Agency Exhibits" are the exhibits which were filed by the Agency in their instant Exceptions.

("Summary 2"); August 2, 2014, ("Summary 3"); January 10, 2015, ("Summary 4"); February 27, 2015, ("Summary 5"); and May 16, 2015, ("Summary 6"). **Exceptions, Agency Exhibit 7**.

The instant Exceptions pertain solely to Summary 6. As discussed *infra*, Summary 6 simply clarifies and/or reiterates the findings contained in the Remedial Award and subsequent Summaries and does not form the basis for any valid appeal.

I. The Underlying Adverse Inference.

On May 29, 2008, after years of Agency non-responsiveness to the Union's Request(s) for Information, the Arbitrator granted the Union's Motion to Compel and warned the Agency that failure to provide properly requested information would result in an adverse inference**. Exhibit A.** In that Order, the Arbitrator noted that the Union had properly requested certain data pursuant to 5 U.S.C. § 7144(b), that the Agency had been previously ordered to produce the data, but that the "Agency refused to fully comply with the breadth of that request." ***Id.*** The Union had requested, among other items:

> Information Requested:
>
> A. Please furnish the personnel action of each person selected to fill the attached vacancy announcements. Listed by announcement number on the attached spreadsheet. You may delete those items, which may be subject to the Privacy Act, such as social security numbers, date of birth etc.
> B. Please furnish the previous personnel action prior to selection, prior to the current position.
> C. Please furnish the successful applications' resume, SF 171 or OF-612 application.
> D. Please identify and furnish any vacancy announcements in which a waiver of qualifications was given for the other person selected for the vacancy.
> E. Please furnish the vacancy announcements that were withdrawn or canceled prior to the selecting of any applicant, from the spreadsheet attached.

Id.

After proceeding to list certain vacancy announcements which the Union knew were at issue, the Union further requested:

> 7. Additional instances like those listed above. Union is requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to…
> …
> 9. Finally, we need to know if persons were hired under each of the 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.

Id.

The Arbitrator provided the Agency with a final warning:

> In light of the foregoing, the Agency is again **ordered** to fully comply with this information request immediately, but no later than **June 30, 2008.** If this order is not fully complied with by the above date, this Arbitrator is compelled to draw an adverse inference that the unreleased information must be adverse to the Agency.

Id.

On September 29, 2009, the Arbitrator issued the Merits Award in this matter. **Agency Exhibit 2.** While the Authority set aside the remedy in that decision, it noted that: "[I]n 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." ***AFGE 222 v. HUD*, 65 FLRA 433 (2011)**. In the Merits Award, the Arbitrator ruled that she issued an adverse inference against the Agency because it failed to provide the requested information. **Agency Exhibit 2**. In the Merits Award, the Arbitrator stated:

> 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.
>
> 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. Applying this case law to this grievance, the requested documents were necessary for the Union to amend the grievance 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.
>
> 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. 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.

***Id.*, pp. 10-12**.

The Authority set aside the remedy found in the Merits Award but upheld the finding of liability. The Authority approved the adverse inference finding:

> 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.

65 FLRA 433 (2011).

In short, the Agency's own failure to preserve or produce evidence relevant to the matter was what led to the adverse inference finding. If there is any doubt as to which employees are affected, the fault lies with the Agency and, since the agency destroyed and/or hid responsive data, the inferences drawn against it are construed in favor of the damaged party – the Union.

II. The Remedial Award.

On January 26, 2011, the Authority issued its decision on the Arbitrator's September 29, 2009, merits Award. ***AFGE 222,* 65 FLRA 433 (2011)**. In its decision, the Authority set aside the Arbitrator's remedy but left intact the finding of the underlying violation with instructions of a remand for the remedy. ***Id.***

On January 10, 2012, pursuant to the remand order from the Authority, the Arbitrator issued her Remedial Award. **Agency Exhibit 3**. The Remedial Award was upheld by the FLRA on August 8, 2012. ***AFGE 222 v. U.S. Department of HUD,* 66 FLRA 867 (2012)**. In the Remedial Award the Arbitrator ordered the following relief:

> 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.

Agency Exhibit 3, pp.2-3.

The Arbitrator defined the class of Grievants 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 journey man 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.

***Id.*, p. 4**

In sum, the Remedial Award, which was upheld, plainly identified the class in this matter. All that should have been required to implement the Remedial Award was a review of the employees who encumbered the Series listed in the exhibits anytime during the relevant damages period (2002-present), ensured that they met the performance and time-in-grade requirements, and calculate the back pay, interest, and emoluments owed. The Agency, however, attempted to set forth its own class definition, which significantly limited the class covered by the Remedial Award, thereby necessitating subsequent implementation meetings.

III. Summary 1.

Subsequent to the Remedial Award being upheld by the Authority, the Parties engaged in Implementation Meetings ("IM"). After each IM, the Arbitrator would issue a Summary of Implementation Meeting. On March 14, 2014, the Arbitrator issued Summary 1. **Agency Exhibit 7**. The Agency did not file exceptions to Summary 1, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b), 5 CFR § 2425.2(b)**. Implementation meetings and subsequent Summary Orders became necessary because the Agency refused to implement the Remedial Award as it was written. As the Arbitrator noted:

> 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**.

Exhibit 7, Summary 1, p. 2 (Emphasis added).

The Arbitrator further noted:

> 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**…[2]
>
> …**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.

***Id.*, p. 3. (Emphasis added).**

To the extent any clarification was necessary; the Arbitrator plainly provided it in Summary 1, which became final and binding after thirty days passed without the Agency filing Exceptions. The Arbitrator reiterated that her ruling was based, in part, on the adverse inference that she had previously drawn against the Agency for failing to provide necessary documentation during the course of the Grievance filing. She also noted that the class of employees entitled to relief encompassed all bargaining unit employees who

[2] On May 30, 2013, the Arbitrator held a conference call with the Parties to discuss implementation. That call was memorialized via a letter from the Union on June 5, 2013. **Exhibit B.** The Agency never contested the contents of the letter. The memorialization of the conference call reveals that the Arbitrator reminded the Agency of the adverse inference ruling, and that the adverse inference rulings would not be affected by the Agency's alleged ability to now locate information that it had previously represented was destroyed. The Arbitrator stated that the Agency could use the documents to expand the class, but not limit it.

encumbered any positions in any of the job series referenced in the relevant hearing exhibits.

IV. Summary 2.

On May 17, 2014, the Arbitrator issued Summary 2. **Agency Exhibit 7**. The Agency did not file Exceptions to the Summary 2, so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**. In Summary 2 the Arbitrator reiterated her prior orders, stating:

> 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.**

Agency Exhibit 7, Summary 2, p. 3 (Emphasis added).

The Arbitrator further reiterated her position that:

> 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.

***Id.*, p. 4.**

It is clear from Summary 2 that the class of affected BUEs was easily identifiable based on the Remedial Award.

V. Summary 3.

On August 2, 2014, the Arbitrator issued Summary 3. **Agency Exhibit 7**. Summary 3 contained no new requirements or modifications to the Remedial Award or prior Summaries. In Summary 3, the Arbitrator again reiterated her prior orders, stating:

> 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 backpay and interest, as of their earliest date of eligibility…
>
> …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…

Agency Exhibit 7, Summary 3, pp. 1-2.

The Agency filed Exceptions to Summary 3 because it alleged that the cited text contained impermissible modifications to the Remedial Award. The Authority dismissed those Exceptions on May 22, 2015. ***AFGE 222 v. U.S. Department of HUD*, 68 FLRA 631 (2015)**. As such, it is clear that all GS-1101 employees are eligible class members subject to the other noted requirements. The Agency's instant Exceptions addressing challenges to Summary 6 and the identification of affected BUEs should not affect the applicability of the Remedial Award to those GS-1101 series employees covered by Summary 3, which are a subset of that larger class number.

VI. Summary 4.

On January 10, 2015, the Arbitrator issued Summary 4. **Agency Exhibit 7.** The Agency did not file Exceptions to Summary 4 so they became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**. Because the Agency's Exceptions to Summary 3 were then pending, Summary 4 did not relate to that Summary. **Agency Exhibit 7**. In Summary 4, the Arbitrator ordered the Parties to work together to come up with language to stem the chilling effect that Management's actions had on impacted BUEs. ***Id.*, at p. 2**. The Arbitrator also ruled that the start date of the damages period was January 18, 2002, stating:

> 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. This ruling is based upon data provided by the Agency to the Union and shared with this Arbitrator at the hearing by the Parties.

Id.

The Arbitrator further clarified that the language "until the present" as set forth in the Remedial Award means that: "Bargaining Unit Employees (BUEs) shall continue to be considered class members until the award is fully implemented." ***Id.***

VII. Summary 5.

On February 27, 2015, the Arbitrator issued Summary 5. **Agency Exhibit 7.** The Agency did not file Exceptions to Summary 5 so it became final and binding thirty-days after service. **5 U.S.C. § 7122(b)**.

At the fifth Summary of Implementation Meeting, the Union raised concerns that the Agency was **still not** in compliance with the Arbitrator's award and had not yet completed the process of promoting and paying the 17 identified claimants. **Agency Exhibit 7, Summary 5, p. 2**. In Summary 5 the Arbitrator noted: "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." ***Id.*** The Union again explained its methodology in light of the Arbitrator's prior rulings and the Arbitrator found:

> 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.**

***Id,* p. 3 (emphasis added)**.

The Arbitrator's summary further noted the testimony of Mr. Brad Huther, CFO for the Agency stating:

> 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

***Id.*, p. 4**.

As such, Summary 5 confirmed the Union's methodology for identifying affected BUEs and noted that the Agency had still failed to identify its class list or methodology, and had not properly designated funding for the damages owed in this case.

VIII. Summary 6.

On May 16, 2015, the Arbitrator issued Summary 6. **Agency Exhibit 7.** Summary 6 is the subject of the instant Exceptions. In Summary 6, the Arbitrator provided some of the background to this matter and reiterated some of her prior rulings in certain Summaries. **Agency Exhibit 7, Summary 6, pp. 4-7**. The Arbitrator further reiterated her prior adverse inference ruling:

> 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.

***Id.*, p. 7**.

Summary 6 continues with the Agency's presentation of its methodology, the Union's comments thereto, and the Arbitrator's analysis and findings regarding the Agency methodology. ***Id.*, pp. 8-12**. The Arbitrator found that the Agency failed to provide a methodology that complied with her prior Award and Summaries. ***Id.*, p.13**.

> 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 noncompliance 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 supplement 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.

***Id.*, pp. 13-14**.

With regards to the adverse inference, the Arbitrator noted:

> 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.

***Id.*, p. 14.**

The Arbitrator’s Summary also includes her concerns that the Agency (by its own admission) does not have adequate funding to pay the damages owed bargaining unit employees

(based upon even its own methodology) yet, did not set aside any funding to pay the damages in this case, and never recorded this matter as a contingent liability or obligation. ***Id.*, p.16**.

IX. The Seventh Implementation Meeting.

On June 2, 2015, the Parties participated in the seventh Implementation Meeting. The Exceptions contain a review of what allegedly transpired at the June 2, 2015. **Exceptions, pp. 18-20**. However, none of the alleged facts contained in the portion of the Exceptions pertaining to the seventh IM are relevant or admissible as the meeting occurred **after** May 16, 2015, the date of the Summary at issue, Summary 6. At the seventh IM, for the first time, the Agency raised numerous arguments which it also has raised in the instant Exceptions. §§ 2425.4(c) and 2429.5 of the Authority's Regulations state that the Authority will not consider issues or arguments in exceptions that could have been, but were not, presented to the arbitrator. *See, e.g.*, *NATCA v. U.S. Department of Transportation*, 64 FLRA 387, 389 (2010). Because these arguments were raised for the <u>first time</u> ***after*** Summary 6 had already been issued, the Authority may not consider them. *Infra.*

<u>Argument & Analysis</u>

I. The Exceptions must be denied because the Agency fails to establish that Summary 6 was based on non-fact.

The Agency argues that Summary 6 is deficient and must be set aside because it is based on a non-fact. **Exceptions, p. 20**. Specifically, the Agency argues that the Arbitrator "erroneously found that the Agency did not dispute the Union's proposed class of 3,777 grievants since September 2014." ***Id.*** However, this finding was <u>not</u> based on a non-fact and – even if it were - the Agency has failed to establish that absent this finding the Arbitrator would have reached a different result.

A. The Arbitrator's factual finding that the Agency did not dispute the Union's class list of affected employees is properly based upon the record.

The Agency's argument that the Arbitrator erred in finding that the Agency never disputed the Union's list of class members is without merit. The statement is taken out of context. A review of the record, including Summary 6, demonstrates that the Agency was provided with the opportunity to present its own methodology, that the Agency utilized that opportunity, and that the Arbitrator took issue with the Agency's methodology because it did not conform to her prior Awards and guidance. *Supra,* **Summary 6, pp. 12-14**. Indeed, the Arbitrator even noted that based upon the Agency's flawed, proposed methodology, it believed that there were 439 eligible class members. ***Id.*, p. 8**. As such, it is clear that the Agency, through its methodology, which identified 439 claimants (fewer than the Union's proposed list) did dispute the Union's methodology and class list – i.e. the size and make-up of the class, which is based completely on which methodology is followed. Because the Arbitrator rejected the Agency's methodology, she also rejected the Agency's class list, which flowed directly from the Agency's methodology.

In other words, in light of the Arbitrator's acceptance of the Union's methodology (a methodology which was created pursuant to all prior Orders and Summaries from the Arbitrator), the Arbitrator found that the Agency did not dispute that any of those employees were proper class members pursuant to the Union's methodology; and that the Agency never disputed that any of those class members identified by the Union did not have adequate performance rating, requisite time in grade, etc.

The Union's methodology, applied to data provided by the Agency, resulted in the Union's class list. The Agency did not dispute that, applying the Union's methodology to the

Agency's data, the resulting class list would differ from the Union's class list. This is clearly what the Arbitrator meant, and the Agency has not proven that she meant otherwise.

In other words, the Agency has not contested eligibility of the employees *identified by the Union*, pursuant to the methodology adopted by the Arbitrator in Summary 6, cited with approval in Summary 5, and referenced in prior Summaries. *Supra.*

B. The Agency failed to establish that but-for this factual finding the Arbitrator would have reached a different result.

Even if the Authority were to determine that the alleged factual finding at issue was a non-fact, the Exceptions must still be denied. "To establish that an award is based on a nonfact, the appealing party must demonstrate **that the central fact underlying the award** is clearly erroneous, but for which a different result would have been reached by the arbitrator." ***United Power Trades Org. v. U.S. Army Corps of Engineers*, 62 FLRA 493 (2008) (emphasis added).** The alleged factual finding at issue, (that the Agency has not disputed the Union's class list), is not even **a** central fact underlying the Award**.** ***Id.*** It is certainly not **the** central fact.

The Agency's sole argument that it is a central fact is based upon juxtaposition of the alleged finding that the Agency did not dispute the Union's list, and the following language which states: "[T]herefore, the Agency is directed to, within forty-five (45) days, retroactively promote and make whole. . ." **Summary 6, p. 15**. The Agency then summarily concludes, without any additional argument that: "[I]t is also clear the Arbitrator would have reached a different result had she not made the erroneous finding of fact." **Exceptions, p. 21.**

The Agency ***does not explain, nor attempt to explain***, how the Arbitrator would have reached a ***different*** conclusion without the finding in question. In reality; however, the alleged factual finding **is not a central** fact, and there is a plethora of evidence within Summary 6 which

proves that even without the alleged factual finding at issue, the Arbitrator would have reached **the exact same result**.

Summary 6 contains numerous factual findings and legal conclusions which are central and underlying to the Arbitrator's conclusion which the Agency has **not** alleged are non-facts. Specifically, the Arbitrator found that the Agency's methodology was not in compliance with her Award and prior summaries because it: (1) deliberately limited the scope of the Award; (2) used invalid distinctions between field and headquarters positions; (3) utilized information that contradicted the adverse inference which was ordered after the Agency failed to provide data that it had been ordered to produce after being properly requested; and because (4) its end result in practice failed to promote specific Series that were contained in the original grievance and covered by the Remedial Award. **Summary 6, p. 13**.

These factual findings are all central facts underlying the award, and formed the basis for the Arbitrator's conclusion. However, the alleged non-fact as alleged by the Agency herein, is not erroneous, and even if it were, is not **the** central underlying fact which absent the finding, would have resulted in a different result. As such, this Exception must be denied.

II. The Exceptions must be denied because the Agency fails to establish that Summary 6 was incomplete.

The Agency argues that Summary 6 is deficient and must be set aside because it is an incomplete award. **Exceptions, p. 22**. Specifically the Agency argues that Summary 6 was incomplete so as to make implementation impossible in regards to the retroactive promotions. ***Id.*** "In order to prevail on the ground that an Award is incomplete, the appealing party must demonstrate that the award is impossible to implement because the meaning and effect of the

award are too unclear or uncertain." ***U.S. Dep't of the Air Force, Grissom Air Reserve Base, Ind*., 67 FLRA 302, 304 (2014).**

A review of the Exceptions and Summary 6 plainly demonstrate that the award is not incomplete or impossible to implement. The Agency simply does not wish to devote the resources necessary to implement the Order[3].

A. Summary 6 is not incomplete just because it "doesn't list the corresponding job-title, classified position description and position information to promote the employees."

The Agency argues that Summary 6 is incomplete because it directs the Agency to retroactively promote employees but does not provide the Agency with specific information such as a corresponding job title, classified position description, or position information. **Exceptions, p. 22.** This argument fails for multiple reasons. First, the Agency fails to provide any case law, rule or regulation in support of this argument. Second, the Agency has already provided retroactive promotions without any additional details from the Arbitrator. Third, any alleged deficiency can be cured by the Arbitrator. Finally, this Exception is untimely because the Arbitrator has previously ordered the Agency to provide retroactive promotions without further instruction and the Agency did not timely appeal that order.

1. Case law does not require the Arbitrator to provide a specific position into which the employee should be promoted.

The Agency's argument that Summary 6 is deficient because it directs the Agency to retroactively promote employees but does not provide the Agency with specific information such as a corresponding job title, classified position description, or position information is without merit. The Agency failed to provide any case law, rule or regulation in support of this argument and the Union was unable to locate any caselaw that requires an Arbitrator, when directing a

[3] The Arbitrator has noted her concerns that the Agency failed to properly set aside funding and resources to implement the Award. *See, e.g., Summary 5, p.4, Infra.*

retroactive promotion, to identify a specific position in which to place an aggrieved employee. Indeed, the Authority has ruled that, when as here, an arbitrator has found the specific requirements giving rise to entitlement to backpay; there is no requirement for the arbitrator to identify the specific employees entitled to backpay or to calculate the amount of backpay. ***NATCA v. Federal Aviation Administration*, 55 FLRA 322 (1999).** So, too, here, there is no requirement for the Arbitrator to direct the Agency to promote the class member(s) to a specific position.

The Arbitrator's failure to include such instruction in the Summary does not render it incomplete or deficient in anyway. Rather, the Agency has full discretion to place each impacted bargaining unit employee into **any** position for which the employee is qualified so long as the terms of the Remedial Award are met. As noted, the Remedial Award required 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." **Agency Exhibit 3**. The Agency is well within its rights to assign each impacted employee into **any** position or series so long as the other requirements of the Award are met.

2. The Award cannot be construed as incomplete because the Agency has previously promoted seventeen class members without any further instruction.

The Agency's argument that Summary 6 is incomplete is further without merit because it previously had no problems or issues promoting class members to specific positions despite not receiving the instructions from the Arbitrator that it now claims it required. As noted *supra*, in prior Summaries, the Arbitrator ordered the Agency to process retroactive promotions for the six witnesses and eleven employees identified during the Agency's review. In Summary 1 the Arbitrator stated:

> 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.

Agency Exhibit 7, Summary 1.

In Summary 2 the Arbitrator stated:

> 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). . .

Agency Exhibit 7, Summary 2.

Finally, in Summary 3 the Arbitrator stated:

> 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. . .

Agency Exhibit 7, Summary 3.

As of this date, the Agency has in fact processed promotions and paid back pay with interest for these 17 class members. And yet, the Agency was able to do so without **any specific instruction or guidance from the Arbitrator** specifying into which position title, series, position description, etc., those grievants should be placed. The argument that Summary 6 is impossible to implement because it fails to include the specified information is without merit and must be denied.

3. Any alleged deficiency in the Award can be cured by the Arbitrator.

The Agency even noted that the Authority has specifically rejected alleged ambiguities as a basis for finding an award deficient on the grounds that an award is incomplete when the arbitrator has retained jurisdiction to clarify the award. The Authority advised that such ambiguities are for clarification by the arbitrator and provide no basis for finding the award deficient. ***U.S. Department of Veterans Affairs Med. Ctr., Huntington, W. Va.***, **46 FLRA 1160, 1167 (1993).**

It is undisputed that Arbitrator McKissick has retained jurisdiction in this matter for purposes of implementation, etc. **Agency Exhibit 3, 7.** Because jurisdiction has been maintained, the alleged ambiguities can be clarified by this Arbitrator and provide no basis for finding the award deficient. As such, this Exception must be denied.

4. The Arbitrator has previously ordered the Agency to provide promotions without additional information or guidance and the Agency did not appeal those orders.

The Agency's Exception that the award is incomplete is without merit because the Exception was not timely raised. As noted, the Arbitrator has previously ordered class members to be promoted to a GS-13 position without further instruction or guidance. ***Supra,* Section II(A)(2)**. The Agency's failure to file Exceptions on this basis after receipt of the Remedial Award and Summaries is fatal to their claimed argument herein. **5 U.S.C. § 7122(b), 5 C.F.R. § 2425.2(b)**[4]. Nothing contained in Summary 6 as it pertains to the order to promote a class member is a new requirement. As such, this Exception must be denied.

[4] The Agency did file Exceptions to Summary 3, but those Exceptions were denied. Moreover, the Agency did not raise the exception that Summary 3 was incomplete.

B. Summary 6 is not incomplete just because it provides a deadline of forty-five days to implement the Award.

The Agency further argues that the award is incomplete because it is "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." **Exceptions, p. 23**. Again, the Agency fails to provide any legal support for this argument. Indeed, the Agency even failed to provide any evidence, such as an affidavit from an employee in the personnel department, asserting the alleged impossibility. It is clearly not "impossible" for the Agency to process promotions in the 45-day time period based on several reasons. First, based upon a review of the data provided by the Agency, **thousands** of the 3,777 have already received promotions to the GS-13 level or have separated from the Agency. **Exhibit C**. Therefore, the Agency will not be required to process even a fraction of the promotions that it indicates.

Second, the fact that processing numerous personnel actions in the allotted time-frame will be difficult does not mean it is impossible. If the Agency so desires, it can hire additional employees or transfer existing employees into the personnel division to assist the other employees, or it can pay employees overtime to complete the work within the allotted time. Alternatively, the Agency could approach the Union and negotiate a different time period to complete the promotions. Or, the Agency could process as many actions as it is able to and then, if necessary, request an extension for additional time for the remaining actions. It is not "impossible" to comply with Summary 6. As such, the Exception must be denied.

C. Summary 6 is not incomplete based upon the Agency's allegations that it does not have the financial resources necessary to pay the Award.

Finally, the Agency argues that the award is incomplete because the 45-day time period allotted by the Arbitrator is not sufficient time for the Agency to be sure that it has sufficient

funding to pay the underlying back pay. **Exceptions, p. 23.** Again, the Agency fails to provide any legal support for this argument. As noted *supra*, the Arbitrator noted her concern that despite admitting that it did not have sufficient funding to pay the damages in this case, the Agency did not set aside any funding, and has never recorded this matter as a contingent liability or obligation[5]. **Summary 6, p. 16**. Aside from possibly being a violation of the Anti-Deficiency Act, it is fiscally irresponsible to not set aside sufficient funding, especially since the Agency has had years to prepare for the implementation of the Award.

The Agency's Exception that the award is incomplete because it does not have sufficient funding to pay the damages in this case is akin to the child who murders his parents and then asks for mercy from the court because he is an orphan. **Kozinski, Alex; Eugene Volokh. "Lawsuit Shmawsuit." 103 Yale Law Journal 463 (1993)**. The Agency has no one to blame but itself for its alleged inability to pay the damages in this case, and yet has the chutzpa to file an Exception to its own irresponsible action. As such, this Exception must be denied.

III. The Exceptions must be denied because the Agency fails to establish that Summary 6 was contrary to law.

The Agency argues that Summary 6 is deficient and must be set aside because it is contrary to law. **Exceptions, p. 24**. Specifically, the Agency argues that the Summary is contrary to law because: (1) it constitutes a classification issue; (2) it impacts a reserved management right; and (3) it directs the Parties to determine a "reasonable and appropriate manner and method of obtaining TSP information." *Id.* As demonstrated below, however, none of those

[5] On page 8 of the Agency's Exceptions, it makes reference to the Union's estimation of the cost for implementation of this case. **Exceptions, p. 8**. The document referenced by the Agency was provided to Agency personnel by the Union President during a meeting to discuss settlement, and was submitted for settlement purposes only. **Exhibit H**. It was wholly inappropriate for the Agency to reference this document in its Exceptions. The reference to the document does not serve any arguments set forth by the Agency and it is extremely curious that they chose to include it.

allegations demonstrate that the Summary is contrary to law, and as such, the Exception must be denied.

A. The Agency failed to raise the asserted contrary to law defenses before the Arbitrator issued Summary 6.

The Agency's allegation that Summary 6 is contrary to law is without merit because, prior to the issuance of Summary 6, the Agency had not raised any of these defenses. The Agency's instant Exceptions relate **only to Summary 6**. Summary 6 was issued on May 16, 2015. Yet, the Agency did **not raise any classification defenses** until it filed its Motion to Stay on June 8, 2015[6] [7]. At no time relevant to Summary 6 prior to June 8, 2015 did the Agency raise any argument concerning classification. The Agency did not raise them during meetings with the Arbitrator (until the seventh IM which occurred after Summary 6 was issued), nor did the Agency raise them in any other filings. The Agency has not and cannot point to anything in the record before the Arbitrator, relevant to Summary 6, where it raised these arguments. Only issues raised before the Arbitrator can be raised on appeal, yet the Agency still attempts to untimely raise new arguments in this case. §§ 2425.4(c) and 2429.5 of the Authority's Regulations state that the Authority will not consider issues or arguments in exceptions that could have been, but were not, presented to the arbitrator. ***See, e.g., NATCA v. U.S. Department of Transportation,* 64 FLRA 387, 389 (2010)**. As such, this Exception must be denied.

[6] While it is true that the Agency previously raised allegations that this grievance deals with classification, the Authority has repeatedly ruled otherwise. *Supra*. Those defenses were raised years ago and were already ruled upon. The Agency did not re-raise any classification based defense until after Summary 6 was issued.

[7] It is likely that the reason that the Agency did not raise any classification related arguments at the implementation meetings is because it recognized the finality of the Remedial Award after the Authority's decision in **66 FLRA 867**. It was only after the dissenting opinion's recent attempt to open the door on an argument previously denied by the Authority, in conflict with Authority precedent, that the Agency thought to raise such arguments.

B. The Agency failed to timely file Exceptions to any Classification argument.

The Agency alleges that Summary 6 is contrary to law because it constitutes a classification. **Exception, p. 24.** However, there is nothing new in Summary 6 that would permit the Agency to appeal on this basis. The classification defense is premised on the fact that the Arbitrator is requiring the Agency to provide retroactive promotions to impacted BUEs. However, there is nothing new in Summary 6 that would provide an opening for the Agency to now provide that argument. From the Remedial Award up until and including Summary 6, the Arbitrator required retroactive promotions. As such, in order for the Agency to have the Authority consider an argument pertaining to classification, the Agency would have had to timely file Exceptions after the Remedial Award or prior Summaries. Because the Agency failed to do so, an Exception based upon classification is untimely.

The Agency has not presented any evidence, nor did it raise any arguments concerning classification issues before the Arbitrator at any of the Implementation Meetings relevant to the Exceptions, nor before the Arbitrator when she was considering the proper remedy in this case. In fact, as the Authority noted, the Agency declined to participate in the briefing and argument over the proper remedy. ***AFGE 222,* 66 FLRA 867**. The Agency fully participated in the Implementation Meetings and could have raised whatever issues or arguments it desired - its failure to do so is fatal to its argument. As such, the Exception must be denied.

C. Summary 6 does not deal with classification.

The Agency argues that Summary 6 is contrary to law because it "concerns solely the grade level of duties permanently assigned to grievants and, thus, deals with the classification of positions." **Exceptions, p. 25**. As noted, this argument also fails because it is a collateral attack on the Remedial Award which is already final and binding. This argument is similar to the

arguments the Agency previously set forth before the Authority, which the Authority dismissed and found to not have merit. The Authority has ruled:

> 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)**.

65 FLRA 433 (emphasis added).

The Agency argues that: "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." **Exceptions, p. 25.** The Agency relies upon the definition of 5 C.F.R. §511.701(a) in support of its argument that the Award deals with classification. Section 511.701(a)(1) states:

> A classification action is a determination to establish or change the title, series, grade or pay system of a position based on application of published position classification standards or guides. This is a position action.

5 C.F.R. §511.701(a)(1).

A plain reading of the definition provides that a classification action is based upon a position itself, or the establishment or change in the title, duties, etc., of the position. But Summary 6 and the methodology to identify affected BUEs **do not deal with establishment or change of duties at all.** Indeed, the Arbitrator herein as not changed the position title, duties, or grade of any position. Rather, the Remedial Award, upheld by the FLRA and as clarified in the subsequent Summaries, contain Orders for the Agency to process retroactive <u>selections</u> to

positions for affected Grievants – those Grievants who were adversely affected by the Agency's violations of the CBA. The Arbitrator's underlying merits award, which was upheld, found that, "but for" the Agency's violations, the Grievants would have been selected for the career ladder positions at issue. **Agency Exhibit 3**. The remedy is a reconstruction of exactly what would have occurred "but for" the violations noted in the prior merits decisions. Indeed, the Authority has long held that creating a remedy based upon a "but for" proper reconstruction of what an Agency would have done had it not violated the law or contract is appropriate. ***AFGE Local 3448 v. Social Security Administration, 54*** **FLRA 142, 148 (1998)** (finding award ordering agency to select grievant for next available position properly reconstructed what agency would have done absent violation of parties' priority consideration provision). The fact that a grievant may end up with a promotion as a result of the Arbitrator's order does not mean that the order improperly deals with matters pertaining to classification. As such, Summary 6 does not include any classification issue and is, therefore, not contrary to law.

D. Management Rights are not impacted as a result of the Arbitrator's Order.

The Agency further argues that Summary 6 is contrary to law because it "unlawfully impacts a reserved management right; namely, the numbers, types and grade of a significant portion of its employees." **Exceptions, p. 26.** It is critical to note that this argument fails because it is an untimely collateral attack on the Remedial Award, which is already final and binding. The Remedial Award required the Agency to process retroactive selections and promotions and that decision is final. This argument also fails because the Agency did not raise any issue or defense pertaining to management rights until the seventh Implementation Meeting, which occurred after Summary 6 had already been issued. *Supra.*

Finally, this argument fails because management's rights have not been impacted by the Award. When a party alleges that an arbitrator's award is contrary to § 7106(a) of the Statute, the Authority first assesses whether the award affects the exercise of the asserted right. ***Social Security Administration v. AFGE Local 3506,* 67 FLRA 597 (2014)**. If the award affects the right, then the Authority examines whether the award provides a remedy for a contract provision negotiated under § 7106(b). ***Id.*** Under the Authority's case law, an award enforcing a contract provision will not be found deficient absent a claim that the contract provision was not negotiated under § 7106(b) of the Statute. ***Id.***

The Authority places the burden on the party arguing that the award is contrary to management rights to allege not only that the award affects a right under § 7106(a), but also that the agreement provision that the arbitrator has enforced is not the type of contract provision that falls within § 7106(b) of the Statute. ***Id.*** It is well established that an arbitrator's award is not contrary to law merely because the award affects a management right under § 7106(a) of the Statute. ***Id.*** An arbitrator's award that enforces a contract provision that falls within one of the subsections of § 7106(b) cannot be contrary to law on management rights grounds, even if the award affects a management right under § 7106(a).

Applying Authority precedent to the facts herein, it is clear that even if Summary 6 affected a management right, the Arbitrator was enforcing Article 13 of the Parties' CBA, and Article 13 falls within §7106(b). Thus, the Award is not contrary to law, and the Agency has not met its burden of establishing otherwise.

Article 13 of the CBA deals exclusively with Merit Promotion and Internal Placement. **Exhibit D.** Specifically, the Article deals with issues pertaining to the posting of vacancy announcements, selection procedures, and hiring practices, both internally and for applicants

from outside the Agency. ***Id.*** The Arbitrator ruled in the Merits Award that the Agency violated Article 13 in numerous ways: "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." **Agency Exhibit 2.**

The Parties negotiated hiring practices and procedures pursuant to 5 U.S.C. § 7106(b), the Arbitrator found that the Agency violated those negotiated terms (Article 13 and other Articles), and the remedy does nothing more than enforce the contract provision at issue. Indeed, Section 13.16 of the Article specifically provides for corrective action when a violation of the competitive placement procedures has occurred. **Exhibit D.** Based upon the foregoing, and because the Arbitrator's remedy is reasonably related to Article 13 and the harm being remedied, the Award is not contrary to law. ***AFGE Local 3506*, 67 FLRA 597**. As such, this Exception must be denied.

E. The portion of Summary 6 directing the Parties to determine a reasonable and appropriate manner to obtain TSP information is not contrary to law.

The Agency alleges that the Arbitrator's order requiring the Parties to "determine a reasonable and appropriate manner and method of obtaining TSP information" is contrary to law because the Agency does not maintain the information. **Exceptions, p. 28.** The Agency then proceeds to explain how the Federal Retirement Thrift Investment Board's ("FRTIB") maintains the requested TSP data, and that HUD is not permitted to disclose the requested information. *Id.* But the Arbitrator's order ***does not require*** any unlawful disclosure whatsoever. Rather, all that is required in Summary 6 is that the Parties work together to determine a "reasonable and appropriate" manner and method of obtaining the information. One legal possibility is for the

Agency and Union to submit a joint letter to impacted bargaining unit employees explaining the need for the data and having each individual execute a release so that the FRTIB can release the information.

There is nothing in Summary 6 which ***orders*** the Agency to engage in any unlawful activity or to disclose information not under its care and direction. Furthermore, there is nothing in Summary 6 which requires HUD to take an action which is within the purview of another Agency. The Agency, and Union, are merely instructed to work together to determine a reasonable and appropriate manner and method of obtaining TSP information. As such, this Exception must be denied.

IV. The Exceptions must be denied because the Agency fails to establish Arbitrator bias.

The Agency's Exceptions further challenge Arbitrator McKissick's partiality in this matter. **Exceptions, p. 29**. This Exception must be denied because: (1) the Agency failed to raise any claims of partiality prior to the issuance of Summary 6; and (2) the Agency failed to establish that Arbitrator McKissick was at all biased in this matter. Rather, the record plainly reflects that the Arbitrator has been fair and partial throughout the 13 year history of this case and if anything, has bent over backwards to accommodate an Agency that has done nothing but delay these proceedings. Indeed, the Authority noted that the Agency refused to engage in the remedy briefing on remand, *supra*, and upon receipt of the Authority's ruling in **66 FLRA 867**, the Agency refused to implement the ordered remedy until the Union filed a ULP. **Exhibit E, F, G**.

A. Applicable Legal Standard.

To establish that an award is deficient because of an arbitrator's bias, a party must show the award was procured through improper means, there was partiality or corruption on the part of the arbitrator, or the arbitrator engaged in misconduct that prejudiced the rights of the party. Though not alleged, a party's claim that all of the arbitrator's findings were against the party does not, standing alone, satisfy this standard. ***DVA Medical Center, Detroit,* 61 FLRA 371 (2005); *VA Connecticut Healthcare System,* 58 FLRA 501 (2003).** Further, to the extent the Agency even alleged it, an arbitrator's intemperate language directed toward one party does not alone establish bias. ***Army Air Force Exchange Service,* 51 FLRA 1709 (FLRA 1996).**

An arbitrator is not biased simply because the arbitrator made findings favoring one party over another or interpreting the agreement in a manner that differs from a party's interpretation. ***DVA Medical Center,* 61 FLRA 88**. Finally, it is well established that an arbitrator has considerable latitude in conducting a hearing, and the fact that an arbitrator conducts a hearing in a manner that a party finds objectionable does not, by itself, provide a basis for finding an award deficient. *See* ***AFGE, Local 22,* 51 FLRA 1496, 1497-98 (1996).**

B. The Agency failed to raise any allegations of bias until after the issuance of Summary 6.

The Agency's Exceptions relate only to Summary 6. Summary 6 was issued on May 16, 2015, and Implementation Meeting 7 was not held until June 2, 2015. The Agency did not raise any allegations of Arbitrator bias until Implementation Meeting 7. **Exceptions, p. 20**.

It is well established that absent extraordinary circumstances, the Authority will not entertain a claim of bias if such claim could have been, but was not, raised before the arbitrator. ***Puget Sound Naval Shipyard,* 59 FLRA 583 (2004).** While the Agency did raise questions about the Arbitrator's partiality on June 2, 2015, at Implementation Meeting 7, such

claims were raised **after** Summary 6 had already been issued. Because the Agency failed to raise any claims of arbitrator bias at Implementation Meeting 6, or in any other filing or meeting prior to Implementation Meeting 7, the Authority should not address those arguments. The Agency failed to demonstrate that any extraordinary circumstances exist such that its bias argument should be considered by the Authority. As such, this Exception must be denied.

C. The Agency has not met its high legal burden to prove bias, and a review of the thirteen year case history plainly demonstrates that Arbitrator McKissick has been fair and partial.

Even if the Agency had made allegations of bias prior to Summary 6, the Exception must still be denied. The record reflects that Arbitrator McKissick has handled this matter for thirteen years, and it was not until Implementation Meeting 7 that the Agency raised any issues of bias. During this time, Arbitrator McKissick has held multiple days of hearings, has conducted countless in-person and telephonic status conferences, and has issued more than ten orders or awards. The Agency argues that: "the record reveals that the Arbitrator demonstrated partiality through her continued attempts to usurp the Authority's rulings…" **Exceptions, p. 29.** Contrary to the Agency's allegations, the FLRA has repeatedly upheld the Arbitrator's Awards and at no time has she attempted to "usurp the Authority's rulings." The Agency then proceeds to list the case history in some effort to breathe new life into rehashed arguments which the Authority has already ruled upon, in the Union's favor.[8] Unfortunately for the Agency, the Authority's case law is well established and there is no mechanism to reverse a decision that is final and binding.

The Agency further argues that: "overall the Arbitrator's IM summaries are contradictory and clearly disregard her previous conclusions in an attempt to effectuate an unlawful organizational upgrade." **Exceptions, p. 31**. Yet, the Agency only provides two weak examples

[8] This is possibly an attempt to gain sympathy based on dicta in the dissenting opinion found in 68 FLRA 631.

of the alleged partiality and does not provide any examples as to how the Arbitrator's awards and/or summaries are contradictory.

First, the Agency cites to the alleged non-fact that the Agency failed to dispute the Union's list. As discussed *supra*, the fact is not a non-fact, and even if it were, does not demonstrate partiality on the part of the Arbitrator. ***DVA Medical Center,* 61 FLRA 88**.

Second, the Agency alleges that the Arbitrator has adopted the Union's summaries whole cloth, and that the Union only presents its proposed summary in .pdf format. ***Id.*, p. 32**. The Union submits its summary in .pdf format so as to avoid any exchange of protected meta-data; a practice which the Agency has also followed in numerous filings and submissions. Moreover, the Arbitrator has had no issue converting the .pdf file to a document which can be edited, and does, in fact, edit the Union's .pdf submissions.

Regarding the Agency's gratuitous request that the case be remanded to another Arbitrator, the Authority has held that this extraordinary move will only be taken when a party demonstrates that the current Arbitrator can no longer effectuate compliance with her Award. The Agency has not demonstrated that in this case, and indeed cannot. In fact, the Arbitrator has already completed the vast majority of compliance efforts in this case and, moreover, at this late juncture of the case, remanding the matter to another Arbitrator will simply be a waste of Union and Agency resources as it will take any new Arbitrator hundreds of hours to get caught up to speed on the case. As such, this Exception must be denied.

V. The Exceptions must be denied because the Agency fails to establish that Summary 6 contained an impermissible modification.

The Agency relies on the doctrine of *functus officio* in support of its argument that the "Arbitrator's application of the adverse inference to limit or preclude the use of data modified

her original award." **Exceptions, p. 33.** Such an argument is without merit because: (1) the Arbitrator did not modify that adverse inference, and (2) the Arbitrator has repeatedly reiterated what the adverse inference covered and the Agency is now untimely raising this defense.

A. Applicable Legal Standard

Under the doctrine of *functus officio*, once an arbitrator resolves the matter submitted to arbitration, the arbitrator is generally without further authority. ***U.S. Dep't of Transp., FAA, Nw. Mountain Region, Renton, Wash.*, 64 FLRA 823, 825 (2010)**. The doctrine of *functus officio* prevents arbitrators from reconsidering a final award. *See A**FGE, Local 2172,* **57 FLRA 625, 627 (2001) (citing *Devine v. White,* 697 F.2d 421, 433 (D.C. Cir. 1983)**). Consistent with this principle, the Authority has found that, unless an arbitrator has retained jurisdiction or received permission from the parties, the arbitrator exceeds his or her authority when reopening and reconsidering an original award that has become final and binding. *See* ***U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 66 FLRA 300, 302 (2011) (citing *Overseas Fed'n of Teachers AFT, AFL-CIO,* 32 FLRA 410, 415 (1988))**. In this case, it is undisputed that the Arbitrator has retained jurisdiction over implementation and that the Parties agreed to participate and attend implementation meetings without objection. But note the retained jurisdiction is limited to implementation of the Remedial Award, and the Arbitrator has not reopened and reconsidered any aspects of the original award.

Furthermore, even if the Arbitrator had not specifically retained jurisdiction, or if the Parties had not agreed to participate in implementation meetings, the exception to the doctrine of *functus officio*, such as when an arbitrator merely clarifies an award, would be applicable. ***AFGE, Local 400,* 50 FLRA 525, 526 (1995**). The Authority has held that an arbitrator may clarify an ambiguous award even without a joint request from the parties, but the clarification

must conform to the arbitrator's original award. ***United States Dep't of the Army Corps of Eng 'rs, Northwestern Div. and Portland Dist.,* 60 FLRA 595, 596 (2005**). Indeed, a supplemental award providing any necessary clarifications would still be permitted. Moreover, where an arbitrator expressly retains jurisdiction in the original award for purposes of resolving any dispute regarding interpretation or implementation, the arbitrator does not act improperly by issuing an award resolving any dispute over implementation of the original award. *See* ***United States Dep't of the Air Force, Seymour Johnson Air Force Base, N.C.,* 56 FLRA 249, 253 (2000)**.That is precisely what the Arbitrator did here.

B. The adverse inference ruling has not been modified.

From the very onset of this case, the Union requested specific data to support its case and the Agency refused to provide this data. In fact, the Agency claimed on repeated occasions that much of the requested data was lost or destroyed. *See*, **Exhibit B**. In light of the Agency's failure to provide the requested data and present testimonial evidence, the Arbitrator issued an adverse inference. ***Supra***.

The Agency's argument that the Arbitrator initially issued an adverse inference concerning only "the numbered series vacancy announcements that were not provided" but then modified the inference to preclude the usage of the accession lists is not supported by the record. In actuality, the adverse inference has <u>not</u> been modified, and even if it were, the Agency has untimely raised this objection.

The adverse inference ruling covered all of the data that the Union requested which included: vacancy announcements, names and qualifications of applicants and selectees, and positions held by applicants and selectees prior to the then instant selection. While the Union listed specific vacancy announcements, it also very clearly requested "additional instances like

those listed above." ***Id***. In other words, the Union had limited information about certain violative announcements, and needed **all** of the data to ascertain the other violative announcements. The Union had to make the request in that manner because the Agency hadn't provided even the most basic of the requested information. The Arbitrator explained in her merits award that the adverse inference was issued as to all of the missing documents:

> Applying this case law to this grievance, **the requested documents** were necessary for the Union to amend the grievance…
>
> 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.

Agency Exhibit 2.

Indeed, even the Authority noted that the adverse inference was for <u>all</u> requested documentation, not just the vacancy announcements:

> Because the Agency did not disclose **information, <u>including</u> 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.

Supra **(emphasis added).**

The Union requested:

> Information Requested:
> A. Please furnish the personnel action of each person selected to fill the attached vacancy announcements. Listed by announcement number on the attached spreadsheet. You may delete those items, which may be subject to the Privacy Act, such as social security numbers, date of birth etc.
>
> 7. **Additional instances like those listed above**. Union is requesting copies of certain vacancy announcements in order to make an assessment. These announcements include, but are not limited to…
> …
> 9. Finally, we need to know if persons were hired under each of the 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**.

Exhibit A (emphasis added).

Clearly the request was for **all** potentially responsive data, not only vacancy announcements, and the ruling covered the entire request. *Id.* The Agency argues that 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." **Exceptions, p. 34**. But the Agency misses the entire point of the adverse inference. The Arbitrator **could not** have possibly identified the "accession lists" by name when issuing the adverse inference because the Agency had represented that there was **no such data in existence**. The accession lists provided by the Agency are simply the compilation of the requested data (ie, the data that was requested by the Union and not provided by the Agency). The accession lists include employee names, grades, series, applicable vacancy announcement number, the series and grade of the applicants and selectees, etc. This was the exact data requested by the Union, but which the Agency failed to produce, and in some cases asserted did not exist. This data is exactly what the Arbitrator ordered the Agency to produce and was precisely what the Arbitrator included in her Adverse Inference finding. The Agency has attempted to introduce the **exact data the Union was seeking** by calling it a different name and saying it is **now available**. Because the adverse inference was already drawn as to this data, the Agency cannot be permitted to have the proverbial second bite at the apple.

The Agency's argument can be summarized as follows: It did not produce requested data, informed the Arbitrator that the data no longer existed, then found (or re-created the data) and re-

named it, and now demands that the Arbitrator rely on such data which the Agency previously informed the Arbitrator did not exist. Obviously such an argument is without merit.

The Arbitrator has not modified the adverse inference and the ruling was always intended to cover all applicable data. As such, this Exception must be denied.

C. The Agency failed to timely raise this defense and failed to raise it before the Arbitrator.

It is undisputed and well established that the Authority will only address issues which were raised before the Arbitrator. ***Supra***. Here, the Arbitrator has repeatedly explained the applicability of the adverse inference ruling; the Agency has never raised the argument before the Arbitrator that the adverse inference had been modified. The Agency never previously challenged the adverse inference after it was granted. Moreover, assuming arguendo that there was a modification of the adverse inference, the alleged modification occurred prior to the issuance of Summary 6, and as such the Agency's modification Exception is now untimely.

During a conference call in May 2013, which was memorialized in June 2013, **Exhibit B**, and again in both Summary 1 and in Summary 2, the Arbitrator reiterated what she had previously informed the Parties - that the adverse inference was drawn due to the Agency's failure to produce requested data and that the class members were easily identified by listings of employees who encumbered positions in the applicable job series. ***Supra***. In fact, during the May 30, 2013 conference call, the Arbitrator specifically instructed the Agency that the data it was claiming to have now found (i.e, vacancy announcements, selections, etc.) was the very data that it previously failed to produce, and could not now use. **Exhibit B.** The accession lists now provided by the Agency is the same data it used to construct its methodology, and is the very data the Union previously requested but did not receive.

Based upon the adverse inference ruling, in part, the Arbitrator ruled 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**." **Agency Exhibit 7, Summary 5**. If the Arbitrator modified the adverse inference, this modification occurred in Summaries 1, 2 and 5, yet the Agency did not file Exceptions to Summary 1, 2, or 5 and thus, each became final and binding thirty-days after being issued. **5 U.S.C. §7122(b).**

Because the Agency did not raise any issues with an alleged modification of the adverse inference before the Arbitrator and did not timely appeal other rulings which allegedly modified the adverse inference, the Exception must be denied.

Conclusion

The Agency's Exceptions must be dismissed and/or denied. Each of the Agency's Exceptions fails to establish that Summary 6 was deficient in any way. Rather, the Agency simply disagrees with the Arbitrator's findings and attempts to collaterally attack the Remedial Award. Moreover, the Agency has failed to establish that the Arbitrator was biased against the Agency or that the findings contained in Summary 6 impermissibly modified any prior findings. The Agency's Exceptions, therefore, must be dismissed and/or denied.

Respectfully Submitted,

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EXHIBITS:

Exhibit A – Order on Union's Motion to Compel

Exhibit B – June 5, 2013 letter from Union

Exhibit C – Affidavit of Hershel Goodwin

Exhibit D – CBA Article 13

Exhibit E – Affidavit of Michael J. Snider, Esq.

Exhibit F – February 28, 2013 letter to FLRA

Exhibit G – Filed ULP

Exhibit H – Affidavit of Holly Salamido